S. HRG. 110–672

# FEDERAL COCAINE SENTENCING LAWS: REFORMING THE 100-TO-1 CRACK/POWDER DISPARITY

## HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME AND DRUGS

OF THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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# FEDERAL COCAINE SENTENCING LAWS: REFORMING THE 100-TO-1 CRACK/POWDER DISPARITY

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**TUESDAY, FEBRUARY 12, 2008**

U.S. SENATE,
SUBCOMMITTEE ON CRIME AND DRUGS,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:30 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr., Chairman of the Subcommittee, presiding.

Present: Senators Biden, Kennedy, Feingold, and Sessions.

## OPENING STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Chairman BIDEN. Good afternoon. The hearing will come to order. We are going to start a few minutes earlier because two of my colleagues who will be here and who have great interest in the subject will come and make an opening statement and will have to leave and come back. So I will get my opening statement out of the way.

I say to the witnesses all, welcome. Delighted to have you here. We appreciate your taking the time.

What we will do is I will make an opening statement here, and then, I am told Senators Kennedy and Feingold each plan on coming, and if any of my Republican colleagues do, and they have to go back to another Committee meeting, then I will let them make an opening statement, and we will turn to all of you for your statements, if that is appropriate, if you do not mind.

So let me begin by saying thanks on behalf of the Subcommittee for being here, all of you. We are going to examine an issue that has long been the subject of vigorous debate and study: the difference in the way in which Federal law treats drug offenses involving powder cocaine versus crack cocaine.

As you all know, under the current law, the mere possession of 5 grams of crack, which is slightly less than the weight two sugar cubes, and these are about the size—you cannot see these, but these look about the size of little sugar cubes here—carries the same 5-year mandatory minimum sentence as distributing 500 grams of powder cocaine, the amount of sugar that I just held up. I will make it clear: This is all sugar up here.

[Laughter.]

Chairman BIDEN. And not sugar in the parlance of the street sugar.

Many have argued that this 100-to-1 disparity is arbitrary, unnecessary, and unjust, and I agree. And I might say at the outset in full disclosure, I am the guy that drafted this legislation years ago with a guy named Daniel Patrick Moynihan, who was the Senator from New York at the time. And crack was new. It was a new "epidemic" that we were facing. And we had at that time extensive medical testimony talking about the particularly addictive nature of crack versus powder cocaine. And the school of thought was that we had to do everything we could to dissuade the use of crack cocaine. And so I am part of the problem that I have been trying to solve since then, because I think the disparity is way out of line.

The current disparity in cocaine sentencing I do not think can be justified on the facts we know today and the facts we operated on at the time we set this up.

In 1986, crack was the newest drug on the street, and Congress was told that this smokeable form of cocaine was instantly addictive and that its effect on a child if smoked during pregnancy was far worse than that of other drugs and that it would ravage our inner cities.

I remember one headline that summed it up well, and it read "New York City Being Swamped by 'crack'; Authorities Say They Are Almost Powerless to Halt Cocaine." And they called it "the summer of crack" in that headline.

In Congress, more than a dozen bills were introduced to increase the penalties for crack. Because we knew so little about it, the proposals were all over the map, ranging from the Reagan administration's proposal of a 20-to-1 disparity to Senator Chiles's proposal—the late Senator Chiles, late Governor Chiles—of 100-to-1.

Senators Byrd, Dole, and I led an effort to enact the Anti-Drug Abuse Act of 1986 which established the current 100-to-1 disparity. Our intentions were good, but much of our information turned out not to be as good as our intentions. Each of the myths upon which we based the sentencing disparity has in some ways been dispelled or altered. We know that crack and powder cocaine are pharmacologically identical, and they are simply two forms of the same drug. Crack and powder cocaine cause identical psychological and physiological effects once they reach the brain. Both forms of cocaine are potentially addictive.

The two drugs' effects on a fetus are identical. The "generation of crack babies" many predicted, including me, has not come to pass. In fact, some research shows that the prenatal effects of alcohol exposure are "significantly more devastating to the developing fetus than cocaine"—although I would point out that if you ingested the same amount of powder cocaine as crack cocaine as frequently, it would have a profound effect;

Crack simply does not incite the type of violence that was feared. Gangs that deal in other types of drugs are every bit as violent as crack gangs. I would argue meth is even more dangerous in terms of the way the gangs operate.

After 21 years of study and review, these facts have convinced me that the 100-to-1 disparity cannot be supported and that the

penalties for crack and powder cocaine trafficking merit similar treatment under the law.

The past 21 years has also revealed that the dramatically harsher crack penalties have disproportionately impacted on inner-city communities, the African-African community: 82 percent of those convicted of crack offenses in 2006 were African-Americans.

With many of the starting premises not as starkly viewed as being correct, last June I introduced the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act, which eliminates the disparity between crack and powder cocaine offenses. Totally eliminates it. It does so without raising penalties for powder because there is not a shred of evidence that shows powder penalties are inadequate.

My bill also eliminates the 5-year mandatory minimum sentence for simple possession of crack, the only mandatory minimum for possession of a controlled substance.

It focuses Federal resources where we need them most—on major drug kingpins, not users and low-level dealers. And it provides sentencing enhancements for all drug offenses that involve a dangerous weapon or violence.

And it provides $30 million in grants to State and local governments to fund programs that improve the availability of drug treatment for offenders in prisons, jails, juvenile facilities, and those on supervised release.

I want to commend Senators Hatch and Sessions for their leadership on this issue and their respective bills to reduce the disparity. I hope we can work together to permanently fix this injustice, and I am willing, as I am sure they are, to consider one another's proposal and see if we can work something out.

There is a growing movement for bold action on this issue. Eight members of this Committee—four Republicans and four Democrats—are supporting one of the bills pending before this Committee.

In November, the bipartisan United States Sentencing Commission sent Congress an amendment to address what it called, and I quote, the "urgent and compelling" crack/powder disparity. Congress accepted the measure, which modestly reduced crack penalties pending comprehensive congressional action.

The report that accompanied the Sentencing Commission's amendment is the fourth such report—and I have a copy of it here—that the Commission has issued in 12 years calling for Congress to take actions to substantially reduce the crack/power sentencing disparity.

Editorial boards around the country have also urged Congress to act. The New York Times, San Francisco Chronicle, St. Petersburg Times, the Detroit Free Press, and Miami Herald all have endorsed my bill, and I am sure there are as many that have endorsed the bill of my colleagues who have an alternative approach.

So I welcome debate and discussion on this issue because I am not convinced that any disparity in the sentencing of crack and powder defendants is justified given what we have come to know.

Now I would like to turn over the floor to my distinguished colleague from Alabama, Senator Sessions.

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**STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA**

Senator SESSIONS. Thank you, Mr. Chairman, and I believe we are now on a path to do something right about this problem. I have for some time believed that the crack/powder disparity cannot be justified. I authored legislation in the year 2000 with Senator Hatch, and we have just not been able to get the ball rolling. So I am glad you are having this hearing. It is time—I mean, it is past due. We need to confront this problem.

Senator Biden, I was a Federal prosecutor when you passed the Sentencing Guidelines; you and Senator Thurmond and Senator Kennedy and others supported that. I believed then and believe today that it was a tremendous step forward because Federal judges literally could give people probation or 20 years in jail for the same offense, no matter how much cocaine or how little cocaine. And it created uniformity.

But I believe, as Members of the Senate, if we are going to declare what sentences should be within narrow ranges, we ought to listen to what is happening out there. Let's see what our experience teaches us. Does it teach us that the level of sentencing that we have done is perfect, or should it be adjusted?

So I would just say with this aspect of the Federal Sentencing Guidelines, it is out of sync. It is not justified. I do not believe that we can justify the severity of sentences that we are receiving for crack cocaine.

Now, I do remember, just like you said, Mr. Chairman, I was a prosecutor in the mid-1980s. Crack started arising, and people predicted it would spread. And it shocked me how fast it spread to rural Alabama—not just an urban area like Mobile, where I was, but throughout the rural areas. People were using crack, and it changed the—gangs did form. There was a great deal of violence, and we utilized that to prosecute gangs.

I noticed it was surprising to me how many of the people that were convicted had charges for murder and armed robbery and other kinds of charges that tended to be violent gangs.

But I think we are at a point now where this 100-to-1 disparity that does fall heavier on the African-American community simply because that is where crack is most often used has got to be fixed. I want to join you in this, and let's do it this year. Let's get it done.

Chairman BIDEN. I hope we can. I would point out, back at the time we were writing this legislation, the Sentencing Commission, and I recall testimony from distinguished witnesses pointing out that in Florida, unless someone had 5 kilos of cocaine, they were not moved in the Federal system. There was a swamp in everything. But rather than go back and talk about what it was, I would like to get this expert testimony as to how they see it now.

With your permission, Senator, before you walked in, I was asked—Senator Feingold as well as Senator Kennedy have a keen interest in this and are not going to be able to stay for the whole hearing. Would you mind if they made brief opening statements?

Senator SESSIONS. No. That would be fine. I would yield.

## STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. I thank both the Chairman and Senator Sessions very much. It is a little out of order, so I do appreciate it. And thank you for holding the hearing and for your strong leadership on this, Senator Biden.

The disparity in sentencing between crack and powder cocaine offenses is a serious blemish on our system of justice. Over the past 20 years, it has become clear that neither public health nor law enforcement considerations justify the disparity. To the contrary, its effects are pernicious. It diverts resources to low-level offenders and exacerbates overcrowding in Federal prisons, and it has a dramatically disproportionate effect on African-Americans, which undermines confidence in the Federal justice system in many communities.

I applaud the U.S. Sentencing Commission for taking an important step to address this problem by lowering the base offense level for crack cocaine offenses. I wrote to the Commission in December, along with Senator Webb and Senator Kerry, urging the Commission to make this adjustment retroactive, and I was pleased that it did so. As the Commission recognized, a sentence that is unfair for people who are sentenced today is equally unfair for people who were sentenced a year or a decade ago. That is why the Commission for the past 20 years has made every reduction in drug sentencing retroactive.

Last week, testifying before the House Judiciary Committee, Attorney General Mukasey opined that applying the adjustment retroactively could threaten public safety by allowing the early release of violent crack cocaine offenders. But no offender will be entitled to automatic release. A judge will examine every case individually to determine whether a reduced sentence is appropriate. The Attorney General expressed concern that this would be too much of a burden on judges, but the Judicial Conference of the United States supported making this adjustment retroactive. We should listen to the expertise of the Sentencing Commission and the Judicial Conference, and we should not undo the progress that has been made.

Instead, we should focus on furthering this progress. I am a cosponsor of Chairman Biden's bill, S. 1711, which would eliminate the disparity by increasing the amount of crack cocaine necessary to trigger the mandatory minimum sentence. It would also eliminate the 5-year mandatory minimum sentence for possession of crack cocaine, which is the only mandatory minimum that exists for simple drug possession. It would substitute more effective tools, such as grants for improving drug treatment for prisoners; increased monetary penalties for major drug traffickers; and revised guidelines, if the Sentencing Commission finds it appropriate, to reflect the use of a dangerous weapon or violence in drug offenses. I commend Senator Biden for the bill, and I am pleased to support it.

For two decades, the evidence has accumulated that the current approach to crack cocaine offenses is wrong. On multiple occasions, the U.S. Sentencing Commission has urged Congress to address this problem. It is high time that we fulfill our responsibility as

legislators to fix this law so that we can begin to wash away the stain it has left on our system of justice.

Thank you very much, Mr. Chairman.

Senator SESSIONS. Mr. Chairman, I just briefly would say I do value the Sentencing Commission's recommendations. I think we in Congress ought to listen to them because we define the sentences so narrowly that we need constant feedback on what good public policy is.

Second, I do want to emphasize that we have had a significant reduction in drug use in America and we have broken up—and violent crime is down, and a large part of that is tough sentences. There is just no doubt about it. Not many people shoot people. Not many people sell cocaine. So focusing on those and having tough sentences is not bad.

Finally, I would like to thank my former Attorney General colleagues. Senators Salazar, Pryor, and Cornyn have joined with me in introducing the legislation to reduce this disparity. They have all been prosecutors. They know the real world out there. And we have all concluded we need to do better and create a more legitimate sentencing range for these kind of offenses.

Thank you.

Chairman BIDEN. Thank you.

Now let me introduce our distinguished panel of witnesses. First, Gretchen Shappert will testify for the Department of Justice. Ms. Shappert is currently a United States Attorney for the Western District of North Carolina, a post she was appointed to in the year 2004.

Next is the Honorable Ricardo Hinojosa. The judge was appointed to the Sentencing Commission by President Bush in 2003 and has chaired it since 2004. He also serves as United States District Judge for the Southern District of Texas, and he was appointed to that post in 1983 by President Reagan.

Testifying for the Federal Judicial Conference is the Honorable Reggie B. Walton, United States District Court Judge for the District of Columbia. After President Bush nominated Judge Walton in 2005, former Chief Justice Rehnquist appointed Judge Walton to the Judicial Conference's Criminal Law Committee. Prior to his appointment to the bench, Judge Walton served as President George H.W. Bush's Associate Director for the Office of National Drug Control Policy and as then-President Bush's senior White House adviser on crime.

And I am going to mispronounce the name. Dr. Nora Volkow serves as the Director of the National Institute of Drug Abuse of the Department of Health and Human Services and is a research psychiatrist and scientists. The doctor pioneered the use of brain imaging to investigate the toxic effects on drugs and their addictive properties.

And James Felman is a Co-Chair of the Committee on Sentencing in the Criminal Justice Section of the American Bar Association and has handled several high-profile criminal appeals as an expert in Federal sentencing law.

I welcome you all, and I would invite your testimony in the order you have been introduced.

**STATEMENT OF GRETCHEN C.F. SHAPPERT, UNITED STATES ATTORNEY, WESTERN DISTRICT OF NORTH CAROLINA, DEPARTMENT OF JUSTICE**

Ms. SHAPPERT. Thank you, Chairman and Senator Sessions and members of the Subcommittee. I appreciate the opportunity to appear before you on behalf of the Department of Justice to discuss Federal cocaine sentencing policies. My name is Gretchen Shappert. I am the United States Attorney for the Western District of North Carolina. I have been in public service most of my professional life, both as a prosecutor and as an assistant public defender. And last week, I completed 4½ consecutive weeks of trial in my district, two of the cases involving individuals who were distributing crack cocaine. Indeed, much of my career in public service has been defined by the ravages of crack cocaine.

The Department of Justice recognizes that the penalty structure and quantity differentials for powder and crack cocaine created by Congress as part of the Anti-Drug Abuse Act of 1986 are seen by many as empirically unsupportable and unfair because of their disparate impact. As this Subcommittee knows, since the mid-1990s, there has been a great deal of discussion and debate on the issue. I am here today on behalf of the Department of Justice to affirm our willingness to engage in discussions with this Subcommittee regarding the current statutory differential between crack and powder cocaine.

Any discussion of the crack and powder cocaine differential must also address the serious public safety concerns and court administrability issues raised by the impending retroactive application of the Sentencing Guideline Amendments to crack cocaine offenders. Because Congress only has until March 3rd to address the United States Sentencing Commission's decision, Attorney General Mukasey last week asked Congress to quickly enact legislation to prevent the retroactive application of the Sentencing Commission Amendments. Specifically, he asked Congress to ensure that serious and violent offenders remain incarcerated for the full terms of their sentences. In calling for action, he emphasized that "we are not asking this Committee to prolong the sentences of those offenders who pose the least threat to their communities, such a first-time offenders and non-violent offenders. Instead," he said, "our objective is to address the Sentencing Commission's decision in a way that protects public safety and addresses the adverse judicial and administrative consequences that will result."

Mr. Chairman, because you asked that the Department of Justice address the sentencing disparity issue first, I will begin with that, and then turn to our deep concerns about retroactive application of the guidelines.

It has been said, and I certainly believe based upon my experience, that whereas cocaine powder destroys an individual, crack cocaine destroys a community. The emergence of crack cocaine as the major drug of choice in several Charlotte communities in the late 1980s dramatically transformed the landscape. We saw an insurgence of drug-related violence, open-air drug markets, and urban terrorism unlike anything we had experienced in the past. The sound of gunfire after dark was not uncommon. Families were

afraid to go out of their homes at night for fear of violence, and individuals slept in their bathtubs to avoid stray gunfire.

I have also seen the dramatic results when Federal prosecutors, allied with local law enforcement and community leaders, make a commitment to take back neighborhoods from the gun-toting drug dealers who have laid claim to their communities. The successes of our Project Safe Neighborhoods initiatives, combined with Weed and Seed, have had a tremendous transforming effect on communities.

In Shelby, North Carolina, for example, Federal prosecutors initiated prosecutions of violent crack-dealing street gangs and helped to slash the crime rate in that community, enabling community leaders to begin to deal with community problems, to build a community garden, to initiate truancy programs and sporting programs for young people. Traditional barriers are breaking down, and Shelby is a thriving and diverse Southern city, and this would not have happened but for a systematic response to the cocaine problem.

In the jury trial I just completed last Wednesday night, the jury heard stories about gun-toting drug dealers kidnapping one of their co-conspirators and holding him for ransom. These are the sort of things that we have seen and associated with crack dealing.

I know from my conversations with prosecutors across the country that our experience in North Carolina is not unique, and my purpose in being here is to underscore the importance of continuing strong initiatives to fight drug violence.

Toward this end, we believe that any reform in cocaine sentencing must satisfy two important conditions: first, any reforms should come from the Congress, not the Sentencing Commission; second, any reforms, except in very limited circumstances, should apply only prospectively.

Bringing the expertise of the Congress to this will give the American people the best chance for a well-considered and fair result that takes into account not just the differential between crack and powder on offenders, but the implications of crack and powder cocaine trafficking on the communities and citizens whom we serve.

What we are talking about is whether the current balance between the competing interests in drug sentencing is appropriate. We are trying to ascertain what change will ensure that prosecutors will have the tools to effectively combat drug dealers like those who have terrorized cities in North Carolina while addressing the concerns about the present structure's disproportionate impact upon African-American offenders. This is a decision for which the Congress and this Subcommittee are made. Indeed, the United States Sentencing Commission itself recognized this fact when it delayed retroactive implementation of the reduced crack cocaine guideline until March 3rd, thereby giving this Congress a short window to review and consider the broader implications of policy choices.

In considering options, we continue to believe that a variety of factors fully justify higher penalties for crack offenses. In the cases I have prosecuted, I have seen the greater violence associated with crack cocaine distribution, and the Sentencing Commission has shown a higher rate of recidivism, a higher rate of management en-

hancements, and a higher rate of related violence associated with crack prosecutions.

But beyond the violence and beyond the increased recidivism, beyond the leadership enhancements, crack cocaine is, quite simply, different in its impact upon communities from powder cocaine. Crack and powder are not equal in their effects, and the law must recognize that differential. To treat crack and powder cocaine as the same would be to disregard the disproportionate impact these two drugs have on communities, would disregard how crack is distributed, particularly street-level drug dealers who have terrorized local neighborhoods. It would disregard the greater level of violence associated with crack. It would disregard the more rapid high and potential addiction associated with crack cocaine and would disregard the corrosive effects that crack cocaine has had on families, communities, and human dignity.

We in the Department of Justice believe that there is a consensus that crack cocaine and powder are different in their consequences, and the law must reflect that difference. At the same time, we recognize that there is not a consensus as to how the law should codify that difference and what the penalties should be. We intend to work with Congress to develop that consensus.

As I indicated, the second condition of any reforms to cocaine sentencing should also apply only prospectively, except in very limited circumstances. Without finality, the criminal law is deprived of its most significant deterrent effect. Even when the Supreme Court found constitutional infirmities affecting fundamental rights of criminal defendants, it rarely has applied those rules retroactively. For example, the Supreme Court has not made its decision in *Booker* retroactive.

The shortcomings of retroactive application of any new rules are illustrated starkly in the Sentencing Commission's recent decision to extend eligibility for its reduced crack penalty provisions to more than 20,000 crack offenders already in Federal prisons. The consequences of relitigating potential sentence reductions for 20,000-plus offenders is like a tsunami hitting the Federal court system.

Proponents of retroactivity argue that we should not be concerned about the most serious and violent offenders being released early because a Federal judge will still have to decide whether to release such offenders. But that misses an important point. The litigation and effort to make such decisions in so many cases forces prosecutors, U.S. marshals, probation officers, and judges to dedicate limited resources to keep in prison defendants whose judgments have already been made final under the rules that we all understood, and the impact will be disproportionate. The greater impact will occur in those districts that have borne the greatest problems in the past. Fully 50 percent of the cases involving retroactivity will impact the Fourth, Fifth, and Eleventh Circuits. In my own district, 536 defendants are eligible for resentencing. That represents approximately two-thirds of our caseload for an entire year. And the litigation is likely to be far more complicated and drawn out than many proponents of retroactivity envisioned.

I am informed that Federal defenders in some areas have already issued guidance to Federal defense counsel urging them to argue for complete full-blown sentencing hearings. Prosecutors are at a

serious disadvantage if this occurs. Agents have retired, witnesses are no longer available, files have been archived, and the original prosecutors have moved on. Defending the community against violent offenders is very difficult if you no longer have the evidence.

We believe that a minimum of 1,600 offenders will be eligible for immediate release. Many of those prisoners eligible for release will not have the benefit of the prison re-entry programs we associate with effectively moving people back into their communities. And recidivism is a fundamental concern. We know from the Sentencing Commission's findings in 2004 that the Criminal History Category III reflects a 34-percent likelihood of recidivating; a Criminal History Category VI reflects a 55-percent likelihood of recidivating, and that a large number of the individuals in this population eligible for resentencing are looking at a likelihood of recidivism.

Mr. Chairman, the Department of Justice is open to addressing the differential between crack and powder cocaine as part of an effort to resolve the crack retroactivity issue. Thank you for inviting me to participate in this important public hearing. I will be happy to respond to questions.

[The prepared statement of Ms. Shappert appears as a submission for the record.]

Chairman BIDEN. Thank you very much.

Judge?

**STATEMENT OF RICARDO H. HINOJOSA, CHAIR, U.S. SENTENCING COMMISSION, WASHINGTON, D.C.**

Judge HINOJOSA. Chairman Biden, Ranking Member Sessions, Senator Kennedy, I appreciate the opportunity to appear before you today.

The United States Sentencing Commission has been considering cocaine sentencing issues for a number of years and has worked closely with Congress to address the sentencing disparity that exists between the penalties for powder cocaine and crack cocaine offenders. Although the Commission took action this past year to address some of the disparity existing in the sentencing guideline penalties for crack cocaine offenses, the Commission is of the opinion that any comprehensive solution to the problem of Federal cocaine sentencing policy requires revisions of the current statutory penalties and, therefore, must be legislated by Congress. The Commission continues to encourage Congress to take legislative action on this important issue, and it views today's hearing as an important step in that process and thanks you for holding this hearing.

As you are aware, in May 2007 the Commission issued its fourth report to Congress on Federal cocaine sentencing policy. My written statement for today's hearing contains highlights from our 2007 report, as well as updated preliminary data from fiscal year 2007. In the interest of time, I will briefly cover some of the information submitted in writing.

In preliminary fiscal year 2007 data, we see a continuation of trends we have seen with respect to crack cocaine and powder cocaine offenses through the years. The Commission obtained information on 6,175 powder cocaine cases, which represent approximately 25 percent of all drug-trafficking cases, and 5,239 crack co-

caine cases, which represent approximately 21 percent of all drug-trafficking cases.

Federal crack cocaine offenders have consistently received substantially longer sentences than powder cocaine offenders. The average sentence length for crack cocaine offenders was approximately 129 months, whereas for powder cocaine offenders it was 86 months. The difference in sentence lengths has increased over time. In 1992, crack cocaine sentences were 25.3 percent longer, while in 2007 they were 50 percent longer than powder cocaine sentences.

African-Americans continue to represent the substantial majority of crack cocaine offenders. Our data show that in 2007, 82.2 percent of Federal crack cocaine offenders were African-Americans, while in 1992 it was 91.4 percent.

Powder cocaine offenders are now predominantly Hispanic. According to our 2007 data, Hispanics were 55.9 percent of powder cocaine offenders compared to 39.8 percent in 1992; 27.5 percent were African-American compared to 27.2 percent in 1992; and white offenders comprised 15.4 percent of powder cocaine offenders compared to 32.3 percent in 1992.

In its 2007 report, the Commission determined the offender's function in the offense by a review of the narrative of the offense conduct section of the Presentence Report from a 25-percent random sample of crack and powder cocaine cases for fiscal year 2005. For purposes of our report, offender function was assigned based on the most serious trafficking function performed by the offender in the offense, providing a measure of culpability based on the offender's level of participation in the offense. According to this analysis, 54.4 percent of crack cocaine offenders were categorized as street-level dealers. The largest portion of powder cocaine offenders—33.1 percent—were categorized as couriers or mules.

According to the Commission's analysis, only a minority of powder cocaine offenses and crack cocaine offenses involve the most egregious aggravating conduct, such as weapons involvement, violence, or aggravating role in the offense—although it occurs more frequently in crack cocaine offenses than powder cocaine offenses. Information contained in the 2007 report from fiscal year 2006 data indicates that an adjustment under the Federal Sentencing Guidelines for aggravating role was applied in 6.6 percent of powder cocaine offenses, and an adjustment for aggravating role was applied in 4.3 percent of crack cocaine offenses.

The May 2007 report from fiscal year 2006 data indicates that 8.2 percent of powder cocaine offenders received a guideline weapon enhancement and 4.9 percent were convicted under title 18, U.S. Code Section 924(c). By comparison, 15.9 percent of crack cocaine offenders received a guideline weapon enhancement and 10.9 percent were convicted under 18 U.S.C. Section 924(c).

The Commission believes there is no justification for the current statutory penalty scheme for powder and crack cocaine offenses. It is important to note that comment received in writing by the Commission and at public hearings has shown that Federal cocaine sentencing policy, as it provides heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the judiciary, criminal justice practitioners, academics, and community interest groups.

The Commission remains committed to its recommendation in 2002 that any statutory ratio should be no more than 20-to-1. Specifically, consistent with its May 2007 report, the Commission strongly and unanimously—the bipartisan United States Sentencing Commission—strongly and unanimously recommends that Congress: increase the 5-year and 10-year statutory mandatory minimum threshold quantities for crack cocaine offenses; repeal the mandatory minimum penalty provision for simple possession of crack cocaine; and reject addressing the 100-to-1 drug quantity ratio by decreasing the 5-year and 10-year statutory mandatory minimum threshold quantities for powder cocaine offenses.

The Commission further recommends that any legislation implementing these recommendations include emergency amendment authority for the Commission to incorporate the statutory changes into the Federal Sentencing Guidelines.

Sentencing Guidelines continue to provide Congress a more finely calibrated mechanism to account for variations in offender culpability and offense seriousness, and the Commission remains committed to working with Congress to address the statutorily mandated disparities that currently exist in Federal cocaine sentencing policy.

Again, I thank you for the opportunity to testify before you today, and I look forward to answering any of your questions, and the Commission strongly thanks you for having held this hearing, Senator Biden.

[The prepared statement of Judge Hinojosa appears as a submission for the record.]

Chairman BIDEN. Thank you, Judge.

Judge Walton?

**STATEMENT OF REGGIE B. WALTON, DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA, AND MEMBER, CRIMINAL LAW COMMITTEE, FEDERAL JUDICIAL CONFERENCE, WASHINGTON, D.C.**

Judge WALTON. Good afternoon. Thank you, Senator Biden, Senator Kennedy, and Senator Sessions. It is a pleasure and an honor to have the opportunity to appear here personally, but also on behalf of the Judicial Conference.

I have thought about what I could say—I am not going to read my testimony; you have that—I will emphasize in the summary of my written testimony the perspective that I bring to this issue. As you know, I worked in the first Bush administration in the drug office and was involved in a lot of these issues at that time. As I thought about what I would say to you here today, I thought about, well, why did I go to law school? I went to law school—

Chairman BIDEN. I ask myself that question a lot.

[Laughter.]

Judge WALTON. Well, I went to law school because I saw injustices that were taking place as I grew up. And, unfortunately, a lot of those injustices were based upon race. And I felt that if I became a part of the system, maybe I could do something to ensure that whenever somebody walked into a court of law in this country, they would be treated fairly and that they also would be treated equally.

As I thought about the sentencing situation as it relates to crack and powder, I thought about the many times when I have sat in judgment and had to impose sentences. And most often they were young African-American males whom I was sentencing. And I knew that if I was sentencing them for something other than crack cocaine, the sentence that I had to extract would be significantly less. And it hurt me to have to impose those sentences, and that is not because I am a light sentencer. I do not think anybody you would talk to would tell you that I am lenient when it comes to crime. But I do believe in fundamental fairness, and the Sentencing Commission—and I applaud them for what they have done—reached the conclusion that it is fundamentally unfair to maintain the present system that we have.

I do not disagree that crack has had an impact on communities, but there are a lot of drugs that have an impact on communities. I know in this city, for example, PCP is having a significant impact on communities, and I also know that, yes, drugs can destroy communities and individual lives. But, also, moving so many of our young African-American males out of black communities is also having a very detrimental impact.

One of the other things I do in addition to my regular job is I am Chairman of the National Prison Rape Elimination Commission, and I travel all throughout the country and go into prisons. And what I see in our prisons is sad. You see all of these young black males who are locked up, their lives destroyed; their communities, as a result of them not being there, destroyed. And that is not to say that we should not punish people. I believe in strong punishment. I believe that when people do wrong, punishment should be extracted. But that punishment has to be fair. And I know from my own personal experience, I have had jurors, potential jurors, who have told me that they would refuse to sit as a juror in a case involving crack cocaine because they know of the unfairness, and they will not be a part of an unfair system.

And I know there are many people in the community who will not come forward, who will not cooperate, who will not participate in the process, because they see it as fundamentally unfair. I do not think that is good for our American system of justice for a sizable number of people to feel that our system is unfair and, therefore, do not want to be a part of it.

I know in many of our African-American communities, yes, they are being harmed by drugs, but they are also being harmed by the perspective that the system of laws we have as it relates to crack cocaine is not fair. And as a result of their perspective about that unfairness, they have a jaded perspective about the entire criminal justice system, and that is something I believe it is time to address.

As far as the retroactivity issue is concerned, I too have concerns about people being released who might pose a danger to the community. But one of the things that I think we have to appreciate is the value of judges who have the opportunity to look at cases and make an individual decision as to whether this particular person should or should not be released.

If you enact legislation, what is that legislation going to say if we repeal the courageous decision taken by the Sentencing Commission? Is it going to say that any level of violence at any time

in a person's history is going to preclude him or her from the benefit of what has been determined to be a fundamentally unfair law? Because if that is what is going to happen, are we going to say, well, if they were violent at the time they committed the offense, but they have been locked up for 15 years, and during those 15 years they have completed educational programs, they have completed a drug program, they have been exemplary inmates but, nonetheless, because they have this prior history where maybe they carried a gun at the time they committed the offense or maybe they did engage in some violence 15 years ago, we are going to categorically say that across the board they cannot be released?

On any given day in America, we have probably about 3 million of our fellow citizens locked up. And I do not have a problem, as I say, locking people up, but I think as a society we have to address that issue. We are expending far too much money to incarcerate people, and we incarcerate some people for far too long than they have to be incarcerated and who could otherwise be returned to the community and become contributing members of our society. I have seen individuals who have turned their lives around. And while, as I say, punishment is important, I think that punishment has to be fair. And I applaud you and your fellow Senators who have decided to take this issue on, and I sure hope that at some time during the course of this year the Senate will see fit to rectify this problem, which is, I think, causing many of our fellow Americans to not believe in our judicial process.

Thank you very much.

[The prepared statement of Judge Walton appears as a submission for the record.]

Chairman BIDEN. Thank you very much for your testimony, Judge. And no one has ever accused you—

[Applause.]

Chairman BIDEN. Please refrain from demonstrations, pro or otherwise. But I assure you, no one has ever accused you of being lenient, but they have viewed you as being fair, and I appreciate your straightforward testimony.

Doctor?

**STATEMENT OF NORA D. VOLKOW, M.D., DIRECTOR, NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL INSTITUTES OF HEALTH, DEPARTMENT OF HEALTH AND HUMAN SERVICES, WASHINGTON, D.C.**

Dr. VOLKOW. Yes, good afternoon. I want to thank you, Chairman and members of the Subcommittee, for giving me the opportunity and the privilege to come and discuss with you what we have learned from science vis-a-vis the effects of cocaine in the brain, and with particular emphasis on cocaine hydrochloride (powder) and cocaine freebase (crack). I also want to speak to you not just as the Director of the National Institute on Drug Abuse but as a scientist, which is a discipline whose aim is to provide with knowledge that is objective and not subjected to the perception of what is right or wrong.

What we have learned is that cocaine use in this country is down from the epidemic of the 1980s; however, it is still unacceptably high. Six million individuals 12 years or older have used cocaine

in the last year, and 1.6 million individuals have used cocaine freebase (crack).

Why is cocaine abused? Cocaine is abused because it increases the concentration of the chemical dopamine in pleasure centers in the brain, and when dopamine goes up, that produces a high sense of euphoria. Cocaine does this by blocking the molecules that normally clean dopamine from our brains. So when these molecules are blocked, dopamine accumulates, and that is associated with a very intense high. And that is the way that cocaine produces its highly pleasurable effects, and that is also why it produces addiction.

The effects of cocaine, regardless of whether it is smoked freebase (crack) or whether it is taken by the hydrochloride form, which you can snort or inject, are going to deliver the same identical molecule in the brain. And for the equivalent concentration, the level of blockade of those molecules that dopamine is identical.

The difference relies in terms of why some situations lead to more intense effects than others the route of administration. The faster you block those molecules that dopamine, the dopamine transporters, the more intense the high. And the variable that determines how fast cocaine gets into the brain and blocks dopamine transporters is not cocaine freebase or cocaine hydrochloride, but the route of administration. There are certain routes of administration that will deliver that cocaine very, very rapidly into the brain. What are those routes of? Injection, intravenous injection, smoking. How do you, why do you—when you inject intravenously, you have to use cocaine hydrochloride. You cannot inject freebase because it is not going to be soluble. If you want to smoke it, you cannot smoke hydrochloride because it is going to and you will have no cocaine left, and that is why you have cocaine freebase.

So the two routes of administration that produce the most intense effects are injection and smoking. And, also, those are the routes of administration that are associated with the highest degree of addictiveness. Indeed, early studies estimate approximately 5 to 6 percent of individuals will become addicted to cocaine within 2 years. Most of them go there by injection or by smoking. There are more smokers than injectors, and, those in treatment, we end up seeing more people that smoke cocaine than those that inject. But most of those individuals, which is important to recognize, started by snorting cocaine hydrochloride. So it is a trajectory of events that leads an individual to go from snorting into injection or into smoking.

There are differences also vis-a-vis the consequences of these routes of administration vis-a-vis their medical complications. Cocaine can have very serious adverse effects because it vasoconstricts blood vessels, and so blood does not get into organs, and there are certain organs that do not tolerate as well—heart and brain. That is why you can end up with a myocardial infarct, even if you are in your 20s, or with a stroke from the use of cocaine.

Cocaine also changes the electrical properties of cells, and that can lead to an arrhythmia or to seizures that actually can prove to be lethal. Both of those medical complications are much more frequent when you inject or when you smoke than when you snort.

There is a third complication, which is that the use of cocaine is associated with a higher risk of infectious diseases, such as HIV/AIDS. This is more common when you inject because you can actually get contaminated material. But you can also by smoking, snorting, or injecting increase the likelihood of HIV because cocaine use, intoxication, facilitates risky sexual behaviors.

The good news, though, is that cocaine can be prevented and treated, and science has shown that treatment, whether it is voluntary or mandated by the courts, is effective. Indeed, science, for example, monitoring the effects of treatment in the criminal justice system has shown that it is highly effective, not just in decreasing the rate of drug use but also in decreasing the rate of incarceration.

So, in summary, I say that when people take cocaine freebase or they inject cocaine or they snort cocaine, the identical molecule will end up in the brain. The difference is going to be determined the route of administration.

Also, I wanted to just make a last statement, that as we try to offer our knowledge and expertise together to solve this problem of cocaine in this country, we should not forget the importance of prevention and treatment if we are to succeed.

Thank you very much, and I will be happy to answer any questions.

[The prepared statement of Dr. Volkow appears as a submission for the record.]

Chairman BIDEN. Thank you very much, Doctor.

Mr. Felman?

**STATEMENT OF JAMES E. FELMAN, CO–CHAIR, COMMITTEE ON SENTENCING, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION**

Mr. FELMAN. Chairman Biden, Ranking Member Sessions, good afternoon. My name is James Felman, and since 1988 I have been engaged in the private practice of Federal criminal defense law with a small firm in Tampa, Florida, and I am here today, and honored to be so, on behalf of the American Bar Association. We appreciate the opportunity to appear before the Subcommittee today.

The crack/powder disparity is simply wrong, and the time to fix it is now. For more than a decade, the ABA has been part of a growing consensus that the disparity in sentences for crack and powder cocaine offenses is plainly unjust. This is a bipartisan issue. Indeed, the United States Sentencing Commission's call for change has been consistent, even though it has been constituted with different members appointed by different Presidents and confirmed by Senates controlled by different parties.

We applaud this Subcommittee and its leadership for conducting this hearing as an important step in ending once and for all this enduring and glaring inequity.

Beginning in 1995, the ABA endorsed the proposal submitted to the Congress by the Sentencing Commission that would have equalized crack and powder penalties and targeted specific aggravating factors. The ABA has never wavered from the position it took in 1995, and neither has the Sentencing Commission.

In 1997, and again in 2002, the Sentencing Commission recommended reducing the 100-to-1 ratio and repealing the mandatory minimum for simple possession of crack. Unfortunately, the Sentencing Commission's recommendations have not yet been addressed.

The Sentencing Commission recently reduced crack penalties by two offense levels. This was an important measure and went as far as the Commission felt that it could go given its inability to alter congressionally established mandatory minimums. It is critical to understand, however, that this minus-two amendment is only the beginning of what must be done to address the crack/powder disparity.

The 100-to-1 ratio enacted by the Congress in 1986 was premised on many assumptions, but subsequent research and extensive analysis by the Sentencing Commission and others has revealed were not supported by sound evidence and, in retrospect, were exaggerated or simply false.

But although the myths which led to the 100-to-1 ratio have proven false, the disparate impact of this sentencing policy, particularly on the African-American community, is no myth. It is both real and it is growing.

As the Sentencing Commission has noted, revising the crack cocaine threshold would do more to reduce the sentencing gap between African-Americans and Caucasians than any other single policy change and would dramatically improve the fairness of the Federal sentencing system. Enactment of S. 1711 would take that much needed step.

It is important that I emphasize that the ABA not only opposes the crack/powder differential, but also strongly opposes the mandatory minimum sentences that are imposed for all cocaine offenses.

Justice Kennedy, addressing the ABA in 2003, stated, "I can neither accept the necessity nor the wisdom of Federal mandatory minimum sentences...[i]n too many cases, mandatory minimum sentences are unwise or unjust."

The ABA agrees wholeheartedly with Justice Kennedy and, thus, strongly supports the repeal of the existing mandatory minimums, particularly the draconian 5-year minimum mandatory for mere possession of crack—the only drug, as mentioned, that triggers the mandatory minimum for a first offense of simple possession.

The average length of Federal sentences has tripled since the adoption of mandatory minimums. The United States now imprisons its citizens more of its citizens than any other nation on the planet, at a rate roughly 5 to 8 times higher than the countries of Western Europe, and 12 times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are imprisoned here in the United States. And we know that incarceration does not always rehabilitate and sometimes has the opposite effect. For that reason, we also strongly support the appropriation of funds for developing effective alternatives to incarceration, such as drug courts, supervised treatment programs, and diversionary programs. Drug offenders are peculiarly situated to benefit from such programs, as their crimes are often ones of addiction.

We are encouraged to see the appropriation of such funds for State programs in S. 1711 and hope that this appropriation can be expanded to reach Federal programs as well.

In conclusion, the ABA firmly supports passage of S. 1711 as proposed by Senator Biden and cosponsored by Senator Feingold on the Subcommittee, among others. We also commend the leadership of Senators Hatch, Kennedy, Feinstein, Specter, and Sessions for their introduction of alternative bills to address the crack/powder disparity. We hope that decisive and rapid action will be possible.

On behalf of the American Bar Association, thank you for considering our views on an issue of such consequence for achieving justice in Federal sentencing.

[The prepared statement of Mr. Felman appears as a submission for the record.]

Chairman BIDEN. Thank you very much. We will do 10-minute rounds, since there is only three of us. If Senator Kennedy comes back and has to leave, I will yield him my time.

I have a lot of questions, as you might guess. Doctor, let me begin with you. It is the route to the brain, not the nature of whether it is freebase or powder cocaine, that impacts on how rapidly the dopamine is interfered with. Is that correct? It is the route, whether—so snorting or injecting, it has the effect on the brain more rapidly than snorting it. Is that correct?

Dr. VOLKOW. That is correct. And the faster it gets, the more intense its effects. The molecule is identical.

Chairman BIDEN. All right. Now, does that beg the question or answer the question as to whether or not if one were to—is there a higher rate of addiction—and the clinical definition of "addiction," X number of times a week, et cetera. Is there a higher rate of addiction for those who snort cocaine versus freebase or inject cocaine? Or is it one way or another? Is it the same effect?

Dr. VOLKOW. There is a higher rate of addiction when you inject or when you smoke than when you snort.

Chairman BIDEN. That was the premise upon which we started this whole thing off. And, again, I have to take blame for what ended up being what was in law at the time back in 1986, as the author of this legislation. That was the testimony.

Now, let me ask any of the other witness, is the fact that if one were—and the other study I remember seeing years ago, back when I used to chair this Committee in the 1990s, was that there is a correlation between HIV—a higher correlation between HIV and crack use than HIV and powder use because of the nature of how rapidly the high occurs and how quickly it diminishes so that people would repeat it, they would binge on crack cocaine. I remember going into Philadelphia bringing a group of policemen down in the south side of Philly, in South Philly, and there was a particular place where you could see people walking in a side door, a woman standing up, and then her head would be lowered, and she was performing a sexual act, and then 10 minutes later another—you know, she would get enough to get a hit for her. She would get literally paid in crack cocaine. That was how she was being paid by the drug dealer. And there was a lot of discussion about how the promiscuous sexual behavior was associated with

the frequency and the need for this hit, as the addiction occurred, that it did not occur as rapidly with people using powder cocaine.

Is there any truth to any of that?

Dr. VOLKOW. Well, again, powder cocaine can be administered by a route that is less addictive—snorting—or by a route that is as addictive as—

Chairman BIDEN. I know, but isn't the vast majority of the consumption of powder cocaine through the nostril and not through the veins? It is a relatively small percentage.

Dr. VOLKOW. Correct. The people, the individual taking the cocaine, that is correct.

Chairman BIDEN. Right.

Dr. VOLKOW. And with respect to your question about the risk for HIV, the highest risk actually for probably almost any drug is injection of cocaine more than smoking of cocaine, more than injection of heroin, because exactly what you were saying. You need to administer the drug very frequently, every 40, 30 minutes. And so you are injecting constantly, and that leads many people that become addicted what is called graduation to prefer smoking over injection because of the high risk of HIV.

Chairman BIDEN. Right. And is the high risk to HIV in that circumstance because of the needle or is it because of the promiscuous behavior that it promotes?

Dr. VOLKOW. Two factors: the needle, the contamination through the needle is one; and the second one, intoxication with cocaine leads to very risky sexual behaviors, whether it is injected, smoked, or even snorted.

Chairman BIDEN. OK. The next question, and the last one I have for you, Doctor, is—I have been a very strong supporter of drug rehabilitation programs and investing more money into drug rehab. You made reference that programs actually work. But let me ask you, is there any difference between—of those people who are subjected to—either in the prison or voluntarily move into drug rehabilitation programs associated with cocaine by whatever means it is administered, is there a breakdown among them based upon whether they get into rehab as a consequence of having been addicted to cocaine through freebasing or cocaine through snorting? I mean, or is there no distinction? The people who end up in treatment, is it harder or easier to treat one than the other?

Dr. VOLKOW. To my knowledge, there is no evidence of easiness of treating one individual because they were using hydrochloride versus freebase. There are many other factors that will determine the prognosis, not whether they are freebasing or using the hydrochloride.

Chairman BIDEN. Now, the allegation is made and continues to be made that there is a greater amount of violence associated with freebasing of cocaine. I assume that relates to anything from the way in which it is sold to the way in which it is used and the impact on the brain and what it causes in reactions of people. Another thing we hear a lot about—and there is some evidence—is that speed or methamphetamine, there is an excessive amount of violence associated with methamphetamine, consumption of methamphetamine. Is there a distinction between—I am going to talk about the violence, the violence side of the behavior.

I used to say to people, when I was doing this on a regular basis in those years—I held thousands of hours of hearings—that if I had to live in an apartment house where everybody was freebasing or in an apartment house where everybody was injecting heroin, I want to live where they inject heroin because I do not want to—the violence associated with injection of heroin and being on a high from heroin is significantly different than that associated with cocaine-induced paranoia or with regard to speed.

Is it true that there is a greater degree of violence associated with cocaine? And if so, is there a distinction between violence that is induced as a consequence of powder versus crack?

Dr. VOLKOW. Well, first you asked me is there a distinction between cocaine and methamphetamine, and I would say that methamphetamine is even a more potent drug than cocaine in terms of its ability to increase dopamine and also its duration of effects. And as a result of that, circumstances being equal, you can predict the one who could have potentially more adverse effects than the other.

However, we need to consider that the consequences that we see socially are not just the product itself, the chemical form of the drug, but the nature of the environment that gives accessibility to that drug. So when you speak to me and ask is there more evidence, for example, of violence in environments where you have high levels of crack versus a rural environment where a person may be by themselves taking methamphetamine, I would say, well, in that case, what is tipping the balance is your surrounding and not the drug itself.

But coming back to the chemical actions of the drug, if you inject, cocaine actually is going to have more aggressive—will facilitate aggressive behavior more than heroin. So, Senator, you chose well. You are much better off with heroin than cocaine vis-a-vis with aggression.

Chairman BIDEN. Now, let me be clear: I said living in an apartment with others who use it, an apartment complex.

Dr. VOLKOW. Yes, and in clinical models where you can take rats, for example, and put them together and give them cocaine or give them heroin, the level of aggression and attack to each other is much greater with cocaine than heroin. There is no reason that—we do not have an animal model for freebasing cocaine, so we inject them. And the higher the doses, if you inject them, the more active your animals are going to be.

So there you have an element of doses and the environment in which you are giving the drugs to the animal. But there is no—I mean, that is why I am sort of saying when you inject or when you smoke, the same drug is going to end up in your body. There is no difference at all. The circumstances may be very different, and I think that is where the issues become more complicated and it is not just an answer about the potency of hydrochloride versus freebase. Because if you are asking me directly, they are identical molecule. The circumstances may be very different, and then that is what determines the outcomes.

Chairman BIDEN. Thank you. I have a lot of questions, but I am going to yield—and I have questions for the rest of the panel, but I am going to yield to my colleague. My time is up.

Senator SESSIONS. Well, this is an important subject, Chairman Biden, and thank you for opening this discussion.

Judge Walton, you know, as the lawyer in me, I tend to not utilize the word "fairness" too much, but I think at a fundamental level, there is a sense that I have, as a former Federal prosecutor who sent a lot of people to jail for a long time under mandatory sentencing, that I think we do have a fairness question for a whole host of reasons. And I think we have a public policy question, and your experience on both sides of the bench and having been in the drug czar's office I think entitles you to speak to that, and I thank you for sharing that thought.

Mr. Commissioner, thank you for the Sentencing Commission's work. You have worked on this for quite a number of years. You have sent messages to the Congress. You have made your recommendations to Congress. And we just have not listened. I mean, I have offered the legislation for 6 years, and I remain somewhat baffled we have not fixed it before now. I thought earlier last year—we had a press conference with former Attorneys General that said this is the time to work on this, it was a step in the right direction that may lead us to action instead of talk.

And, Ms. Shappert, I am pleased that you are someone who has actually prosecuted these cases, and you have seen the kind of defendants that get the biggest sentences. Would you describe that for us a little bit, what it is like, that you have a neighborhood in your district that has been taken over by a crack gang, and what an undercover effective Federal prosecution can do, and how the strong sentences are effective tools for the prosecutor to actually decimate a gang instead of catching just one or two?

Ms. SHAPPERT. I would be happy to. I worked a neighborhood a couple years ago called Grier Heights. It is a community in Charlotte that was overrun with drug dealers, and what made this so disturbing is you had a lot of single parents in this neighborhood, you had a lot of elderly people, and they were absolutely terrorized by open air drug markets and crack cocaine dealers.

We went in there with the Charlotte-Mecklenburg Police Department and ATF with a mind toward cleaning up this community, and what we did is we were able to identify certain traffickers, prosecute them, and use what you are familiar with as rolling indictments. We would do one indictment, get one group of drug dealers, take out the next group, and keep moving.

In my district, we have historically used a root-to-branch approach, which is to say we do not want to just take the head off the monster, we want to take out the entire operation. So we not only prosecuted individuals who were open-air dealers. We went after their sources in New York. We went after their sources in West Palm Beach. We went after the violent offenders, the street distributors, the cookers, the whole operation. We indicted a total of over 70 individuals, and the average sentence was over 200 months.

When I started prosecuting in this neighborhood, I would go in there to do interviews, and when I would go into this neighborhood, people would come out of their apartments to shake my hand. They were so grateful to have their neighborhood back. When we went to trial, a number of the neighborhood members sat and watched

the trials with us because they were so acutely interested. And when we finished our prosecutions, the city of Charlotte put a police satellite station in that community so that we could reinforce our efforts to keep that neighborhood clean.

It is important to emphasize that our entire motive was to take back this neighborhood for the people who actually live there. And when we talk about crack cocaine sentences, we can never lose sight of the community that we are trying to protect and defend.

The trial I just finished last week up in Statesville, North Carolina, involved this community of Lenore—

Senator SESSIONS. And you tried this yourself?

Ms. SHAPPERT. I tried three cases, Senator.

Senator SESSIONS. A United States Attorney actually got into the courtroom?

Ms. SHAPPERT. I tried three cases in 4½ weeks, picked three juries, and went back to back to back on three historical cocaine—

Senator SESSIONS. I am impressed.

Ms. SHAPPERT. I am still a trial lawyer, and I practice law where the rubber meets the road.

So in that neighborhood, we found that there were streets that were so clogged with street traffic of drug dealers that people could not get through. We went in there again to clean up that neighborhood, to turn it over back to the community. Our motive is to ensure the safety of these communities.

Senator SESSIONS. Right.

Ms. SHAPPERT. And that is what we did.

Senator SESSIONS. I just want to say that those who may too lightly think that we can just slash sentences across the board and that tough sentences do not do any good, murders fell substantially in the neighborhood where we had a major gang prosecution. Many of those that were convicted of crack offenses had previous murder charges against them. Some had gotten away with it, and some had been—so these were violent criminals that were removed from the community for long periods of time. I do not think that this is a—so I just want to make this point. As we go wrestle with what the appropriate sentence is, we cannot lose sight of the fact that neighborhoods can be destroyed, that children cannot go out to play, that the good and decent citizens there care deeply and are glad to see people be put away. And many come up to me and thank me for that from those neighborhoods.

With regard to crack, in your experience, Ms. Shappert, are you aware of much cocaine powder, hydrochloride, being injected by needle? Or is it normally through the nasal passages?

Ms. SHAPPERT. Well, I will tell you that when I became an assistant public defender in 1983, there was a lot of cocaine injection. And I can remember as an assistant public defender asking clients who said they were stealing just because they liked to steal to roll up their sleeves so I could inspect the needle marks on their arms. But when crack cocaine hit Charlotte in 1986–88, the whole circumstance changed. We almost never see cocaine injected anymore. We see it smoked.

Senator SESSIONS. Now, we just had one of the most tragic events in our community of Mobile in which an individual—I suppose most people read about it—threw his four beautiful children

off the bridge to their death. And the Sunday Mobile paper—I believe it was Sunday's paper—did some background work on him, and he was a crack addict. And the family agreed that it was his addiction to crack that put him over to that most incredibly horrible crime.

Dr. Volkow, do you see that there is a danger from this kind of crack addiction for violence that we cannot deny?

Dr. VOLKOW. Absolutely, and as mentioned before, high doses of cocaine can produce paranoid thinking and can result in psychosis. And what you are describing right now is a very unfortunate case of that example where people take high doses of the drug, with repeated administration they become increasingly more sensitive to this paranoid effect, and it can result in full-blown psychosis with violence.

Senator SESSIONS. My best judgment is that crack cocaine, the fact that you can easily smoke it and it gives that intense high, you do not have to use a needle to inject, creates a greater risk than powder. But I cannot deny that both create a risk.

Judge, would you just briefly tell us how many years the Commission has expressed concern about that?

Judge HINOJOSA. It started in 1995, and on the issue of violence, Senator, when we wrote the 2007 report, we updated it by going to the 2005 sample of about 25 percent of the powder and crack cases, and we found that by using the definition of violence as we used it, meaning injury, death, and threats of injury or death involved in the occurrence or the commission of the offense, that with regards to powder it was in 6.2 percent of the cases and with regards to crack it was in 10.4 percent of the cases. So it is a relatively small number of both, although obviously slightly more in crack.

Senator SESSIONS. Could you share this—I understand that the violence level, in the mid- to late 1980s, when I was prosecuting more than one of these gangs, more than one, apparently the numbers show that violence connected with crack cocaine is less than it was sometime years ago. Do you have any idea why that trend may be so?

Judge HINOJOSA. I do not have a specific answer, but we see it, and I would suggest—I do not disagree with you that it may have something to do with regards to prosecutions in certain areas. This is based strictly on Federal prosecutions, on the people who have actually been sentenced. That is what the Commission data shows. But you are correct; you know, prosecution probably makes a difference.

Senator SESSIONS. I would say there are a couple of reasons. One is that you apprehend the violent gang guys, and they go to jail for 20 years, and they are not out there to do it again. That helps keep violence down. The gun prosecutions, the 924(c), carrying a firearm in the commission of a drug offense, carries a mandatory 5 without parole. Do you think, Madam U.S. Attorney, that that has caused fewer drug dealers to carry guns as they go about their business than used to be so?

Ms. SHAPPERT. We know from the stories of people we debrief after they have been apprehended that they have learned to keep their "piece," as they call their gun, separate from their drugs for

that very reason, because it has discouraged carrying guns to drug-trafficking offenses.

I also think that the increased prosecution of drug offenses by the Department of Justice has targeted the same people who were involved in drug-related violence and has been highly effective in reducing the use of guns in drug crimes.

Senator SESSIONS. Well, I would just conclude this point and say that it is time for us to think about this. I believe I made my suggestion, and my colleagues have, as to what we think a 20-to-1 ratio—as the Sentencing Commission suggested be the minimum what they would like to see, that is where I basically am. We do not need to send any signal that we have gone soft on drugs, that we are going soft on drug gangs and criminals. But at the same time, our policy needs to be rational. We do not need to have the taxpayers pay to keep somebody in jail when it is not worth their money to keep them there. So it is time for Congress, I think, to give attention to it and let's reach a conclusion and fix it.

Thank you, Mr. Chairman.

Chairman BIDEN. Thank you very much.

Doctor, I have one last question for you. I remember years ago, meaning 10 years ago, maybe 15, that crack cocaine was viewed as a great equalizer. There was an interesting phenomenon. In the 1980s—and do not hold me to the exact number. I do not have this in my staff material. This is from memory. In the 1970s and 1980s, there was somewhere between 2 and 3 times as many men consuming controlled substances as women. And then the argument was made, whether it is true or not, that when crack was introduced in the late 1980s, it became a great equalizer; that women who would not snort cocaine for the first time for fear of distorting their nostrils or would not put a needle in their arm, felt a lot more comfortable smoking; and that that generated a closing of the disparity from 20 or 3-to-1 men versus women to much closer to 1-to-1. Is there any truth to that?

Dr. VOLKOW. To my knowledge, there is no evidence to that particular statement, indeed, and that is why I make the point, that most cases of addiction with freebase start with cocaine snorting. And that is the other issue that we need to keep in mind because the sense that we become uncomfortable by having only cocaine hydrochloride and that will take the problem of freebase is actually not justified. Why? Because once a person becomes addicted, they will seek a different route of administration. If there is no freebase, they will inject. And history has already given us that lesson.

The other thing today, in my curiosity, I entered into Wikipedia to see what you all could get very easily out of the Web on crack cocaine, and lo and behold, you have there the recipe for producing cocaine freebase from cocaine hydrochloride. So let's not kid ourselves. If someone wants to take cocaine freebase, they can cook it themselves just following the guidelines.

So there is no evidence in that respect, therefore, coming back to your question, that it was the equalizer in the use of drugs for cocaine or for other drugs. That is not the case. Unfortunately, we have been seeing equalization on the rates of drug use, both for legal and illegal, in women and for all types of drugs. And in some,

like prescription medication, females are starting to outnumber males. So it was not due to crack.

Chairman BIDEN. Thank you.

May I ask you, Ms. Shappert, what is the Department's position on the minimum mandatory portion of—forget equalizing, but the minimum mandatory requirement that exists for use of crack cocaine?

Ms. SHAPPERT. I cannot give the Department's position on minimum-mandatory. I can tell you the Department is interested in a dialog and a discussion with this Committee and the Congress about changing the ratio of cocaine and cocaine powder and addressing the sentencing disparity in light of the concerns that have been raised by many different members of the community. And we link that to the equally significant issue to us of public safety, particularly with the application of retroactivity and the 20,000 individuals who are going to be eligible for resentencing.

Chairman BIDEN. Now, both judges—correct me if am wrong—said, I thought, a similar thing. But I may be mistaken. When you indicated that you are willing to look, the Department is willing to look at retroactivity as it relates to the individual case, the violence, the degree to which violence is associated with the sentence that was received, how do you—what is the matrix you would use? I think Judge Walton said if someone had been violent 15 years earlier, had another violent offense—maybe I am mistaken. It may have been you, Judge. I do not know who said it. But that someone may have been convicted of consuming crack cocaine, but the violent offense that he or she has on her record was unrelated to that particular offense.

Are you saying that the violence has to be related to the offense or the violence related to the individual who is incarcerated as opposed to the specific offense relating to crack?

Ms. SHAPPERT. I am referring to what the Attorney General said last week, which is that in terms of reviewing and addressing this problem of the 20,000 individuals who are eligible for resentencing, the concern of the Department of Justice is with violent offenders and recidivists. We are far less concerned with first offenders and small possession cases. And in reviewing that question and addressing it with the Congress, the dialog needs to be focused exclusively—rather, not exclusively, but significantly on the public safety question. So all of those matters need to be worked out in the context of protecting the community, recognizing that these were legitimate sentences, that we all understood that they were legitimate sentences, and retroactivity will have profound consequences for a lot of the communities that are the most fragile.

Chairman BIDEN. Judge, would you respond to that, Judge Walton?

Judge WALTON. Well, again, I think the problem becomes what do you say in your legislation to ensure that you are truly keeping locked up those who are going to actually pose a danger to the community if they are released. And I think that is very difficult to effectuate through legislation. As the situation now exists, if Congress does not take action, it will be imperative on the judges, pursuant to the direction of the Sentencing Commission, to make an assessment as to whether someone poses a potential danger to soci-

ety. And you obviously will take into account the information provided at the time they were sentenced by way of a presentence report, which will be made available to the judge if he or she does not currently have one. We will be receiving from the Federal Bureau of Prisons information about the individual's institutional adjustment, and if they have infractions of a violent nature, then judges would factor that in. I know if I had that before me, I would not be inclined to grant the reduction.

So I think looking at it from an individualized perspective ends up making the process fairer as compared to categorically saying that a certain standard set forth by legislation is going to control what happens to all offenders.

Chairman BIDEN. Judge, does the Commission have a sense of—or the Conference as to what kind of workload this would impose to have to review 20,000? You do not handle 20,000 criminal cases a year.

Judge WALTON. Well, that is spread throughout the entire country, and we are only talking about, as was indicated, around 1,600 the first year. We obviously thought about that, and we obviously are concerned because we do have tremendous caseloads. On the other hand, our conclusion was that we were willing to roll up our sleeves and tackle this problem.

Chairman BIDEN. I just want to make sure—I am not taking issue with you. Especially in the Rehnquist Court and now the Roberts Court, there is a great, legitimate concern about the caseload of the Federal district court judges. That is what we are talking about here, correct?

Judge WALTON. That is correct.

Chairman BIDEN. And so the question is that, if memory serves me—and, again, I have been paying more attention to the other Committee I chair, quite frankly, than the detail of this one for a while now. But if I am not mistaken, the total number of prosecutions a year in the Federal court are less than 25,000. There are more prosecutions in the city of Philadelphia in 1 year than there are in the entire Federal criminal justice system—at least there were several years ago.

And so my question becomes the practical. I am trying to figure out, along with my colleagues, a practical way to—I happen to think there should be no disparity, but a practical way to figure out how to deal with the disparity, which everyone seems to be coming around there has to be some change from 100-to-1, and, second, the impact on retroactivity. My legislation that you have endorsed, Mr. Felman, does not include retroactivity, for example. And so that is why I ask—I just want to make it clear for the record why I am asking. I would hate like heck for us to get to the position where we have reached a consensus and then find out that the bench says, Whoa, whoa, whoa, we cannot handle this, we cannot do a review of 1,600 cases next year in terms of the sentencing disparity determining whether or not the retroactivity applies.

And so if we go this route, we are going to need to work with you to make sure that we are in a position, if that is the case, if that is the route that is chosen, that the Judicial Conference feels confident that they can do this without affecting the Speedy Trial Act, without affecting a whole range of other caseload work that

you Federal judges have right now. That is the reason I raised the question.

Judge WALTON. Well, the Judicial Conference has not taken a position on whether, if there is a legislative fix, that should be made retroactive. The only position we have taken is in reference to the two-level decrease.

Chairman BIDEN. It would be the same effect. I mean, in other words, if we do nothing at all, if we remain silent and cannot give you consensus, then what happens is you are faced with this retroactivity, and the question is could you handle it now. Based on the Sentencing Commission recommendation, could you handle the caseload? Yes, Ms. Shappert?

Ms. SHAPPERT. To be honest with you, I am not sure we all can. If you noticed, 50 percent of those cases are going to fall in three circuits—the Fourth, the Fifth, and the Eleventh. I look at my district. We are going to have at least 536, and that number is misleading. The Commission tells us 536 will be eligible, but the number is misleading for several reasons.

First of all, where individuals have had Rule 35's and had their sentences reduced, defendants who we thought would not be eligible for the retroactivity will be, so that increases the number.

The other factor we are finding in my district is that marijuana offenders, ecstasy offenders, fraud defendants, are also filing petitions thinking that they are eligible for this, too. So we are having to sort through hundreds of cases to—

Chairman BIDEN. Do you have in the Federal system many marijuana offenders?

Ms. SHAPPERT. Yes, in fact, we do. Not as many as we do for crack cocaine. I recently got a life sentence for a marijuana offender, so, yes, we do prosecute marijuana—

Chairman BIDEN. I assume that was like a shipload.

Ms. SHAPPERT. No. It was like several tractor-trailer loads full.

Chairman BIDEN. Good, OK. Well, I—

Ms. SHAPPERT. The point being is that we are dealing with a lot of cases that had nothing to do with crack cocaine, and the files have been archived. This 20,000 people represents 10 percent of the Federal prison population. And it is fine to say that we will have sentencing hearings for each and every one of these individuals to consider two levels, but there are several factors. Files have been archived. Witnesses are gone. Agents have retired. We do not have the same resources as prosecutors. And if other circuits do what the Ninth Circuit has done and seek to give a full-blown sentencing hearing, we are not talking about simply a two-level reduction. We are talking about potentially much more significant reductions in sentences. Prosecutors have to review a file that is 5 or 7 or 10 years old in addition to our regular caseloads.

Judge WALTON. I hear what the Justice Department is saying, and I was formerly a member of the Justice Department for years. I do not hear judges crying out and saying we are going to be overwhelmed, therefore, we should not try and fix this fundamentally unfair process. I do not hear probation department officers saying that. My probation officers said they feel that they can address the issue.

So I just do not hear that coming from the judiciary that we do not have the resources; we are not willing to invest the time to address this problem.

Judge HINOJOSA. Senator, I was told that this would not be a hearing about retroactivity, but I do want to say—

Chairman BIDEN. Well, it is really not. I just—but it does come up in the context of what we are hopefully going to negotiate with the Justice Department.

Judge HINOJOSA. I do want to say something on behalf of the Commission. I do not think anybody should be left with the impression that the Commission just jumped into something without having thought about this, and this bipartisan Commission took the time to conduct studies, to have public hearings, to receive public comment. In fact, we received over 30,000 public comments, either in the form of letters from the ABA and other individuals and organizations. We had public hearings. The Department of Justice was present, as well as was the Judicial Conference. We have heard from the Judicial Conference. And we looked at the factors we normally look at when we make a decision under the statutes, which we are supposed to do every time we reduce penalties, and that is how we did it.

It was important to us that the Judicial Conference recommended and indicated that they could handle it and that they would be—they were supportive of this, as well as the other individuals that we heard from. And the Commission, having done that, then felt this was the right thing to do. We have done it in the past with regards to other drug reductions. It has been handled by the courts. And that is how the Commission made its decision. This was well thought out and we did look at all the possibilities. We also then proceeded to indicate that this is not a full rehearing as far as the sentencing, that this was not a full resentencing. We did this under our guidelines. We have the statutory authority to do that. We stated that. We indicated that there should be public safety consideration on the part of the courts. This is not automatic. Obviously, a Federal district judge will have to make this decision. It can be denied. And, therefore, that will happen in these cases. Each one of these will be looked at with regards to people with violence in their past. As Judge Walton indicated, these are individuals who have received higher sentences because their criminal history categories are higher. In some cases, they became career offenders.

And so all of this has been thought out. Their sentences reflect that, and the Commission thought about this, unanimously voted on this. And I do not want anybody to be left with the impression that the Commission is not concerned about public safety and that we have not done what is necessary with regards to trying to protect—

Chairman BIDEN. Judge, understand I am trying to make your point. I am not suggesting that it was irresponsible. But I do think for the public at large and the press that is here listening to this hearing, which has created a great deal of interest for the reason it has been debated for so long, and there is such a disparity that they understand in open public testimony what each of you think. We have a member of the Sentencing Commission and two Federal

judges. We have a defender, we have a scientist, and we have a prosecutor. And I just want to make sure that everyone understands your position from each of your expertise.

Ms. Shappert, you want to say something?

Ms. SHAPPERT. Yes. I deeply respect the work of the Sentencing Commission and, in fact, I testified on behalf of the Department in front of the Sentencing Commission. One thing that I do not think was considered by all persons—and I am sure the Honorable Hinojosa did consider it. But one thing that is important to remember is the Federal public defenders did not acknowledge or did not underscore that many of them would be seeking full-blown resentencing hearings. And I am informed that many felt that Federal public defenders are promoting full-blown resentencing hearings looking to the law of the Ninth Circuit. The Ninth Circuit has already had a decision coming out where they are making *Booker* retroactive for these resentencing hearings.

Chairman BIDEN. Well, we could legislate that, could we not?

Ms. SHAPPERT. Yes, you could.

Chairman BIDEN. We could make that painfully clear.

Ms. SHAPPERT. Yes, could that?

Chairman BIDEN. Would that go a long way in resolving the Department's concern? In other words, if it were not a full-blown hearing, if it were along the lines of the Sentencing Commission recommendations, how much difficulty—if that were codified, how much difficulty would the Department have with that approach?

Ms. SHAPPERT. Well, it would certainly dramatically ease our workload and make things, we believe, more consistent across the country. It still would require that all of these defendants be eligible for resentencing hearings. We are still concerned about the violence associated with the backgrounds of some of these individuals. We still believe that there needs to be a retroactivity fix and that the Senate is the place where that needs to happen.

Chairman BIDEN. Mr. Felman, from your perspective as a defense lawyer, how would you view this?

Mr. FELMAN. I think it is important that we not make these decisions based on myths. I have been hearing a lot about these are some of the most violent people. These are, by definition, not crimes of violence. These are non-violent offenses. What we have just heard is that 90 percent of crack offenders had no hint of violence about them at all. There was no threat of violence, there was no actual violence—90 percent. So we are talking about 10 percent of the 19,000. And the 19,000 gets thrown around a lot. That is the number of resentencings that need to be done over the next decades, the next 20 or 30 years. There are 70,000 sentences a year in the Federal system, and we are talking about 1,600 that need to be done now.

And let's assume that all 1,600 are released, and I have read the Attorney General's comment suggesting that we should all be in fear of those 1,600 people who are, by definition, convicted of a non-violent crime. And the statistic that is missing from that discussion is the number of people who are going to get out of prison this year, anyway. It is 650,000. And for the Attorney General of this Nation to put our people in fear over the release of 1,600 people knowing that otherwise 650,000 were going to be released is

truly disappointing. And even these people will not be released if a judge looks at them and says these people could be violent, that 10 percent. They may not be released. Even if we let all these people out, we will still have locked up more people this year than ever before.

And so I am in a district with the number two amount of crack cases; the second most district is the Middle District of Florida. And we are in the Eleventh Circuit, and it is my understanding that the Eleventh Circuit and the Fourth Circuit have both ruled that you are not entitled to a full resentencing. The only circuit that has ruled that you are is the Ninth Circuit. And so in my district, I do not hear anybody complaining. The probation officers and the prosecutors and the Federal defenders have been comparing lists. They have been working diligently. There is not a tsunami. They are prepared to professionally discharge their duty and to process these cases and to get it done.

Thank you.

Chairman BIDEN. Thank you for your input.

Jeff?

Senator SESSIONS. Well, 650,000 released is not from Federal prisons, right?

Mr. FELMAN. That is correct. That is nationwide, State and Federal.

Senator SESSIONS. Right. Well, these represent—the Federal prosecutions of crack dealers represent the worst, normally, and that is why they have gotten heavier sentences. And I do think—I do not know how many people will die as a result of a mass release of 25 percent of the Federal penitentiary, but some will, because a lot of these people will go back to this and get involved in violence and kill somebody, much less dealing drugs and maybe addicting more people in the future.

So I just want—I heard your point of view, but I think we need to be realistic here. Let's ask the Department of Justice about the 5-year mandatory sentence for mere possession of 5 grams of crack. Are you willing to talk about altering that sentence?

Ms. SHAPPERT. The Department of Justice is willing to discuss the disparity, and that is across the board.

Senator SESSIONS. Well, I think that is an excessive sentence myself, and I know Congressman Rangel and others were for these tough sentences, and I supported them and Senator Biden did, and now we have gotten—the world has changed some, and it is time for us to look back at it and see if we can get the thing in the right range there.

I would just conclude, Mr. Chairman, by saying that we have had a good discussion. This is a good panel. There is no free lunch here. If you weaken too much the sentencing, we are going to have more crime and a more difficult time prosecuting, because it is the fear of the large sentence that almost guarantees large numbers of people who are apprehended will provide the evidence necessary to convict the higher-ups. Isn't that right, Ms. Shappert?

Ms. SHAPPERT. Absolutely, Senator.

Senator SESSIONS. Judge, you have seen that yourself, and so many of the people do not get the full sentence because in some cases I have seen almost everybody would agree to plead guilty and

confess and tell on the rest of the gang, and they all get a little less sentencing you would think they would have gotten otherwise.

Judge WALTON. If I could weigh in on the discussion that was taking place when you were asking your questions, understand I am not here personally and not on behalf of the Conference suggesting that we should not vigorously prosecute people who are involved drug-trafficking activity. Clearly, individuals who are higher-ups and managers of drug organizations should be punished if they are convicted and punished appropriately. Clearly, individuals who are involved in drugs and violence should be punished appropriately.

But what happens, as you know as a former prosecutor at the ground level—I just finished a case recently—some of the top individuals who had all of the information that would help the Government make a case provided cooperation. As a result of that cooperation, they will get significantly reduced sentences. The individuals, because of our current structure that exists regarding crack cocaine, who end up getting the greater sentences are individuals who are the low-level offenders who do not have any information to provide so they cannot cooperate with the Government because they have nothing to provide by way of assistance. So because of our sentencing structure, they get significant sentences even though they are not warranted as compared to the individuals who are higher up on the totem pole. And that is one of the big concerns I have about the practical impact of what our sentencing structure does.

Senator SESSIONS. That can happen and does happen. I think most prosecutors try to not allow that to happen. But I share your concern.

I think we are on the road to doing something right. I thank all of you for your participation. I am ready to get busy. Thank you.

Chairman BIDEN. Well, what I would like to do—and I do not want to make additional work for you or keep you much longer, but I have a number of additional questions maybe I can submit to you in writing, and they do not require long answers. But I would like to go back to—it seems to me if we are going to—it is not sufficient that we merely reduce the disparity, and, again, our legislation equalizes it. But it seems to me part of this, when we figure into this this overall debate with regard to crack cocaine versus powder cocaine, is the mandatory minimum sentence for first-time offenders, as well as this notion of retroactivity, which we are going to have to face. I acknowledge this was not the purpose of the hearing, the retroactivity, but it was raised as part of what is essentially—and I appreciate it. I thank the Department for essentially publicly acknowledging they are prepared to negotiate an overall settlement of this, whatever everyone acknowledges is not merely a disparity but an unfair disparity.

And so there are three pieces to it: one is whether it is 1-to-1 or 100-to-1 or something in between; two is the minimum mandatory sentences for first offender drug users; and the third is how to deal with, if we accomplish any of that, retroactivity. And it is interesting, that chart has just been placed up, the violence involved in powder versus crack cocaine. The larger message of that chart, as I understand it, Doctor, is basically that, on average, 90 percent of

the time involving cocaine there is no violence associated with it. That is the sort of larger, overarching piece about this, going to this issue of are we going to release 25 percent of the Federal prison population back onto the street who are violent criminals who we are going to be putting back on the street.

And so I hope we will do this—not privately like secret, but not in the hearing context, I hope we can—and I am sure that Senators Sessions and Hatch are prepared with me to sit down with the Department to see if we can come to some greater sense of what a common ground might be. It may not be. My intention is to pursue no disparity. But, also, I am a realist. I have been here for a long time. And I would rather get something good done than nothing done at all. So that is the context in which I raise each of these.

One of the questions that I had—and there may be no answer to it, but I found interesting, and, quite frankly, I did not know—was that the—let me find the statistic—that back in the mid-1990s, the sentences for crack cocaine were 25.3 percent longer than powder; now it is 50 percent longer.

Is there an explanation for that, Judge? I mean, is there a reason for that?

Judge HINOJOSA. There are some possibilities as to what we consider may be the reasons for it. Part of it is there is a slightly higher number of people who get sentenced for crack who are subject to the mandatory minimums, and their criminal history category tends to be—the average is III as opposed to II.

Chairman BIDEN. I see.

Judge HINOJOSA. And so the safety valve provisions apply in 13.5 percent in the crack cases, but in about 44.5 percent of the powder cases, people qualify for the safety valve provisions. And so that may be some reason that there is more relief for powder defendants because of their criminal history, which, again, shows how criminal history plays a part with regards to the sentences of crack defendants from the standpoint of getting them higher sentences, and, therefore, they would not go below the mandatory minimums.

Chairman BIDEN. And, Doctor, I warn you and implore you, I plan on in the Subcommittee holding additional hearings on treatment programs and what treatment regimes we should be involved with. And I am going to ask you if you would be kind enough to come back and talk to us. One of the things that I—I was the author of the drug court legislation, and it seems to me that it is not fully appreciated, the value of those courts and the funding of them. So I just would—I give warning. I will ask you to come back and testify before us.

The other thing I would like to suggest is that I may, after we have a discussion over the next several weeks, I hope, very well either—one, I would warn or even possibly reconvene the panel to debate and discuss what may or may not be something we can work out. In the meantime, let me turn to staff and ask if there is anything glaring that we should have asked that I did not. And I will invite my colleagues who are not able to be here, and, again, I would ask your bosses to submit just one or two questions if they want. I want to be able to get these folks back, so I do not want to send them off with too much homework here. But I do have three or four questions that I would like to ask that are more in

the weeds than we have been discussing here and I do not think are going to particularly enlighten this discussion. But I think we need them for the record if you all are willing.

Would any of you like to make a closing comment or an observation?

Dr. VOLKOW. Well, I want to first thank you for taking leadership on this issue and for bringing up something that has become one of our major initiatives, the notion of treatment on those drug abusers that end up in the criminal justice system, because probably it is one of the things that we can do that can change both criminal behavior as well as substance abuse.

Chairman BIDEN. As you know, those six hundred and some thousand people being released, a number of them are walking out with a bus ticket and an addiction as they walk through the gate. As they walk through the gate to freedom, they walk through addicted. Addicted because of the availability of drugs in the prison system, particularly in the State system. And we are also going to be holding hearings on a piece of legislation that Senator Specter and I have on the Second Chance Act. What do we do about those folks? Because a significant number go from that prison gate to underneath a bridge because there is no housing, there is no employment, there is no—so we have to be taking a look at this.

Yes, Mr. Felman?

Mr. FELMAN. I just wanted to make sure that this statistic about releasing 25 percent of the Federal prison population is properly understood. What we are talking about is 200,000 inmates, roughly, and we are talking about releasing 20,000 of them. But we are not talking about releasing 20,000 of them now. We are talking about releasing 2,000 or less now. So we are talking about actually less than 1 percent of the prison population that would be released at any given time.

Chairman BIDEN. I am glad you mentioned that. It is a valid point.

Mr. FELMAN. So I just want to make sure that that was clear and to reiterate the ABA's position that although, obviously, there are differing positions about what the proper ratio should be, we believe very firmly that there is no basis for a ratio other than 1-to-1 because these are ultimately the same drug. There are no other drugs that are punished based on their mode of ingestion. To the extent that there is greater violence associated with crack, the way the guidelines should address that is to punish the people who are actually violent by increasing those punishments. To build in a specific offense characteristic into the base offense level would result in double punishment.

All crack, we know by definition, was once powder. And so it is a question of where along the chain of distribution you want to really lower the hammer. And if we are hammering only the people with the crack, what you are getting is the street level dealer at the end of the distribution chain. And so there is not any reason—just because crack is or is not more addictive or is perceived to have these other issues, it all comes from powder. And so we believe that fairness must not only be actual, it must be perceived to be real, and that the African-American community might continue

to have a perception of unfairness if there is anything other than 1-to-1 ratio.

Judge WALTON. One other thing I want to emphasize, which is what Judge Hinojosa indicated, and that is that when the Sentencing Commission has taken similar action regarding other substances, they have made it retroactive. And what would the message be to minority communities who are most affected by crack if we change it as it relates to crack but we did not do it regarding other drugs. What is that saying, again, about the fairness of the process?

Ms. SHAPPERT. Senator, I would also point out that the Department of Justice is always opposed to retroactivity, whether it was for the LSD penalties or for marijuana.

But the more important point I would like to make is that March 3rd the retroactivity goes into effect. We are on a very short time window right now because if something is not done before March 3rd, there will be ex post facto issues that will come into play.

So I would urge your Committee to meet with the Department of Justice as quickly as possible so we can start moving.

Chairman BIDEN. That is a valid point. I agree with that, and we will. I must say in closing that beyond—and the point Mr. Felman made and you made, Judge Walton, that perception matters in terms of fairness of the criminal justice system, and that is one of the reasons why I went to 1-to-1. You could make, I think, an argument that there could be some slight difference, but as a practical political matter—and I mean that in the broadest sense—of the fair administration of justice, I think it has reached the point where it is perceived to be completely out of whack and viewed as targeted.

I have a son who is a Federal prosecutor. As a matter of fact, I have a son who is the Attorney General of the State of Delaware. And it is interesting to hear him talk about this from the State level and to hear his concerns about the way in which—he was in the Philadelphia office, a large Federal office, and about how minimum mandatories were leveraged to do a lot of things that did not sit well with him.

So there is a lot going on here, but the perception—I guess the only point I am trying to make is perception does matter in this case, and I look forward to working with the Justice Department and my colleagues to see if we can get something done quickly. And, Doctor, I look forward to having you come back to speak about things that are near and dear to my heart, particularly as it relates to prevention and treatment.

Thank you all very, very much. We are adjourned.

[Whereupon, at 4:21 p.m., the Committee was adjourned.]

Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

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**Answers to Questions for the Record**

***Federal Cocaine Sentencing Policy: Reforming the 100-to-1 Ratio***

**James Felman**
**Co-Chair, Committee on Sentencing, Criminal Justice Section**
**American Bar Association**

**Questions of Senator Joseph R. Biden, Jr.**

Question 1: *As a general matter, should we sentence a drug addict more severely because the drug he or she is addicted to, perhaps as a result of socio-economic factors, happens to be more addictive? Shouldn't we punish crime and treat addiction?*

Answer: The ABA has consistently advocated against the over-criminalization of conduct, including in particular conduct resulting from substance abuse and mental illness. The ABA has also opposed reliance on incarceration as a crime control strategy. We agree with a March 10, 2008, New York Times editorial that the explosive growth in U.S. prison populations documented in a recent report of the Pew Center for the States has resulted in "a terrible waste of money and lives" without a corresponding benefit in terms of public safety.[1] In fact, jurisdictions like New York and Kansas that have made an effort to reduce their prison populations have experienced a reduction in crime. Sending people to prison when they pose no danger to the community generally results in their returning to the community in worse shape than they left it, and they are provided little assistance in terms of jobs and housing and treatment services when they come home. The adverse impact on minority communities of the "race to incarcerate" has been particularly troublesome. More specifically, the ABA has urged equalization of sentences for crack cocaine and powder cocaine, noting the grossly disproportionate impact on black defendants of the current 100-to-one ratio. The ABA has strongly supported greater use of community-based treatment alternatives to incarceration, including inpatient treatment, for offenders whose crimes are associated with substance abuse and/or mental illness.[2] It has been joined in

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[1] *See One in 100: Behind Bars in America 2008*, The Pew Center on the States (2008).

[2] The relationship between drug rehabilitation and crime is clear. If drug addiction creates a propensity to commit crime, drug rehabilitation is very effective at preventing crime. Rates of recidivism are lower for drug offenders who receive treatment while in prison or jail, lowest for those treated outside of a prison setting. Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 Hastings L.J. 1217, 1220 (2002). *See also United States v. Perella*, 273 F. Supp. 2d 162, 164 (D. Mass. 2003).

advocating this position by both the National Association of District Attorneys and the National Legal Aid and Defender Association.

Question 2: *My legislation appropriates funds for alternatives to incarceration and treatment programs for drug offenders. What is the ABA's position regarding the increased use of alternatives to incarceration and treatment programs for drug offenders?*

Answer: The ABA strongly supports the use of alternatives to incarceration and community-based treatment programs. In February of 2007 the ABA House of Delegates approved a series of policy resolutions urging jurisdictions to develop, implement, and fund programs that prosecutors and other criminal justice professionals can utilize to enable offenders to be placed under community supervision in appropriate cases. Generally, these programs should be available to any offender who poses no substantial threat to the community, and who is not charged with a crime involving substantial violence or playing a major role in large scale drug trafficking. The ABA also supports deferred adjudication/diversion options that avoid a permanent conviction record for offenders who are deemed appropriate for community supervision, and community-based treatment and job training programs. Finally, the ABA has urged jurisdictions to implement meaningful graduated sanctions for violations of parole or probation as alternatives to incarceration. These policies were originally developed by the ABA Commission on Effective Criminal Sanctions, and they were co-sponsored in the ABA House by the National Association of District Attorneys and the National Legal Aid and Defender Association.

The ABA in particular supports the expanded use of alternatives to incarceration in the federal system. Virtually every state criminal justice system makes use of a wide variety of forms of punishment short of incarceration, such as probation, home detention, intermittent confinement, and community service. In the federal criminal justice system these alternatives have been greatly curtailed since the advent of the guidelines. In 1984, more than 30% of defendants were sentenced to probation without any term of imprisonment.[3] By 2006 that figure had dwindled to a mere 7.5%, as

[3]*See* United States Sentencing Commission, Fifteen Years of Guideline Sentencing, Fig.2.2, p.43 (Nov. 2004).

92.5% of offenders were sentenced to imprisonment.[4] The data reflects a marked and consistent trend away from the use of alternatives to incarceration which appears to be growing each and every year.[5] At the same time, utilization of community confinement has been curtailed and shock incarceration ("boot camp") programs have been eliminated.

The abandonment of alternatives to incarceration was not dictated by the Sentencing Reform Act of 1984. Indeed, 28 U.S.C. §994(j) provides that "[t]he Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense ...."

The restoration of alternatives to incarceration under the guidelines has been the subject of considerable study. The Judicial Conference

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[4]*See* 2006 Sourcebook of Federal Sentencing Statistics, Fig. D & Table 12.

[5]The percentage of defendants sentenced to imprisonment has increased nearly every year for which data is available:

| | |
|---|---|
| 2007: | 92.3% |
| 2006: | 92.5% |
| 2005 post-*Booker*: | 92.1% |
| 2005 pre-*Booker*: | 91.9% |
| 2004 post-*Blakely*: | 91.0% |
| 2004 pre-*Blakely*: | 91.3% |
| 2003: | 91.0% |
| 2002: | 90.9% |
| 2001: | 91.2% |
| 2000: | 90.6% |
| 1999: | 89.6% |
| 1998: | 89.0% |
| 1997: | 87.0% |
| 1996: | 88.1% |
| 1995: | 86.4% |

Source: For 1998-2007, Annual Sourcebooks of Federal Sentencing Statistics; for 1995-1998, www.ussc.gov/linktojp.htm.

recommended expanded use of alternatives to incarceration in 1990. Also that year an esteemed group of experts under the direction of Commissioner Helen Corrothers of the United States Sentencing Commission recommended expansion of a wide array of alternatives to incarceration. Ten years later, in 2000, the Practitioners' Advisory Group to the Commission (through the undersigned) submitted specific proposed amendments to implement the Congressional directive in Section 994(j) through an expansion of Zones B and C within Criminal History Category I. The Commission drafted several similar options and published them for comment in 2002.[6] The reasoning underlying the 1990 recommendations of the Judicial Conference and the Corrothers working group has not eroded, and the 2000-02 options studied to implement these recommendations remain viable. The data makes implementation of these recommendations more compelling with each passing year. As referenced by the Practitioners' Advisory Group, surveys of the judiciary confirm the widespread view of sentencing judges that greater flexibility to utilize alternatives to incarceration is essential to achieve the purposes of sentencing.

We believe this issue is of vital importance in giving district judges the flexibility needed to accomplish sentences that are sufficient but not greater than necessary to achieve all of the goals of punishment as reflected in Section 3553(a). In view of those goals, sentences of imprisonment in 92.5% of cases is grossly excessive. In addition to the direct costs associated with these sentences, the negative impact on defendants' prospects for rehabilitation are likely significant. Even a brief period of incarceration often causes the defendant to suffer loss of employment and family support, the two things most likely to promote rehabilitation and prevent recidivism. Indeed, the Sentencing Commission's recidivism data confirms that those able to benefit from increased alternatives to incarceration under the 2000-02 proposals are the least likely to recidivate.

For these reasons, we urge Congress to establish a pilot program for federal substance abuse courts that would be available as a sentencing or pretrial diversion option. Substance abuse or addiction is a contributing cause

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[6]67 Fed. Reg. 2456-75 (Jan. 17, 2002).

not only of simple possession, but of drug trafficking and many other federal crimes.

The benefits and cost savings of substance abuse treatment and substance abuse courts are well established. Experts are in agreement that substance abuse treatment can be far more cost effective than incarceration. Incarceration diminishes the ability to get a job, to be a parent and to be a productive member of the community, which in turn increases the risk of recidivism and the costs to the criminal justice system and society as a whole.[7] According to the National Institute on Drug Abuse, every dollar spent on effective treatment yields a $4 to $7 return in reduced drug-related crime, theft, and criminal justice system costs, and the return is even greater when health care savings are taken into account.[8] According to a report prepared for the Office of National Drug Control Policy, each dollar spent on cocaine treatment yields $7.48 in societal benefits.[9]

Many states have adopted substance abuse court programs as a sentencing or pretrial diversion option. There are two typical approaches: (1) deferred prosecution (diversion) programs in which the participant does not plead guilty or judgment is withheld pending successful completion of (or failure in) the program; and (2) programs in which the participant pleads guilty, but the sentence is deferred or suspended pending successful completion of (or

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[7]Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* (March 2004), Justice Policy Institute Policy Report; National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations*, National Institutes of Health (2006); *National Treatment Improvement Evaluation Study 1997 Highlights* (March, 1997) Washington, D.C.: U.S. Department of Health and Human Services, Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration.

[8]Rutledge, Josh, *Drug Treatment Urged in Criminal Justice, Report Cites Lower Society Costs*, The Washington Times, July 25, 2006.

[9]Rydell, C.P. & S.S. Everingham, *Controlling Cocaine* (1994).

failure in) the program.[10] In February 2005, the GAO submitted a comprehensive report on adult drug courts. The GAO based its conclusions on twenty-seven evaluation studies. It found that the majority of studies revealed that drug courts resulted in reduced recidivism rates for all felony and drug offense participants.[11] Re-arrest and re-conviction rates for participants were below those of the control group.[12] Other studies show that drug court programs reduce recidivism, keep offenders employed and with their families and in their communities, and save taxpayer dollars that would otherwise be wasted on ineffective incarceration.[13] The Sentencing Commission, based on findings that lower recidivism rates correlate with abstinence, employment, and education, has advised that rehabilitation programs that include substance abuse treatment, job training, and/or the pursuit of a degree would have a high cost-benefit value.[14]

The federal system has made limited use of treatment programs as an alternative to incarceration. Pretrial diversion is available only for simple possession, and is not available to anyone who is an "addict," or who has two or more prior felony convictions.[15] Instead, such treatment is typically afforded only during incarceration.[16] Even during incarceration the one-year

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[10]GAO Report to Congressional Committees, Adult Drug Courts, Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes at 36, Feb. 2005 ("GAO Report").

[11]*Id.* at 44.

[12]*Id.* at 45, 49.

[13]Ryan S. King, *Changing Direction? State Sentencing Reforms 2004-2006* (March 2007), http://www.sentencingproject.org.

[14]United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12-13, 15-16 & Ex. 10 (May 2004).

[15]United States Attorneys Manual § 9-22.100.

[16]*See* 18 U.S.C. § 3621(e)(2)(B).

sentence reduction used as an incentive to participate in the treatment is unavailable to many categories of offenders.

Five federal districts have experimented with increased treatment as an alternative to incarceration, and the results have been encouraging.[17] Six other district courts are opening similar programs within the next few months, and proposals are pending in four other districts. The success of these programs demonstrates that treatment programs are highly effective as alternatives to imprisonment. In contrast, a lengthy period of incarceration makes recidivism more likely by breaking up families and making offenders less employable. If offenders were given the tools and incentives on the front end, it appears likely that recidivism would be reduced at less cost.

Question 3: *The Department of Justice has suggested any solution to the crack powder disparity must also limit or eliminate the retroactive application of the recent "minus-two" amendment to the crack guidelines by the United States Sentencing Commission. Does the ABA perceive an immediate need for legislation reversing or limiting the retroactive guideline amendment? Is the ABA concerned that retroactive application of the Sentencing Commission's decision will hamper law enforcement efforts, overburden the courts, or otherwise militate in favor of reversing the Sentencing Commission's unanimous decision?*

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[17]Substance abuse courts are currently in operation in three districts, and "re-entry courts" are in operation in two other districts. No legislation was needed for these programs. They were implemented by Probation Offices, District Courts, and Defenders, with the assent of U.S. Attorneys. Legislation is needed, however, to create such programs at the front end.

Answer: The ABA strongly supported the decision of the United States Sentencing Commission to make its "minus-two" amendment retroactive. As my co-chair Barry Boss testified before the Commission, fundamental notions of due process compel that individuals receive appropriate punishment for their crimes. Indeed, there is a fine line between imprisoning the innocent and over-punishing the guilty. Given the tremendous number of crack defendants who have been over-punished, there is a "moral imperative" for the ameliorating amendment to be made retroactive.[18] We stand by that position today, and believe legislation to either reverse or limit the retroactive amendment would be both unjust and potentially unconstitutional.

Retroactive application of the amendment was appropriate in light of the Commission's pattern of making such amendments retroactive, and because it reflected a widely held view that the sentences imposed under the 100-1 ratio were simply unjust and excessive. No compelling reason existed not to remedy this by reducing these unjust and excessive sentences.

Now that the amendment has taken effect, the right to seek a reduced sentence in accordance with it has attached. Aside from the egregious unfairness of inflicting an unjust initial sentence followed by having a partial remedy for it snatched away no sooner than given, such legislation would present grave ex post facto difficulty.

Representations were made at the hearing that there was going to be a "mass release" of 10% or 25% of the federal prison population as a result of the retroactive amendment. This is not so. The federal prison population is approximately 200,000 today.[19] The Commission estimates that due to the retroactive amendment, approximately *19,500* people are going to be released *over the course of thirty years*.[20]

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[18]Testimony of Barry Boss, United States Sentencing Commission Public Hearing on Retroactivity, November 13, 2007 at 65 (Transcript available at http://www.ussc.gov/hearings/11_13_07/Transcript111307.pdf).

[19]*See* http://www.bop.gov/news/quick.jsp#1.

[20]*See* United States Sentencing Commission, Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive, Table 7; http://www.ussc.gov/PRESS/rel121107.htm.

These defendants, of course, were going to be released in any event, and in most cases not much later. According to the Commission, two thirds will receive a sentence reduction of two years or less.[21] The Commission estimates that, across 94 judicial districts, 1508 prisoners will be due for immediate release on March 3, a number that is probably overstated, as many of these prisoners have been released after serving their full original sentences. Nearly 70,000 people are released from federal prison annually,[22] while nearly ten times that number are released from state prisons each year. A few more, who have already served sentences that are greater than necessary to serve legitimate sentencing goals, is hardly a "mass release."

The Department of Justice has stated that "nearly 80 percent of the offenders who will be eligible for early release have a criminal history of II or higher," and that "many of them will also have an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role."

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[21]*See* United States Sentencing Commission, Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive, Table 6 (28.6% with 0-12 months reduction, 34.9% with 13-24 months reduction, 18.7% with 25-36 months reduction, 9.9% with 37-48 months reduction, and 7.9% with 49+ months reduction).

[22]The breakdown by offense type is as follows:

Violent offenses 4,343
Property offenses 9,175
Drug offenses 24,971
Public-order offenses 4,627
Weapon offenses 7,089
Immigration offenses 17,526
Missing/Unknown 1,826

Total 69,557

BJS Federal Justice Statistics Program website (http://fjsrc.urban.org) Data Source: Bureau of Prisons - Extract from BOP's online Sentry System, FY 2006 (as standardized by the FJSRC).

Increases for criminal history, weapon enhancement, or aggravating role adjustment were already included in the original sentence, however, and will not be lessened by any new sentence. The Commission's policy statement provides that the judge must leave all guideline application decisions other than the amended guideline unaffected. USSG § 1B1.10(b)(1). Moreover, as noted at the hearing, 94.5% of crack cases in 2005 involved no actual violence, and 89.6% involved no violence or threat of violence. Any violence or weapon involvement is already built into the original guideline sentence and would be built into any new sentence.

The Department of Justice has stated that defendants in Criminal History III have a 34.2% rate of recidivism and that those in criminal history category VI have a 55.2% rate of recidivism. It is important to understand, however, that these are the average recidivism rates for *all* types of offenders. For Criminal History Categories II and higher, drug offenders have the *lowest* rate of recidivism of all offenders.[23]

The implementation of the amendment is underway and appears to be running smoothly. District Court Judges, Probation Officers, Defenders, the Bureau of Prisons and U.S. Attorneys' Offices have been working in a spirit of cooperation to ensure an efficient and fair process. The ABA is unaware of any compelling reason these resources are insufficient to the task or that the efforts already undertaken should be squandered by legislation to limit or reverse the retroactive application of the "minus-two" amendment.

Question 4: *As you know, this past December in* Kimbrough v. United States, *the Supreme Court held in a 7-2 opinion that a judge can consider the 100-to-1 sentencing disparity between crack and powder cocaine in determining that a sentence within the Guidelines would be "greater than necessary" to serve the objectives of sentencing.*

*In essentially reaffirming the central holding in* Booker—*that the Guidelines are advisory and not mandatory—does* Kimbrough *in any way*

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[23]United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

*lessen the need for prompt, comprehensive Congressional reform in this area?*
Answer: As I outlined in my initial testimony, the Commission's "minus-two" amendment is only the beginning of what must be done to address the crack-powder disparity. Before the amendment, guideline sentences for crack were three to over six times longer than for powder cocaine;[24] now they are two to five times longer.[25] In the Commission's view, the amendment is "only a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio," and requires a "comprehensive solution" from Congress.[26]

In *Kimbrough*, the Supreme Court held that a sentencing court does not abuse its discretion when it imposes a below-guideline sentence based on the widely shared view that the 100-1 ratio is unjust. Under the advisory guidelines as interpreted in *Kimbrough*, district judges may now be expected to exercise this discretion to depart or vary from the guidelines in a larger number of cases. Again, however, this is only a partial remedy. A judge cannot sentence below a mandatory minimum, and many courts remain hesitant to sentence outside the guidelines. Thus, until Congress acts, the cocaine penalty structure continues to undermine the purposes of sentencing and to create unjustified disparity.

If anything, the Court's decision in *Kimbrough* makes Congressional reform in this area more urgent than ever. Only those defendants fortunate enough to receive a *Kimbrough* variance will now escape the impact of the 100-1 ratio. This, in turn, only highlights the unfairness of sentences imposed under a mandatory minimum or without a *Kimbrough* variance – such sentences will often bear the hallmarks of both unwarranted severity and

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[24] *Id.* at 3.

[25] USSG § 2D1.1 (Nov. 1, 2007).

[26] United States Sentencing Commission, Cocaine and Federal Sentencing Policy 9-10 (May 2007).

unwarranted disparity. In light of *Kimbrough*, it is more important than ever that Congress act to eliminate both unwarranted severity and unwarranted disparity in the sentencing of crack offenses.

Question 5: *With sentences for crack cocaine so high, in part because of the five gram/five-year mandatory minimum trigger, does the existing sentencing structure impede the potential for rehabilitation and access to programs like drug courts and other alternative to prison programs?*

Answer: Please see the answer to Question 2 above.

Question 6: *The Sentencing Guidelines go to great lengths to account for "offender characteristics" rather than "offense characteristics," by including higher sentences for individuals who have a criminal history, possess or use a firearm, or cause violence. Yet, the current cocaine sentencing structure—building in huge sentences for all crack offenders—seems to do just the opposite by punishing a whole class far worse for the conduct of a just a few.*

*Do you believe that these laws are consistent with what the Attorney General recently called the Department's core mission: "To ensure the fair and impartial administration of justice" for all Americans?*

Answer: The aggravating circumstances once thought to be particularly prevalent in crack cocaine offenses are already available in the existing guidelines and statutes applicable to all drug cases.[27] Thus, under the current penalty structure for crack offenders, this means that they are being punished

[27] *See* USSG § 2D1.1(b)(1) (actual possession of a weapon by the defendant or access to a weapon by an unindicted participant); 18 U.S.C. § 924(c) (consecutive mandatory minimum if weapon was possessed, used or brandished); USSG § 4B1.3 (offense was part of a pattern of criminal livelihood); USSG Chapter Four (criminal history score); USSG § 3B1.4 (use of a minor); USSG § 3B1.1 (aggravating role); USSG § 2D1.2 (sales to pregnant women, minors, or in protected locations); USSG § 2D1.1(a) (death or serious bodily injury); USSG § 5K2.1 (death); USSG § 2K2.2 (bodily injury); USSG § 3C1.1 (obstruction of justice).

once based on an assumption that aggravating circumstances exist in every case even if they do not exist in the individual case, and a second time if the aggravating circumstance is actually present in the case. As with all other drug types, any additional harm in a crack cocaine offense should not be addressed through the blunt instrument of a higher penalty built into the base offense level applicable to all offenses, but by enhancements that may or may not exist in individual cases.

**Questions of Senator Patrick Leahy**

Question 1: *One goal of our Federal drug policy is to reduce the availability of crack cocaine in this country. What evidence, if any, demonstrates that harsher crack penalties have reduced the availability of crack as compared to powder cocaine?*

Answer: The ABA is not aware of any evidence demonstrating that harsher crack penalties have reduced the availability of crack as opposed to powder cocaine. Given that all crack is by definition derived from powder, there does not appear to be any reason to believe increased penalties for crack would have any effect on the availability of powder, which can then rather easily be converted into crack.

Question 2: *We in Congress passed the 1986 Anti-Drug Abuse Act with the intent of creating severe and certain punishment for mid-level and high-level drug distributors. Yet, the last two decades have revealed that more than 60% of crack cocaine defendants are street-level dealers or lower in the distribution network. The Department has frequently stated that it is necessary to infiltrate these organizations beginning with lower-level sellers in order to collect information to work up the hierarchy. But given that the majority of prosecutions continue to be for low-level offenses, is there any evidence to suggest that there is progress in addressing high level sellers?*

Answer: A "major goal" of the Anti-Drug Abuse Act of 1986 was "to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources" on "major" and "serious" drug traffickers.[28] In

[28]H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596

practice, the largest number of prosecutions involving cocaine of any type is against low level offenders, *i.e.*, street level dealers of crack cocaine and couriers of powder cocaine.[29] This focus is particularly evident in crack cocaine prosecutions, as 55.4% of all crack cocaine offenders are street level dealers, while 33.1% of powder cocaine offenders are couriers.[30]

The median quantity of crack cocaine associated with the function of a street-level dealer is 52 grams.[31] In 2006, over 35% of all crack cocaine cases involved less than 25 grams,[32] and nearly 50% involved less than 50 grams.[33] This is because "sellers at the retail level are the most exposed and easiest targets for law enforcement, provide an almost unlimited number of cases for prosecution, and are easily replaced."[34]

John P. Walters, Director of the Office of National Drug Control Policy, told Congress in early 2005 that the current policy of focusing on small-time dealers and users was ineffective in reducing crime, while breaking generation after generation of poor minority young men.[35] As the Sentencing Commission has found, "retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high.

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(Background).

[29]United States Sentencing Commission, Cocaine and Federal Sentencing Policy 85 (May 2007).

[30]*Id.* at 20-21, Figures 2-5 & 2-6.

[31]United States Sentencing Commission, Cocaine and Federal Sentencing Policy at 45, Figure 10 (May 2002) (median drug weight for street level crack dealers was 52 grams in 2000).

[32]United States Sentencing Commission, Cocaine and Federal Sentencing Policy at 112, Table 5.3 (May 2007).

[33]*Id.* at 25, Figure 2.10.

[34]*Id.* at 85.

[35]Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor, May 27, 2005.

Incapacitating a low level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else."[36]

This focus on low level crack offenders is particularly misguided because "virtually all cocaine is imported in powder form."[37] Powder cocaine is a necessary ingredient of crack cocaine without which crack cocaine cannot be made. Yet, high level powder dealers are punished less severely than low level crack dealers. The ABA is unaware of any evidence to demonstrate significant progress in addressing high level sellers, and there does not appear to be any basis to conclude such progress could result from excessive penalties for crack cocaine as those dealing in crack are most often further down the distribution chain.

Question 3: *You testified that the American Bar Association believes that, although there are differing positions about what the proper ratio should be, your organization believes that no evidence exists for a ratio greater than 1:1. Can you elaborate on why your organization believes this?*

Answer: As I indicated in my initial testimony, the ABA has never wavered from the position it adopted in 1995 that the penalties for crack and powder cocaine should be equalized. As Dr. Volkow made clear in her testimony at the hearing, crack and powder cocaine are scientifically the identical substance. The only difference between crack and powder is the mode of administration, and no other drug is punished differently based solely on mode of administration. The ABA sees no rational basis to sentence offenses based on the mode of administration of the identical substance.

Moreover, as noted above, all crack cocaine is derived from powder cocaine. Thus, the establishment of penalties for powder and crack offenses

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[36]United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004). *See also* United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported that dealers were immediately replaced).

[37]United States Sentencing Commission, Cocaine and Federal Sentencing Policy at 85 (May 2007).

is to some degree a question of where in the chain of distribution to place the most severe penalties. The ABA sees no rational basis to impose the most severe penalties at the end of the distribution chain rather than at the beginning of it.

Additional flaws in tying crack penalties to a quantity ratio is that drug quantities may be readily manipulated through investigative techniques and the problem that culpability is not always correlated with quantity. In many cases culpability would have a sounder footing if based on factors such as role in the offense, entitlement to a greater share of the proceeds, use of a weapon, threatened or actual violence, and other criteria embodied in 18 U.S.C. §3553(a). Use of drug quantity as the dominant consideration driving crack sentences is often inconsistent with the overall purposes of sentencing.

The argument is made by some that crack should be punished more severely than powder because there is a slightly higher incidence of violence associated with crack offenses. The simple answer to this is that those who are actually violent should be punished for such violence. Those who are not violent should not be punished as though they are simply by virtue of a "one size fits all" base offense level that assumes the worst of all offenders. Moreover, the incidence of violence in crack offenses is low, steadily decreased after the 1980s, and is addressed, if it occurred, through available enhancements in individual cases. In crack cases in 2005, death occurred in only 2.2% of cases, any injury occurred in only 3.3% of cases, and a threat was made in 4.9% of cases.[38] Thus, 94.5% of cases involved no actual violence, and 89.6% involved no violence or threat of violence. Only 2.9% of crack offenders in 2005 used a weapon.[39]

There has been a reduction in violence associated with crack since 1992. According to the Commission, this is consistent with the aging of the crack cocaine user and trafficker populations.[40] "By the early 1990s . . . the relationship between crack and unwelcome social outcomes had largely

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[38] *Id.* at 38.

[39] *Id.* at 33.

[40] *Id.* at 83, 87.

disappeared. . . . After property rights were established and crack prices fell sharply reducing the profitability of the business, competition-related violence among drug dealers declined."[41]

Violence or weapon involvement, if it occurred, should be taken into account through enhancements in individual cases. Building it into the punishment for any given quantity of crack cocaine on the assumption that it occurs in every case punishes offenders for conduct that did not occur or double counts it when it did occur.

The argument is also sometimes made that crack offenders should be punished more harshly because it is claimed they have a higher rate of recidivism. For Criminal History Categories II and higher, drug offenders have the *lowest* rate of recidivism of all offenders[42] Further, across all criminal history categories and for all offenders, the largest proportion of "recidivating events" that count toward rates of recidivism are supervised release revocations, which are based on anything from failing to file a monthly report to failing to report a change of address.[43] Drug trafficking accounts for only a small fraction – as little as 4.1% – of recidivating events for all offenders.[44]

While it is true that crack cocaine offenders generally have higher criminal history categories than powder cocaine offenders,[45] as the

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[41]Roland G. Fryer, Jr., Paul S. Heaton, Steven D. Leavitt, Kevin M. Murphy, National Bureau of Economic Research, *Measuring the Impact of Crack Cocaine* (May 2005), http://pricetheory.uchicago.edu/levitt/Papers/FryerHeatonLevittMurphy2005.pdf.

[42]United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

[43]*Id.* at 4, 5 & Exs. 2, 3, 13.

[44]*Id.* at Ex. 13.

[45]United States Sentencing Commission, Cocaine and Federal Sentencing Policy 44 (May 2007).

Commission has explained, "African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers" because of "the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished neighborhoods."[46] Indeed, though African Americans comprise only 15% of drug users, they comprise 37% of those arrested for drug offenses, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.[47]

Because African-Americans have a higher risk of conviction than similar White offenders, they already (1) have higher criminal history scores and thus higher guideline ranges, (2) are sentenced more often under the career offender guideline, (3) are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and (4) are more often disqualified from safety valve relief. In short, criminal history is already accounted for in a host of ways in individual cases. Building it into every crack cocaine sentence effectively double counts criminal history and exacerbates racial disparity.

It is now widely acknowledged that the assumptions that led to the adoption of the 100 - 1 ratio was exaggerated and in some cases simply false. But as I indicated in my initial testimony, the impact of this ratio on the African-American community has been no myth. The ABA does not believe any rational or principled basis exists for a ratio other than 1 - 1 for these two different forms of the identical substance. Given the absence of any such

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[46]United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004).

[47]*See* Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

rational basis, the ABA is concerned that any ratio other than 1 - 1 would correctly be perceived as racially unfair and unjustifiable.

Question 4: *The Justice Department testified that there is greater violence associated with crack cocaine than powder cocaine, and that this justifies higher penalties for crack sentencing laws. Do you agree? To the extent that this is a concern, are there ways for the Guidelines to address actual violence as opposed to addressing actual violence with a higher ratio for crack offenders?*

Answer: Please see the answer to Question 3 above.

**Questions of Senator Edward M. Kennedy**

Question 1: *Twenty years ago, I worked with my colleagues on this Committee to enact the Sentencing Reform Act to reduce unjustified disparities and achieve proportionality in punishment. Unfortunately, the disparity in cocaine sentencing has led to a harsh and unfair impact on low-income and African-American communities, and has raised doubts about the fairness of the criminal justice system. Many of us believe that the law is unfair, and it needs to be changed.*

*The Commission's effort to address the situation through its guidelines has given people hope. This isn't the first time the Sentencing Commission has amended drug guidelines and made the amendment retroactive. According to testimony submitted to the Commission by Barry Boss of the ABA, this process occurred with LSD, marijuana and oxycodone, to meet concerns with proportionality and fairness. The situation is no different with cocaine, yet the Administration and Attorney General Mukasey are opposing a change that could have a positive effect on many lives.*

*What is your response to those who criticize making the Commission's guideline amendment retroactive?*

Answer: Please see the answer to Question 3 by Senator Biden above.



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Question 2: *Our crack powder laws were intended to punish those at the highest levels of the illegal drug trade—the traffickers and the kingpins. But the low amount needed to trigger the harsh sentence is not associated with high-level drug dealing. As the Commission reported in 2005, only 15% of federal cocaine traffickers were high-level dealers. The overwhelming majority of defendants were low-level participants, such as street dealers, lookouts or couriers.*

*Isn't it true that harsh sentences for low-level participants have only a limited impact on the drug trade?*

Answer: Please see the answer to Question 2 by Senator Leahy above.

**Questions of Senator Tom Coburn, M.D.**

Questions for All Witnesses

Question 1: *Senator Biden's bill provides for several grant programs for drug rehabilitation programs in prisons and for substance abusers on parole in Sections 6 and 7, as well as increased funding for 3 agencies for the prosecution of high-level drug offenses in Section 10. Are there any grant programs with similar purposes that currently exist? If so, are additional programs, such as the ones in the Biden bill, necessary to curb drug dealing, addiction and ensure those released from prison do not return to their habits?*

Answer: Please see the answer to Question 2 by Senator Biden above.

Question 2: *Is there a way to ensure that the high-level drug dealers and traffickers, rather than the small-time dealers, are the targets of longer prison sentences for both crack and powder through means other than quantity-based sentencing in the Guidelines? For example, could the Guidelines enforce some combination of drug quantity and offender function (i.e. past criminal history, reasons for dealing [such as to feed an addiction rather than*

*establishing a distribution ring], or past drug-specific crimes) to establish a sentence?*

Answer: Please see the answers to Questions 2 and 3 by Senator Leahy above.

Question for Mr. James Felman: *The Sentencing Commission also notes a problem regarding "prosecutorial and investigative sentencing manipulation. For example, because powder cocaine is easily converted into crack cocaine and because the penalties for crack cocaine offenses are significantly higher than for similar quantity powder cocaine offenses, law enforcement and prosecutorial decisions have to wait until powder has been converted into crack [because it] can have a dramatic impact on a defendant's final sentence." So, why should we leave the powder sentencing structure unchanged when we could root out much of the problem by concentrating on powder cocaine through decreasing the threshold that triggers a mandatory sentence for powder alone?*

Answer: The ABA strongly opposes addressing the crack/powder disparity by raising the penalties for powder cocaine. There is, simply stated, no evidence that existing powder cocaine penalties are inadequate. The Sentencing Commission concurs in this assessment and has urged Congress to "reject addressing the 100-1 drug quantity ratio by decreasing the . . . threshold quantities for powder cocaine offenses, as there is no evidence to justify" increased penalties for powder cocaine offenses."[48]

[48] *See* United States Sentencing Commission, Cocaine and Federal Sentencing Policy 8 (May 2007).

Written Questions
for Hon. Ricardo H. Hinojosa,
Chair, U.S. Sentencing Commission,
Hearing on "Federal Cocaine Sentencing Laws:
Reforming the 100-to-1 Crack/Powder Disparity"
February 12, 2008

## Draft Answers to Senators' Questions for the Record

**Senator Biden Question 1**

**In your expert opinion and according to prevailing studies, is the crack cocaine drug market more dangerous and more violent than the market for powder cocaine? Does your data suggest that crack defendants are any more violent than powder defendants? Please explain your answer.**

The United States Sentencing Commission's ("Commission") data indicates that levels of violence are relatively comparable for crack and powder, and the prevalence of violence has decreased for both powder cocaine and crack cocaine offenses since the Commission's review of cocaine sentencing in 2002. Violence, as indicated by the occurrence of any injury, death, or threats of injury or death, occurred in 10.4 percent of crack cocaine offenses and 6.2 percent of powder cocaine offenses in the Commission's fiscal year 2005 drug sample.[1] By comparison, violence occurred in 11.6 percent and 9.0 percent of crack cocaine and powder cocaine offenses, respectively, in the Commission's fiscal year 2000 drug sample.[2] An offense was considered "violent" if *any* participant in the offense, not just the defendant, made a credible threat, or caused any actual physical harm, to another person.

**Senator Biden Question 2**

**Why can't differences - like greater weapons involvement - be adequately accounted for by sentencing enhancements for weapons possession and use?**

The guidelines currently contain a number of provisions to account for more serious offender conduct. For example, the drug trafficking guideline at §2D1.1(b)(1) provides a sentencing enhancement if the drug trafficking offense involved the possession of a dangerous weapon, including a firearm. According to fiscal year 2006 data contained in the May 2007 Report, the guideline enhancement for weapon involvement applied in 15.9 percent of crack cocaine offenses and 8.2 percent of powder cocaine offenses.[3] The guidelines also contain enhanced sentences at §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving

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[1] *See* U.S. Sentencing Commission Report to Congress: *Cocaine and Federal Sentencing Policy* submitted to Congress on May 15, 2007 ("May 2007 Report"), Figure 2-20. The "fiscal year 2005 drug sample" refers to a specialized coding and analysis project the Commission undertook on federal cocaine offenders to supplement the data in its sentencing database with information it does not routinely collect and report. The methodology used in this special coding and analysis project are described in Appendix A of the May 2007 Report.

[2] *See* U.S. Sentencing Commission Report to Congress: *Cocaine and Federal Sentencing* Policy, May 2002 ("May 2002 Report"), Figure 20.

[3] *See* May 2007 Report, Table 2-2.

Underage or Pregnant Individuals; Attempt or Conspiracy) for drug trafficking offenses involving statutorily protected locations, such as schools and playgrounds, and protected individuals, such as minors and pregnant women. In addition, the guidelines provide sentencing adjustments for offenders who perform an aggravating role in the offense (§3B1.1), obstruct justice (§3C1.1), use a minor to commit the offense (§3B1.4), or commit the offense as part of a pattern of criminal conduct engaged in as a livelihood (§4B1.3), as well as for career offenders (§4B1.1). These sentencing guideline enhancements provide Congress a more finely-calibrated mechanism to account for variations in offender culpability and offense seriousness than was available at the time the 100-to-1 drug quantity ratio was established in 1986. The Commission continues to believe these enhancements are the appropriate mechanism to account for differences in offender culpability.[4]

**Senator Biden Question 3**

**In the Commission's comprehensive studies of this issue, is there evidence that powder thresholds are too low? If so, please provide that evidence. Is there a surge of powder cocaine use in our streets?**

During its study of cocaine sentencing policy in 2002 and 2007, the Commission did not receive any testimony during its public hearings on the issue, empirical data, or scientific literature suggesting that the current powder cocaine penalties are insufficient.[5] At the Commission's public hearing on the subject on March 19, 2002, for example, then-Deputy Attorney General Larry Thompson testified that he was "not aware of any specific information we have regarding the fact that the existing powder penalties are too low."[6] For these reasons, the Commission stands by its 2002 and 2007 recommendation that Congress reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses.

The Commission does not have information about current powder cocaine usage trends as such information is not regularly included in the sentencing documentation submitted by the courts to the Commission.

**Senator Biden Question 4**

**Alternatively, what indications are there that powder penalties are adequate?**

As previously stated in response to Question 3, *supra*, the Commission has not received any testimony during its public hearings on the issue, empirical data, or scientific literature suggesting that the current penalties for powder cocaine offenses are inadequate. Furthermore, according to the Commission's 2007 Report, only 0.4 percent of powder cocaine offenders were

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[4] *See* May 2007 Report, 8; May 2002 Report, vii.

[5] *See* May 2007 Report, 8. Some, however, have suggested increasing powder cocaine penalties as a means of addressing the crack-powder disparity. *See, e.g.,* Statement of Chuck Canterbury, Fraternal Order of Police, regarding Federal Cocaine Sentencing Policy, to the U.S. Sentencing Commission, Nov. 14, 2006, Tr. 130, available at www.ussc.gov.

[6] Statement of Larry Thompson, Deputy Attorney General, Department of Justice, to the U.S. Sentencing Commission, March 19, 2002, Tr. 71, cited in May 2002 Report at 111.

sentenced above the guideline range, suggesting that sentencing courts are not finding the penalties for powder cocaine to be inadequate.[7]

**Senator Biden Question 5**

**The Sentencing Guidelines go to great lengths to account for "offender characteristics" rather than "offense characteristics," by including higher sentences for individuals who have a criminal history, possess or use a firearm, or cause violence. Yet, the current cocaine sentencing structure–building in huge sentences for all crack offenders–seems to do just the opposite. It punishes a whole class of people with greater penalties for the conduct of just a few. Do you believe that these laws are consistent with what the Attorney General recently called the Department's core mission: "To ensure the fair and impartial administration of justice for all Americans"?**

The current statutory 100-to-1 drug quantity ratio appears to have been based on beliefs about the association of crack cocaine offenses and certain harmful conduct, particularly violence, that are not supported by current relevant information.[8] As discussed in the answer to Question 1, for example, violence, as indicated by the occurrence of any injury, death, or threats of injury or death, occurred in 10.4 percent of crack cocaine offenses in the Commission's 2005 drug sample.[9] Therefore, to the extent that the statutory 100-to-1 drug quantity ratio was designed in part to account for this particular conduct, it appears to sweep too broadly by treating *all* crack cocaine offenders *as if* they committed those acts, even though sentencing data indicate that most crack cocaine offenders in fact had not committed those acts. In this regard, the current statutory 100-to-1 drug quantity ratio, by providing inappropriate sentencing uniformity among all crack cocaine offenders, fails to promote adequate proportionality.

**Senator Biden Question 6**

**How does the current penalty structure for the crack form of cocaine compare with the penalty structure for other dangerous drugs such as heroin and methamphetamine mixture?**

In the overwhelming majority of federal drug cases, the primary drug type is cocaine, heroin, marijuana, or methamphetamine.[10] With the exception of methamphetamine-actual, the threshold quantities that trigger the mandatory minimum provisions set forth in the current statutory scheme are greater for other drug types than they are for crack cocaine. For heroin, for example, 100 grams and 1,000 grams trigger the five- and ten-year mandatory minimum penalties respectively, compared to five grams and 50 grams, respectively, for crack cocaine.[11]

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[7] *See* May 2007 Report, Table 2-2.

[8] *See* May 2002 Report, 4-10 (discussing legislative history of current statutory cocaine penalties).

[9] The "fiscal year 2005 drug sample" refers to a specialized coding and analysis project the Commission undertook on federal cocaine offenders to supplement the data in its sentencing database with information it does not routinely collect and report. The methodology used in this special coding and analysis project are described in Appendix A of the May 2007 Report.

[10] *See* May 2007 Report, 4; U.S. Sentencing Commission *2007 Sourcebook of Federal Sentencing Statistics* at Table 33, available at www.ussc.gov.

[11] *See* May 2007 Report, 4 (citing 21 U.S.C. § 841).

Congress established statutory mandatory minimum penalties for methamphetamine offenses in 1988.[12] Congress increased the penalties for methamphetamine offenses in the Methamphetamine Trafficking Penalty Enhancement Act of 1998.[13] This legislation cut in half the relevant threshold quantities such that five grams and 50 grams of methamphetamine-actual trigger five-year and ten-year mandatory minimum penalties, respectively; and 50 grams and 500 grams of methamphetamine-mixture trigger five-year and ten-year mandatory minimum penalties, respectively. The Commission responded by incorporating these mandatory thresholds into the guidelines.[14]

For crack cocaine offenses, the threshold quantities are triggered by the weight of any mixture or substance that contains crack cocaine, regardless of the purity of the mixture or substance. Any additives to powder cocaine or impurities created in the manufacturing process of crack cocaine count toward the weight of the drug for purposes of both triggering the mandatory minimum and determining the guideline sentencing range. By contrast, for methamphetamine-actual, the threshold quantities are triggered solely by the weight of pure methamphetamine.[15] Thus, to the extent crack cocaine is impure, quantity-based penalties for crack cocaine offenses remain more severe than for methamphetamine-actual.

The effect of this particular differential treatment, however, is muted somewhat by the manner in which the guidelines treat "ice." Ice is a mixture or substance, crystalline in structure, containing methamphetamine hydrochloride that is typically 80 to 90 percent pure. In response to a directive in the 1990 Crime Control Act, the Commission amended the guidelines to treat a mixture or substance containing d-methamphetamine hydrochloride as methamphetamine-actual if the mixture or substance is at least 80 percent pure. Therefore, crack cocaine will be accorded the same guideline penalties based on drug quantity alone as ice (*i.e.*, methamphetamine that is at least 80 percent pure).[16]

**Senator Biden Question 7**

**In his February 7 testimony before the House Judiciary Committee, the Attorney General asked Congress to pass legislation blocking the Sentencing Commission's decision granting retroactive effect to its recent amendment to the federal sentencing guidelines for crack cocaine offenses. Mr. Mukasey testified that the lower guidelines "will pose significant public safety risks." Do you agree with that assessment? Please explain.**

On November 1, 2007, the Commission's amendment to the federal sentencing guidelines for crack cocaine offenses took effect and applies to defendants originally sentenced on or after that date. The amendment adjusts downward by two levels the base offense level assigned to each threshold quantity of crack cocaine listed in the Drug Quantity Table in §2D1.1 and provides a mechanism for determining the guideline range for offenses involving crack

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[12] *See* May 2007 Report, 4.
[13] Pub. L. No. 105–277, Division E, 112 Stat. 2681 (1998), codified at 28 U.S.C. § 841.
[14] *See* Amendment No. 594 (2000).
[15] *See* May 2007 Report, 5.
[16] *See* May 2007 Report, 4-6.

cocaine and other controlled substances. The amendment remains consistent with the statutory mandatory minimum penalty structure as required by 28 U.S.C. § 994(a).[17]

Under 28 U.S.C. § 994(u), the Commission is required to determine whether a guideline amendment that reduces a sentencing range may be applied retroactively to offenders who were sentenced under prior versions of the *Guidelines Manual* and who currently are incarcerated. Section 994(u) of title 28, United States Code, specifically provides that:

> [i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced. Consistent with the statutory authority granted to the Commission, under 18 U.S.C. § 3582(c)(2) the court may modify a term of imprisonment once it has been imposed.

Sentencing courts are not authorized to apply a guideline amendment that reduces penalties retroactively unless the Commission decides to give the amendment retroactive effect. Specifically, 18 U.S.C. § 3582(c)(2) provides:

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has been subsequently lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Commission.

The Commission made its decision on retroactivity of the crack cocaine amendment after months of deliberation. It solicited public comment on the issue of retroactivity and received over 33,000 letters or other written comments, almost all of which were in favor of retroactivity. In November 2007, it held a full-day hearing on the issue of retroactivity, receiving testimony from a cross section of witnesses. In considering whether to give the crack cocaine retroactive effect, the Commission considered, as it does in all such instances, "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively."[18]

The Commission amended the guideline provision governing retroactivity to require the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person

[17] Section 994(a) states that the Commission shall promulgate guidelines "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. § 994(a) (West 2007).
[18] USSG §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range), background commentary.

or the community that may be posed by such a reduction.[19] Thus, safety risks must be weighed by the court in every case before a sentence reduction may be granted. Furthermore, the court has full discretion to deny a motion for a sentence reduction under 18 U.S.C. § 3582(c)(2).

**Senator Biden Question 8**

**On page five of her written testimony Ms. Shappert asserts that, "Commission data and reports confirm . . . greater violence at the local level associated with the distribution of crack as compared to powder." As Chair of the Sentencing Commission, is that a fair characterization of the Commission data?**

Commission data indicates that the geographical scope of crack cocaine offenses tends to be more local than powder cocaine offenses. According to the Commission's 2005 drug sample, the geographical scope of 76.5 percent of crack cocaine offenses was local in nature, compared 25.5 percent for powder cocaine offenses.[20] Thus, it may follow that violence associated with crack cocaine offenses is more local in nature than violence associated with powder cocaine offenses. However, as stated in the answer to Question 1, Commission data indicates that levels of violence are relatively comparable for crack and powder, and the prevalence of violence has decreased for both powder cocaine and crack cocaine offenses since the Commission's review of cocaine sentencing in 2002. Violence, as indicated by the occurrence of any injury, death, or threats of injury or death, occurred in 10.4 percent of crack cocaine offenses and 6.2 percent of powder cocaine offenses in the Commission's fiscal year 2005 drug sample.[21]

**Senator Biden Question 9**

**In both the 2002 and 2007 Reports, the Commission recommended repealing the mandatory minimum for simple possession of crack. Why is this important?**

When Congress passed the Anti-Drug Abuse Act of 1988,[22] it further distinguished crack cocaine offenses from both powder cocaine and other drug offenses by creating a mandatory minimum penalty for simple possession of crack cocaine. This is the only federal statutory mandatory minimum penalty for a first offense of a simple possession of a controlled substance. By comparison, simple possession of any quantity of any other drug (except flunitrazepan) by a first-time offender – including powder cocaine – is a Class A misdemeanor offense punishable by a *maximum* of one year in prison.[23]

The Commission has recommended repealing the statutory mandatory minimum for simple possession of crack cocaine because its application can result in significantly

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[19] *See*, USSG §1B1.10(b), Application Note 1(B)(ii), effective March 3, 2008; Amendments 712, 713, Appendix C to the *Guidelines Manual.*

[20] *See* May 2007 Report, Figure 2-7. The "fiscal year 2005 drug sample" refers to a specialized coding and analysis project the Commission undertook on federal cocaine offenders to supplement the data in its sentencing database with information it does not routinely collect and report. The methodology used in this special coding and analysis project are described in Appendix A of the May 2007 Report.

[21] *See* May 2007 Report, Figure 2-20.

[22] Pub. L. 100-690, 102 Stat, 4181 (1988).

[23] The maximum statutory penalty for flunitrazepan is three years imprisonment for a first-time offender. It does not have a mandatory minimum term of imprisonment.

disproportionate sentencing.[24] Under the current statutory structure, an offender who simply possesses five grams of crack cocaine receives the same five-year mandatory minimum penalty as a trafficker of five grams of crack cocaine, and the same as a serious trafficker of other drugs.[25] Accordingly, although there are relatively few simple possession crack cocaine cases at the federal level – in fiscal year 2007 there were 109 cases of which 20 were subjected to the federal mandatory minimum penalties – the Commission believes the mandatory minimum penalty for simple possession of crack cocaine should be repealed.

**Senator Biden Question 10**

**What effect on the size of the federal prison population can we expect as a result of any statutory changes the crack/powder cocaine disparity? How will sentencing enhancements such as the type provided for in my bill affect this calculus?**

The Commission has prepared prison impact analyses for a number of possible changes to the 100-to-1 statutory ratio, which are set forth in Appendix D of its May 2007 report.[26] These analyses indicate that a change to the statutory ratio would result in an overall decrease in the federal prison population, assuming all other factors that contribute to the size of the federal prison population remain unchanged. Crack offenders would receive less disparate sentences compared to powder cocaine offenders, and average sentences for crack cocaine offenders would be shorter.

The addition of sentencing enhancements such as those proposed in S. 1711 would have some impact on these analyses as they would operate to increase the sentences for certain offenders whose conduct would trigger the new enhancements. The Commission cannot estimate with specificity the impact such proposed enhancements may have on sentences. The impact will depend, to some degree, on how the Commission incorporates them into the guidelines and how they ultimately are applied by the criminal justice community. It should be noted that several of the factors listed in section 5 of S. 1711 already are incorporated into the guidelines, including whether the defendant possessed a weapon, committed the offense as part of a pattern of criminal conduct engaged in as a livelihood, was an organizer or leader, or distributed to a minor or a pregnant woman. As a result, the impact of this portion of S. 1711 may be smaller than it otherwise would be.

**Senator Biden Question 11**

**One of the central goals of the Anti-Drug Abuse Act of 1986 was to impose tough 5- and 10-year mandatory minimum sentences for major and serious drug kingpins. Has the law achieved that purpose as it relates to crack cocaine? Please explain.**

According to the Commission's data, relatively low-level dealers, *i.e.*, street level dealers as defined in the Commission's report, continue to comprise the largest portion – 55.4 percent –

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[24] *See* May 2002 Report, 109.

[25] *See* 21 U.S.C. § 844.

[26] Appendix D sets forth the prison impact analyses for changes to the statutory ratio keeping the triggering quantities for powder cocaine at their current level and adjusting the trigger quantities for crack cocaine to achieve the following ratios: 25-to-1; 20-to-1; 15-to-1, 10-to-1; 5-to-1; 2-to-1; and 1-to-1. *See* May 2007 Report at Appendix D.

of crack cocaine offenders.[27] Furthermore, Commission data indicates that 73.4 percent of offenders identified as street-level crack cocaine dealers were exposed to a statutory mandatory minimum penalty.[28] In contrast, 1.8 percent of crack cocaine offenders were importers or high level suppliers, as defined in the Commission's 2007 Report.[29] For these reasons, the Commission concluded that the statutory 100-to-1 drug quantity ratio appears to sweeps too broadly.[30]

**Senator Leahy Question 1**

**At the Crime and Drug Subcommittee's hearing on crack powder sentencing laws, we heard testimony from the Department of Justice indicating that the "greater violence associated with crack cocaine distribution" justifies increased penalties for crack offenses compared to powder. You are the Chair of the Sentencing Commission that, over the course of the last 15 years, has heard volumes of public comment and held public hearings on crack sentencing laws. Does the Sentencing Commission's data validate the Department's view that crack defendants are more prone to violence than powder cocaine offenders?**

Commission data indicates that levels of violence are relatively comparable for crack and powder, and the prevalence of violence has decreased for both powder cocaine and crack cocaine offenses since the Commission's review of cocaine sentencing in 2002. Violence, as indicated by the occurrence of any injury, death, or threats of injury or death, occurred in 10.4 percent of crack cocaine offenses and 6.2 percent of powder cocaine offenses in the Commission's fiscal year 2005 drug sample.[31] By comparison, violence occurred in 11.6 percent and 9.0 percent of crack cocaine and powder cocaine offenses, respectively, in the Commission's fiscal year 2000 drug sample.[32] An offense was considered "violent" if *any* participant in the offense, not just the defendant, made a credible threat, or caused any actual physical harm, to another person.

**Senator Leahy Question 2**

**At the hearing, we heard testimony from the Justice Department indicating that in addition to greater violence, a higher rate of recidivism, a higher rate of management enhancements, and the different impact crack as compared to powder cocaine has on communities all justify higher penalties for crack offenses. How do you reconcile the Department's views with your Sentencing Commission's latest findings and recommendations in your May 2007 report?**

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[27] *See* May 2007 Report, Figure 2-6. For purposes of classifying offenders by function in the offense, the Commission defined street level dealers as offenders whose most serious offense conduct is distribution of retail quantities of less than one ounce directly to users. *See* May 2007 Report, 18 and Appendix A.

[28] *See* May 2007 Report, Figure 2-13.

[29] *See* May 2007 Report, Figure 2-6. For purposes of classifying offenders by function in the offense, the Commission defined importers and high-level suppliers as offenders whose most serious offense conduct was the importation or supplying of large quantities of drugs, who were near the top of the distribution chain, and who had an ownership interest in the drugs. *See* May 2007 Report, 18 and Appendix A.

[30] *See* May 2007 Report, 7-8.

[31] *See* May 2007 Report, Figure 2-20. The "fiscal year 2005 drug sample" refers to a specialized coding and analysis project the Commission undertook on federal cocaine offenders to supplement the data in its sentencing database with information it does not routinely collect and report. The methodology used in this special coding and analysis project are described in Appendix A of the May 2007 Report.

[32] *See* May 2002 Report, Figure 20.

In the Commission's view, the extent of any differences between crack cocaine and powder cocaine offenders in the rates of violence, weapon involvement, role adjustments, and criminal history do not justify the current statutory 100-to-1 drug quantity ratio. These differences are discussed at length in Chapter 2 of the Commission's 2007 Report and briefly summarized at Table 2-2 of the Report.[33] For example, in fiscal year 2006, the guideline enhancement for possession of a dangerous weapon applied in 15.9 percent of crack cocaine cases compared to 8.2 percent of powder cocaine cases, a conviction under 18 U.S.C. § 924(c) occurred in 10.9 percent of crack cocaine cases compared to 4.9 percent of powder cocaine offenses. Similarly, violence, as indicated by the occurrence of any injury, death, or threats of injury or death, occurred in 10.4 percent of crack cocaine offenses compared to 6.2 percent of powder cocaine offenses in the Commission's fiscal year 2005 drug sample.[34] The average Criminal History Category was III for crack cocaine offenders, compared to Criminal History Category II for powder cocaine offenders. On the other hand, 6.6 percent of powder cocaine offenders received a guideline enhancement for performing an aggravating role compared to 4.3 percent of crack cocaine offenders.

The Commission concluded that these differences do not justify the current statutory 100-to-1 drug quantity ratio. The Commission believes that the penalty structure for crack cocaine offenses should focus more closely on serious and major traffickers as described generally in the legislative history of the 1986 Anti-Drug Abuse Act.[35] The Commission further concluded in both its 2002 and 2007 Report that increasing the five-year mandatory minimum threshold quantity for crack cocaine offenses to *at least* 25 grams, resulting in a statutory drug quantity ratio of *not more* than 20-to-1, would more closely reflect the overall penalty structure established by the 1986 Act.[36]

**Senator Leahy Question 3**

**Congress originally intended that the mandatory-minimum drug sentences passed in the Anti-Drug Abuse Act of 1986 be used to punish mid- and high-level drug distributors. You testified that the Commission's data shows that the majority of "crack" offenders are more typically lower-level offenders rather than larger dealers, distributors, and importers. Given these facts, do the Commission's findings show that the enforcement of mandatory minimum sentences on the most typical "crack" cocaine offenders has been consistent with the original intent of Congress? Why or why not?**

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[33] *See* May 2007 Report, Chapter 2 and Table 2-2.

[34] *See* May 2007 Report, Figure 2-20. The "fiscal year 2005 drug sample" refers to a specialized coding and analysis project the Commission undertook on federal cocaine offenders to supplement the data in its sentencing database with information it does not routinely collect and report. The methodology used in this special coding and analysis project are described in Appendix A of the May 2007 Report.

[35] The Subcommittee on Crime of the House Committee on the Judiciary generally defined serious traffickers as "managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities" and major traffickers as "manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities." *See* H.R. Rep. No, 99-845, pt. 1, 11-12 (1986).

[36] *See* May 2007 Report, 8-9.

According to the Commission's data, relatively low-level dealers, *i.e.*, street level dealers as defined in the Commission's report, continue to comprise the largest portion – 55.4 percent – of crack cocaine offenders.[37] Furthermore, Commission data indicates that 73.4 percent of offenders identified as street-level crack cocaine dealers were exposed to a statutory mandatory minimum penalty.[38] In contrast, 1.8 percent of crack cocaine offenders were importers or high level suppliers as defined in the Commission's report.[39] For these reasons, the Commission concluded that the statutory 100-to-1 drug quantity ratio appears to sweep too broadly.[40]

**Senator Leahy Question 4**
**During testimony before the House Judiciary Committee, the Attorney General claimed that federal crack cocaine offenders may "automatically" be released under the Commission's December 11, 2007 decision. Is this accurate?**

Not all inmates previously sentenced under the crack cocaine sentencing guideline will be eligible to receive a reduced sentence. Furthermore, eligible offenders will not automatically receive a sentence reduction because a federal judge is required to make a final determination in each case.

The governing statutory authority for retroactive application of a sentencing guideline amendment is provided by 18 U.S.C. § 3582(c)(2), which states:

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has been subsequently lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court *may* reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Commission. (Emphasis added.)

Section 3582(c)(2) of title 18, United States Code, therefore grants the court discretion to reduce a sentence but does not require a reduction. Furthermore, the statute requires that any reduction in sentence be consistent with the applicable policy statements issued by the Commission.

The relevant guideline provision, §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range), contains a number of limitations on both the eligibility for, and extent of, a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). For example, §1B1.10(a)(2)(B) provides that if a defendant's guideline range would not be lowered by the amendment, a reduction in sentence is not authorized. Therefore, an offender will not be eligible

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[37] *See* May 2007 Report, Figure 2-6. For purposes of classifying offenders by function in the offense, the Commission defined street level dealers as offenders whose most serious offense conduct is distribution of retail quantities of less than one ounce directly to users. *See* May 2007 Report, 18 and Appendix A.
[38] *See* May 2007 Report, Figure 2-13.
[39] *See* May 2007 Report, Figure 2-6. For purposes of classifying offenders by function in the offense, the Commission defined importers and high-level suppliers as offenders whose most serious offense conduct was the importation or supplying of large quantities of drugs, who were near the top of the distribution chain, and who had an ownership interest in the drugs. *See* May 2007 Report, 18 and Appendix A.
[40] *See* May 2007 Report, 7-8.

for a sentence reduction if the crack cocaine amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (*e.g.*, a statutory mandatory minimum or the career offender provision in the guidelines). The extent of any reduction is generally limited by §1B1.10(b) to no lower than the minimum of the amended guideline range as determined by substituting only the crack cocaine amendment. Furthermore, in determining whether, and to what extent, a sentence reduction is warranted, the court is required to consider public safety considerations, among other factors, and may also consider post-sentencing conduct of the defendant. The court has full discretion to deny a motion for sentence reduction under 18 U.S.C. § 3582(c)(2).

**Senator Leahy Question 5**

**In the same testimony, the Attorney General asked Congress to pass legislation blocking the Sentencing Commission's decision to give retroactive effect to its recent amendment to the federal sentencing guidelines for crack cocaine offenses. That testimony claimed the court system would be over-burdened if retroactivity were to occur. Do you agree? Why or why not?**

The Commission considered the burden on the courts before deciding to give the crack cocaine amendment retroactive effect. The Commission received written comment and received testimony at its November 13, 2007, public hearing on retroactivity from the Criminal Law Committee of the Judicial Conference of the United States. The Criminal Law Committee recommended that the Commission give the crack cocaine amendment retroactive effect and specifically addressed the issue of the burden of the courts, concluding that the administrative "challenges do not outweigh the fairness arguments in favor of retroactivity."[41] The Commission ultimately was persuaded that the administrative burdens of applying the crack cocaine amendment retroactively are manageable.[42]

**Senator Leahy Question 6**

**Did the Sentencing Commission consider the burden on the courts before making its decision to apply this rule retroactively? If so, how did the Commission view this claim in comparison with the overall need for fair and just sentences?**

The Commission did consider the burden on the courts before deciding to give the crack cocaine amendment retroactive effect. One of the factors considered by the Commission in all retroactivity decisions is the difficulty in applying the amendment retroactively.[43] The magnitude of the change in the guideline range, *i.e.*, two levels, is not difficult to apply in individual cases and, as stated in the answer to Question 5 above, the Commission received persuasive written comment and testimony from the Criminal Law Committee of the Judicial Conference of the United States that the administrative burdens of applying the crack cocaine amendment retroactively are manageable.[44]

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[41] *See* Statement of Judge Paul Cassell, Chair, Criminal Law Committee of the Judicial Conference of the United States, regarding Retroactivity of Crack Cocaine Amendment, to the Commission, November 2, 2007. Judge Reggie B. Walton testified at the November 13, 2007, hearing and echoed similar sentiments.

[42] *See* Amendment 713, Reason for Amendment, Appendix C to the *Guidelines Manual.*

[43] *See* §1B1.10 background commentary.

[44] *See* Amendment 713, Reason for Amendment, Appendix C to the *Guidelines Manual.*

**Senator Leahy Question 7**

**Your Commission's 2002 and 2007 reports on crack powder sentencing laws recommended that Congress repeal the penalties for simple crack possession. Why is this important?**

When Congress passed the Anti-Drug Abuse Act of 1988[45] it further distinguished crack cocaine offenses from both powder cocaine and other drug offenses by creating a mandatory minimum penalty for simple possession of crack cocaine. This is the only federal statutory mandatory minimum penalty for a first offense of a simple possession of a controlled substance. By comparison, simple possession of any quantity of any other drug (except flunitrazepan) by a first-time offender – including powder cocaine – is a Class A misdemeanor offense punishable by a *maximum* of one year in prison.[46]

The Commission has recommended repealing the statutory mandatory minimum for simple possession of crack cocaine because its application can result in significantly disproportionate sentencing.[47] Under the current statutory structure, an offender who simply possesses five grams of crack cocaine receives the same five-year mandatory minimum penalty as a trafficker of five grams of crack cocaine, and the same as a serious trafficker of other drugs.[48] Accordingly, although there are relatively few simple possession crack cocaine cases at the federal level – in fiscal year 2007 there were 109 cases of which 20 were subjected to the federal mandatory minimum penalties – the Commission believes the mandatory minimum penalty for simple possession of crack cocaine should be repealed.

**Senator Leahy Question 8**

**I am concerned that the American public may be unaware of the side effects that would result if we reduced the racial disparities between crack and powder cocaine simply by raising the penalties for powder cocaine. Isn't it true that raising powder penalties would increase, rather than reduce, racial disparities among certain minority communities?**

Increasing penalties for powder cocaine offenders would have an impact mostly in the Hispanic community, since Hispanics continue to represent an increasing proportion of federal powder cocaine offenders. Hispanics accounted for 39.8 percent of powder cocaine offenders in 1992, 50.8 percent in 2000, and 57.5 percent in 2006.[49]

**Senator Kennedy Question 1**

**As you know, the Commission has recommended reducing the ratio between sentences for crack and powder cocaine from 100:1 to 20:1. Senator Hatch and I have introduced legislation to enact that resolution and also to raise the amount of crack cocaine triggering a mandatory minimum sentence from 5 grams to 25 grams, in order to target the most serious drug traffickers.**

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[45] Pub. L. 100-690, 102 Stat, 4181 (1988).

[46] The maximum statutory penalty for flunitrazepan is three years imprisonment for a first-time offender. It does not have a mandatory minimum term of imprisonment.

[47] *See* May 2002 Report, 109.

[48] *See* 21 U.S.C. § 844.

[49] *See* May 2007 Report, 15; May 2002 Report, Table 3.

**With these reforms, the cocaine laws will be more consistent with penalties for other types of drugs that require larger amounts of the drug to trigger a mandatory minimum penalty. The 20:1 ratio will also mean that over 3,000 fewer federal prison beds will be needed over a five year period, thus saving millions of dollars each year. Which could be redirected toward more serious drug offenders and actually have an impact in reducing drug trafficking.**

**The Commission made its recommendation in 2002. Does it continue to support the 20:1 ratio?**

The Commission believes that the penalty structure for crack cocaine offenses should focus more closely on serious and major traffickers as described generally in the legislative history of the 1986 Anti-Drug Abuse Act.[50] In both its 2002 and 2007 Report, the Commission further that increasing the five-year mandatory minimum threshold quantity for crack cocaine offenses to *at least* 25 grams, resulting in a statutory drug quantity ratio of *not more* than 20-to-1, would more closely reflect the overall penalty structure established by the 1986 Act.[51]

In addition, the Commission recommended increasing the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses; repealing the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844; and rejecting any attempt to alleviate the statutory 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses.

Senator Kennedy Question 2

**Recently, Attorney General Mukasey spoke out against the retroactive application of the reduction in crack cocaine penalties and urged Congress to block this change in the law, suggesting it would release hundreds of violent gang members into our communities.**

**Many of us disagree with the Attorney General, because there are already adequate safeguards to ensure that only appropriate candidates are released. Prisoners seeking to benefit from retroactivity must petition a federal court for the reduction and convince the court that they deserve it. The court must then determine whether and to what extent a prisoner will benefit from the reduction. This process will take time, and no prisoner will be released without a court's careful consideration of the merits, including consideration of the government's position.**

**What is your response to those who claim that retroactivity will increase crime and harm communities?**

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[50] The Subcommittee on Crime of the House Committee on the Judiciary generally defined serious traffickers as "managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities" and major traffickers as "manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities." *See* H.R. Rep. No, 99-845, pt. 1, 11-12 (1986).

[51] *See* May 2007 Report, 8-9.

As suggested by this question, existing safeguards are in place to potentially lessen crime and community harm that could result from retroactive application of the crack cocaine amendment, and the court has full discretion to deny a motion for sentence reduction under 18 U.S.C. § 3582(c)(2). Additionally, when the Commission decided to give the crack cocaine amendment retroactive effective, it also amended the guideline provision governing retroactivity to require the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction. Accordingly, public safety must be weighed by the court in every case before a sentence reduction may be granted and, as stated above, the court has full discretion to deny such motion.[52]

**Senator Feingold Question 1**

**The U.S. Sentencing Commission has recommended that Congress address the 100-to-1 sentencing disparity by increasing the amount of crack cocaine necessary to trigger the mandatory minimum sentences. At the same time, the Commission has recommended against addressing the disparity by reducing the amount of powder cocaine necessary to trigger the mandatory minimums. Why does the Commission believe that reducing the threshold quantities of powder cocaine is not the appropriate way to address the disparity?**

During its study of cocaine sentencing policy in 2002 and 2007, the Commission did not receive any testimony during its public hearings on the issue, empirical data, or scientific literature suggesting that the current powder cocaine penalties are insufficient.[53] At the Commission's public hearing on the subject on March 19, 2002, for example, then-Deputy Attorney General Larry Thompson testified that he was "not aware of any specific information we have regarding the fact that the existing powder penalties are too low."[54] For these reasons, the Commission stands by its 2002 recommendation that Congress reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses. Furthermore, according to the Commission's 2007 Report, only 0.4 percent of powder cocaine offenders were sentenced above the guideline range, suggesting that sentencing courts are not finding the penalties for powder cocaine to be inadequate.[55]

**Senator Coburn Question 1**

**Senator Biden's bill provides for several grant programs for drug rehabilitation programs in prisons and for substance abusers on parole in Sections 6 and 7, as well as increased funding for 3 agencies for the prosecution of high-level drug offenses in Section 10. Are there any grant programs with similar purposes that currently exist? If so, are additional**

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[52] *See*, USSG §1B1.10(b), Application Note 1(B)(ii), effective March 3, 2008; Amendments 712, 713, Appendix C to the *Guidelines Manual.*

[53] *See* May 2007 Report, 8. Some, however, have suggested increasing powder cocaine penalties as a means of addressing the crack-powder disparity. *See, e.g.,* Statement of Chuck Canterbury, Fraternal Order of Police, regarding Federal Cocaine Sentencing Policy, to the U.S. Sentencing Commission, Nov. 14, 2006, Tr. 130, available at www.ussc.gov.

[54] Statement of Larry Thompson, Deputy Attorney General, Department of Justice, to the U.S. Sentencing Commission, March 19, 2002, Tr. 71, cited in May 2002 Report at 111.

[55] *See* May 2007 Report, Table 2-2.

**programs, such as the ones in the Biden bill, necessary to curb drug dealing, addiction and ensure those released from prison do not return to their habits?**

The Commission does not have sufficient information to answer this question at this time because sentencing documentation submitted by the courts to the Commission does not typically include information regarding the availability of drug rehabilitation or other grant-based programs, such as those administered by the Department of Justice's Office of Justice Programs. However, the Commission is the process of studying alternatives to incarceration. As part of that study, the Commission is planning a symposium on the subject this summer in Washington, D.C., at which it expects to obtain more information on such programs.

**Senator Coburn Question 2**

**Is there a way to ensure that the high-level drug dealers and traffickers, rather than the small-time dealers, are the targets of longer prison sentences for both crack and powder through means other than quantity-based sentencing in the Guidelines? For example, could the Guidelines enforce some combination of drug quantity and offender function (i.e. past criminal history, reasons for dealing [such as to feed an addiction rather than establishing a distribution ring], or past drug-specific crimes) to establish a sentence?**

The Commission believes that the penalty structure for crack cocaine offenses should focus more closely on serious and major traffickers as described generally in the legislative history of the 1986 Anti-Drug Abuse Act.[56] In both its 2002 and 2007 Report, the Commission further concluded that increasing the five-year mandatory minimum threshold quantity for crack cocaine offenses to *at least* 25 grams, resulting in a statutory drug quantity ratio of *not more* than 20-to-1, would more closely reflect the overall penalty structure established by the 1986 Act.[57]

There are a number of guideline provisions that result in sentencing enhancements for more culpable offenders. For example, §2D1.1(b)(1) provides an enhancement if a dangerous weapon, including a firearm, was involved in the offense. In addition, §3B1.1 provides a sentencing increase for offenders who perform an aggravating role in the offense (*i.e.,* supervise or manage others), and §3C1.1 provides an enhancement for offenders who obstruct justice. Chapter Four of the *Guidelines Manual* provides increased punishment based on the criminal history of the defendant, and specific sentencing increases are provided for "career offenders"[58] and offenders who commit the offense as part of a pattern of criminal conduct engaged in as a livelihood.[59] The Commission believes that a statutory change in the 100-to-1 drug quantity ratio, coupled with these existing guideline provisions, would operate to appropriately target higher level and more culpable traffickers.

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[56] The Subcommittee on Crime of the House Committee on the Judiciary generally defined serious traffickers as "managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities" and major traffickers as "manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities." *See* H.R. Rep. No, 99-845, pt. 1, 11-12 (1986).

[57] *See* May 2007 Report, 8-9.

[58] USSG §4B1.1 (Career Offender).

[59] USSG §4B1.3 (Criminal Livelihood).

**Senator Coburn Question 3** (Question directly for Judge Ricardo Hinojosa)
**Offense severity is the preliminary determinant of the sentencing guideline range, but an offender's criminal history also plays a significant role, correct? Isn't it true that the average number of criminal history events counted under the guidelines may have increased for crack cocaine offenders in 2006? If so, are instances of criminal history higher for a crack offender than a powder offender? Thus, couldn't the explanation for longer sentences for crack offenders be due to their criminal history or increased offender prosecutions/convictions and not just negative effects of the current sentencing guidelines?**

Criminal history plays a significant role in the final calculation of the guidelines sentence as it represents the horizontal axis of the guidelines sentencing grid, with an offender's Criminal History Category potentially increasing as more criminal history events are counted, and more serious criminal history events are assigned greater criminal history points, under the guidelines. As explained below, longer sentences for crack cocaine offenders are attributable in part to the criminal history of these offenders compared to the criminal history of powder offenders. Crack cocaine offenders have a higher average Criminal History Category than powder cocaine offenders, and this contributes in part to a greater average sentence length for crack cocaine offenders compared to powder cocaine offenders.

For crack cocaine offenders, the average number of counted criminal history events and the average number of assigned criminal history points decreased slightly from fiscal year 2005 to fiscal year 2006 then increased in fiscal year 2007.[60] However, the average Criminal History Category for crack cocaine offenders remained at Category III in fiscal years 2005, 2006, and 2007 because the fluctuations in countable criminal history events and assigned criminal history points did not result in a higher average Criminal History Category for these offenders. Similarly, for powder cocaine offenders, the average number of counted criminal history events and the average number of assigned criminal history points decreased from fiscal year 2005 to fiscal year 2006 then increased in fiscal year 2007. These fluctuations in countable criminal history events and assigned criminal history points likewise did not result in a higher average Criminal History Category for powder cocaine offenders, which remained at Category II in fiscal years 2005, 2006, and 2007.

Perhaps more important, however, is the effect of differences in criminal history between crack cocaine offenders and powder cocaine offenders on the operation of statutory "safety valve" under 18 U.S.C. § 3553(f). This provision relieves a defendant from the statutory mandatory minimum and triggers a two-level reduction under the drug trafficking guideline. One of the criteria for "safety valve" eligibility is that a defendant must be in Criminal History Category I. For crack cocaine offenders, 22.3 percent, 22.0 percent, and 20.9 percent were in Criminal History Category I in fiscal years 2005, 2006, and 2007, respectively. In comparison for the same fiscal years, respectively, 61.7 percent, 61.7 percent, and 60.8 percent of powder cocaine offenders were in Criminal History Category I. Only 14.0 percent of crack cocaine offenders in fiscal year 2006 received the safety valve, compared to 45.5 percent of powder

[60] The Commission generally compiles and reports information on federal criminal offenders by fiscal year rather than calendar year and therefore can report information about whether counted criminal history events have increased in 2006 only on the basis of fiscal year, rather than calendar year, information.

cocaine offenders.[61] This difference could be attributable in part to the lower proportion of crack cocaine offenders in Criminal History Category I compared to powder cocaine offenders.

[61] *See* May 2007 Report, Table 2-2.

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

December 9, 2008

The Honorable Joseph R. Biden, Jr.
Chairman
Subcommittee on Crime and Drugs
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed a response to questions arising from the appearance of United States Attorney Gretchen Shappert before the Committee on February 12, 2008, at a hearing titled, "Federal Cocaine Sentencing Policy: Reforming the 100-to-1 Ratio".

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

C.O.S.

Keith B. Nelson
P.P. Principal Deputy Assistant Attorney General

Cc: The Honorable Lindsey O. Graham
Ranking Member

**"Federal Cocaine Sentencing Policy: Reforming the 100-to-1 Ratio"**

**February 12, 2008**

**Questions for the Hearing Record**
**for**

**Gretchen Shappert**
**United States Attorney**
**Western District of North Carolina**
**United States Department of Justice**

QUESTIONS FROM SENATOR BIDEN:

1. **You and Attorney General Mukasey indicated that the Department is willing to start talking about changing the disparity. This is a marked change from where the Department has been in years past.**

   **I'd like to know where the Department stands: What disparity does the Department support, and on what basis?**

RESPONSE:

The Department continues to believe that there is a valid basis for the quantity differential provided for in statute by Congress between crack cocaine and powder cocaine.

2. **If the Department believes that the current ratio of 100:1—or something close to it—is justified by differences relating to the production, trafficking, and/or use of crack and powder cocaine, please explain those differences to me with as much specificity as possible and provide objective, empirical—as opposed to anecdotal—support for the existence of those differences?**

RESPONSE:

Crack cocaine is associated with greater violence and danger than powder cocaine. While crack cocaine and powder cocaine are different forms of the same drug, there are significant differences in the ways they are marketed and ingested. For example, crack cocaine is much more addictive than powder cocaine and results in far more emergency room visits. Crack cocaine also is typically sold in open markets that destroy neighborhoods, and extreme violence accompanies the sale of crack, involving higher levels of gun crime and violent crime than that involving the sale of powder. Finally, crack cocaine is often sold in very small and inexpensive quantities, meaning that a dealer need not have a large amount of crack at any given time to inflict tremendous

harm on the community. In our view, these fundamental differences fully justify the existing differential.

Historically, Congress and the Sentencing Commission have cited an increase in violence and weapons use associated with crack cocaine offenses compared with powder cocaine cases to support disparate treatment in the Guidelines. In the Sentencing Commission's May 2007 Report to Congress, the Commission acknowledged that crack cocaine offenses involved more individuals with access to weapons compared with powder cocaine offenses. The Commission reported that in 2005, offenders had access to, possessed, or used a weapon in 32.4 percent of crack cocaine cases, compared with 15.7 percent of the offenders in powder cocaine cases. The percentage of cases with weapon involvement increased to 42.7 percent for crack cocaine offenses and 27 percent for powder cocaine offenses when the analysis included any participant in the drug offense (including unindicted coconspirators) who had access to a weapon.

3. **The small minority that opposes a substantial reduction or elimination of the crack/powder ratio—which includes the Department—has long contended that greater violence is associated with the crack trade. In concluding that "a variety of factors fully justify higher penalties for crack offenses," you point to just two: "greater violence . . . associated with the distribution of crack compared to powder," and that "crack offenders are more frequently associated with weapons use than powder offenders." Finally, you state that "Sentencing Commission data and reports confirm" this. However, Figure 2-20 of the Sentencing Commission's May 2007 report to Congress supports precisely the opposite conclusion.**

**The Figure shows that nearly 90 percent of crack offenders and 94 percent of powder offenses involve no violence whatsoever, and injury or death occurs in 5.5 percent of crack offenses and 3.1 percent of powder offenses.**

**While any violence is reprehensible and should be punished on a case-by-case basis, do these relatively low and comparable numbers not directly refute the Department's assertion that crack offenders are significantly more violent than powder offenders? Please explain.**

**RESPONSE:**

Sentencing Commission data does not capture all of the violence associated with crack cocaine trafficking. While the figures show the violence directly related to the offenses of conviction was relatively low, the Commission also found that in 2005, crack cocaine offenders had access to, possession of, or used a weapon at twice the rate (32.4 percent of cases) of powder cocaine offenders (15.7 percent of cases). This is just one

important statistic indicating that crack distribution generally is more violent than distribution of powder cocaine.

As I mentioned in my testimony, it has been said, and certainly it has been my experience, that whereas cocaine powder destroys an individual, crack cocaine destroys a community. The emergence of crack cocaine as the major drug of choice in Charlotte during the late 1980's dramatically transformed the landscape. We saw an epidemic of violence, open-air drug markets, and urban terrorism unlike anything we had experienced previously. Tough penalties for crack were part of an aggressive and collaborative approach to the systemic crack cocaine problem in those affected communities, and it has proven very successful. Lowering crack penalties signals a retreat from the battle against drug abuse and threatens to devastate vulnerable communities once again.

**4. As to your second proffered rationale, you contend that increased weapons use associated with the crack trade justifies a dramatic disparity. The diagram referred to in the previous question shows that while crack offenders more often possess a weapon in the course of their offense than powder offenders, the occurrence of actual violence is very low. Why can't a judge and prosecutor adequately address any small amount of increased violence by using sentencing enhancements and seeking and obtaining higher sentences with additional weapons convictions, which often carry their own five, seven, or ten-year mandatory minimum sentences?**

RESPONSE:

Many crack offenders (about a third) do receive an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role in the offense. This is characteristic of crack offenders, as there is far greater violence at the local level associated with the distribution of crack as compared to powder. Yet the higher penalties for crack offenses across the board appropriately reflect its greater harm to the communities threatened by the violence crack distribution poses, as well as the fact that crack is a more dangerous and harmful substance than powder cocaine. Sentencing enhancements simply do not fully capture the violence associated with the crack cocaine trade.

**5. Why should we build into the base offense for crack such draconian penalties that have the effect of punishing *all* crack offenders—violent and non-violent—as though they were violent offenders?**

RESPONSE:

Tough penalties for crack were intended to protect communities at risk of the devastation crack causes. Because of the nature of its use and distribution, crack cocaine trafficking is associated with greater violence. Moreover, crack cocaine is a more

dangerous and harmful substance than powder cocaine. As such, higher penalties for crack offenses appropriately reflect its greater harm.

**6. Does the current sentencing structure, reflecting a 100-to-1 disparity between drugs that are pharmacologically identical, seem to you to reflect fair, rational punishment?**

RESPONSE:

The current sentencing structure was established by Congress, and the Department has historically supported that structure as fair and rational. Moreover, in addition to the disparate effects on the community that crack cocaine and powder cocaine have as described above, scientific evidence has established that there are fundamental differences between crack cocaine and powder cocaine, depending on the route of administration. Crack cocaine is smoked, while powder cocaine is overwhelmingly inhaled. Smoked crack cocaine produces "quicker and higher peak blood levels [of the drug] in the brain" than does snorted powder cocaine. Accordingly, smoked crack causes a "faster euphoria" than does snorted powder. *See* Testimony of Nora D. Volkow, M.D., Director, National Institute on Drug Abuse, National Institutes of Health, U.S. Department of Health and Human Services, before the U.S. Senate Committee on the Judiciary, February 12, 2008. Hence, while the pharmacology of crack and powder cocaine is identical, the physiological impact on the user is not the same. The more intense physiological impact of crack on the user also provides a fair and rational basis for greater penalties.

**7. What evidence exists to support the conclusion that current penalties for powder cocaine are not stiff enough? Can you point to any empirical evidence that would support increasing penalties for powder cocaine?**

RESPONSE:

Although there may be anecdotal evidence, the Department is not aware of any empirical studies to date.

**8. Given that crack and powder are pharmacologically identical, that prenatal exposure effects are the same, and that they are associated with similar levels of violence—how can anything but parity, or something very close to it, be justified?**

RESPONSE:

The question assumes that because crack cocaine and powder cocaine "are pharmacologically identical," they must be treated the same. As Dr. Volkow's testimony made clear: "Cocaine, in any form, produces similar physiological and psychological effects once it reaches the brain, but the onset, intensity, and duration of its effects are directly related to the route of administration and to how rapidly cocaine enters the

brain." *Id.* As noted above, smoked crack cocaine reaches the brain more quickly and intensely than does snorted powder. Accordingly, the quantity differential, leaving aside the disparate effects on the community caused by the two forms of the drug, is rationally related to the differences in the routes of administration.

**9. Do you dispute the statistics in Figures 2-2, 2-4, and 2-11 published in the Commission's 2007 report?**

**RESPONSE:**

The Department does not dispute the actual statistics in the Commission's 2007 Report. However, we believe the statistics tell only part of the story. They do not accurately portray all of the harms done to communities by crack cocaine.

**10. The Sentencing Guidelines go to great lengths to account for "offender characteristics" rather than "offense characteristics," by including higher sentences for individuals who have a criminal history, possess or use a firearm, or cause violence. Yet, the current cocaine sentencing structure, which builds in huge sentences for all crack offenders, does just the opposite by punishing a whole class far worse for the conduct of a just a few.**

**Do you believe that these laws are consistent with what the Attorney General recently called the Department's core mission: "To ensure the fair and impartial administration of justice" for all Americans?**

**RESPONSE:**

Yes. The current federal cocaine sentencing structure was established by Congress and enforcing those laws is consistent with the Department's core mission.

**11. The Department has long taken the position that "the current federal sentencing policy and current sentencing guidelines for crack cocaine offenses are reasonable." (United State Attorney R. Alexander Acosta, Testimony before the U.S. Sentencing Commission, Nov. 14, 2006.) Now, however, the Department is willing to "begin[] discussions on changes to the current statutory differential between crack and powder cocaine offenses." (Attorney General Mukasey, Testimony Before the House Judiciary Committee, Feb. 7, 2008.) This is certainly a positive development, albeit long overdue.**

**Why has the Department changed its policy on this issue?**

RESPONSE:

The Department has not changed its policy; the Attorney General signaled only a willingness to begin discussions in the context of addressing the serious public safety and administrability concerns raised by retroactive application of the Sentencing Commission's decision. His statement, "I understand the commitment of Members of this Committee to community safety, and would appreciate the opportunity to work with this Committee and this House to address the retroactivity issue in an expedient manner, while beginning discussions on changes to the current statutory differential between crack and powder cocaine offenses," did not reflect a substantive policy change.

**12. Has the Department concluded that the 100-to-1 disparity is unwarranted, or is it simply willing to negotiate as an express quid pro quo for overturning the unanimous retroactivity decision of the bipartisan Sentencing Commission?**

RESPONSE:

As indicated above, the Attorney General's statement did not reflect a substantive policy change, but rather simply indicated the Department's openness to addressing the quantity differential as part of an effort to address the Sentencing Commission's retroactivity decision.

**13. Will the Department be willing to negotiate a reduction in the crack/powder ratio if the Sentencing Commission's decision stands?**

RESPONSE:

Congress decided not to address the Sentencing Commission's retroactivity decision. Accordingly, the Department is currently not committed to addressing the quantity differential.

**14. In his February 7 testimony before the House Judiciary Committee, the Attorney General asked Congress to pass legislation blocking the Sentencing Commission's decision to give retroactive effect to its recent amendment to the federal sentencing guidelines for crack cocaine offenses. Mr. Mukasey testified that the lower guidelines "will pose significant public safety risks." Yet, on February 22, 2008 the Washington Post reported that most of the nearly 1,500 or 1,600 crack offenders eligible for early release "are small-time dealers or addicts who are not career criminals and whose charges did not involve violence or firearms."**

**Doesn't this analysis run directly counter to the Attorney General's March 7 testimony that these crack offenders are "among the most**

**serious and violent offenders in the federal system" and that their early release "will produce tragic, but predictable results"? Do you have any empirical data to support your position?**

RESPONSE:

The Commission's study reported in the Washington Post had not yet been completed when the Attorney General testified. Nonetheless, a close look at the pool of offenders eligible for early release supports the Department's assertion. Data from the U.S. Sentencing Commission shows that nearly 80 percent of the offenders who will be eligible for early release have a Criminal History Category of II or higher. According to the 2004 report from the Sentencing Commission you cite, 20 percent to 48 percent of Drug Traffickers in Criminal History Category II or higher recidivate within the first two years of release. We believe the recidivism rates will be even higher for the crack offenders eligible for release because the 2004 Commission study excluded 15 percent of the offenders most likely to recidivate, either because offenders were either still serving prison sentences (those serving longer than seven years) or had not been released from prison for two complete years. The crack offenders now eligible for release will include those that have a much higher risk of recidivating than the narrow sample included in the 2004 study.

In addition, many of the offenders now eligible for release received an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role in the offense. This is characteristic of crack offenders, as there is far greater violence at the local level associated with the distribution of crack as compared to powder. For example, according to Commission studies, in 2005, crack cocaine offenders had access to, possession of, or used a weapon in 32.4 percent of cases in 2005, as opposed to powder cocaine offenders had access to, possession of, or used a weapon in 15.7 percent of cases.

Moreover, the dangers that could result from the early release of these offenders is amplified by the fact that retroactive application of the crack amendment would result in many prisoners being unable to participate in specific pre-release programs provided by the Bureau of Prisons (BOP). Preparation to reenter society intensifies as the inmate gets closer to release. As part of this process, BOP provides a specific release preparation program and works with inmates to prepare a variety of documents that are needed upon release, such as a resume, training certificates, education transcripts, a driver's license, and a social security card. BOP also helps the inmate identify a job and a place to live. Finally, many inmates receive specific pre-release services afforded through placement in residential reentry centers at the end of their sentences. The reductions in sentence resulting from the retroactive application of the guideline have reduced or eliminated the ability of many inmates to participate in the Bureau's reentry programs. Absent the opportunity to participate in these programs, an increased likelihood exists that the inmates who have obtained early release will re-offend.

**15. The Federal Judicial Conference testified that it does not believe that retroactive application of the Commission amendments will over-burden the courts. Yet, you have expressed concern that it will.**

**Does the Department still believe that overseeing the release of additional prisoners will place an undue burden on our federal courts, notwithstanding the fact that federal judges have told us that the courts are ready and able to handle any increased workload? If so, on what basis does the Administration base its claims that the courts would be over-burdened?**

**RESPONSE:**

The Department's concerns that retroactive application would place a heavy burden on the courts was well founded. Application of the crack amendment will require the review of approximately 20,000 sentencings, which is equivalent to more than 25 percent of all federal sentencings in 2006 and approximately the same as all of the crack sentences imposed during FY 2003, 2004, 2005 and 2006 combined. Put another way, the 20,000 estimated eligible crack offenders comprise approximately 10 percent of the entire federal prison population.

Once the Commission passed the amendment, the Department worked very closely with the Administrative Office of the Courts, U.S. Probation, the Bureau of Prisons, the U.S. Marshals and the Federal Defender in order to minimize disruption to the courts. The Department encouraged prosecutors throughout the country to work out arrangements with judges, probations officers and others in their district to manage the sentence reductions without the need for hearings in most cases, which has greatly reduced the burden on the courts. While the Department is working cooperatively throughout the country to minimize the impact on the ability to address new crime, there can be no doubt that significant resources are being diverted to address crack retroactivity.

**16. In your testimony you expressed concern that crack offenders who may be released will not be able to take advantage of reentry programs that are critical to their integration back into society.**

**Can you please provide the funding levels for prison-based reentry and drug treatment programs for each year since 2002: (1) requested in the President's budget; and (2) the amount appropriated by Congress?**

**RESPONSE:**

The following tables provide the Bureau of Prisons' requested and enacted budgets for reentry and drug treatment programs for fiscal year 2002 to fiscal year 2008.

The second table on drug treatment funding is extracted from the first table, which includes drug treatment as well as a number of other reentry programs. We should note, however, that preparation for reentry begins on the first days of an inmate's incarceration.

The vast majority of inmate programs and services are geared toward helping inmates prepare for their eventual release. The BOP provides many self-improvement programs, including work in prison industries (non-appropriated funds) and other institution jobs, vocational training, a specific Release Preparation Program, and other programs that impart essential life skills, which are included in the BOP's overall budget.

Table I: Bureau of Prisons Funding for Drug Treatment, Religious Programs, Education Programs, Psychology Programs, and Residential Reentry Centers. (FY 2002 - FY 2008)

| Fiscal Year | Requested | Enacted |
|---|---|---|
| FY 2002 | $ 326.457,000 | $ 324,694,000 |
| FY 2003 | 345,198,000 | 342,057,000 |
| FY 2004 | 390,844,000 | 387,444,000 |
| FY 2005 | 407,000,000 | 407,000,000 |
| FY 2006 | 444,727,000 | 438,768,000 |
| FY 2007 | 461,122,000 | 461,122,000 |
| FY 2008 | 472,503,000 | 463,242,000 |

Table II: Bureau of Prisons Funding for Drug Treatment (FY 2002 - FY 2008) (extracted from Table I)

| Fiscal Year | Requested | Enacted |
|---|---|---|

| | | |
|---|---|---|
| FY 2002 | $ 39,380,000 | $ 39,380,000 |
| FY 2003 | 43,202,000 | 43,202,000 |
| FY 2004 | 47,709,000 | 47,709,000 |
| FY 2005 | 48,642,000 | 48,642,000 |
| FY 2006 | 62,600,000 | 62,600,000 |
| FY 2007 | 65,100,000 | 65,100,000 |
| FY 2008 | 67,200,000 | 67,200,000 |

**17. Do you believe that robust funding for prison-based reentry programs is important? Do you believe that the funding levels since 2002 have been adequate?**

**RESPONSE:**

Adequate funding of prison-based reentry programs is of vital importance to help prepare prisoners to reenter the community. Rigorous BOP research has found that inmates who participate in Federal Prison Industries are 24 percent less likely to recidivate and are 14 percent more likely to be employed one year after release; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within 3 years after release. Even though we have been experiencing significant budgetary constraints in recent years, the Department of Justice fully supports funding that optimizes proven prison-based reentry programs.

**18. According to data from the Sentencing Commission's 2005 data sample, 42.7 percent of crack offenses and 25.4 percent of powder offenses had some broadly defined weapon involvement. In the same sample only 28 percent of crack and 14 percent of powder cases resulted in either statutory convictions or guideline enhancements for weapons.**

**If the Department is concerned with the prevalence of weapons and violence associated with crack trafficking, why has the government sought stiffer penalties in only about half of all cocaine cases involving weapons?**

**RESPONSE:**

The Commission's Report to Congress of May 2007, found that since 2000, application rates of sentencing enhancements for weapon involvement have increased for both powder cocaine (10.6 percent to 13.0 percent) and crack cocaine (21.6 percent to 26.5 percent) offenses. The government's decision not to seek a weapons-based enhancement in the remaining cases may be based on various factors such as evidentiary issues, or as a result of a plea bargain. We note, however, that the same report indicates that although crack cocaine offenders consistently have received weapon enhancements at a greater rate than powder cocaine offenders for the five most serious offender functions (the five most serious categories of participation are importer, organizer, wholesaler, manager, and broker), weapon enhancement rates were nearly equal for powder cocaine offenders and crack cocaine offenders at the low-level functions of street-level dealer.

QUESTIONS FROM SENATOR LEAHY:

1. **At last week's hearing on federal cocaine sentencing laws, we heard testimony from the Chair of the U.S. Sentencing Commission indicating that years of public hearings and public comment have demonstrated that "no justification [exists] for the current statutory scheme for powder and crack offenses." Yet, the Justice Department continues to oppose any change in the law, even a partial reduction in the disparity.**

a. **What empirical evidence justifies the Justice Department's continued support for the current sentencing scheme that treats 1 gram of "crack" cocaine as equivalent to 100 grams of powder cocaine?**

RESPONSE:

Crack cocaine is associated with greater violence and danger than powder cocaine. While crack cocaine and powder cocaine are different forms of the same drug, there are significant differences in the ways they are marketed and ingested. For example, crack cocaine is much more addictive than powder cocaine and results in far more emergency room visits. Crack cocaine also is typically sold in open markets that destroy neighborhoods, and extreme violence accompanies the sale of crack, involving higher levels of gun crime and violent crime than that involving the sale of powder. Finally, crack cocaine is often sold in very small and inexpensive quantities, meaning that a dealer need not have a large amount of crack at any given time to inflict tremendous harm on the community. In our view, these fundamental differences fully justify the existing differential.

Historically, Congress and the Sentencing Commission have cited an increase in violence and weapons use associated with crack cocaine offenses compared with powder cocaine cases to support disparate treatment in the Guidelines. In the Sentencing Commission's May 2007 Report to Congress, the Commission acknowledged that crack cocaine offenses involved more individuals with access to weapons compared with

powder cocaine offenses. The Commission reported that in 2005, offenders had access to, possessed, or used a weapon in 32.4 percent of crack cocaine cases, compared with 15.7 percent of the offenders in powder cocaine cases. The percentage of cases with weapon involvement increased to 42.7 percent for crack cocaine offenses and 27 percent for powder cocaine offenses when the analysis included any participant in the drug offense (including unindicted coconspirators) who had access to a weapon.

**b. Please identify any scientific studies or other medical evidence relied upon by the Justice Department to reach this conclusion.**

**RESPONSE:**

In addition to the disparate effects on the community that crack cocaine and powder cocaine have as described above, scientific evidence has established that there are fundamental differences between crack cocaine and powder cocaine, depending on the route of administration. Crack cocaine is smoked, while powder cocaine is overwhelmingly inhaled. Smoked crack cocaine produces "quicker and higher peak blood levels [of the drug] in the brain" than does snorted powder cocaine. Accordingly, smoked crack causes a "faster euphoria" than does snorted powder. *See* Testimony of Nora D. Volkow, M.D., Director, National Institute on Drug Abuse, National Institutes of Health, U.S. Department of Health and Human Services, before the U.S. Senate Committee on the Judiciary, February 12, 2008. The more intense physiological impact of crack on the user also provides a fair and rational basis for greater penalties.

**2. You testified that the Justice Department continues to believe that certain factors fully justify higher penalties for crack offenses. In particular, you testified that the Justice Department has relied on U.S. Sentencing Commission data finding "a higher rate of related violence associated with crack prosecutions." However, you failed to mention that the Sentencing Commission's May 2007 report on crack sentencing laws, using fiscal year 2005 data, found that 90 percent of "crack" cocaine cases involved no violence and 94 percent of powder cocaine cases involved no violence. That same report found, based on fiscal year 2000 data, "crack" cocaine cases involved no violence 89 percent of the time and powder cocaine cases had no violence 91 percent of the time.**

**a. Given that a bipartisan Sentencing Commission has repeatedly found little or no statistical difference exists in the levels of violence between "crack" and powder cocaine offenders, on what empirical basis does the Justice Department dispute those findings?**

**RESPONSE:**

The Department does not dispute the Commission's findings. Rather, we note that the same Commission Report also found that the reduction in violence experienced

since 1992 is consistent with the aging of the crack cocaine trafficker and user populations. Almost all crack cocaine related violence is of the "systemic" type, that is, violence that occurs within the drug distribution process. The Report cites studies by Professor Alfred Blumstein, which found that the reduction in violence is attributable to a reduction in new users of crack cocaine and a consequent reduction in the crack cocaine street markets, and by Dr. Bruce Johnson, which attributed the decline in violence to a decline in the number of arrestees with "detected cocaine/crack use." These studies were also corroborated by the Commission's own analysis of the sentencing data.

**b. What, if any, empirical data does the Justice Department rely on to suggest "crack" cocaine offenders are more violent than powder cocaine offenders?**

RESPONSE:

Please see our response to Question 2 from Senator Biden.

**3. Advocates of the 100-to-1 crack-powder disparity have often suggested that "crack" cocaine offenders are caught more often with weapons or commit acts of violence more often than "powder" cocaine offenders. Yet, the Sentencing Guidelines already provide sentencing enhancements for use or possession of a weapon and for any acts of violence associated with a drug offense. Does the Justice Department believe that the specific offense characteristics under the Sentencing Guidelines are insufficient to punish drug offenders who possess weapons or commit violence? If so, why?**

RESPONSE:

The Department's view that the quantity differential between crack cocaine and powder cocaine is reasonable rests largely on the fact that crack cocaine is associated with much greater dangers than powder, including increased violence, and that lowering crack penalties would signal a retreat from the battle against drug abuse. Current research shows that crack cocaine is a more dangerous and harmful substance than powder cocaine and should therefore carry higher penalties regardless of what specific offense characteristics apply in a given case.

**4. Earlier this month, the Attorney General informed the House Judiciary Committee that even a modest adjustment in this disparity between the treatment of "crack" and powder cocaine would lead to an increase in violent crime because "many" crack offenders are "violent gang members." I am concerned that the Attorney General's comments inappropriately suggested that "crack" cocaine is somehow associated with gang activity, more than powder cocaine. What factual basis existed for the Attorney General to suggest that "crack" offenders are more related to gangs than "powder cocaine" offenders?**

RESPONSE:

The Attorney General's statements were based on the experience of federal prosecutors who prosecute drug cases. Additionally, the Sentencing Commission's May 2007 Report to Congress: Cocaine and Federal Sentencing Policy recognizes that "[a]lmost all crack cocaine related violence is of the 'systemic' type, that is, violence that occurs within the drug distribution process." *Id.* at 86. The footnote to this statement quotes the Commission's 1995 report, which stated that "Crack cocaine is associated with systemic crime – crime related to its marketing and distribution – to a greater degree than powder cocaine. Researchers and law enforcement officials report that much of the violence associated with crack cocaine stems from attempts by competing factions to consolidate control of drug distribution in urban areas. Some portion of the distribution of powder cocaine, and the majority of the distribution of crack cocaine, is done on street corners or open-air markets, crack houses, or powder shooting galleries between anonymous buyers and sellers. These distribution environments, by their very nature, are highly susceptible to conflict and intense competition. As a result, individuals operating in these surroundings are prone to be involved in, as well as victimized by, increased levels of violence." *Id.*, fn. 129.

**5. There are several bills pending before the Judiciary Committee that would reduce or eliminate the crack-powder sentencing disparity, including S. 1383, S. 1685, and S. 1711. Does the Justice Department support anyone of these bills?**

RESPONSE:

As noted above, the Department continues to believe that the quantity differential has a valid basis given the different effects that crack cocaine and powder cocaine have on communities.

**6. In recent years, Congress and the U.S. Sentencing Commission have issued bipartisan calls for the elimination of the one-year mandatory minimum for simple possession of "crack" cocaine, the only drug under federal law to have a mandatory minimum sentence for simple possession. Yet, the Justice Department has not weighed in on this issue. At the hearing, you informed Senator Biden that you were unable to give the Department's position on whether a mandatory minimum sentence should exist for simple possession of "crack" cocaine. Now that you have had time to consult with high-ranking officials at main Justice, does the Justice Department support the elimination of the mandatory penalty for possession of crack cocaine? Why or why not?**

RESPONSE:

The Department continues to consider this issue.

**7. The Justice Department oversees several agencies - including the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco & Firearms (ATF) - that investigate and prosecute "crack" cocaine cases.**

**a. Do any of these federal agencies or their agents target "crack" cocaine offenders because the sentences imposed are more significant than powder cocaine offenders? If so, identify the agencies and/or agents who do so?**

**RESPONSE:**

No, Department of Justice agencies and agents do not target crack cocaine offenders, or any other offenders, because the sentences imposed are more significant than other sentences. The Department of Justice's drug enforcement policy is to identify and target the most significant drug supply organizations and components nationwide. FBI, DEA, and ATF follow that policy. They target the organizations and offenders who are engaged in the most serious illegal activity that has the most significant impact on our communities, regardless of the type of drug involved.

The Department of Justice investigative agencies also engage in ongoing, proactive, intelligence-driven threat assessments to identify and address emerging drug threats, nationwide as well as in particular regions and districts. In some instances, those threat assessments lead to initiatives targeting methamphetamine traffickers -- sometimes domestic manufacturers and sometimes importers and distributors of methamphetamine produced in Mexican super-labs. In other instances, the threat assessments result in initiatives targeting violent street gangs, which can develop a virtual stranglehold on an urban neighborhood, typically fueled with the proceeds of lucrative sales of heroin, crack cocaine, and/or powder cocaine. In any event, the targeting that results from strategic threat assessments is a function of the agencies' individual and collective determination of the impact on the communities involved, not of the length of sentences imposed for particular drug types.

Regardless of the type of drug involved, the Department of Justice investigative agencies also take into consideration numerous other aggravating factors relating to the offenses and the offenders. These factors include whether the drug trafficking organization or offenders engage in intimidation or violence; use firearms or other dangerous weapons; cause or attempt to cause bodily injury or even death; distribute their product to juveniles or use juveniles in their illegal activity; distribute their drugs in or around schools, playgrounds, or correctional facilities; or create particular environmental or other public health hazards. Consideration is also given to drug traffickers who have demonstrated an ongoing disregard for the law and societal norms through a pattern of prior criminal behavior, as well as those who have chosen to depend on criminal activity for their livelihoods.

b. **Given that the Commission has found that "crack" offenders are typically low-level dealers, as opposed to the wholesale and large scale distributors who typically comprise powder cocaine offenders, what factual basis exists for the Justice Department to invest its precious resources towards targeting low-level "crack" offenders?**

RESPONSE:

As stated above, the Department of Justice does not invest its precious resources towards targeting low-level crack cocaine offenders. Rather, DOJ's investigative agencies target the organizations and offenders who are engaged in the most serious illegal activity that has the most significant impact on our communities, regardless of the type of drug involved. The extent to which individual crack cocaine offenders are prosecuted is a function of their involvement in a larger, seriously dangerous organization, as well as a function of such other aggravating factors as may apply.

c. **Is this practice disclosed to the Federal judges sentencing offenders who have been targeted for these higher sentences?**

RESPONSE:

As stated above, no such practice exists. Moreover, for each and every convicted defendant, federal sentencing judges are provided with extremely comprehensive presentence reports that disclose information about every aspect of the offense and the offender that is deemed relevant in applicable statutes and sentencing guidelines. In addition, defendants are afforded the right to attorneys who can, and do, vigorously argue such sentencing issues as are factually and legally appropriate under the circumstances of the particular case.

QUESTIONS FROM SENATOR KENNEDY:

1. **You've actively prosecuted crack cocaine cases and witnessed the impact of crack cocaine on communities. You've also recommended that any reforms in the cocaine sentencing laws should come from Congress, not the Sentencing Commission, and that the laws should only be applied prospectively.**

   **Twenty years ago, I worked with my colleagues on this Committee to enact the Sentencing Reform Act to reduce unjustified disparities and achieve proportionality in punishment. Unfortunately, because of mandatory minimum sentences, the disparity in cocaine sentencing has led to a harsh and unfair impact on low-income and African-American communities, and has raised doubts about the fairness of the criminal justice system. Many of us believe that the law is unfair, and it needs to be changed.**

**The Commission's effort to address the situation through its guidelines has given people hope. This isn't the first time the Sentencing Commission has amended drug guidelines and made the amendment retroactive. According to testimony submitted to the Commission by Barry Boss of the ABA, this process occurred with LSD, marijuana and oxycodone, to meet concerns with proportionality and fairness. The situation is no different with cocaine, yet the Justice Department is opposed to a change that could have a positive effect on many lives.**

**What is your response to those African-American and low-income communities who commend the Commission for making its guideline amendment retroactive?**

RESPONSE:

The Department respects the views of those who believe that current federal cocaine sentencing policy disproportionately affects African-Americans, in that most crack offenders in the federal system are African-American. The Department, however, believes that the debate here has shifted from a focus on the devastating effects crack cocaine has on victims and communities, to a focus on the effects current laws have on those who commit these serious crimes. Former Deputy Attorney General Larry Thompson's March 19, 2002 testimony before the U.S. Sentencing Commission best summarizes the problem with this shift in focus: "[S]tatistics 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." Finally, as I explained during my testimony before the Sentencing Commission on November 13, 2007, the Department's consistent position has been that changes to penalties for drug offenses should be applied prospectively, not retroactively. Accordingly, the Department simply has maintained its position with respect to this issue.

2. **Recently, Attorney General Mukasey spoke out against the retroactive application of the reduction in crack cocaine penalties. He urged Congress to block this change in the law, suggesting it will release hundreds of violent gang members into the community.**

**Many of us disagree with the Attorney General, because there are already adequate safeguards to ensure that only appropriate candidates are released. Prisoners seeking to benefit from retroactivity must petition a federal court for the reduction and convince the court that they deserve it. The court must then determine whether and to what extent a prisoner will benefit from the amended guideline. This process will take time. No prisoner will be**

**released without a court's careful consideration of the merits, including consideration of the government's position.**

**How can the Department of Justice substantiate claims that making the Commission's guideline change retroactive will increase crime and harm communities, when administrative and judicial safeguards will monitor these potential candidates?**

RESPONSE:

Because of the sheer number of offenders eligible for release under the amendment, the lapse of time from the original convictions and sentencings, and, as is often the case, only a small portion of the evidence from the original case still available, prosecutors and courts have little to go on aside from prison records to determine whether an offender is a good candidate for early release or is a threat to the community.

In addition, early release is resulting in many prisoners being unable to participate in specific pre-release programs provided by the Bureau of Prisons (BOP), which works with inmates to prepare a variety of documents that are needed upon release, such as a resume, training certificates, education transcripts, a driver's license, and a social security card. BOP also helps the inmate identify a job and a place to live.

Finally, due to the geographic disparity in the distribution of these cases, the sudden influx of offenders released early threatens to swamp some probation offices with these high-risk offenders who are suddenly under their supervision. Probation officers who already are spread thinly are being taxed even more. And when these crack dealers "slip," it is the community that pays the price.

QUESTIONS FROM SENATOR FEINGOLD:

1. **You've expressed concern that offenders who are now eligible for a sentence reduction as a result of the Sentencing Commission's amendment might not get the full benefit of the Bureau of Prison's re-entry program. You obviously recognize the importance of re-entry programs in facilitating the transition from prison to free society for offenders who have served their time. As I'm sure you're aware, the President's recent budget proposal would slash funding for state and local law enforcement assistance, including funding for re-entry programs administered at the state and local level.**

a. **Do you agree that these budget cuts are problematic in light of the importance of re-entry programs to the safety of communities?**

RESPONSE:

The President's FY 2009 Budget request consolidates the Department's most successful state and local law enforcement assistance programs into four flexible, competitive discretionary grant programs. This approach would help state, local, and tribal governments develop programs appropriate to the particular needs of their jurisdictions. Through the competitive grant process, the Department's Office of Justice Programs (OJP) would continue to assist communities in addressing a number of high-priority concerns including reentry initiatives. Specifically, the FY 2009 budget request includes more than $1 billion in state, local and tribal law enforcement assistance and consolidates more than 70 existing programs into four larger, multi-purpose grant programs: 1) the Violent Crime Reduction Partnership Initiative; 2) the Byrne Public Safety and Protection Program; 3) the Child Safety and Juvenile Justice Program; and 4) Violence Against Women Grants.

**b. Will you urge the President to amend his budget proposal to ensure adequate funding for these programs?**

RESPONSE:

The President's FY 2009 Budget request contains adequate funding for these programs, including more than $1 billion in state, local and tribal law enforcement assistance.

QUESTIONS FROM SENATOR COBURN:

**1. Senator Biden's bill provides for several grant programs for drug rehabilitation programs in prisons and for substance abusers on parole in Sections 6 and 7, as well as increased funding for 3 agencies for the prosecution of high-level drug offenses in Section 10. Are there any grant programs with similar purposes that currently exist? If so, are additional programs, such as the ones in the Biden bill, necessary to curb drug dealing, addiction and ensure those released from prison do not return to their habits?**

RESPONSE:

We believe that reducing illicit drug use, manufacturing, and trafficking, drug-related crime and violence, and drug-related health consequences is an important priority.

The Department of Justice and the Substance Abuse and Mental Health Administration administers several grant programs aimed at substance abuse treatment. Specifically, the Residential Substance Abuse Treatment (RSAT) Program provides formula grants to assist states and units of local government in developing and implementing residential substance abuse treatment programs in state and local correctional and detention facilities.

The Indian Alcohol and Substance Abuse Program (IASAP) provides funding and technical assistance to federally recognized tribal governments to plan, implement, or enhance tribal justice strategies to address crime issues related to alcohol and substance abuse. In FY 2007, the program focuses attention on controlling and preventing the growing methamphetamine problem in Indian Country.

The Drug Court Discretionary Grant Program provides financial and technical assistance to states, state courts, local courts, units of local government, and tribal governments to develop and implement treatment drug courts that effectively integrate substance abuse treatment, mandatory drug testing, sanctions and incentives, and transitional services in a judicially supervised court setting with jurisdiction over nonviolent, substance-abusing offenders. The purpose of the SAMHSA Juvenile and Adult Drug Courts Treatment Program is to provide a comprehensive array of substance abuse treatment and recovery support services for non-violent offenders in established drug court programs. The DOJ Program primarily provides funding for the infrastructure and services necessary to integrate treatment with assessment, and to allow for proper case processing and accountability in drug courts. SAMHSA's Program enhances treatment services and recovery support services necessary for the Drug Court Program. Both the DOJ and SAMHSA require grantees to address compliance with the established standards for model drug courts, such as the 10 key components of drug courts and coordinate to ensure that an individual drug court does not receive grant funds from both agencies for overlapping services. SAMHSA is also a co-sponsor, with the Bureau of Justice Assistance at DOJ, of the Federal Consortium Addressing Substance-Abusing Offenders (FCASOA) that increases collaboration and helps eliminate duplication in crime and substance abuse programs.

Information regarding these components is available at http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefiningDC.pdf and http://www.samhsa.gov/Grants/2008/ti_08_007.aspx/

In addition to the Drug Court Program, SAMHSA manages many other activities that focus on the criminal justice system and facilitate reentry and recovery for individuals with substance use disorders.

The FY 2008 Edward Byrne Memorial Competitive Grant Program helps local communities improve the capacity of local justice systems and provides for national support efforts including training and technical assistance programs strategically targeted to address local needs. Applicants may apply for five different funding categories. Category I is aimed at programs that prevent crime and drug abuse in the United States.

The Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) Program allows states and local governments to support a broad range of activities to prevent and control crime and to improve the criminal justice system. The primary purpose areas under JAG are:

- Law enforcement programs
- Prosecution and court programs

- Prevention and education programs
- Corrections and community corrections programs
- Drug treatment and enforcement program
- Planning, evaluation, and technology improvement programs
- Crime victim and witness programs (other than compensation)

The Department's Prisoner Reentry Initiative provides funding to develop, implement, enhance, and evaluate reentry strategies that will ensure the safety of the community and the reduction of serious, violent crime. Limited funds may be available for substance abuse treatment on both a pre and post release basis. In addition, the recently enacted Second Chance Act of 2007 (HR 1593), provides for some substance abuse funding through grant programs. The total funding available under that program has yet to be determined by Congress.

2. **Is there a way to ensure that the high-level drug dealers and traffickers, rather than the small-time dealers, are the targets of longer prison sentences for both crack and powder through means other than quantity-based sentencing in the Guidelines? For example, could the Guidelines enforce some combination of drug quantity and offender function (i.e. past criminal history, reasons for dealing [such as to feed an addiction rather than establishing a distribution ring], or past drug-specific crimes) to establish a sentence?**

RESPONSE:

The current sentencing guidelines structure does ensure that high level drug dealers receive longer prison sentences. Although the calculation of offense levels starts with a determination of the quantity of narcotics involved in the offense, many of the other factors you mention are considered before the final sentence is determined.

For example, the guidelines provide a sentencing adjustment when an offender plays an aggravating role in the offense, increasing by four levels the offense level if the defendant was an organizer or leader of a criminal activity that involved five or more participants; by three levels if the defendant was a manager or a supervisor if the activity involved five or more participants; or by two if the defendant was an organizer or leader in any other activity. Conversely, the guidelines provide a mitigating role adjustment that decreases by four offense levels if the defendant was a minimal participant in the criminal activity, and by two levels of the defendant was a minor participant.

In addition, a calculation of any applicable sentencing guideline requires a determination of a defendant's criminal history, which are classified between Criminal History Categories I through VI. The sentencing table in the guidelines provides an increasingly longer sentence depending on the resulting criminal history category.

Finally, the guidelines provide a "safety valve" for defendants which allows the court to impose a sentence below the statutory minimum if the defendant does not have more than one criminal history category point, if the defendant did not use violence or

credible threats of violence, if the offense did not result in death or serious bodily injury, if the defendant was not a leader or organizer, and the defendant at the time of sentencing has truthfully provided all information and evidence to the government regarding the offense. The safety valve allows a small-time or one time participant in a narcotics conspiracy to receive a significantly lower sentence than would be applicable based on quantity alone. In addition, even where higher drug quantities or non-first offenders are involved in a crack offense, the guidelines also separately provide for a reduction in an offender's sentencing range where the offender is deemed to have played "a mitigating role." U.S.S.G. § 2D1.1(a)(3). All of the above calculations ensure that high level drug dealers are the targets of longer prison sentences than small-time dealers.

3. **Regarding retroactive application of reforms, you note that all three of the bills discussed in this hearing apply only prospectively. In your opinion, even if one of the bills that maintain a disparity pass, would the ruling in *United States v. Booker*, which allows a judge to consider the sentencing guidelines as advisory, still apply and provide the judge the opportunity to assign a sentence even less than what the bill would establish? Would the judge's ability to reduce a sentence for a defendant under *Booker* apply retroactively?**

**RESPONSE:**

In *United States v. Booker,* the Supreme Court held that judicial fact-finding pursuant to the Guidelines violated defendant's Sixth Amendment right to a jury trial, and remedied the problem by rendering the Guidelines advisory. Thus courts are no longer bound to follow the Guidelines, but "must consult those Guidelines and take them into account when sentencing." *Booker* is applicable to all cases "pending on direct review or not yet final" as of January 12, 2005. Barring a new Supreme Court case or a substantial change to the current federal sentencing guidelines structure, *Booker* would still apply in cases under the new ratios, and the sentencing judge would still be able to assign a lesser sentence than that established by the bill.

**RESPONSES TO QUESTIONS FOR THE RECORD**
**NORA D. VOLKOW, M.D.**
**DIRECTOR**
**NATIONAL INSTITUTE ON DRUG ABUSE**
**FOLLOWING FEBRUARY 12, 2008, HEARING ENTITLED**
***FEDERAL COCAINE SENTENCING POLICY:***
***REFORMING THE 100-TO-1 RATIO***

**Senator Joseph R. Biden, Jr.**
**Dr. Nora Volkow**
**National Institute on Drug Abuse**

**Question: If it is the route of administration and not the inherent properties of crack or powder that make it more or less addictive, and as Diagram 3-1 from the Sentencing Commission's 2007 report suggests, inhalation and injection of any drug—including cocaine—both send a significant concentration of the drug to the brain very quickly, is it fair to say that smoking crack cocaine and injecting powder cocaine have a very similar potential for addiction?**

Yes – smoking crack cocaine and injecting powder cocaine have an equivalent potential for addiction. Cocaine's addictive liability is directly related to the speed with which it enters the brain. The rapid, intense "high" experienced by a user who smokes crack cocaine is comparable to the "high" experienced by a user who injects cocaine intravenously. Moreover, both drugs act by the same mechanisms once in the brain, so both users would be at similar risk of becoming addicted. It is important to note that powder cocaine is overwhelmingly used intranasally ("snorting"), which is a slower route of administration than smoking or intravenous use. It is also important to recognize that many people who are addicted to cocaine get their start by snorting cocaine powder, and that those who make the switch to smoking or injection do so only later.

**Question: Isn't it true that injection can in fact be more dangerous to the user than smoking because of the associated risks of contracting HIV and other dangerous diseases through intravenous use?**

In the past, the transmission of HIV among drug abusers was primarily associated with the use of contaminated equipment used for intravenous drug administration. However, less well recognized is the role that drug abuse, including cocaine, plays more generally in the spread of HIV by increasing the likelihood of high-risk sex with infected partners. This is because of the intoxicating effects of the drug, which can alter judgment and inhibition and lead people to engage in impulsive and unsafe behaviors. Therefore, even drug abusers who do not inject are at increased risk for HIV infection.

**WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY
FOR NORA VOLKOW, M.D.,
DIRECTOR, NATIONAL INSTITUTE ON DRUG ABUSE,
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,
HEARING ON "FEDERAL COCAINE SENTENCING LAWS:
REFORMING THE 100-TO-1 CRACK/POWDER DISPARITY"
FEBRUARY 12, 2008**

1. **You testified at last week's Subcommittee hearing that although there are slight differences in the routes of administration, no pharmacological difference exists between crack cocaine and powder cocaine. Given your scientific testimony, do you believe any scientific data exists that would justify penalizing crack a hundred times more than powder? Why or why not?**

There is no scientific evidence to support the claim that either chemical form of cocaine is inherently more dangerous or addictive than the other; rather, it is the route of administration that determines how intense those effects are for a cocaine abuser. When crack cocaine is smoked or powder cocaine is injected, it produces quicker and higher peak blood levels of the drug in the brain than does snorting powder cocaine, which is overwhelmingly the route of administration for powder cocaine. Sentencing issues are not within NIDA's mission, and any questions regarding sentencing for cocaine offenses should be referred to the Department of Justice.

2. **You testified that once cocaine is absorbed into the bloodstream and reaches the brain its effects are identical regardless of whether it is crack or powder. Given your finding and Congress's erroneous belief over twenty years ago that crack led to more serious health effects than powder cocaine, does the scientific evidence now show that our 100 to 1 crack penalty scheme is outdated?**

The current science shows that once delivered to the brain, crack cocaine and powder cocaine have identical mechanisms of action (i.e., both forms of the drug result in the blockade of dopamine transporters) and that both forms of the drug carry the potential for equally serious health effects. The differences between the two forms of the drug are due to the circumstances in which the drug is delivered, specifically the route of administration. Powder cocaine is overwhelmingly used intranasally, which is a slower route of administration than smoking or intravenous use, which are the primary means by which crack cocaine is used. Again, since sentencing issues are not within NIDA's mission, questions regarding sentencing for cocaine offenses should be referred to the Department of Justice.

3. **You testified that no scientific evidence exists that the chemical form of cocaine, hydrochloride versus freebase, have any difference in the pharmacological effects. Given your testimony, does any scientific evidence**

**exists to show that crack is associated more with violent behavior than powder drug use?**

Research indicates that abuse of cocaine in any form – crack or powder - is associated with increased aggression and violence. These violent consequences are not only the product of drug intoxication, but also of the environment and circumstances in which the drug is obtained and used.

The small number of studies that have compared cocaine-associated violence between crack and powder users do not support the assertion that differences in the chemical composition of the drug results in differing levels of violence. In 1990, Miller and colleagues examined the types of violence committed by cocaine users, and found no differences as a function of the chemical form of the drug or how it was administered. In contrast, Giannini et al (1993) found that the level of violence associated with cocaine use depended on the route of administration, with intravenous use of powder comparable to smoking crack, and both intravenous use and smoking associated with more violence than snorting. Although the results of these studies differ, they both indicate that the chemical form of the drug does not determine the degree of violence committed by the user. Thus, the Giannini study indicates that differing routes of administration are associated with differing levels of violence, with smoking crack cocaine associated with higher levels of violence than snorting powder cocaine. While the Giannini study also demonstrated injecting powder is associated with a higher level of violence than snorting powder, powder is overwhelmingly snorted, not injected.

References:

Miller, N.S., Gold, M.S., & Mahler, J.C. (1990) A study of violent behaviors associated with cocaine use: Theoretical and pharmaceutical implications.

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**Senator Edward M. Kennedy**

**Questions for the Record**

**Senate Judiciary Committee Hearing on "Federal Cocaine Sentencing Laws: Reforming the 100-1 Crack/Powder Disparity"**

**Held on February 12, 2008**

***To Nora Volkow***

**Question 1**

Drug abuse and addiction are important public health issues. Until we direct more resources to break the cycle of drug addiction, we'll only be treating the symptoms, not the disease. Punishment and incarceration address only one part of the drug problem.

**What steps can be taken to give the health aspect of this issue more consideration?**

- **We need to continue to educate the public about addiction being a chronic, relapsing disease of the brain.** In 2006, an estimated 23.6 million persons aged 12 and older needed treatment for an illicit drug or alcohol use problem, but only 2.5 million received it at specialty clinics. We must continue to raise awareness of addiction as a disease to help to chip away at the associated stigma that prevents people from getting the help they need. In addition, people need to understand that, as with other chronic, relapsing diseases like high blood pressure, diabetes, and asthma, relapse does not mean treatment failure; in fact, all of these diseases have rates of relapse in line with addiction. Helping people see addiction in this light will humanize the suffering that this disease causes individuals, families, and all of society and help advance the use of and access to effective treatments.

- **Educate and encourage physicians to play a greater role in identifying people at risk.** Because many people regularly visit their primary care physicians, this interface can play a key role in preventing addiction and related consequences and in identifying and referring drug-abusing patients to specialized treatment. We must expand ongoing education efforts to further enlighten physicians about the

relevance of drug abuse and addiction to: a) their patients' overall health profile (i.e., its effects on the etiology and/or course of other medical illnesses) and b) their ability to treat other health conditions. Efforts must also include educating physicians on available drug abuse screening instruments and providing them with the resources to refer them to appropriate treatment. Finally, physicians can play a role in encouraging pharmaceutical companies to get more involved in the development of medications for addiction treatment.

**Question 2**

One of the main problems with the sentencing laws is that there is no way to separate those suffering from addiction and those who are traffickers or violent offenders. As Elmore Briggs, Director of Clinical Services for the District of Columbia, has pointed out, addicts who receive treatment can eventually become productive members of their communities, once their addiction is under control.

**How can we best help criminal justice system personnel develop strategies for identifying persons suffering from addiction?**

NIDA can help criminal justice system personnel understand the value of screening offenders for drug use problems by educating them on the screening tools available. We must emphasize at all levels the value of identifying those who need treatment and beginning that treatment early—while people are in prison. As embodied in NIDA's collaborative Criminal Justice Drug Abuse Treatment Studies (CJ–DATS) Initiative, we work across organizational boundaries to improve access to and quality of substance abuse treatment services. Our current system affords treatment to only a small percentage of inmates who need it, and even then at an inadequate level. Indeed, the Department of Justice's Bureau of Justice Statistics estimates that about half of those in federal and state prison meet the criteria for drug abuse or addiction; yet only about 15 percent receive it. Research has shown that treatment that begins in prison and continues in the community after release can reduce drug use and criminal behavior, and that ongoing treatment can sustain these gains.

**Follow-up Questions of Senator Tom Coburn, M.D.**
Hearing: "*Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/ Powder Disparity*""
United States Senate Committee on the Judiciary
Subcommittee on Crime and Drugs
February 12, 2008

**Questions for All Witnesses**

1. **Senator Biden's bill provides for several grant programs for drug rehabilitation programs in prisons and for substance abusers on parole in Sections 6 and 7, as well as increased funding for 3 agencies for the prosecution of high-level drug offenses in Section 10. Are there any grant programs with similar purposes that currently exist? If so, are additional programs, such as the ones in the Biden bill, necessary to curb drug dealing, addiction and ensure those released from prison do not return to their habits?**

The programs that S. 1711 would establish provide direct services. NIDA does not fund such programs, thus the Institute does not currently have programs with similar purposes.

2. **Is there a way to ensure that the high-level drug dealers and traffickers, rather than the small-time dealers, are the targets of longer prison sentences for both crack and powder through means other than quantity-based sentencing in the Guidelines? For example, could the Guidelines enforce some combination of drug quantity and offender function (i.e. past criminal history, reasons for dealing [such as to feed an addiction rather than establishing a distribution ring], or past drug-specific crimes) to establish a sentence?**

Sentencing issues are not within NIDA's mission.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
*Presiding*

JAMES C. DUFF
*Secretary*

March 20, 2008

Honorable Joseph R. Biden, Jr.
Chairman
Subcommittee on Crime and Drugs
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing in response to your letter of February 29, 2008, regarding written questions from Committee members to the Judicial Conference's witness, Judge Reggie B. Walton of the United States District Court for the District of Columbia, from your hearing entitled "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity" held on February 12, 2008. Enclosed are the written responses to these questions.

Thank you for inviting the Judicial Conference to participate in this hearing. If you have any questions regarding this matter, please contact Amanda Koman, Attorney Advisor, Office of Legislative Affairs, at (202) 502-1700.

Sincerely,

James C. Duff
Secretary

Enclosure

cc: Honorable Lindsey O. Graham

**Written Answers for the Record from**
**Judge Reggie B. Walton**
**Judicial Conference of the United States**

**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**

**Responses to Questions from Senator Joseph R. Biden, Jr.**

Question: You have a reputation for being tough on crime. In your view, as a conservative and tough federal judge, is reducing penalties for crack in order to substantially reduce or eliminate this disparity being "soft on crime?"

I do have a reputation for being tough on crime and firmly believe that those who violate criminal laws should be punished. I believe in strong punishment. But offenders must be punished fairly. Reducing the penalties for crack cocaine would not be "being soft on crime." Even if the ratio between crack and powder cocaine were reduced all the way to 1:1, crack sentences would still be adequate to achieve the purposes of sentencing.[1] Even under a 1:1 ratio, judges would be required in some circumstances and authorized in others to impose enhanced sentences when crack defendants used violence,[2] firearms or other types of weapons,[3] played leadership roles in a conspiracy,[4] or are repeat offenders.[5]

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[1]*See, e.g.*, 18 U.S.C. § 3553(a)(2) (2007)(listing the goals of punishment, as established by the Sentencing Reform Act of 1984, 98 Stat. 1987, 18 U. S. C. § 3551 *et seq.*). Sentences are to be imposed in order "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *Id.*

[2]*See, e.g.*, 18 U.S.C. § 924(c)(1)(A)(i)(2007)(establishing a mandatory five year term of imprisonment for using or carrying a firearm in relation to any drug trafficking crime); 18 U.S.C. § 924(c)(1)(A)(ii)(2007)(establishing a mandatory seven year term of imprisonment for brandishing a firearm in relation to any drug trafficking crime); 18 U.S.C. § 924(c)(1)(A)(iii)(2007)(establishing a mandatory ten year term of imprisonment for discharging a firearm in relation to any drug trafficking crime).

[3]*See, e.g., id.* (establishing enhanced penalties for the use of firearms in drug trafficking offenses); U.S.S.G. §2D1.1(b)(1) (enhancing base offense level by two levels when dangerous weapons are possessed).

[4]*See, e.g.*, U.S.S.G. §3B1.1 (enhancing base offense level by four levels when defendant was an organizer or leader of a criminal activity involving five or more participants).

[5]*See, e.g.*, 18 U.S.C. § 924(c)(1)(C)(2007)(establishing a mandatory twenty-five year term of imprisonment for all second or subsequent convictions under the subsection).

These other sentencing variables would allow judges to remain tough on crime while imposing balanced sentences upon crack and powder-cocaine offenders.

The federal system is unique in relying upon a 100:1 ratio to punish. Not one state sentencing scheme imposes a 100:1 ratio in order to punish its crack offenders,[6] and the one state that did so – Iowa – has since reduced its ratio downward to 10-to-1.[7]

Narrowing the gap between crack and powder sentences would *not* be soft on crime, but it *would* help to eliminate a sentencing disparity that experience has revealed to be irrational and that undermines public confidence in our federal courts.

Question: As a judge, can you describe what's at stake when members of the public view the justice system as fundamentally unfair?

The Judicial Conference has previously expressed its view that the disparity between penalties for powder cocaine and crack cocaine is not supportable and harms public confidence in the federal judiciary.[8] This erosion of public confidence has both abstract and practical consequences.

In the abstract, the undermining of confidence in the justice system diminishes respect for the rule of law (since people come to believe that punishment depends not on one's conduct but upon one's color, class, or connections). Furthermore, because the rule of law is such an essential foundation of democratic government, cynicism about the fairness of the justice system is engendered, causing citizens to lose faith in other social institutions.

In more practical terms, if the public comes to view the justice system with suspicion, as instruments of unequal justice, then citizens may become reluctant to report crimes, refuse to serve as jurors or nullify suspect laws (as noted in my oral testimony),[9] or withhold critical cooperation from law enforcement officers.

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[6]*See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 98-99 (May 2007)[hereinafter U.S. SENTENCING COMM'N, 2007 REPORT](noting that among the 13 states that distinguish between powder cocaine and crack, no state currently employs a ratio as high as the 100-to-1 ratio employed in the federal system).

[7]*See id.* at 99.

[8]JCUS-SEP 06, p. 18.

[9]*See also* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1282 (1996) ("Moreover, the 100:1 ratio is causing juries to nullify verdicts. Anecdotal evidence from districts with predominantly African-American juries indicates that some of them acquit African-American crack defendants whether or not they believe them to be guilty if they conclude that the law is unfair." (citing Jeffrey Abramson, *Making the Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at A15)).

> As a judge who is tough on crime, these are distressing results to me, since they can result in lawbreaking with impunity. I imagine that followed to its logical (but extreme) conclusion, a wholesale lack of public confidence in the justice system could lead to lawlessness and even vigilantism.

Question: Do you believe that these laws [punishing principally by drug weight rather than by offender characteristics or offense characteristics] are consistent with what the Attorney General recently called the Department's core mission: "To ensure the fair and impartial administration of justice" for all Americans?

> It is my understanding that one of the central objectives of the Sentencing Reform Act of 1984 was to eliminate unwarranted disparity between offenders. Like crimes were to receive like punishments. And consistently 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.
>
> Even if crack and powder cocaine were punished equally in the federal system (a 1:1 ratio), using drug weights alone to determine sentence length would still result in disparity. Mandatory minimums are a large part of the problem. In addition to being opposed by the Judicial Conference,[10] mandatory minimums related to drug weight create unwarranted disparities ("cliffs"). For example, the individual who possesses 4.99 grams of crack (and is not subject to a mandatory minimum) will receive a far lower punishment than the individual who possesses 5.01 grams,[11] even though their culpability is essentially identical.
>
> Today, justice under existing federal cocaine laws is neither fair nor impartial. Although it is established that crack and powder cocaine are pharmacologically equivalent, crack is punished 1.3 to 8.3 times more severely than powder,

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[10] *See, e.g.*, JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93; JCUS-MAR 90, p. 16; JCUS-SEP 91, p. 56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 94, p. 42; JCUS-SEP 95, p. 47 (all opposing mandatory minimum sentences).

[11] *See* U.S. SENTENCING COMM'N, 1995 SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 198 (Feb. 1995).

> [T]he sentencing "cliff" between a first offender who simply possesses as much as 5.0 grams of crack (or any quantity of any other drug) and an otherwise similarly situated defendant having a minutely measurable greater quantity (*e.g.*, 5.01 gram) of crack – statutory maximum sentence of one year's imprisonment for the former, minimum sentence of five years' imprisonment for the latter – creates a wide disparity and disproportionality that the sentencing guidelines cannot rectify.

*Id.*

depending on the weight of the drug involved and the specific characteristics of the offender.[12] Because crack prosecutions are more prevalent in African American communities and powder prosecutions are associated to a greater extent with white and Hispanic communities,[13] the ratio has created a significant racial disparity in drug sentencing.

In short, cocaine sentencing is bedeviled by the confluence of irrational mandatory minimum sentences engrafted onto the more nuanced system of sentencing guidelines (which, itself, is largely driven by drug weight to the exclusion of other potentially relevant characteristics). The existing 100:1 disparity and the racial consequences of that disparity exacerbate the problems associated with drug weights and mandatory minimums, and result in crack sentences that are plagued by disparity, irrationality, unfairness, and the appearance of racial bias. It has therefore been suggested that such sentences may frustrate the goals of the Sentencing Reform Act, rather than advancing them.[14]

Question: As a District Court Judge in Washington, D.C., you've presided over a number of crack cocaine cases. Based on your experience, do you believe the 5- and 10-year mandatory minimum sentences set forth in the current federal crack cocaine laws capture major and serious drug kingpins? Please explain.

While the five and ten-year mandatory minimum penalties associated with crack cocaine may establish appropriate minimum sentences in cases involving kingpins, the drug weight thresholds associated with mandatory penalties for crack are low enough that they are over-inclusive, if the goal is to actually reach only drug kingpins or major traffickers. Individuals possessing five grams of crack (the weight of ten paper clips) presumably are not the "kingpins" envisioned by Congress when it passed the Anti-Drug Abuse Act of 1986,[15] yet these individuals are receiving five year federal prison sentences.

According to the Sentencing Commission's most recent data, in 2005, among sampled powder cocaine offenders, about 7.6% were importers or high-level suppliers (kingpins) and approximately 7.3% were street-level dealers.[16] On the

[12]*See* U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 19 (Mar. 17, 2002), *available at* http://www.usdoj.gov/olp/pdf/crack_powder2002.pdf.

[13]*See* U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 5, at 15-16 (noting that African Americans constitute 81.8% of federal crack offenders, but only 27% of federal powder cocaine offenders).

[14]*See id.*, at 8 ("[T]he Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.").

[15]Pub. L. 99–570, 100 Stat. 3207 (1986).

[16]U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 6, at 20 (fig. 2-5).

other hand, among sampled crack offenders, kingpins constituted only 1.8% of the sample, but street-level dealers constituted more than half (55.4%) of the sample.[17] In 2000, the percentage of street-level dealers was even higher: 66.5%.[18]

Furthermore, in many cases street-level dealers lack the ability to provide substantial assistance to prosecutors in exchange for recommended reductions in sentence; kingpins, on the other hand, typically possess extensive information about the structure of their drug trafficking organizations and its participants. Accordingly, as I noted in my oral testimony, offenders with greater culpability are often able to leverage this information in exchange for significantly reduced sentences, while low-level functionaries cannot. The perverse result is that, although they are far less culpable, street dealers and low-level functionaries may get prison sentences comparable (and even greater) in length to those received by high-level suppliers.

Question: As a federal judge, do you have any concern that: (1) federal courts cannot handle the workload that retroactivity may add; (2) those eligible for early release [may] ravage communities with violence and crime; or (3) those eligible for early release will not be able to take advantage of important reentry programs?

While the Criminal Law Committee of the Judicial Conference supported retroactive application of the crack guideline amendment, it definitely had concerns about the impact on the workload of the courts and probation officers. These were discussed by members of the Committee at some length. But the members of the Committee and the members of the Administrative Office of the United States Courts' Probation Chiefs Advisory Group were confident that the workload could be managed by the courts. While it was noted that nearly 20,000 federal offenders would be eligible for reduced sentences under the amended guideline, only a fraction of those (1,585) would be eligible for immediate release. Courts will therefore have some time to prepare and plan for the overwhelming majority of these cases. Already, a number of steps have been taken to mitigate the impact of the retroactivity decision on the workload of the courts.

Even before the Commission voted to approve retroactivity, members of the judiciary were engaged in contingency planning. Several probation chiefs and deputy chiefs from districts with large numbers of potential retroactivity cases met at the Administrative Office of the United States Courts on November 29, 2007. Also attending this planning meeting were officials from the U.S. Department of Justice, the Federal Bureau of Prisons, the U.S. Sentencing Commission, and federal defender services. Participants discussed a number of topics, including staffing issues, ways to document associated workload, and

[17] *Id.* at 21 (fig. 2-6).

[18] *Id.*

ways to optimize community resources, while focusing on triage—identifying offenders who would be eligible for immediate release under retroactivity and planning for their re-entry back into local communities. After the Sentencing Commission decided to make the amendment retroactive, two larger planning meetings provided a forum for probation staff, prosecutors, defenders, and judges to discuss develop local responses to retroactivity. These meetings took place in Charlotte, North Carolina on January 17-18, 2008, and in St. Louis, Missouri on January 24-25, 2008.

Working in coordination with the Sentencing Commission, the Criminal Law Committee developed and promulgated a model order that judges can use in § 3582 crack retroactivity cases, and has issued related guidance from the Bureau of Prisons to all judges. Television programs containing information about prison database systems and related case law have been aired, two topical websites have been developed for judiciary employees to exchange information, and information has been disseminated through various judiciary publications. The retroactive amendment became effective on March 3, 2008, and we are still in the early stages of implementation, but preliminary reports from the district courts suggest that the workload is manageable.

It is unlikely that offenders released pursuant to the Sentencing Commission's decision on retroactivity will "ravage communities with violence and crime," but there is no doubt that public safety considerations were important to the Criminal Law Committee in its consideration of these issues. The Sentencing Commission's analysis suggests that some of the offenders eligible for a reduced sentence may pose greater risks to the community than average offenders. While 54 percent of the general offender population fall into Criminal History Categories II through VI, the Commission's data shows that 78 percent of those eligible for release fall into these higher-risk categories. Similarly, while 16 percent of the general drug offender population possessed or used a weapon in connection with offense, the Commission's data shows that 35.6 percent of the eligible population did so.[19]

Despite the greater risks associated with the population eligible for relief under the retroactive application of the amendment, it is important to underscore that *no* offender is eligible for release without judicial approval. All retroactive application of the amendment does is to provide judges with discretion to determine whether to make a downward adjustment in offenders' sentences. 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

[19]*See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 39 (2006); U.S. SENTENCING COMM'N, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive* (Oct. 3, 2007), *available at* http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf.

conduct (e.g., institutional adjustment in prison). I am confident that my fellow judges will be deliberative and thoughtful in making individualized determinations of eligibility.

Judges and probation staff will work closely with the Federal Bureau of Prisons (BOP) to ensure that offenders have as much pre-release programming as possible, in order to increase the likelihood of successful re-entry. Already, judges have been notified that the BOP has requested a ten-day stay on release orders to give correctional facilities the time to, *inter alia*, work with probation staff in identifying appropriate re-entry initiatives. Probation officers will need time to work with the BOP and staff in the Residential Reentry Centers (RRCs) to identify and arrange for appropriate housing, employment, and transitional services. Some offenders who are eligible for immediate release under the retroactivity decision may not have enjoyed the full panoply of re-entry programming, but BOP and probation officials are cooperating to provide all the re-entry assistance they can. As courts move past the first cohort of defendants (those eligible for immediate release under retroactivity), prison officials should be able to count backwards from the new release date, thereby ensuring that retroactivity offenders receive full programming, enhancing the likelihood of successful re-entry.

In some situations, it may be necessary for probation officers to seek a modification of the conditions of supervised release already in place in the sentencing judgments, to include interim strategies such as halfway house placement or home confinement. This would avoid simply releasing offenders back on the street and would give officers more time to conduct a comprehensive assessment and ensure that any identified risks or needs are appropriately addressed before an offender is completely released from confinement. If a judge wished to shorten a prison sentence and simultaneously modify conditions of release to ensure public safety, a hearing with the defendant present is arguably required under Fed. R. Crim. P. 32.1(c). In many cases, however, offenders would presumably consent to such modifications. Moreover, Rule 32.1(c)(2)(B) does not require a hearing where "the relief sought is favorable to the person and does not extend the term of probation or of supervised release." In light of this language, it was the view of the Criminal Law Committee that no hearing would be required if a judge determined to shorten a term of imprisonment and substitute a less onerous condition of confinement in its place.

These remarks apply only to the retroactive application of the amendment to the sentencing guidelines. Neither the Criminal Law Committee nor the Judicial Conference has taken a position on whether a legislative reduction in crack penalties should be applied retroactively.

Question: What is at stake for our criminal justice system and principles of fundamental fairness if the Sentencing Commission's decision is not applied retroactively?

Since the retroactive application of the amendment has already become effective, this is now something of an academic question unless Congress intends to revisit the matter. It does seem as if, had retroactivity been congressionally blocked, skepticism about the fairness of the justice system would have increased. In both dining rooms and courtrooms, people would have argued that the amendment should have applied to offenders who were sentenced in the past as well as offenders will be sentenced in the future. It would have been argued that if the guideline undermined Congress' sentencing objectives, requiring amendment in prospective cases, then past errors also required rectifying. In all likelihood, there would have been unrest in BOP facilities. Furthermore, had the retroactive amendment been blocked, critics who have studied the racial dimensions of the 100:1 disparity might have noted that previous drug amendments, affecting white offenders, had been made retroactive and might have asked why, when confronted with an amendment that would provide relief to African Americans, a different decision was made.

**Responses to Questions from Senator Patrick Leahy**

Question: The Attorney General believed the amendment would result in the release of 1,600 violent gang members and dangerous drug offenders will be instantaneously and automatically set free to prey on hapless communities. Do you share the Attorney General's concerns?

As I noted in my written response to Senator Biden, *supra*, public safety considerations were very important to the Criminal Law Committee in its consideration of the retroactivity issue. For good reason. The Sentencing Commission's analysis suggests that some of the offenders eligible for a reduced sentence may pose greater risks to the community than average offenders. While 54 percent of the general offender population fall into Criminal History Categories II through VI, the Commission's data shows that 78 percent of those eligible for release fall into these higher-risk categories. Similarly, while 16 percent of the general drug offender population possessed or used a weapon in connection with offense, the Commission's data shows that 35.6 percent of the eligible population did so.[20]

Despite the risks associated with the population eligible for relief under the retroactive application of the amendment, it is important to underscore that *no* offender is eligible for release without judicial approval. No release will be automatic. All retroactive application of the amendment does is to provide judges with discretion to determine whether to make a downward adjustment in offenders' sentences. 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

[20] *See id.*

offender's post-sentencing conduct (e.g., institutional adjustment in prison). I am confident that my fellow judges will be deliberative and thoughtful in making individualized determinations of eligibility.

Judges and probation staff will work closely with the Federal Bureau of Prisons (BOP) to ensure that offenders have as much pre-release programming as possible, in order to increase the likelihood of successful re-entry. Already, judges have been notified that the BOP has requested a ten-day stay on release orders to give correctional facilities the time to, *inter alia*, work with probation staff in identifying appropriate re-entry initiatives. Probation officers will need time to work with the BOP and staff in the Residential Reentry Centers (RRCs) to identify and arrange for appropriate housing, employment, and transitional services. Some offenders who are eligible for immediate release under the retroactivity decision may not have enjoyed the full panoply of re-entry programming, but BOP and probation officials are cooperating to provide all the re-entry assistance they can. As courts move past the first cohort of defendants (those eligible for immediate release under retroactivity), prison officials should be able to count backwards from the new release date, thereby ensuring that retroactivity offenders receive full programming, enhancing the likelihood of successful re-entry.

In some situations, it may be necessary for probation officers to seek a modification of the conditions of supervised release already in place in the sentencing judgments, to include interim strategies such as halfway house placement or home confinement. This would avoid simply releasing offenders back on the street and would give officers more time to conduct a comprehensive assessment and ensure that any identified risks or needs are appropriately addressed before an offender is completely released from confinement. If a judge wished to shorten a prison sentence and simultaneously modify conditions of release to ensure public safety, a hearing with the defendant present is arguably required under Fed. R. Crim. P. 32.1(c). In many cases, however, offenders would presumably consent to such modifications.

Question: Given that the 100:1 crack/powder disparity has disproportionately impacted minority communities, are you concerned that the Justice Department's position on retroactivity will further undermine the public's willingness, particularly in minority communities, to cooperate with federal agents and prosecutors?

I do not know if the public will meaningfully link the Justice Department's opposition to retroactivity with particular investigations and prosecutions, but I do believe that existing disparities in crack and powder sentencing have undermined the public's confidence in the justice system in certain communities. If the public perception was that crack sentencing was riddled by even more inequities, then increased withdrawal of public cooperation is certainly possible.

As I noted in my written response to Senator Biden, *supra*, public skepticism

about the justice system has both abstract and practical consequences. In the abstract, the undermining of confidence in the justice system diminishes respect for the rule of law (since people come to believe that punishment depends not on one's conduct but upon one's color, class, or connections). Furthermore, because the rule of law is such an essential foundation of democratic government, cynicism about the justice system is engendered, causing citizens to lose faith in other social institutions. In more practical terms, if the public comes to view the justice system with suspicion, as instruments of unequal justice, then citizens may become reluctant to report crimes, refuse to serve as jurors or nullify suspect laws (as noted in my oral testimony),[21] or withhold critical cooperation from law enforcement officers. As a judge who is tough on crime, these are distressing results to me, since they can result in lawbreaking with impunity. I imagine that followed to its logical (but extreme) conclusion, a wholesale lack of public confidence in the justice system could lead to lawlessness and even vigilantism.

Question: You have long been a supporter of the Federal guidelines. As a Federal judge, are you concerned that the 100:1 crack powder disparity has had any impact on the credibility of the Guideline system as a whole?

It is a source of some concern for me. The federal sentencing guidelines are complex and require considerable sophistication to apply. The 2007 guidelines manual is more than 650 pages long, and features intricate tables and grids. The general public has a very limited understanding of the federal courts generally, and probably knows even less about the relationship of the 100:1 ratio and the guidelines. Many know only that crack is punished significantly more than powder – while in 2000 the average prison sentence for trafficking in powder cocaine was 74 months, the average sentence for trafficking in crack was 117 months.[22] And they also know that most of those sentenced for crack are African Americans.[23] Because they may not distinguish the guidelines from mandatory minimum penalties or the 100:1 ratio, some members of the public may view the guidelines with antipathy and mistrust.

Question: Do you agree [with the Attorney General's assertion that the court system would be over-burdened if retroactivity were to occur]? Is it not true that the Judicial Conference of the United States testify [sic] before the Commission in November 2007 that the courts would not be unduly burdened by such a decision?

I believe that the federal courts will be able to manage the increased workload associated with the retroactivity decision. I believe that the courts are doing so, already. As I noted in my written response to Senator Biden, *supra*, the Criminal Law Committee of the Judicial Conference had concerns about the impact on the

[21] *See also supra* note 9 (describing accounts of potential jurors that refuse to serve).

[22] *See* U.S. Department of Justice, *supra* note 12, at 21 (reporting sentence lengths).

[23] *See supra* note 13 and associated text (describing racial demographics of cocaine sentencing).

workload of the courts and probation officers. These were discussed by members of the Committee at some length. But the members of the Committee and the members of the Administrative Office of the United States Courts' Probation Chiefs Advisory Group were confident that the workload could be managed by the courts. For these reasons, the Criminal Law Committee supported retroactive application of the guideline amendment.

It was noted that nearly 20,000 federal offenders would be eligible for reduced sentences under the amended guideline, but only a fraction of those (1,585) would be eligible for immediate release. Courts will therefore have some time to prepare and plan for the overwhelming majority of these cases. Already, a number of steps have been taken to mitigate the impact of the retroactivity decision on the workload of the courts.

Even before the Commission voted to approve retroactivity, members of the judiciary were engaged in contingency planning. Several probation chiefs and deputy chiefs from districts with large numbers of potential retroactivity cases met at the Administrative Office of the United States Courts on November 29, 2007. Also attending this planning meeting were officials from the U.S. Department of Justice, the Federal Bureau of Prisons, the U.S. Sentencing Commission, and federal defender services. Participants discussed a number of topics, including staffing issues, ways to document associated workload, and ways to optimize community resources, while focusing on triage—identifying offenders who would be eligible for immediate release under retroactivity and planning for their re-entry back into local communities. After the Sentencing Commission decided to make the amendment retroactive, two larger planning meetings provided a forum for probation staff, prosecutors, defenders, and judges to discuss develop local responses to retroactivity. These meetings took place in Charlotte, North Carolina on January 17-18, 2008, and in St. Louis, Missouri on January 24-25, 2008.

Working in coordination with the Sentencing Commission, the Criminal Law Committee developed and promulgated a model order that judges can use in § 3582 crack retroactivity cases, and has issued related guidance from the Bureau of Prisons to all judges. Television programs containing information about prison database systems and related case law have been aired, two topical websites have been developed for judiciary employees to exchange information, and information has been disseminated through various judiciary publications. The retroactive amendment became effective on March 3, 2008, and we are still in the early stages of implementation, but preliminary reports from the district courts suggest that the workload is manageable.

**Responses to Questions from Senator Edward M. Kennedy**

Question: What would the retroactivity of cocaine laws mean to communities that have been negatively affected by the current law?

> Retroactivity will mean—and already means—the return of crack offenders to these communities. Often, these are individuals who have been incarcerated in federal prisons for long periods of time. Understandably, these communities will be confronted with challenges, for many of the offenders eligible for release under retroactivity have risk factors that are greater than those seen in typical federal drug offenders. As noted in my answer to Senator Biden's question, *supra*, the Sentencing Commission's analysis suggests that some of the offenders eligible for a reduced sentence may pose greater risks to the community than average offenders. While 54 percent of the general offender population fall into Criminal History Categories II through VI, the Commission's data shows that 78 percent of those eligible for release fall into these higher-risk categories. Similarly, while 16 percent of the general drug offender population possessed or used a weapon in connection with offense, the Commission's data shows that 35.6 percent of the eligible population did so.[24] But the probation officers who will be working with these offenders are dedicated professionals who have already started preparing for their release, and who are dedicated to facilitating successful re-entry. Affected communities may struggle with the challenges imposed by offenders predisposed to recidivism, but these same communities will enjoy the fruits of individuals who come home committed to turning their lives around. Finally, at a more abstract level, individuals in these communities, suspicious of a criminal justice system that for twenty years has seemed to selectively employ different sentencing standards for different categories of people, may regain confidence in the justice system.

Question: What is your response to those who claim that retroactivity will increase crime and harm communities?

> I would suggest to those individuals that I cannot rule out absolutely that retroactivity may very well impact crime rates, but I am more optimistic about the effects on communities, and believe that overall, the effect on communities could be positive. Research shows that any population released from long-term incarceration has an inflated recidivism rate. Among state populations, approximately two-thirds of those released from prison recidivate within three years,[25] and even among the federal BOP population, approximately 40% of those

[24] *See supra* note 19 (outlining risk demographics of eligible offenders).

[25] TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE U.S. (2002), *available at* http://www.ojp.gov/bjs/reentry/recidivism.htm (reporting that overall 67.5% of prisoners released in 1994 were rearrested within three years).

released recidivate within three years of their release from prison.[26] Again, as noted above, and as described in my answer to Senator Biden's question, *supra*, the individuals eligible for release under retroactivity appear to possess risk factors greater than those seen in average drug offenders. Therefore, the recidivism rate of re-offending may be at (or even above) this level. Of course, not all of those who will return to prison will go back because of new crimes; many will return because of technical violations while serving terms of supervised release (e.g., refusing to comply with the conditions imposed by the sentencing court).

But even if two-thirds of those released under retroactivity return to prison, one-third of those released will successfully re-enter their communities. Not only will this save the public considerable expense,[27] but it will allow those individuals to reintegrate into their families and neighborhoods. I have seen individuals, sobered by terms spent in prison and aided by dedicated probation officers committed to facilitating their successful re-entry, turn their lives around. I have seen real transformations: individuals released from prison that have made a difference in the lives of their family members, in the workplace, and in their communities.

Question: Have you continued to face situations [when actual and potential jurors expressed their belief to you that the criminal justice system operates unfairly]?

I have. The phenomenon of citizens who either will not serve on a jury or who have expressed doubt about their ability to dispassionately weigh the facts of a case involving crack cocaine is something that I have observed as a district judge.

Question: How much difference do you think this change in the sentencing laws will make in ending perceptions of unfairness in the criminal justice system?

The U.S. Sentencing Commission has described the amendment of the crack guideline and its retroactive application as a small, preliminary step in addressing the larger issue of federal cocaine sentencing policy. It has been the view of the Commission, and is the view of most judges, I think, that the larger solution is legislative in nature, and rightly resides with the Congress. In all likelihood, because the general public has only a limited understanding of how the federal sentencing guidelines operate, the retroactive application of the guideline amendment will probably have a limited impact on public perceptions. A larger, congressional, solution to the issue of crack-powder disparity, however, would probably go quite a long way in redressing public perceptions of unfairness.

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[26]MILES D. HARER, FEDERAL BUREAU OF PRISONS, RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987 2 (1994), *available at:* http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf.

[27]*See* Memorandum from Matthew G. Rowland, Deputy Assistant Director, Office of Probation and Pretrial Services, Administrative Office of the U.S. Courts, to Chief Probation Officers and Chief Pretrial Service Officers (May 9, 2007), *available at*: http://jnet.ao.dcn/img/assets/5723/pps010-07.pdf (noting that $24,443.08 per inmate per year to confine people in a BOP facility).

**Responses to Questions from Senator Russell D. Feingold**

Question: What types of considerations will judges take into account in determining whether to reduce a sentence that is currently being served?

> As described in my answer to Senator Biden's question, *supra*, it is important to underscore that under retroactive application of the guideline amendment for crack, *no* offender is eligible for release without judicial approval. All retroactive application of the amendment does is to provide judges with discretion to determine whether to make a downward adjustment in offenders' sentences. 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),[28] 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). I am confident that my fellow judges will be deliberative and thoughtful in making individualized determinations of eligibility.

Question: Why did the Judicial Conference conclude that [Attorney General Mukasey suggestion that requiring judges to evaluate retroactivity cases would place too great a burden on the judiciary] was not a persuasive argument against retroactive application of the adjustment?

> As described in my answer to Senator Biden's question, *supra*, while the Criminal Law Committee of the Judicial Conference supported retroactive application of the crack guideline amendment, it definitely had concerns about the impact on the workload of the courts and probation officers. These were discussed by members of the Committee at some length. But the members of the Committee and the members of the Administrative Office of the United States Courts' Probation Chiefs Advisory Group were confident that the workload could be managed by the courts. While it was noted that nearly 20,000 federal offenders would be eligible for reduced sentences under the amended guideline, only a fraction of those (1,585) would be eligible for immediate release. Courts will have some time to prepare and plan for the overwhelming majority of these cases. Already, a number of steps have been taken to mitigate the impact of the retroactivity decision on the workload of the courts.
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> Even before the Commission voted to approve retroactivity, members of the judiciary were engaged in contingency planning. Several probation chiefs and deputy chiefs from districts with large numbers of potential retroactivity cases met at the Administrative Office of the United States Courts on November 29, 2007. Also attending this planning meeting were officials from the U.S. Department of Justice, the Federal Bureau of Prisons, the U.S. Sentencing Commission, and federal defender services. Participants discussed a number of topics, including staffing issues, ways to document associated workload, and

[28]For some of the § 3553(a) considerations (goals of punishment), *see supra* note 1.

ways to optimize community resources, while focusing on triage—identifying offenders who would be eligible for immediate release under retroactivity and planning for their re-entry back into local communities. After the Sentencing Commission decided to make the amendment retroactive, two larger planning meetings provided a forum for probation staff, prosecutors, defenders, and judges to discuss develop local responses to retroactivity. These meetings took place in Charlotte, North Carolina on January 17-18, 2008, and in St. Louis, Missouri on January 24-25, 2008.

Working in coordination with the Sentencing Commission, the Criminal Law Committee developed and promulgated a model order that judges can use in § 3582 crack retroactivity cases, and has issued related guidance from the Bureau of Prisons to all judges. Television programs containing information about prison database systems and related case law have been aired, two topical websites have been developed for judiciary employees to exchange information, and information has been disseminated through various judiciary publications. The retroactive amendment became effective on March 3, 2008, and we are still in the early stages of implementation, but preliminary reports from the district courts suggest that the workload is manageable.

**Responses to Questions from Senator Tom Coburn**

Question: Are there any [drug rehabilitation] grant programs with similar purposes [to those outlined in sections 6 and 7 of Senator Biden's bill] that currently exist? If so, are additional programs, such as the ones in the Biden bill, necessary to curb drug dealing, addiction and ensure those released from prison do not return to their habits?

It is my understanding that there are some grant programs available to rehabilitate people with drug addiction. The Department of Health and Human Service's Substance Abuse and Mental Health Services Administration (SAMHSA) makes grants available to state and local agencies, much like sections six and seven of Senator Biden's bill would, although there are a limited number of these grants available. I cannot say definitively whether or not existing grants satisfy existing needs, but my perception is that they do not.

In the federal system, under 18 U.S.C. § 3583, offenders emerging from prison typically are required to complete a term of supervised release. Judges impose standard conditions including the prohibition against any unlawful use of a controlled substance and typically mandate drug testing.[29] Individuals who have substance abuse problems may be required to undergo medical, psychiatric, or

[29]*See* 18 U.S.C. § 3583(d)(2007)(describing drug testing requirements as mandatory conditions of supervised release).

psychological treatment for their dependency.[30] Of the roughly 165,000 offenders on supervised release in fiscal year 2007, approximately 30,000 received drug treatment in the federal system.

Question: Is there a way to ensure that the high-level drug dealers and traffickers, rather than the small-time dealers, are the targets of longer prison sentences for both crack and powder through means other than quantity-based sentencing in the Guidelines? For example, could the Guidelines enforce some combination of drug quantity and offender function (i.e. past criminal history, reasons for dealing [such as to feed an addiction rather than establishing a distribution ring], or past drug-specific crimes) to establish a 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. As described in my answer to Senator Biden's question, *supra*, defendants who use violence,[31] firearms,[32] or who play leadership roles in a conspiracy[33] 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.[34] For example, U.S.S.G. §3B1.1 increases the offense level, and exposure to imprisonment, for defendants who have had an aggravating role in the commission of the offense, while §3B1.2 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,[35] and defendants who are eligible for a mitigating role reduction may have

[30] *See* 18 U.S.C. § 3563(b)(9)(2007)(describing substance abuse dependency treatment as a discretionary condition of supervised release).

[31] *See, e.g.,* 18 U.S.C. § 924(c)(1)(A)(i)(2007)(establishing a mandatory five year term of imprisonment for using or carrying a firearm in relation to any drug trafficking crime); 18 U.S.C. § 924(c)(1)(A)(ii)(2007)(establishing a mandatory seven year term of imprisonment for brandishing a firearm in relation to any drug trafficking crime); 18 U.S.C. § 924(c)(1)(A)(iii)(2007)(establishing a mandatory ten year term of imprisonment for discharging a firearm in relation to any drug trafficking crime); 18 U.S.C. § 924(c)(1)(C)(2007)(establishing a mandatory twenty-five year term of imprisonment for all second or subsequent convictions under the subsection).

[32] *See, e.g., id.* (establishing enhanced penalties for the use of firearms in drug trafficking offenses); U.S.S.G. §2D1.1(b)(1) (enhancing base offense level by two levels when dangerous weapons are possessed).

[33] *See, e.g.,* U.S.S.G. §3B1.1 (enhancing base offense level by four levels when defendant was an organizer or leader of a criminal activity involving five or more participants).

[34] *See supra* note 1 (outlining the goals of punishment as articulated in § 3553(a)).

[35] These factors are also listed in 18 U.S.C. § 3553(f)(1)-(5)(2007) and include: (1) no more than one criminal history point, (2) no violence or weapons in connection with the offense, (3) no death or serious bodily injury, (4) not an organizer, leader, manager or supervisor, and (5) provided a truthful statement to the government concerning the offense.

their offense levels lowered by an additional two to four levels per §2D1.1(a)(3).

There are certain guideline provisions that will result in higher sentences for high-level drug dealers if the defendant is convicted of a particular offense. For example, U.S.S.G. §2D1.5 calls for an offense level of not less than 38 if the defendant is convicted of participated in a continuing criminal enterprise, as set forth in 21 U.S.C. § 848. In addition, the guidelines authorize upward departures for offenses that involve "unusually high purity" under the theory that controlled substances become diluted and combined with other substances as they pass down the chain of distribution.[36]

Within this guideline framework, judges must also consider the statutory purposes of sentencing, which include the need to provide just punishment, afford adequate deterrence, protect the public, and provide necessary correctional treatment.[37] As settled in *Booker*, judges are able to weigh an offender's role in the offense, criminal history, and relative culpability against the offense level suggested by a quantity-based approach.

Question: According to research by the Sentencing Project, drug users generally purchase drugs from sellers of the same racial or ethnic background (see *Federal Crack Cocaine Sentencing* paper). Given this fact, isn't the racial disparity in sentencing more easily explained by the prevalence of minority drug kingpins selling crack to minority buyers, rather than some innate racial discrimination in the sentencing structure? If so, wouldn't making sentences harsher for those selling and distributing crack, such as the ratios set forth in Senator Sessions' bill, make more sense since it would reduce the number of distributors and, as a result, decrease the number of minority offenders?

The approach reflected in Senator Sessions' bill, the Drug Sentencing Reform Act of 2007,[38] is consistent with the recommendation of the Judicial Conference.[39] It does so by reducing somewhat the penalties for crack and by increasing the penalties for powder cocaine. To the extent this approach would reduce the number of crack offenders impacted by mandatory minimum sentences, it would be consistent with the Conference's longstanding opposition to mandatory minimums,[40] but to the extent it exposed greater numbers of powder cocaine offenders to mandatory sentences, it would be inconsistent.

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[36]*See* U.S.S.G. §2D1.1, comment. (n. 9), "[T]he fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs."

[37]*See supra* note 1.

[38]S. 1383, 110th Cong. (2007).

[39]*See* JCUS-SEP 06, p. 18 (recommending the reduction of the sentencing disparity between crack and powder cocaine).

[40]*See supra* note 10 (describing Judicial Conference opposition to mandatory minimum sentences).

As a sentencing judge, and given my background, I certainly approve of punishing drug kingpins. However it is not clear to me whether increasing penalties for powder-form cocaine, as contemplated in section 101 of Senator Sessions' bill, would ultimately reduce the number of minority offenders. While buyers and sellers may typically belong to the same race, at some point in the cocaine distribution, interracial transactions are occurring. Invariably, crack cocaine is derived from powder cocaine. Sentencing Commission research indicates that powder cocaine has significant international dimensions, reflected in the fact that almost 40% (39.4%) of powder offenders in 2006 were non-citizens, and that more than half of those sentenced for powder offenses were Hispanic.[41] Crack offending, on the other hand, "almost exclusively is produced and trafficked domestically."[42] In 2006, 96.4% of crack offenders were U.S. citizens, and 81.8% of crack offenders were African American.[43] As long as powder cocaine (which would still be punished less severely than crack under the Sessions bill) reaches United States cities, I suspect that it would be produced and trafficked much as it is today. Thus, while there are many aspects of the Sessions bill that the Judicial Conference would support, and that I, as a sentencing judge, personally favor, I don't see an obvious mechanism by which the bill would ameliorate the racial impact of crack on African American neighborhoods.

[41]U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 6, at 16, tbl. 2-1.

[42]U.S. SENTENCING COMM'N, 2002 SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 62 (May 2002).

[43]U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 6, at 16, tbl. 2-1.

SUBMISSIONS FOR THE RECORD


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**Testimony of Caroline Fredrickson, Director and Jesselyn McCurdy, Legislative Counsel of the American Civil Liberties Union Washington Legislative Office for the Subcommittee on Crime and Drugs of the Senate Committee on the Judiciary on "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity" February 12, 2008**

The American Civil Liberties Union (ACLU) would like to thank the Subcommittee on Crime and Drugs of the Senate Committee on the Judiciary for the opportunity to submit testimony for this hearing on "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity." The ACLU is a nonpartisan organization with hundreds of thousands of activists and members and with 53 affiliates nationwide. Our mission is to protect the Constitution and particularly the Bill of Rights. Thus, the disparity that exists in federal law between crack and powder cocaine sentencing continues to concern our organization due to the implications of this policy on due process and equal protection rights of all people. Equally important to our core mission are the rights of freedom of association and freedom from disproportionate punishment, which are also at risk under this sentencing regime.

For many years, the ACLU has been deeply involved in advocacy regarding race and drug policy issues. The ACLU assisted in convening the first national symposium in 1993 that examined the disparity in sentencing between crack and powder cocaine, which was entitled "Racial Bias in Cocaine Laws." Fifteen years ago the conclusion of representatives from the civil rights, criminal justice and religious organizations that participated in the symposium was that the mandatory minimum penalties for crack cocaine are not medically, scientifically or socially justifiable and result in a racially biased national drug policy. In 2002 and 2007, we urged the United States Sentencing Commission (USSC) to support amendments to federal law that would equalize crack and powder cocaine sentences at the current level of sentences for powder cocaine. In 2008, we urge the United States Senate to enact S.1711, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 which would eliminate the unjust and discriminatory 100 to 1 disparity between crack and powder cocaine sentences in federal law.

**Background and History**

In June 1986, the country was shocked by the death of University of Maryland basketball star Len Bias in the midst of crack cocaine's emergence in the drug culture. Three days after being drafted by the Boston Celtics, Bias, who was African American, died of a drug and alcohol overdose. Many in the media and public assumed that Bias died of a crack cocaine overdose. Congress quickly passed the 1986 Anti-Drug Abuse Act motivated by Bias' death and in large part by the notion that the infiltration of crack cocaine was devastating America's inner cities. Although it was later revealed that Bias actually died of a powder cocaine overdose, by the time the truth about Bias' death was discovered, Congress had already passed the harsh discriminatory crack cocaine law.

Congress passed a number of mandatory minimum penalties primarily aimed at drugs and violent crime between 1984 and1990. The most notorious mandatory minimum law enacted by Congress was the penalty relating to crack cocaine, passed as a part of the Anti-Drug Abuse Act of 1986. The little legislative history that exists suggests that members of Congress believed that crack was more addictive than powder cocaine, that it caused crime, that it caused psychosis and death, that young people were particularly prone to becoming addicted to it, and that crack's low cost and ease of manufacture would lead to even more widespread use of it. Acting upon these beliefs, Congress decided to punish use of crack more severely than use of powder cocaine.

On October 27, 1986, the Anti-Drug Abuse Act of 1986 was signed into law, establishing the mandatory minimum sentences for federal drug trafficking crimes and creating a 100 to 1 sentencing disparity between powder and crack cocaine. Members of Congress intended the triggering amounts

of crack to punish "major" and "serious" drug traffickers. However, the Act provided that individuals convicted of crimes involving 500 grams of powder cocaine or just five (5) grams of crack (the weight of two pennies) would be sentenced to at least five (5) years imprisonment, without regard to any mitigating factors. The Act also provided that those individuals convicted of crimes involving 5000 grams of powder cocaine and 50 grams of crack (the weight of a candy bar) be sentenced to 10 years imprisonment.

Two years later, drug-related crimes were still on the rise. In response, Congress intensified its war against crack cocaine by passing the Omnibus Anti-Drug Abuse Act of 1988. The 1988 Act created a five (5) year mandatory minimum and 20-year maximum sentence for simple possession of 5 grams or more of crack cocaine. The maximum penalty for simple possession of any amount of powder cocaine or any other drug remained at no more than 1 year in prison.

**The 100 to 1 Disparity in Federal Cocaine Sentencing Has a Racially Discriminatory Impact and has had a Devastating Impact on Communities of Color**

Data on the racial disparity in the application of mandatory minimum sentences for crack cocaine is particularly disturbing. African Americans comprise the vast majority of those convicted of crack cocaine offenses, while the majority of those convicted for powder cocaine offenses are Hispanic. This is true, despite the fact that whites and Hispanics form the majority of crack users. For example, in 2006, whites constituted 8.8% and African Americans constituted slightly more than 81% of the defendants sentenced under the harsh federal crack cocaine laws, while more than 66% of crack cocaine users in the United States are white or Hispanic. Due in large part to the sentencing disparity based on the form of the drug, African Americans serve substantially more time in prison for drug offenses than do whites. The average sentence for a crack cocaine offense in 2006, which was 122 months, was slightly more than 3 years longer than the average sentence of 85 months for an offense involving the powder form of the drug. Also due in large part to mandatory minimum sentences for drug offenses, from 1994 to 2003, the difference between the average time African American offenders served in prison increased by 62%, compared to an increase of 17% for white drug offenders. African Americans now serve virtually as much time in prison for a drug offense at 58.7 months, as whites do for a violent offense at 61.7 months. The fact that African American defendants received the mandatory sentences more often than white defendants, who were eligible for a mandatory minimum sentence, further supports the racially discriminatory impact of mandatory minimum penalties.

For more than 20 years, federal and state drug laws and policies have also had a devastating impact on women. In 2003, 58% of all women in federal prison were convicted of drug offenses, compared to 48% of men. The growing number of women who are incarcerated disproportionately impacts African American and Hispanic women. African American women's incarceration rates for all crimes, largely driven by drug convictions, increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period. Sentencing policies, particularly the mandatory minimum for low-level crack offenses, subject women who are low-level participants to the same or harsher sentences as the major dealers in a drug organization.

The collateral consequences of the nation's drug policies, racially targeted prosecutions, mandatory minimums, and crack sentencing disparities have had a devastating effect on African American men, women and families. Recent data indicates that African Americans make up only 15% of the country's drug users, yet they comprise 37% of those arrested for drug violations, 59% of those

convicted, and 74% of those sentenced to prison for a drug offense. In 1986, before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites. Four years later, the average federal drug sentence for African Americans was 49% higher. As law enforcement focused its efforts on crack offenses, especially those committed by African Americans, a dramatic shift occurred in the overall incarceration trends for African Americans, relative to the rest of the nation, transforming federal prisons into institutions increasingly dedicated to the African American community.

Mandatory minimums not only contribute to these disproportionately high incarceration rates, but also separate fathers from families, separate mothers with sentences for minor possession crimes from their children, leave children behind in the child welfare system, create massive disfranchisement of those with felony convictions, and prohibit previously incarcerated people from receiving social services such as welfare, food stamps and access to public housing. For example, in 2000 there were approximately 791,600 African American men in prisons and jails. That same year, there were only 603,032 African American men enrolled in higher education. The fact that there are more African American men under the jurisdiction of the penal system than in college has led scholars to conclude that our crime policies are a major contributor to the disruption of the African American family.

One of every 14 African American children has a parent locked up in prison or jail today, and African American children are nine (9) times more likely to have a parent incarcerated than white children. Moreover, approximately 1.4 million African American males – 13% of all adult African American men – are disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is seven (7) times the national average. In addition, as a result of federal welfare legislation in 1996, there is a lifetime prohibition on the receipt of welfare for anyone convicted of a drug felony, unless a state chooses to opt out of this provision. The effect of mandatory minimums for a felony conviction, especially in the instance of simple possession or for very low-level involvement with crack cocaine, can be devastating, not just for the accused, but also for that person's entire family.

**Facts Dispel the Myths Associated with Crack Cocaine**

The rapid increase in the use of crack between 1984 and 1986 created many myths about the effects of the drug in popular culture. These myths were often used to justify treating crack cocaine differently from powder cocaine under federal law. For example, crack was said to cause especially violent behavior, destroy the maternal instinct leading to the abandonment of children, be a unique danger to developing fetuses, and cause a generation of so-called "crack babies" that would plague the nation's cities for their lifetimes. It was also thought to be so much more addictive than powder cocaine that it was "instantly" addicting.

In the more than 20 years since the enactment of the 1986 law, many of the myths surrounding crack cocaine have been dispelled, as it has become clear that there is no scientific or penological justification for the 100 to 1 ratio. In 1996, a study published by the Journal of American Medical Association (JAMA) found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack.

For instance, crack was thought to be a unique danger to developing fetuses and destroy the maternal instinct causing children to be abandoned by their mothers. During the Sentencing Commission hearings that were held prior to the release of the commission's 2002 report on Cocaine

and Federal Sentencing Policy, several witnesses testified to the fact that the so-called myth of "crack babies" who were thought to suffer from more pronounced developmental difficulties by their in-utero exposure to the drug was not based in science. Dr. Ira J. Chasnoff, President of the Children's Research Triangle, testified before the Sentencing Commission that since the composition and effects of crack and powder cocaine are the same on the mother, the changes in the fetal brain are the same whether the mother used crack cocaine or powder cocaine.

In addition, Dr. Deborah Frank, Professor of Pediatrics at Boston University School of Medicine, in her 10-year study of the developmental and behavioral outcomes of children exposed to powder and crack cocaine in the womb, found that "the biologic thumbprints of exposure to these substances" are identical. Dr. Frank added that small but identifiable effects of prenatal exposure to powder or crack cocaine are prevalent in certain newborns' development, but they are very similar to the effects associated with prenatal tobacco exposure, such as low birth weight, height or head circumference.

Crack was also said to cause particularly violent behavior in those who use the drug. However, in the 2002 report on Cocaine and Federal Sentencing Policy, the Commission includes data that indicates that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2005: 1) 57.3% of overall crack offenses did not involve the use of a weapon by any participant in the crime; 2) 74.5% of crack offenders had no personal weapons involvement; and 3) only 2.9% of crack offenders actively used a weapon. Most violence associated with crack results from the nature of the illegal market for the drug and is similar to violence associated with trafficking of other drugs.

Another of the pervasive myths about crack was that it was thought to be so much more addictive than powder cocaine that it was "instantly" addicting. Crack and powder cocaine are basically the same drug, prepared differently. The 1996 JAMA study found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack. The study also concluded that the propensity for dependence varied by the method of ingestion, amount used and frequency, not by the form of the drug. Smoking crack or injecting powder cocaine bring about the most intense effects of cocaine. Regardless of whether a person smokes crack or injects powder cocaine, each form of the drug can be addictive. The study also indicated that people who are incarcerated for the sale or possession of cocaine, whether powder or crack, are better served by drug treatment than imprisonment.

**Federal Cocaine Sentencing Should Reflect the Original Legislative Intent of Congress and Focus on High-Level Drug Traffickers**

Indeed, if the message Congress wanted to send by enacting mandatory minimums was that the Department of Justice should be more focused on high-level cocaine traffickers, Congress missed the mark. Instead of targeting large-scale traffickers in order to cut off the supply of drugs coming into the country, the law established low-level drug quantities to trigger lengthy mandatory minimum prison terms. The USSC's 2007 report states that 61.5% of crack defendants have low-level involvement in drug activity, such as street level dealers, couriers, or lookouts.

Harsh mandatory minimum sentences for crack cocaine have not stemmed the trafficking of cocaine into the United States, but have instead caused an increase in the purity of the drug and the

risk it poses to the health of users. The purity of drugs affects the price and supply of drugs that are imported into the country. The Office of National Drug Control Policy below best explains how purity and price are related to reducing the supply of drugs.

> "The policies and programs of the *National Drug Control Strategy* are guided by the fundamental insight that the illegal drug trade is a market, and both users and traffickers are affected by market dynamics. By disrupting this market, the US Government seeks to undermine the ability of drug suppliers to meet, expand, and profit from drug demand. When drug supply does not fully meet drug demand, changes in drug price and purity support prevention efforts by making initiation to drug use more difficult. They also contribute to treatment efforts by eroding the abilities of users to sustain their habits." National Drug Control Strategy, Office of National Drug Control Policy, The White House, February 2006, page 17.

One indication that the National Drug Control Strategy has not made progress in cutting off the supply of drugs coming into this country is the fact that the purity of cocaine has increased, but the price of the drug has declined in recent years. In the context of a business model, declining prices and higher quality products are what one would commonly expect from most legitimate products (i.e. televisions, computers and cell phones), but not from illegal cocaine trade. According to ONDCP, for cocaine from 1981 to 1996 the retail price declined dramatically and then rose slightly through 2000. However, the purity or quality of cocaine sold on the streets is twice that of the early 1980s, although somewhat lower than the late 1980s. As a result there is more cocaine available on the street at a lower price. This is a clear indication that this country's drug control policy has not properly focused on prosecuting high-level traffickers in order to reduce the flow or drugs coming into the country.

In the 1995 Commission report on Cocaine and Federal Sentencing Policy, the Drug Enforcement Agency (DEA) explained that powder cocaine is typically imported into the United States in shipments "exceeding 25 kilograms and at times reaching thousands of kilograms." These shipments are generally distributed to various port cities across the country. In 2007, the USSC found that the median drug quantity for powder offenders is 6,000 grams versus 51.0 grams for crack cocaine offenders. Even though the DEA recognizes that importers ship well over 25 kilograms at a time into the country, the discussion about what constitutes a high-level crack cocaine trafficker should at the very least start at the median level of approximately 6000 grams of powder cocaine.

**Increasing Support in Congress and by the United States Sentencing Commission for Changing the 100 to 1 Crack Cocaine Disparity**

Several members of 110th Congress have introduced legislation addressing the 100 to 1 disparity between federal crack and powder cocaine sentences. S.1711, introduced by Senator Joseph Biden (D-DE), would eliminate the current disparity in federal sentences between crack and powder cocaine offenses. The ACLU supports this legislation because many of the myths associated with determining the 100 to 1 ratio have been proven wrong by recent data. Numerous scientific and medical experts have determined that the pharmacological effects of crack cocaine are no more harmful than powder cocaine. The effect of cocaine on users is the same regardless of form. Thus, federal law should not make a distinction between sentences for selling or possession of the two drugs and equalizing the disparity is the only fair way to address the 100 to 1 ratio.

Senators Hatch (R-UT) and Kennedy (D-MA) and Senator Sessions (R-AL) have also introduced bills that would reduce the federal crack cocaine disparity from 100 to 1 to 20 to 1. Senators Hatch and Kennedy would increase the amount of crack cocaine that would trigger a five-year sentence to 25 grams and the amount that would trigger a ten-year sentence to 250 grams. Senator Sessions' bill would increase the amount of crack cocaine that would subject a person to the five-year mandatory minimum sentence to 20 grams, but decrease the amount of powder cocaine that would result in a five-year sentence to 400 grams. While we acknowledge the efforts of Senators Hatch, Kennedy and Sessions to reduce the federal crack cocaine disparity, the ACLU supports eliminating the 100 to 1 disparity entirely because there is no justification for treating the drugs differently under the law.

In the House, H.R.4545, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 was introduced by Representatives Sheila Jackson-Lee (D-TX) and Christopher Shays (R-CT). This legislation is the companion bill to Senator Biden's S.1711 and would also eliminate the current disparity in federal sentences between crack and powder cocaine offenses. The ACLU supports H.R.4545 for the same reasons we endorsed S.1711.

The ACLU also commends Representatives Charles Rangel (D-NY) and Bobby Scott (D-VA) for their long-standing efforts to address the federal crack cocaine disparity. Representative Rangel has introduced H.R.460, the Crack Equitable Sentencing Act of 2007 which would also eliminate the federal crack and powder cocaine disparity. Representative Bobby Scott has introduced H.R.5035, Fairness in Cocaine Sentencing Act of 2008 which would eliminate the mandatory minimum sentences for both crack and powder cocaine offenses on the federal level, as well as provide funding for federal and state drug courts.

In addition, Representative Roscoe Bartlett (R-MD) has introduced H.R.79, the Powder-Crack Cocaine Penalty Equalization Act of 2007 legislation that would equalize the trigger quantities of crack and powder cocaine at the current five (5) gram level of crack. The ACLU opposes any measures that would lower the amount of powder cocaine required to trigger a mandatory minimum. Powder cocaine sentences are already severe and increasing the number of people incarcerated for possessing small amounts of cocaine is not the answer to the problem. Additionally, any measures that decrease the amount of powder cocaine would disproportionately impact minority communities, particularly Hispanic communities, because of the disparate prosecution of powder cocaine offenses. In 2006, 14.3% of all powder cocaine defendants were white, 27% were black and 57.5% were Hispanics. The mandatory sentences for crack cocaine and the disparity with powder cocaine sentences have created a legacy that must come to an end.

In April 2007, the United States Sentencing Commission (USSC) promulgated amendments to the Federal Sentencing Guidelines that make them more consistent with the statutory mandatory minimums. This guideline amendment became effective November 1, 2007. On December 11, 2007, in a 7-0 unanimous decision, the USSC decided to apply the guideline amendment changes retroactively. This will result in approximately 19,500 prisoners who are serving sentences longer than the five- and ten-year mandatory minimums, as a result of the sentencing guidelines, to be eligible for the sentence they should have received in accordance with the law.

However, even with all these recent developments it is important to remember that the USSC's guideline amendments are only a small step forward in the efforts to reform the federal crack

cocaine law. These guideline changes will not eliminate or even significantly alleviate the very long mandatory minimum sentences that many people are serving for crack cocaine offenses.

**Conclusion**

October 2006 marked the twentieth anniversary of the enactment of 1986 Anti-Drug Abuse Act. In the more than twenty years since its passage, many of the myths surrounding crack cocaine have been dispelled, as it has become clear that there is no scientific or penological justification for the 100 to 1 sentencing disparity ratio. This sentencing disparity has resulted in unwarranted disparities based on race. Nationwide, statistics compiled by the USSC reveal that African Americans are more likely to be convicted of crack cocaine offenses, while Hispanics are more likely to be convicted of powder cocaine offenses. In addition, many of the assumptions used in determining the 100 to1 ratio have been proven wrong by recent data. Scientific and medical experts have determined that in terms of pharmacological effects, crack cocaine is no more harmful than powder cocaine – the effects on users is the same regardless of form. Finally, Congress made it explicitly clear that in passing the current mandatory minimum penalties for crack cocaine, it intended to target "serious" and "major" drug traffickers. The opposite has proved true: mandatory penalties for crack cocaine offenses apply most often to offenders who are low-level participants in the drug trade.

Congress must act in order to eliminate the statutory 100 to 1 disparity between crack and powder cocaine. For these reasons, the ACLU urges Congress to enact S.1711/H.R. 4545, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 in order to end this 20-year travesty of justice.

Thank you for taking our views into consideration.

WASHINGTON
LEGISLATIVE OFFICE

February 4, 2008

Dear Senator:

**Re: ACLU Urges Senators to Support S. 1711, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007**

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ANTHONY D. ROMERO
*EXECUTIVE DIRECTOR*

RICHARD ZACKS
*TREASURER*

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nationwide, we urge you to co-sponsor and support S.1711, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 which would eliminate the unjust and discriminatory 100 to 1 disparity between crack and powder cocaine sentences in federal law.

Currently, the federal crack cocaine law requires that if a person gets caught distributing or possessing 5 grams of crack cocaine, he or she is subject to a five-year mandatory minimum sentence – the same sentence that person would face for distributing 500 grams of powder cocaine. A person convicted of distributing 50 grams of crack cocaine is subject to a ten-year mandatory minimum. It takes 5,000 grams of powder cocaine to receive the same ten-year mandatory sentence. This is often referred to as the federal 100 to 1 disparity between crack and powder cocaine.

S.1711, introduced by Senator Joseph Biden (D-DE) would eliminate the current disparity in federal sentences between crack and powder cocaine offenses. The ACLU supports this legislation because many of the myths associated with determining the 100 to 1 ratio have been proven wrong by recent data. Numerous scientific and medical experts have determined that the pharmacological effects of crack cocaine are no more harmful than powder cocaine. The effect of cocaine on users is the same regardless of form. Thus, federal law should not make a distinction between sentences for selling or possession of the two drugs and equalizing the disparity is the only fair way to address the 100 to 1 ratio.

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However, even with all these very exciting developments it is important to remember that the USSC's guideline amendments are only a small step forward in the efforts to reform the federal crack cocaine law. **These guideline changes will not eliminate or even significantly alleviate the very long mandatory minimum sentences that many people are serving for crack cocaine offenses. Congress still must act in order to eliminate the statutory 100 to 1 disparity between crack and powder cocaine. The ACLU strongly urges you to co-sponsor and support the passage of S. 1711 in order to end this 20-year travesty of justice.** If you have any question, please feel free to contact Jesselyn McCurdy, Legislative Counsel at jmccurdy@dcaclu.org or (202) 675-2314.

Sincerely,

Caroline Fredrickson
Director

Jesselyn McCurdy
Legislative Counsel

02/04/2008 11:20AM

NCLR
NATIONAL COUNCIL OF LA RAZA

**Testimony on**

**Federal Cocaine Sentencing Laws:**
**Reforming the 100-to-1 Crack/Powder Disparity**

**Submitted by:**

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**Director, Civil Rights and Criminal Justice Policy**

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**Before the:**

**United States Senate**
**Judiciary Subcommittee on Crime and Drugs**

**February 12, 2008**

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## I. INTRODUCTION

Chairman Biden, Ranking Member Graham, and the other members of the Senate Judiciary Subcommittee on Crime and Drugs, on behalf of the National Council of La Raza (NCLR), I thank you for holding this hearing – "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity," – on an issue of concern to the Latino[1] community in the United States. NCLR is the largest national Latino civil rights and advocacy organization in the U.S. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in six key areas – wealth building, civil rights and criminal justice, immigration, education, civic engagement, and health. In addition, it provides capacity-building assistance to its Affiliates who work at the state and local level to advance opportunities for individuals and families.

I appreciate the opportunity to submit testimony in support of reforming the drug sentencing guidelines in the United States, particularly in light of the December 10, 2007 Supreme Court decision *Kimbrough v. United States* which allows federal judges to depart downward from the federal sentencing guidelines for crack cocaine sentences. First, this statement begins with a brief overview of NCLR's work on criminal justice issues. Second, I will highlight the disparate impact of existing drug laws on the Latino community. Finally, my testimony concludes with recommendations to promote drug sentencing policies and practices that are equitable for all Americans.

## II. BACKGROUND

### A. NCLR's Work on Criminal Justice Issues

Over the past decade, numerous reports from credible sources have documented severe racial and ethnic disparities in the criminal justice system. Many of those reports now include at least some Latino data, which almost uniformly substantiate patterns of discrimination against Hispanics at every stage of the system. As more evidence of such disparities is published, and as more Hispanic families are affected by growing incarceration rates, there appears to be greater Latino grassroots support for sentencing reform proposals to address such disparities. In response, in August 2000, the Executive Committee of the Board of Directors of the National Council of La Raza authorized the establishment of a new criminal justice policy project, charged with the task of working to reduce disparities in the criminal justice system. As a result, over the last eight years NCLR has substantially increased its work on criminal and juvenile justice reform issues, including:

- Publishing a number of reports specific to Latinos in the justice system:
  - 1999, *The Mainstreaming of Hate,* a major report on hate crimes, racial profiling, and law enforcement abuse

[1] The terms "Latino" and "Hispanic" are used interchangeably by the U.S. Census Bureau and throughout this document to identify persons of Mexican, Puerto Rican, Cuban, Central and South American, Dominican, and Spanish descent; they may be of any race.

- 2000, contributed to the production of *Justice on Trial*, an important Leadership Conference on Civil Rights (LCCR) report on racial and ethnic disparities in the criminal justice system
- 2002, *Latinos in the Federal Criminal Justice System*, a statistical brief documenting the status of Latinos in the federal criminal justice system
- 2002, Testimony on *Drug Sentencing and its Effects on the Latino Community*, before the U.S. Sentencing Commission
- 2003, *Latinos and the Texas Criminal Justice System*, a statistical brief documenting the status of Latinos in the Texas criminal justice system
- 2004, *Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System*, the first book ever to examine the factors that contribute to the overrepresentation of Latinos in the criminal justice system
- 2004, *District of Columbia Responses to Youth Violence: Impact on the Latino Community*, a major report that documents the possible negative effects that proposed policies would have on Latino children and families
- 2005, *They All Come Home: Breaking the Cycle Between Prison and the Community*, a report which discusses programs and services designed to respond to the prisoner reentry crisis, offering strategies to successfully reintegrate former inmates into the community
- 2006, Testimony on the *Disparate Impact of Federal Mandatory Minimums on Minority Communities in the United States*, submitted to the Inter-American Commission on Human Rights
- 2006, Testimony on the *Effect of the Drug Sentencing Guidelines on the Latino Community*, before the U.S. Sentencing Commission

- Advocating on Capitol Hill on behalf of Latinos concerning a number of issues ranging from racial profiling to sentencing reform, and from gang violence to reentry.

- Engaging in justice system reform at the state level in Texas, the District of Columbia, and most recently in Pennsylvania, Illinois, Washington, and Louisiana.

It is in this context that I submit before you today as the Senate Judiciary Subcommittee on Crime and Drugs reviews the current sentencing structure and its impact on Latinos and other minority communities.

**B. Two Decades after the Anti-Drug Abuse Act of 1986**

The enactment of the Anti-Drug Abuse Act of 1986 came about as a direct response to the so call "crack epidemic." Its goal was to focus on major traffickers in hopes to curb crack use particularly in urban areas. However a lot has changed since the enactment of the 1986 law including an exponential increase in the prison population,[2] primarily due to the increase in drug convictions; a negligible difference currently in the average length of stay for a drug offense and

[2] According to the Bureau of Justice Statistics reports, the prison population in 1986 was approximately 500,000 compared to 2.1 million in 2006.

a violent offense;[3] high costs associated with the booming prison population; and the perceived and real crime rates in the U.S.

The 1986 law resulted in the conviction of individuals found guilty of possession or distribution of five grams of crack cocaine to trigger a five-year mandatory minimum prison sentence, while it takes 500 grams of powder cocaine distribution –not possession – to trigger the same sentence. If convicted of distributing 50 grams of crack cocaine a person is subject to a ten-year mandatory minimum sentence, while it will take 5,000 grams of powder cocaine to trigger the same mandatory sentence.

Numerous studies have documented that the 100:1 powder-crack sentencing ratio directly contributes to blatant racial discrimination in the justice system, affecting mainly African Americans but increasingly Latinos as well.[4] Although the spirit of the law was to go after the "ring leaders," what we know now is that prisons are filled with low-level, mostly nonviolent drug offenders, many of whom turn in friends and family members to law enforcement in return for more lenient sentences. Furthermore, the drug use rates per capita among minorities and White Americans has consistently been remarkably similar over the years.[5] However, government has done little to institute a real solution to drug addiction – specifically, treatment – despite the fact that substance abuse treatment is more effective and less costly than incarceration.[6]

## III. DISPARATE IMPACT OF DRUG LAWS ON LATINOS

Contrary to popular belief and as stated above, the fact that Latinos and other racial and ethnic minorities are disproportionately disadvantaged by sentencing policies is not because minorities commit more drug crimes, or use drugs at a higher rate, than Whites. Instead, the disproportionate number of Latino drug offenders appears to be the result of a combination of factors, beginning with the phenomenon now widely known as "racial profiling." NCLR's 1999 report, and a series of other studies, demonstrates that the Hispanic community is often targeted by law enforcement for drug offenses based on their ethnicity.

Furthermore, the evidence strongly suggests that, from the moment of arrest to the pretrial detention phase and the charging and plea bargain decisions of prosecutors, through the adjudication process, the determination of a sentence, and the availability of drug treatment,

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[3] According to the *Compendium of Federal Justice Statistics, 2003*, the average length of stay for a violent offense was 97.2 months, while the average length of stay for a drug offense was 81.4 months.

[4] According to the Sentencing Project, *Hispanic Prisoners in the United States*, the number of Hispanic in federal and state prisons rose by 219% from 1985 to 1995, with an average annual increase of 12.3%.

[5] According to the Department of Health and Human Services, *2005 National Survey on Drug Use & Health*, illicit drug use associated with race/ethnicity in 2005 was as follows: American Indians or Alaska Natives, 12.8%; persons reporting two or more races, 12.2%; Blacks, 9.7%; Native Hawaiians or Other Pacific Islanders, 8.7%; Whites, 8.1%; Hispanics, 7.6%; and Asians, 3.1%.

[6] Incarceration costs an average of $25,000 per person per year, while treatment can cost as little as $1,700 for outpatient non-methadone treatment. Walker, N., J. M. Senger, F. Villarruel, and A. Arboleda, *Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System*. Washington, DC: National Council of La Raza, 2004.

Latinos encounter a criminal justice system plagued with prejudice and discrimination. For example:

- **Hispanics were arrested by the Drug Enforcement Agency (DEA) at a rate three times their proportion of the general population.** Hispanics constituted 43% of the arrests made by the DEA between October 2002 and September 2003, while they constituted 14% of the total U.S. population.[8]

- **Hispanic defendants were about three times less likely as non-Hispanic[9] defendants to be released before trial.** In 2003, only 19% of Hispanics were released before trial, compared to 60% of non-Hispanics.[10]

- **Hispanic defendants had less extensive criminal histories than White defendants.** In 1996, 56.6% of Hispanic defendants, compared to 60.5% of White defendants, had been arrested on at least one prior occasion.[11]

- **Hispanic federal prison inmates arrested for drug offenses were less likely than either Blacks or Whites to have had a previous criminal conviction.** In 1999, while 70% of Black drug offenders and 60% of White drug offenders had previous convictions, only 35% of Hispanic drug offenders had a previous conviction.[12]

- **Hispanics accounted for approximately one in four of the federal inmate population in 1998.** Racial/ethnic data show that Hispanics accounted for 30.3% of federal inmates in 1998, a rate that is twice as high as this group's percentage of the population that year.[13]

- **Among defendants convicted of drug charges, Hispanics constituted close to half of those convicted in 2003.** Hispanic federal defendants were 43.5% of all those convicted for drug offenses, while non-Hispanics constituted 56.5% of those convicted for the same charges.[14]

- **Hispanic federal prison inmates were the least likely of all racial/ethnic groups to receive any type of substance abuse treatment.** Only 36.4% of Hispanic federal prison inmates received any substance abuse treatment or program during 1997, while 53.7% of Whites and 48.4% of Blacks received some type of treatment or program to address their substance abuse dependency.[15]

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[8] *Compendium of Federal Justice Statistics, 2003.* Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, October 2005.
[9] "Non-Hispanics" may be Black, White, or Asian individuals who are not of Hispanic descent.
[10] *Ibid*
[11] *Federal Pretrial Release and Detention, 1996.* Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, February 1999.
[12] *Federal Drug Offenders, 1999 with Trends, 1984-99.* Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, August 2001.
[13] *Correctional Populations in the United States, 1998.* Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, September 2002.
[14] *Ibid*
[15] *Correctional Populations in the United States, 1997.* Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, November 2000.

- **Hispanic parolees were less likely than Blacks or Whites to violate parole by committing a new crime.** In 2003, Hispanic parolees constituted 9.2% of those whose parole was terminated for committing a new crime compared to Black parolees at 18.3% and White parolees at 11%.[16]

In sum, despite the fact that Latinos are no more likely than other groups to use illegal drugs, they are more likely to be arrested and charged with drug offenses and less likely to be released before trial. Once convicted, Latinos do not receive lighter sentences, even though the majority of Hispanic offenders have no criminal history. As a result, Hispanics are severely overrepresented in the federal prison system, particularly for drug offenses, and once in prison are the least likely to receive any substance abuse treatment. That these sobering statistics are largely the result of irregularities in drug enforcement is largely beyond dispute.

Thus, contrary to the popular stereotype, the overwhelming majority of incarcerated Latinos have been convicted of relatively minor nonviolent offenses, are first-time offenders, or both. Over the past decade, public opinion research reveals that a large majority of the public is prepared to support more rational sentences including substance abuse treatment for low-level drug offenders. The costs of excessive incarceration to the groups affected, and the broader American society – in terms of reduced current economic productivity, barriers to future employment, inhibited civic participation, and growing racial/ethnic societal inequalities – are extremely high. NCLR believes that Congress can play a critical role in reducing unnecessary and excessive incarceration rates of Latinos and other minorities in the U.S., as discussed in further detail below.

## IV. RECOMMENDATIONS

NCLR commends the United States Sentencing Commission's recommendations to Congress which called for the elimination of the threshold differential that exists between crack and powder sentences. Given that crack is derived from powder cocaine, and that crack and powder cocaine have exactly the same physiological and pharmacological effects on the human brain,[17]equalizing the ratio to 1:1 is the only fair solution to eradicating the disparity. Today, NCLR urges Congress to consider the following recommendations especially in light of the most recent Supreme Court decision and the recommendation from the US Sentencing Commission.

1. **Substantially redress the crack-powder ratio disparity by raising the crack thresholds and maintaining the powder thresholds.** Over the past 20 years, it has been proven that the 100:1 powder-crack sentencing ratio has a negative impact mainly on African Americans but increasingly on Latinos as well. Therefore, NCLR calls for closing the gap between crack and powder sentences, so that five grams of crack triggers

[16] *Ibid.*

[17] Instead, it is the way by which the drug is consumed – ingesting, smoking, injecting, or snorting – which causes higher levels of addiction, which in turn calls for a greater demand for the drug. *Report to the Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2002.

the same exact sentence as five grams of powder, and commend Rep. Bobby Scott (D-VA) and Rep. Charles Rangel (D-NY) for introducing legislation that would eliminate the 100 to 1 federal disparity between crack and powder cocaine sentencing.

- African American drug offenders have a 20% greater chance of being sentenced to prison than White drug offenders.[18]
- The average sentence for a crack cocaine offense in 2003 (123 months) was three and a half years longer than for an offense involving the powder form of the drug (81 months). The average sentence for crack cocaine were also 27 months longer than for methamphetamine and 60 months longer than for heroin.[19]

2. **Support the Drug Sentencing Reform and Kingpin Trafficking Act of 2007, (S.1711/H.R. 4545).** This bills introduced by Senator Joseph Biden (D-DE) and Representative Shelia Jackson-Lee (D-TX) respectively, eliminate the current disparity in federal sentences for crack versus powder cocaine offenses.

3. **Resist proposals that would lower the powder thresholds in order to achieve equalization between crack and powder.** NCLR believes that the only proper way of equalizing the ratio is by raising the crack threshold, not by lowering the powder threshold. According to the Commission's data, reducing the powder threshold would have a disproportionate, negative impact on the Latino community.[20] Achieving equalization by lowering the powder threshold might be perceived as reducing sentencing inequalities. In fact, it would have the perverse effect of not reducing high levels of incarceration of low-level, nonviolent African Americans while substantially increasing incarceration of low-level, nonviolent Latinos. In our judgment, the real-world, tangible harm produced by lowering the powder thresholds would far outweigh the abstract, symbolic value of reducing statutory sentencing ratios.
   - Lowering powder thresholds would increase average sentences by at least 14 months,[21] with the inevitable increase in incarceration rates.

4. **Make more widely available alternative methods of punishment for low-level, nonviolent drug offenders.** Under 18 USC Section 3553(a), penalties should not be more severe than necessary and should correspond to the culpability of the defendant. Where current law prevents judges from imposing just sentences for such offenders, the Commission should recommend that Congress enact appropriate reforms.
   - A study conducted for the White House's Office of National Drug Control Policy (ONDCP) found treatment to be 15 times more cost-effective than law enforcement at reducing cocaine abuse.[22]

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[18] *Fifteen Years of Guidelines Sentencing*. United States Sentencing Commission, November 2004.
[19] *2003 Sourcebook of Federal Sentencing Statistics*. United States Sentencing Commission, 2005.
[20] According to the United States Sentencing Commission *Report to the Congress: Cocaine and Federal Sentencing Policy*, May 2007, p. 16. Hispanics constituted 39.8% of all powder cocaine offenders in 1992, 50.8% in 2000, and 57.5% in 2006.
[21] *Drug Briefing*. United States Sentencing Commission, January 2002, Figure 26.
[22] Rydell, C. Peter and Susan Everingham, *Controlling Cocaine*. Santa Monica, CA: The RAND Corporation, 1994. Prepared for the Office of National Drug Control Policy and the U.S. Army.

- A SAMHSA study found that treatment reduces drug sales by 78%, shoplifting by almost 82%, and assaults by 78%. Treatment decreases arrest of any crime by 64%. After only one year, use of welfare has been shown to decline by 10.7%, while employment increased by 18.7%.[23]

5. **DEA agents and federal prosecutors should concentrate on solving the real problem – deterring the importation of millions of tons of powder cocaine – and prosecuting ring leaders with the fullest weight of the law.** Even at the current highest levels for crack (50 grams) and powder (5,000 grams) which trigger the maximum mandatory minimum sentence (ten years), it is a relatively insignificant measure to deter drug trafficking and promote community safety. These low-level actors are disposable given that they are easily replaceable. In the spirit of the 1986 law, the Act should be renewed by investing in training and resources and reserving prison beds for high-level kingpins. Prosecuting low-level crack and/or powder defendants who serve as a courier/mule, street dealer, or look-out does nothing to dismantle well-orchestrated drug rings, and little to protect our communities from drugs.
   - Data from the U.S. Sentencing Commission show that 70% of the federal cocaine cases have been brought against the lowest-level offenders, and that only 7% have been brought against the highest-level dealers.[24]
   - In FY 2000, the average length of stay for the lowest-level crack offenders was approximately 104 months for a quantity averaging 52 grams, while the highest-level powder trafficker received an average sentence of 101 month for a quantity that averaged 16,000 grams.[25] It is difficult to justify the resources spent on investigation, prosecution, and incarceration of insignificant offenders, when the reality is that 52 grams of crack or 16,000 grams of powder are miniscule amounts in the greater scheme of the drug trade.
   - Readjust the budget for ONDCP to reflect the "demand and supply" reduction of drugs. The basic theme has been that for every new dollar spent on demand reduction, two new dollars would be spent to curb supply. However, the trend over the past decade has been to split the budget cost down the middle at a 50-50 split between demand and supply. This has resulted in more resources funneled to domestic drug law enforcement rather than international drug interdiction.[26]

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[23] *National Treatment Improvement Evaluation Study*. Washington, DC: Center for Substance Abuse and Treatment, 1996.
[24] Sterling, E. Eric, *Getting Justice Off Its "Junk Food Diet*. Silver Spring, Maryland: Criminal Justice Policy Foundation, May 31, 2006.
[25] *Report to the Congress: Cocaine and Federal Sentencing Policy*. United States Sentencing Commission, May 2002.
[26] Office of National Drug Control Policy (ONDCP) available at: http://www.whitehousedrugpolicy.gov/.

EFFECTIVE PROSECUTION OF RING LEADERS

In 1987, Carlos Lehder Rivas, one of the co-founders of the Medellin Cartel, also known as the "godfather" of cocaine trafficking, was accused of smuggling 3.3 tons of powder cocaine, constituting 80% of cocaine imports into the U.S. At the peak of Lehder's leadership, a jet loaded with as much as 300 kilograms would arrive at his private airport at Norma's Cay every hour of every day.

Although Lehder was convicted and sentenced to life plus 135 years for drug trafficking, distribution, and money laundering, none of his assets – estimated to be worth between $2.5 and $3 billion – were seized. In exchange for testimony against Manuel Noriega, Panama's former dictator – in 1992 – the U.S. government reduced Lehder's sentence to 55 years.

Fabio Ochoa Vazquez, a high-ranking member of the Medellin Cartel, was later accused of leading a smuggling operation of approximately 30 tons a month of powder cocaine into the U.S. between 1997 and 1999. He was indicted in 1999, extradited in 2001, and convicted in 2003 in the U.S. for trafficking, conspiracy, and distribution of powder cocaine. He was sentenced to 30 years in U.S. federal prison.

NCLR urges that any new thresholds be scientifically and medically justified and correlated directly to the impact of penalties on both the defendant and the larger society. The current massive disparities in the criminal justice system and the resulting excessive rates of incarceration of racial and ethnic minorities offend the nation's commitment to the principle of equality under the law. For Latinos and other minorities, these policies constitute a major barrier to economic opportunity and civic participation; for the nation as a whole, they inhibit economic growth and social cohesion. Finally, they severely undermine the credibility of and confidence in the nation's entire system of criminal justice.

Statement Of Sen. Joseph Biden (D-Del.),
Hearing On "Federal Cocaine Sentencing Laws:
Reforming The 100:1 Crack Powder Disparity"
February 12, 2008

Good afternoon. Today, this Subcommittee examines an issue that has long been the subject of vigorous debate and study—the difference in the way that federal law treats drug offenses involving powder cocaine and crack cocaine.

Under current law, mere possession of 5 grams of crack – which is slightly less than the weight two sugar cubes – carries the same five-year, mandatory minimum sentence as distributing 500 grams of powder cocaine. Many have argued that this 100-to-1 disparity is arbitrary, unnecessary, and unjust—and I agree. The current disparity in cocaine sentencing simply cannot be justified based on the facts as we know them today.

In 1986, crack was the newest drug on the street. Congress was told that this smokable form of cocaine was instantly addictive, that its effect on a child if smoked during pregnancy was far worse than that of other drugs, and that it would ravage our inner cities.

I remember one headline that summed it up well. It read "New York City Being Swamped by 'crack'; Authorities Say They Are Almost Powerless to Halt Cocaine." They called it "the summer of crack."

In Congress, more than a dozen bills were introduced to increase the penalties for crack. Because we knew so little about it, the proposals were all over the map, ranging from the Reagan Administration's proposal of a 20-to-1 disparity to Senator Chiles' proposal of a 1000-to-1.

Senators Byrd, Dole and I led the effort to enact the Anti-Drug Abuse Act of 1986 which established the current 100-to-1 disparity.

Our intentions were good, but much of our information was bad. Each of the myths upon which we based the sentencing disparity has since been dispelled or altered. We now know:

• Crack and powder cocaine are pharmacologically identical. They are simply two forms of the same drug.
• Crack and powder cocaine cause identical physiological and psychological effects once they reach the brain.
• Both forms of cocaine are potentially addictive.
• The two drugs' effects on a fetus are identical. The "generation of crack babies" many predicted has not come to pass. In fact, some research shows that the prenatal effects of alcohol exposure are "significantly more devastating to the developing fetus than cocaine."
• Crack simply does not incite the type of violence that we feared. Gangs that deal in other types of drugs are every bit as violent as the crack gangs.

After 21 years of study and review, these facts have convinced me that the 100-to-1 disparity cannot be supported and that the penalties for crack and powder cocaine trafficking merit similar treatment under the law.

The past 21 years has also revealed that the dramatically harsher crack penalties have disproportionately impacted the African American community: 82% of those convicted of crack offenses in 2006 were African American.

With the starting premises now debunked, last June I introduced the Drug Sentencing Reform & Cocaine Kingpin Trafficking Act, which eliminates the disparity between crack and powder offenses. It does so without raising penalties for powder because there is not a shred of evidence that shows powder penalties are inadequate.

My bill also eliminates the five-year mandatory minimum sentence for simple possession of crack, the only mandatory minimum for possession of a controlled substance.

It focuses federal resources where we need them most—on major drug kingpins, not users and low-level dealers. It provides sentencing enhancements for all drug offenses that involve a dangerous weapon or violence.

And it provides $30 million in grants to state and local governments to fund programs that improve the availability of drug treatment for offenders in prisons, jails, juvenile facilities, and those on supervised release.

I want to commend Senators Hatch and Sessions for their leadership on this issue and their respective bills to reduce the disparity. I hope we can work together to permanently fix this injustice.

There is a growing movement for bold action on this issue. Eight members of this Committee—four Republicans and four Democrats—are supporting one of the three bills pending before the Judiciary Committee.

In November, the bipartisan United States Sentencing Commission sent Congress an amendment to address what it called the "urgent and compelling" crack/powder disparity. Congress accepted the measure, which modestly reduced crack penalties pending comprehensive Congressional action.

The report that accompanied the Sentencing Commission's amendment is the fourth such report the Commission has issued in twelve years calling for Congressional action to substantially reduce the crack/power sentencing disparity.

Editorial boards around the country have also urged Congress to act. The New York Times, San Francisco Chronicle, St. Petersburg Times, the Detroit Free-Press, and Miami Herald, have all endorsed my bill.

I welcome debate and discussion on this issue because I'm not convinced that any disparity in the sentencing of crack and powder defendants is justified given what we now know."

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Written Statement of
Joseph I. Cassilly
State's Attorney Harford County, Bel Air, Maryland
and
President-Elect, National District Attorneys Association

"Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity"

Before the Sub-committee on Crime and Drugs
Committee of the Judiciary
United States Senate

February 12, 2008

I am writing on behalf of the National District Attorneys Association, the oldest and largest organization representing State and local prosecutors. Attached is a resolution adopted by NDAA regarding the sentencing disparity between crack and powder cocaine. NDAA agrees that some adjustment is warranted, but just as the 100:1 disparity cannot be justified by empirical data we believe that the proposed one to one realignment of Federal penalties for crack versus powder cocaine also lacks any empirical or clinical evidence regarding the different effects of these forms of cocaine. A random adjustment will have severe negative consequences on the efforts of this nation's prosecutors to remove the destructive effects of crack and violence from our communities.

The cooperation of Federal and State prosecutors and law enforcement that has developed over the years is due in large part to the interplay of Federal and State laws. I have been a criminal prosecutor for over 30 years. My prosecutors and I work on one of the most active and successful task forces in Maryland. We actively operate with agents of the DEA, FBI, ATF, ICE and prosecutors from the U. S. Attorney for Maryland.

Maryland state statutes differentiate sentences between crack and powder cocaine offenders on a 9:1 ratio based on the amount that would indicate a major dealer. In recent years we have brought dozens of large quantity dealers for Federal prosecution, primarily because of the discretion of Federal prosecutors in dealing with these cases. This discretion allows for pleas to lesser amounts of cocaine or the option of not seeking sentence enhancements. The end result is that the majority of these cases are ultimately resolved by a guilty plea to a sentence below the statutory amount. A DOJ report states, "A facial comparison of the guideline ranges for equal amounts of crack and powder cocaine reveals that crack penalties range from 6.3 times greater to approximately equal to powder sentences."

The practical effect of guilty pleas is that serious violent criminals are immediately removed from our communities, they spend less time free on bail or in pre-trial detention, civilian witnesses are not needed for trial and are therefore not subject to threats and intimidation and undercover officers are not called as witnesses: all of which would happen if we were forced to proceed with these cases at trials in courts. Yet meaningful sentences are imposed, which punish the offender but also protect the community and allow it to heal from harm caused by these offenders. Moreover the plea agreements often call testimony against higher ups in the crack organization. It is critical that Federal sentences for serious crack dealers remain stricter than State laws if this coordinated interaction is to continue.

First let me dispel some of the myths about controlled substance prosecutions that are propagated by those who would de-criminalize the devastation caused by illegal drugs.

Myth 1. Prisons are full of first time offenders caught with small quantities of C.D.S.

The fact is that in joint Federal–State investigations small quantity dealers are delegated to State prosecutors for prosecution. First time users are almost never sent to jail but are directed into treatment programs; a jail sentence is suspended to provide an incentive for them to participate in treatment.

Myth 2. There is no difference between the affect of crack versus powder cocaine on the user [1]

Crack cocaine is produced from "cooking" powdered cocaine. The purpose for this added step is to remove impurities and dilutents from the powder and produce a purer more potent form of cocaine. In "Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?" by D. K. Hatsukami and M.W. Fischman, Department of Psychiatry, Division of Neurosciences, University of Minnesota, Minneapolis it is stated,

> "The physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride or crack cocaine (cocaine base). However, evidence exists showing a greater abuse liability, greater propensity for dependence, and more severe consequences when cocaine is smoked (cocaine-base) or injected intravenously (cocaine hydrochloride) compared with intranasal use (cocaine hydrochloride). The crucial variables appear to be the immediacy, duration, and magnitude of cocaine's effect, as well as the frequency and amount of cocaine used rather than the form of the cocaine."

Smoked cocaine results in the quickest onset and fastest penetration. Generally, smoked cocaine reaches the brain within 20 seconds; the effects last for about 30 minutes. The Drug Enforcement Administration's (DEA) general dosage estimates indicate that 5

[1] Most of the following comments are taken from reports of the United States Sentencing Commission or of the Department of Justice.

grams of crack - the amount that triggers the five-year mandatory minimum - contains between 10 and 50 dosage units. A single dose of crack cocaine ranges from 100 to 500 milligrams. DEA intelligence indicates that a crack user is likely to consume anywhere from 3.3 to 16.5 grams of crack a week, or between 13.2 grams and 66 grams per month. Given that 1 gram of powdered cocaine will "cook" down to .89 of a gram of crack, the crack addict with a bad habit requires more than 74 grams of powder cocaine to supply his demand.

Intranasally administered cocaine has a slower onset. The maximum psychotropic effects are felt within 20 minutes and the maximum physiological effects within 40 minutes. The effects from intranasally administered cocaine usually last for about 60 minutes after the peak effects are attained. A line of cocaine consists of between 40 and 50 milligrams, and a typical user snorts between two and three lines at a time. The typical intranasal powder user consumes about .5 gram per week or 2 grams per month.

One should consider 500 grams of powder is enough to produce 445 grams of crack cocaine; enough to supply 30 crack addicts for a week. Using these amounts, the cost per user per month for crack cocaine is between $1,300 and $6,600 as compared to a cost for powder cocaine of $200 per month; a 6.5:1 to 33:1 ratio in cost.

Myth 3. There is no difference in the associated crimes and the effect on the community caused by crack as opposed to powder cocaine.

The inability to legitimately generate the large amount of money needed by a crack addict leads to a high involvement in crimes that can produce ready cash such as robbery and prostitution. Crack cocaine use is more associated with systemic violence than powder cocaine use. One study found that the most prevalent form of violence related to crack cocaine abuse was aggravated assault. In addition, a 1998 study identified crack as the drug most closely linked to trends in homicide rates. Furthermore, crack is much more associated with weapons use than is powder cocaine: in FY 2000, weapons were involved in 10.6% of powder convictions, and 21.3% of crack convictions.

One of the best-documented links between increased crime and cocaine abuse is the link between crack use and prostitution. According to the authors of one study, "hypersexuality apparently accompanies crack use." In this study, 86.7% of women surveyed were not involved in prostitution in the year before starting crack use; one-third become involved in prostitution in the year after they began use. Women who were already involved in prostitution dramatically increased their involvement after starting to use crack, with rates nearly four times higher than before beginning crack use.

One complaint about the sentencing disparity is that it discriminates against blacks. Unfortunately, what most discriminates against our black citizens is the violence, degradation and community collapse that is associated with crack use and crack dealers and their organizations. It is the black homeowners who most earnestly plead with me, as a prosecutor, for strict enforcement and long prison sentences for crack offenders. The stop snitching video was made by black crack dealers in Baltimore to threaten black citizens with

retaliation and death for fighting the dealers. A black family of five was killed by a fire bomb which was thrown into their home at the direction of crack dealers because they were reporting crack dealers on the street in front of their house.

Many Federal, State and local prosecutors who struggle with the problems of crack can point out those areas in their jurisdictions with the highest violent crime rates are the same areas with the highest crack cocaine use.

The proposal to increase the amount of crack cocaine to .5 kilograms and 5 kilograms respectively in order to trigger a sentencing enhancement would create meaningless and useless penalties. It is doubtful that in the entire history of the war on illegal drugs that there has been few if any seizures of those quantities, because crack is "cooked" in smaller quantities.

Using the information cited in this letter, the nation's prosecutors urge Congress to adopt a sentencing scheme with regard to the destruction caused by crack cocaine to our communities. If there is a need to reduce the disparity between crack and powder cocaine then perhaps the solution is to increase sentences for powder cocaine.

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**RESOLUTION CONCERNING THE DISPARITY IN FEDERAL PENALTIES FOR COCAINE BASE (CRACK) AND POWDER COCAINE**

**WHEREAS** Federal law provides for a 100:1 ratio in the amounts of powder cocaine and cocaine base (crack) that trigger mandatory minimum sentences; and

**WHEREAS** there currently exists a disparity between federal sentences for cocaine base (crack) and powder cocaine; and

**WHEREAS** the United States Sentencing Commission has recently lowered the sentencing tiers for cocaine base (crack) in order to reduce the disparity between penalties for cocaine base (crack) and powder cocaine; and

**WHEREAS** the United States Sentencing Commission has given consideration to the retroactive application of the sentencing guidelines changes; and

**WHEREAS** there currently exist several varying pieces of legislation in the 110th Congress that attempt to address the disparity; and

**WHEREAS** the National District Attorneys Association (NDAA) recognizes that significant differences exist in the manner in which cocaine base (crack) and powder cocaine are ingested, the onset of euphoria, the duration of the effects, the rate of addiction; and the likelihood of non-drug, revenue producing criminal activity; and

**THEREFORE BE IT RESOLVED,** that the National District Attorneys Association (NDAA) believes that there exist evidence-based reasons to recognize the differences between cocaine base (crack) and powder cocaine, however, the NDAA acknowledges that the current level of sentencing disparity that exists between cocaine base (crack) and powder cocaine is not justified nor evidence-based; and

**BE IT FURTHER RESOLVED,** that the National District Attorneys Association believes that the issue of sentencing disparity can and should be revisited by the United States Congress; and

Date: 2/11/2008 Time: 4:45 PM To: Leahy, Sen. Patrick @ 224-3479
Page: 001


February 11, 2008

Dear Senator:

On behalf of Families Against Mandatory Minimums (FAMM), I encourage you to support legislation eliminating the 1-100 sentencing disparity between crack and powder cocaine. FAMM, a non-profit, non-partisan organization, is the national voice for fair and proportionate sentencing laws. Many of our members have been harmed by the unduly harsh sentences imposed for crack cocaine offenses. For them and others like them, we work for sentencing reform so that the punishment meted out by our nation's judicial system fits the crime. Too often it does not, and crack cocaine is the poster child for failures of federal sentencing policy.

FAMM applauds growing bipartisan support for reform of the federal cocaine penalty structure. Of the legislation introduced in the 110th Congress, one bill, S. 1711, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, would eliminate the sentencing disparity between crack and powder. We hope it will receive your full consideration and support.

Introduced by Senator Joseph R. Biden, Jr. (D-Delaware), S. 1711, The Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007would eliminate sentencing differences between crack and powder cocaine in favor of a single mandatory minimum at the current powder cocaine levels and eliminate altogether the five-year mandatory minimum for simple possession of crack cocaine. The bill would also authorize drug treatment and enforcement funds and increase fines for kingpins. S. 1711 directs the U.S. Sentencing Commission to review the sentencing guidelines and, if appropriate, amend them to account for culpability and role in the offense. This bill would eliminate the disparity between crack and powder cocaine sentences.

FAMM commends legislation introduced by Sen. Orrin G. Hatch (R-Utah), S. 1685, the Fairness in Drug Sentencing Act of 2007. S. 1685 would reduce the difference between crack and powder sentencing by increasing the amount of crack cocaine needed to trigger the five-year mandatory minimum sentences from five to 25 grams and the 10-year mandatory minimum from 50 to 250 grams. It would also eliminate the five-year mandatory minimum for simple possession. The bill would not eliminate the cocaine sentencing disparity but reduce it from 100:1 to 20:1. The bill also directs the Sentencing Commission to review the sentencing guidelines and amend them if appropriate to account for specified aggravating and mitigating characteristics.

These bills address, to varying degrees and in various ways, the deeply unjust consequences of the Anti-Drug Abuse Act of 1986, which imposed widely disparate sentences for possession or

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02/11/2008 4:46PM

use of two forms of cocaine, powder cocaine and cocaine base (crack). The distinction between crack and powder cocaine in the Act was based on bad science and fear of growing urban violence. The result was a policy that overstates the relative harmfulness of crack to powder cocaine, uses federal resources on largely low-level, non-violent offenders instead of major traffickers and has contributed to the tripling of our federal prison population.

The disparity in sentences also fueled a dispiriting public debate about fairness and racial prejudice in the justice system. Crack sentencing policy has a disproportionate effect on African Americans. African Americans comprise over 81 percent of all of the defendants sentenced to federal prison for crack cocaine offenses even though, according to the Department of Health and Human Services Substance Abuse and Mental Health Services Administration, less than 18 percent of our Nation's crack cocaine users in 2005 were African American. Additionally, the penalties for crack cocaine users are substantially greater than those imposed on powder cocaine users. That disparity is both inherently unjustified and contributes to the perception that African Americans are subject to longer prison terms than whites who commit similar crimes.

The opposition to the unbalanced penalty structure for crack cocaine is widespread. Judicial, scientific, and public opinion finds the penalty structure is unsupportable and unconscionable. Change is long overdue.

I do not believe that 22 years ago, when the Anti-Drug Abuse Act was passed, lawmakers intended to create inflexible, excessive penalties that punished so many so unfairly. I urge you to take advantage of the current momentum and support legislation that would eliminate the disparity between crack and powder cocaine.

Sincerely,

Julie Stewart

Julie Stewart
President
Families Against Mandatory Minimums

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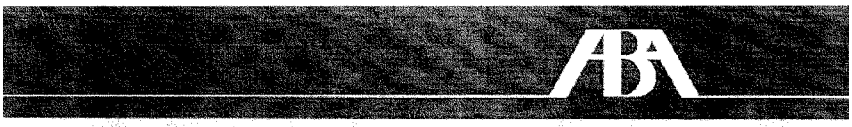


AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

**TESTIMONY OF**

**JAMES E. FELMAN**

**on behalf of the**

**AMERICAN BAR ASSOCIATION**

**before the**

**SUBCOMMITTEE ON CRIME AND DRUGS**

**COMMITTEE ON THE JUDICIARY**

**of the**

**UNITED STATES SENATE**

**for the hearing on**

**"Federal Cocaine Sentencing Laws: Reforming the 100:1 Crack Powder Disparity"**

**February 12, 2008**

Chairman Biden, Ranking Member Graham and distinguished Members of the Subcommittee:

Good afternoon. My name is James Felman. Since 1988 I have been engaged in the private practice of federal criminal defense law with a small firm in Tampa, Florida. I am appearing today on behalf of the American Bar Association for which I serve as Co-Chair of the Criminal Justice Section Committee on Sentencing.

The crack-powder disparity is simply wrong and the time to fix it is now. It has been more than a decade since the American Bar Association joined an ever-growing consensus of those involved in and concerned about criminal justice issues that the disparity in sentences for crack and powder cocaine offenses is unjustifiable and plainly unjust. We applaud this Subcommittee and its leadership for conducting this hearing as an important step in ending once and for all this enduring and glaring inequity.

The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President William H. Neukom to reiterate to this Subcommittee the ABA's position on sentencing for cocaine offenses.

In 1995 the House of Delegates of the American Bar Association, after careful study, overwhelmingly approved a resolution endorsing the proposal submitted by the United States Sentencing Commission that would have resulted in crack and powder cocaine offenses being treated similarly and would have taken into account in sentencing aggravating factors such as weapons use, violence, or injury to another person. The American Bar Association has never

wavered from the position that it took in 1995.

The Sentencing Commission's May 2002 *Report to the Congress: Cocaine and Federal Sentencing Policy* confirms the ABA's considered judgment that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders. The Sentencing Commission's 2002 *Report* provides an exhaustive accounting of the research, data, and viewpoints that led to the Commission's recommendations for crack sentencing reform. The recommendations include:

- Raising the crack cocaine quantities that trigger the five-year and ten-year mandatory minimum sentences in order to focus penalties on serious and major traffickers;
- Repeal of the mandatory minimum penalty for simple possession of crack cocaine; and
- Rejection of legislation that addresses the drug quantity disparity between crack and powder cocaine by lowering the powder cocaine quantities that trigger mandatory minimum sentences.

Unfortunately, the Sentencing Commission's 2002 recommendations were not addressed. Recognizing the enduring unfairness of current policy, the Sentencing Commission returned to the issue and recently took an important, although limited, first step toward addressing these issues by reducing crack offense penalties by two offense levels in its 2007 amendments to the Sentencing Guidelines. As the Sentencing Commission explained in its report accompanying the amendment, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007), the Commission felt its two-level adjustment was as far as it should go given its inability to alter Congressionally established mandatory minimum penalties and its recognition that establishing

federal cocaine sentencing policy ultimately is Congress's prerogative. But it is critical to understand that this "minus-two" amendment is only a first step in addressing the inequities of the crack-powder disparity. The Sentencing Commission's 2007 *Report* made it plain that it views its recent amendment "only as a partial remedy" which is "neither a permanent nor a complete solution." As the Sentencing Commission noted, "[a]ny comprehensive solution requires appropriate legislative action by Congress."

The federal sentencing polices at issue in the 2002 and 2007 Sentencing Commission *Reports* were enacted in the Anti-Drug Abuse Act of 1986, which created a 100 to 1 quantity sentencing disparity between crack and powder cocaine, pharmacologically identical drugs. This means that crimes involving just five grams of crack, 10 to 50 doses, receive the same five-year mandatory minimum prison sentence as crimes involving 500 grams of powder cocaine, 2,500 to 5,000 doses. The 100-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. Many myths about crack were perpetuated in the late 1980's that claimed, for example, that crack cocaine caused violent behavior or that it was instantly addictive. Since then, research and extensive analysis by the Sentencing Commission has revealed that such assertions are not supported by sound evidence and, in retrospect, were exaggerated or simply false.

Although the myths perpetuated in the 1980s about crack cocaine have proven false, the disparate impact of this sentencing policy on the African American community continues to grow. The 1995 ABA policy, which supports treating crack and powder cocaine offenses similarly, was developed in recognition that the different treatment of these offenses has a "clearly discriminatory effect on minority defendants convicted of crack offenses." According to the 2007 *Report* by the Sentencing Commission, African Americans constituted 82% of those

sentenced under federal crack cocaine laws. This is despite the fact that 66% of those who use crack cocaine are Caucasian or Hispanic. This prosecutorial disparity between crack and powder cocaine results in African Americans spending substantially more time in federal prisons for drug offenses than Caucasian offenders. Indeed, the Sentencing Commission reported that revising the crack cocaine threshold would do more to reduce the sentencing gap between African Americans and Caucasians "than any other single policy change," and would "dramatically improve the fairness of the federal sentencing system." The ABA believes that it is imperative that Congress act quickly to finally correct the gross unfairness that has been the legacy of the 100 to 1 ratio. Enactment of S.1711 would take that much needed step to end unjustifiable racial disparity and restore fundamental fairness in federal drug sentencing.

It is important that I emphasize, however, that the ABA not only opposes the crack-powder differential, but also strongly opposes the mandatory minimum sentences that are imposed for all cocaine offenses. The ABA believes that if the differential penalty structure is modified so that crack and powder offenses are dealt with in a similar manner, the resulting sentencing system would remain badly flawed as long as mandatory minimum sentences are prescribed by statute.

At its 2003 annual meeting, Supreme Court Justice Anthony Kennedy challenged the legal profession to begin a new public dialogue about American sentencing practices. He raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities. Justice Kennedy specifically addressed mandatory minimum sentences and stated, "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences." He continued that "[i]n too many cases, mandatory minimum sentences are unwise or unjust."

In response to Justice Kennedy's concerns, the ABA established a Commission (the ABA Justice Kennedy Commission) to investigate the state of sentencing in the United States and to make recommendations on how to address the problems Justice Kennedy identified. One year to the day that Justice Kennedy addressed the ABA, the ABA House of Delegates approved a series of policy recommendations submitted by the Kennedy Commission. These recommendations included the repeal of all mandatory minimum statutes and the expanded use of alternatives to incarceration for non-violent offenders.

Mandatory minimum sentences raise serious issues of public policy and routinely result in excessively severe sentences. Mandatory minimum sentences are also frequently arbitrary, because they are based solely on "offense characteristics" and ignore "offender characteristics." They are a large part of the reason why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. The United States now imprisons its citizens at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are imprisoned here in the United States.

Thus, the ABA strongly supports the repeal of the existing mandatory minimum penalty for mere possession of crack. Under current law, crack is the only drug that triggers a mandatory minimum for a first offense of simple possession. We would urge the Congress to go farther, however, and repeal mandatory minimum sentences across the board.

We also strongly support the appropriation of funds for developing effective alternatives to incarceration, such as drug courts, intensive supervised treatment programs, and diversionary programs. We know that incarceration does not always rehabilitate – and sometimes has the opposite effect. Drug offenders are peculiarly situated to benefit from such programs, as their

crimes are often ones of addiction. That is why last year, after considerable study, research, and public hearings by the ABA's Commission on Effective Sanctions, the ABA's House of Delegates approved a resolution – joined in by the National District Attorneys Association – calling for federal, state, and local governments to develop, support, and fund programs to increase the use of alternatives to incarceration, including for the majority of drug offenders. We are encouraged to see the appropriation of such funds in S.1711, and hope that this appropriation can be expanded to reach federal as well as state programs.

In conclusion, for well over a decade the ABA has agreed with the Sentencing Commission's careful analysis that the 100 to 1 quantity ratio is unwarranted and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce a large racial disparity in sentencing. Indeed, as the Sentencing Commission noted in its 2007 *Report*, federal cocaine sentencing policy "...continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups ... [I]naction in this area is of increasing concern to many, including the Commission."

We applaud the leadership of the Congress in addressing this important issue and hope that decisive and rapid action will be possible. The ABA firmly supports passage of S.1711 as proposed by Senator Biden, and cosponsored by Senator Feingold on the Subcommitte, among others. We also commend the leadership of Senators Hatch, Kennedy, Feinstein and Specter and Senator Sessions for their introduction of alternative bills to address the crack-powder disparity. Clearly there is growing, bipartisan recognition of the urgency for reform of this law. The ABA strongly supports S.1711 because it fully embraces the key principles for reform enunciated repeatedly by the Sentencing Commission. S.1711 would rectify the unwarranted disparity

between crack and powder cocaine sentences, and would do so without raising the already severe penalties for powder offenses. The bill would also address aggravating factors such as weapons use, violence, or injury to another person while providing much needed mitigating adjustments for those who play minor roles and those whose involvement was wholly a product of impulse, fear, friendship or affection where the defendant was otherwise unlikely to commit such an offense. S.1711 is also strongly supported by a broad coalition of criminal justice reform, civil rights, community and faith-based organizations.

Enactment of S.1711 would restore fairness and a sound foundation to federal sentencing policy regarding cocaine offenses by ending the disparate treatment of crack versus cocaine offenses and by refocusing federal policy toward major drug traffickers involved with weapons and violence. We hope the Subcommittee will support S.1711 so that it may be considered and passed by the full Senate.

On behalf of the American Bar Association, thank you for considering our views on an issue of such consequence for achieving justice in federal sentencing.

Date: 2/8/2008 Time: 10:42 AM To: Leahy, Sen. Patrick @ 224-3479
Page: 001

**General Board of Church and Society of The United Methodist Church**
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Dear Member of Congress,

The General Board of Church and Society of The United Methodist Church strongly urges you to support the Drug Sentencing Reform and Kingpin Trafficking Act (S. 1711, H.R. 4545) introduced by Senator Biden (D-DE) and Representative Sheila Jackson-Lee (D-TX). This legislation will eliminate the current disparity in federal sentences for crack versus powder cocaine offenses.

The Anti-Drug Abuse Act of 1986 has resulted in harsh penalties for low-level offenses involving crack cocaine. Defendants are subject to a minimum five-year sentence for possession or sale of only five grams of crack cocaine while the same five year sentence is given for sale of five hundred grams of powder cocaine.

Many of the assumptions used in determining the 100:1 ratio between crack and powder cocaine sentences have been proven false by recent data. For instance, the physiological and psychotropic effects of crack and powder cocaine are the same, thereby making crack cocaine use no more harmful than powder cocaine. In addition, the goal of the original legislation of targeting high-level traffickers has failed. The prison population, as well as correlating costs entailed by incarcerating large numbers of inmates, has ballooned because the mandatory penalties apply most often to offenders who are low-level participants in the drug trade.

The result of these harsh mandatory minimum sentences has been nothing short of tragic and unjust. Rather than providing necessary treatment for those addicted to drugs, they have instead received long prison terms. Mandatory drug sentences treat addiction as a crime instead of a public health concern which contributes to the United States' record rate of incarceration. The nearly 2.3 million people in U.S. prisons and jails accounts for 25% of the world's incarcerated. And yet, drug use and abuse continues. Locking up minor drug offenders for long prison terms is not only ineffective, it is inhumane.

The immorality of the current disparity in sentencing for crack and powder cocaine offenses is evident through recent research, which suggests that while African Americans make up only 15% of drug users in the United States, "they comprise 37% of those arrested for drug violations, 59% of those convicted, and 74% of those sentenced to prison for a drug offense" ("Cracks in the System," ACLU October 2006). Further, although whites and Hispanics comprise two thirds of crack cocaine users, 80% of the crack cocaine defendants are African American ("Cracks in the System," ACLU October 2006).

As a people of faith we cannot abide twenty more years of unjust sentencing characterized by disparity and racism – indeed, we cannot abide even one more year. We strongly urge you to support the Drug Sentencing Reform and Kingpin Trafficking Act (S. 1711, H.R. 4545).

Sincerely,

Jim Winkler
General Secretary

02/08/2008 10:42AM


Written Statement of
Carmen D. Hernandez

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
Committee on the Judiciary
United States Senate

"Federal Cocaine Sentencing Laws:
Reforming the 100-to-1 Crack/Powder Disparity"

February 12, 2008

Over the past twenty years, the sentencing disparity for crack as compared to powder cocaine has come to symbolize the flaws of the federal sentencing system and the shortcomings of the Sentencing Reform Act. Former Chief Justice William Rehnquist opined that "mandatory minimum sentences are perhaps a good example of the law of unintended consequences," and nothing demonstrates this better than the crack cocaine sentencing regime. Despite countless reports by academics, interest groups, the U.S. Sentencing Commission and other government agencies documenting these problems and debunking the rationales for any disparity between crack and powder sentences, actual reform has remained elusive.

We welcome this hearing and the committee members' support for diverse legislation as a clear sign that reform is finally within reach. We urge the committee to make the most of this window of opportunity.

The Federal Bureau of Prisons' inmate population has swelled to more than 200,000, 54 percent of whom are drug offenders. A 1997 survey reveals that nearly one quarter of the drug offenders in federal prisons at that time were there because of a crack cocaine conviction.[1] Every year, at least 5,000 more offenders are sentenced under the disproportionately severe crack cocaine laws. The failure to correct this grave injustice means that the crack/powder sentencing disparity has continued to gain prominence as a symbol of racism in the criminal justice system.

**I. The adverse impact of excessive and disparate crack sentences.**

Eighty-one percent of defendants sentenced in the federal system for crack cocaine are black, and their sentences are 50 percent longer than those for cocaine powder. This is true even though two-thirds of crack defendants are low-level street dealers. Also troubling is the fact that the average sentence for crack cocaine is far longer than the average sentences for violent crimes such as robbery and sexual abuse.

While we fully recognize the harmful effects of crack cocaine distribution on inner-city communities, the negative social and economic impact of the uniquely severe sentencing scheme must also be taken into account. "Far from saving the inner cities, our barbaric crack penalties are only adding to the decimation of inner-city youth."[2] Over-incarceration within black communities adversely impacts those communities by removing young men and women who could benefit from rehabilitation, educational and job training opportunities and a second chance. Drug amounts consistent with state misdemeanors become federal felonies, resulting in disenfranchisement, disqualification for important public benefits including student loans and public housing, and significantly diminished economic opportunity. As a result, many of these persons become outsiders for a lifetime, and their families experience incalculable damage and suffering. Excessive sentences greatly exacerbate all of these harms.

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[1] U.S. Department of Justice, Office of Justice Programs, *Federal Drug Offenders, 1999, with Trends 1984-99* at 11 (2001).

2 Stuart Taylor Jr., Courage, Cowardice on Drug Sentencing, Legal Times, April 24, 1995, at 27.

While supporters of the current scheme might argue that aggressive enforcement and incapacitation of crack dealers is in the best interests of affected black communities, this does not address the question of sentence proportionality. This argument evinces a one-dimensional view of the federal sentencing system that was rejected by previous Justice Department officials. In 1997, Attorney General Janet Reno and the White House's director of national drug policy, Gen. Barry R. McCaffrey, took the position that the 100-to-1 disparity was excessive and recommended reducing it to 10-to-1.

**II. The current 100:1 ratio undermines effective law enforcement.**

The current penalty scheme not only skews law enforcement resources towards lower-level crack offenders, it punishes those offenders more severely than their powder cocaine *suppliers*, an effect known as "inversion of penalties." The 500 grams of cocaine that can send one powder defendant to prison for five years can be distributed to eighty-nine street dealers who, if they convert it to crack, could make enough crack to trigger the five-year mandatory minimum sentence for each defendant.[3] Similarly, the Sentencing Commission reports document that the profit generated from the sale of crack and powder cocaine is equally disproportionate to the sentence imposed. As many have noted, this is at odds with Congress's intended targets for the 5- and 10-year terms of imprisonment, mid-level managers and high-level suppliers, respectively.

Moreover, sentencing policies and law enforcement practices that operate in a racially disparate manner erode public confidence in our criminal justice system, particularly in minority communities. In the past, former Attorney General Janet Reno and a long list of federal judges, all of whom had served as United States Attorneys, emphasized this disturbing consequence in urging reform. At the very least, the penalties likely discourage cooperation with law enforcement. And some stakeholders have suggested that the notoriety of the crack/powder sentencing disparity may actually discourage jury service, permeate jury deliberations and affect trial outcomes.

**III. Arguments for maintaining the sentencing disparity between crack and powder cocaine are unpersuasive; both substances should be punished at the current powder cocaine levels.**

As set forth in the Sentencing Commission's 2007 report, there is no sound basis -- scientific or otherwise -- for the current disparity. Crack and powder cocaine are simply different forms of the same drug, and they should carry the same penalties.[4] Many of the supposed crack-

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[3] The flipside of this argument -- that similar penalties will encourage distributors to take the final step of converting powder cocaine to crack -- is specious. The Guidelines' relevant conduct rules require that a powder distributor be sentenced according to the crack guidelines if conversion was reasonably foreseeable and within the scope of the defendant's agreement.

[4] Even the number of doses per gram is nearly identical: Five grams of crack cocaine represents approximately 10-50 doses; 500 grams of cocaine powder, which triggers the same five-year sentence, represents approximately 2500-5000 doses. William Spade, Jr., *Beyond the 100:1*

related harms referenced by Congress in 1986 have proven false or have subsided considerably over time. For example, recent Commission data reveals that 88% of crack cases do not involve violence, 74% of crack offenders have no weapon involvement, and rarely is a weapon ever brandished or used in a crack offense. Existing guideline and statutory enhancements are more than sufficient to punish these aggravating circumstances.

Even more importantly, crack cocaine and powder cocaine are part of the same supply chain. Anyone trafficking in powder cocaine is contributing to the potential supply of crack cocaine; thus, any dangers inherent in crack are necessarily inherent in powder cocaine. This simple truth, in our view, is perhaps the more persuasive rationale for treating the two forms of cocaine identically. This is what the Sentencing Commission proposed in its 1995 report, and we believe it is the most principled approach.

**IV. Congress should not undercut this long-overdue reform by ratcheting up sentences in other areas or by encouraging the Sentencing Commission to do so.**

Current sentences for powder cocaine and drug offense-related enhancements are more than sufficient. NACDL opposes any proposal to reduce the 100:1 ratio by increasing powder cocaine penalties. Raising already harsh powder cocaine sentencing levels is no answer to the problem of disproportionate and discriminatory crack sentences. There is no credible evidence that powder cocaine penalties, which are generally much longer than heroin or marijuana sentences, are insufficiently harsh. Given that 85% of defendants sentenced at the federal level for powder cocaine offenses are non-white, increasing powder sentences would exacerbate the disproportionate impact of cocaine sentencing on minorities.

Likewise, there is absolutely no need to amend the Sentencing Guidelines so as to add or increase sentencing enhancements. The majority of crack cases do not involve aggravating circumstances, and current laws provide sufficient enhancements for the most common aggravating factors; in addition, sentencing judges have discretion to consider unmentioned factors. Because the existing guideline enhancements, in concert with the applicable statutes, more than adequately punish such offense aggravators (e.g., weapon involvement or prior criminal conduct), there is no need for the Commission to consider new enhancements, as directed by the pending bills. It bears mentioning, however, that S. 1711 sets forth general, as opposed to specific, directives that do not mandate new and unnecessary enhancements. This language is vastly superior to other pending legislation that would mandate enhancements.

**V. Conclusion.**

The Sentencing Commission took action last year to reduce its crack guidelines without deviating from the mandatory minimum statutes passed by Congress. At the same time, the Commission called on Congress to enact a more comprehensive solution. While we strongly support legislation that would completely abolish the sentencing disparity without increasing

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*Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1273 (1996).

current sentences, we commend all the Committee members who have devoted attention to this injustice by sponsoring corrective legislation.

On behalf of NACDL, I urge you to help complete the unfinished reform process and approve the "Drug Sentencing Reform and Cocaine Kingpin Trafficking Act."

Thank you for considering our views.

* * *

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 12,000-plus direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

* * *

Carmen Hernandez is the President of the National Association of Criminal Defense Lawyers. She is a past chair of NACDL's Federal Sentencing Committee and a member of the U.S. Sentencing Commission's Practitioner's Advisory Group. Now in private practice, Ms. Hernandez previously served as an Assistant Federal Defender. She has lectured nationally, written articles and testified before Congress regarding federal sentencing.

**Statement of Ricardo H. Hinojosa**
**Chair, United States Sentencing Commission**
**Before the Senate Judiciary Committee**
**Subcommittee on Crime and Drugs**

**February 12, 2008**

Chairman Biden, Senator Graham, and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss federal cocaine sentencing policy.

As you are aware, the United States Sentencing Commission has been considering cocaine sentencing issues for a number of years and has worked closely with Congress to address the sentencing disparity that exists between the penalties for powder cocaine and crack cocaine offenders. Although the Commission took action this past year to address some of the disparity existing in the federal sentencing guideline penalties for crack cocaine offenses, the Commission is of the opinion that any comprehensive solution to the problem of federal cocaine sentencing policy requires revision of the current statutory penalties and therefore must be legislated by Congress. The Commission encourages Congress to take legislative action on this important issue, and it views today's hearing as an important step in that process.

Part I of this statement briefly summarizes the statutory and guideline penalty structure for crack cocaine offenses. Part II describes some of the findings of the Commission's May 2007 *Report on Cocaine and Federal Sentencing Policy* (the "May 2007 Report"). Part III sets forth the Commission's recommendations for statutory penalty revisions contained in the May 2007 report.

## I. Statutory and Guideline Penalty Structure

The Anti-Drug Abuse Act of 1986[1] established the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties differ for various drugs and, in some cases (including cocaine), for different forms of the same drug.

In establishing the mandatory minimum penalties for cocaine, Congress differentiated between two principal forms of cocaine – cocaine hydrochloride (commonly referred to as "powder cocaine") and cocaine base (commonly referred to as "crack cocaine") – and provided significantly higher punishment for crack cocaine offenses based on the quantity of the drug involved in the offense. As a result of the 1986 Act, federal law requires a five-year mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time

[1] Pub. L. 99–570, 100 Stat. 3207 (1986), hereinafter "the 1986 Act".

trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the "100-to-1 drug quantity ratio."

When Congress passed the 1986 Act, the Commission was in the process of developing the initial sentencing guidelines. The Commission responded to the legislation 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. Offenses involving five grams or more of crack cocaine or 500 grams or more of powder cocaine, as well as all other drug offenses carrying a five-year mandatory minimum penalty, were assigned a base offense level of 26, corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I. Similarly, offenses involving 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine, as well as all other drug offenses carrying a 10-year mandatory minimum penalty, were assigned a base offense level of 32, corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I. Crack cocaine and powder cocaine offenses for quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.

In addition, unlike for any other drug, in 1988 Congress enacted statutory mandatory minimum penalties for simple possession of crack cocaine. In fiscal year 2007, there were 109 federal cases for simple possession of crack cocaine, in which 20 offenders were subject to a statutory mandatory minimum penalty of five years or more. In fiscal year 2006, there were 132 such cases, in which 24 offenders were subject to a statutory mandatory minimum punishment.

## II. The Commission's May 2007 Report

The Commission has given much consideration to the issue of federal cocaine sentencing policy, releasing its first report to Congress on federal cocaine sentencing policy in 1995 in response to a directive from Congress to study the issue. In that report, the Commission concluded that the Congress's objectives with regard to punishing crack cocaine trafficking could be achieved more effectively "without relying on the current federal sentencing scheme for crack cocaine offenses that includes the 100-to-1 quantity ratio."[2] In 1997, again at the request of Congress, the Commission submitted a report that recommended to Congress that it "revise the federal statutory penalty scheme for both crack and powder cocaine offenses."[3] In 2002, the Commission issued another comprehensive report on federal cocaine sentencing policy that set forth recommendations to Congress on this issue.[4]

In the 2006-2007 guideline amendment cycle, the Commission again undertook an extensive review of the issues associated with federal cocaine sentencing policy. The

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[2] *See* U.S. Sentencing Commission Report to Congress February 1995 at xiv.
[3] *See* U.S. Sentencing Commission Report to Congress April 1997 at 9.
[4] *See* US Sentencing Commission Report to Congress May 2002 at ix.

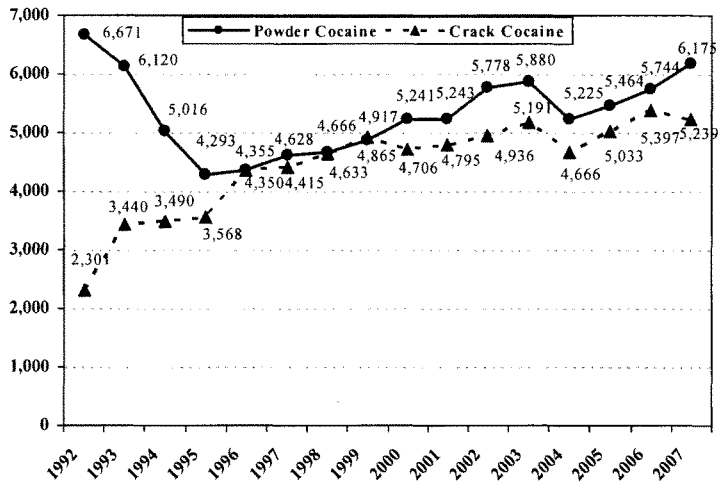
Commission examined sentencing data from fiscal years 2005 and 2006 (including comparing findings derived from that data with findings from the Commission's previous reports to Congress on federal cocaine sentencing policy), surveyed state cocaine sentencing policy, conducted two public hearings, received considerable written public comment, and reviewed relevant scientific and medical literature. Comment received in writing and at the public hearings showed that federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups.

The Commission's efforts culminated in the issuance of its fourth report to Congress on the subject in May 2007. Some of the key findings of the May 2007 report are summarized below. Where possible, the Commission has updated the tables and figures from its May 2007 report to include information through fiscal year 2007.

### A. Federal Cocaine Offenders and Average Sentence Length

Powder cocaine and crack cocaine offenses together historically have accounted for nearly half of the federally-sentenced drug trafficking offenders. In fiscal year 2006, for example, of 25,007 total drug trafficking cases, there were 5,744 powder cocaine cases (23% of all drug trafficking cases) and 5,397 crack cocaine cases (22% of all drug trafficking cases). According to the Commission's preliminary fiscal year 2007 data, of 24,750 total drug trafficking cases, there were 6,175 powder cocaine cases (25% of all drug trafficking cases) and 5,239 crack cocaine cases (21% of all drug trafficking cases).

**Updated Figure 2-1**
**Trend in Number of Powder Cocaine and Crack Cocaine Offenders**
**FY1992-Preliminary FY2007**




Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 2007 Datafiles, MONFY92 – USSCFY06 and Pre20_OPAFY07 .

Federal crack cocaine offenders consistently have received substantially longer sentences than powder cocaine offenders, and the difference in sentence length between these two groups of offenders has widened since 2002. Data presented in the May 2007 report, compiled from the Commission's fiscal year 2006 datafile, indicated that the average sentence length for crack cocaine offenders was approximately 122 months, whereas the average sentence length for powder cocaine offenders was approximately 85 months.[5] The differences in sentences between powder cocaine offenses and crack cocaine offenses have increased over time. In 1992, crack cocaine sentences were 25.3 percent longer than those for powder cocaine. As indicated in Updated Figure 2-3, in 2006, the difference was 43.5 percent.

Preliminary data, as set forth in updated Figure 2-2, indicate that, for fiscal year 2007, the average sentence length for crack cocaine offenders was approximately 129 months, whereas the average sentence length for powder cocaine offenders was approximately 86 months. This increase in the average sentence length for crack cocaine offenders may be attributable to three factors. First, as indicated in section B below, the median drug quantity for crack cocaine offenses increased in fiscal year 2007 to 53.5 grams as compared to 51.0 grams in fiscal year 2006.

[5] *See* Updated Fig. 2-2.

Second, most cocaine offenders in the federal system are convicted of statutes carrying a five-year or ten-year mandatory minimum penalty. According to preliminary fiscal year 2007 data, 83.0 percent of crack cocaine offenders were convicted of statutes carrying mandatory minimum terms of imprisonment, compared to 79.1 percent of such offenders in fiscal year 2006.[6] Exposure to mandatory minimum sentences contributes to longer average sentence length and crack cocaine offenders are less likely to receive the benefit of statutory or guideline mechanisms designed for low-level offenders to be sentenced without regard to the statutory mandatory minimums. According to preliminary fiscal year 2007 data, 13.5 percent of crack cocaine offenders received benefit of a safety valve provision, either as set forth at 18 U.S.C. § 3553(f)[7] or through the federal sentencing guidelines, as compared to 14.0 percent in fiscal year 2006.[8] By comparison, preliminary fiscal year 2007 data indicate that 44.6 percent of powder cocaine offenders qualified for the safety valve compared to 45.5 percent in fiscal year 2006.

Third, while offense severity (based on drug type and quantity) is the preliminary determinant of the sentencing guideline range, an offender's criminal history also plays a significant role. The Commission's preliminary data for fiscal year 2007 also suggests that the average number of criminal history events counted under the guidelines may have increased for crack cocaine offenders compared to the average number of such events counted for crack cocaine offenders in fiscal year 2006, even though in both fiscal years, the average criminal history category for these offenders was Criminal History Category III.[9] In comparison, the average criminal history category for powder cocaine offenders was Criminal History Category II in fiscal years 2006 and 2007. These factors taken together may account for the increase in average sentence length for crack cocaine offenses in fiscal year 2007.

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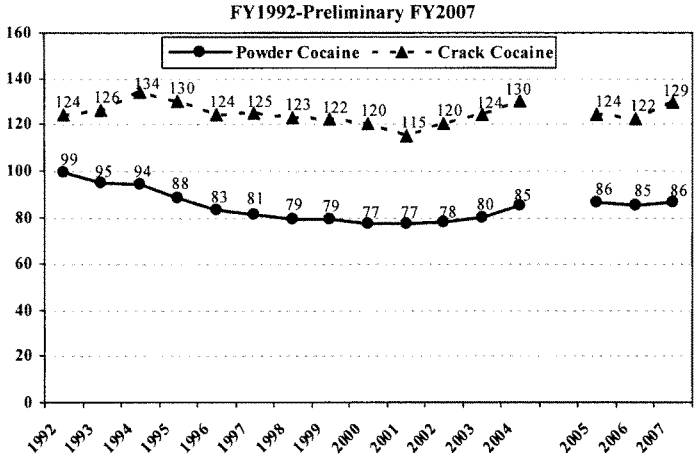
[6] *See* May 2007 Report at 28.

[7] The "safety valve" provides a mechanism by which only drug offenders who meet certain statutory criteria may be sentenced without regard to the otherwise applicable drug mandatory minimum provisions. Enacted in 1994, the safety valve provision was created by Congress to permit offenders "who are the least culpable participants in drug trafficking offenses, to receive strictly regulated reductions in prison sentences for mitigating
factors" recognized in the federal sentencing guidelines.

[8] The Commission uses "safety valve" to refer to cases that received either the 2-level reduction pursuant to USSG §2D1.1(b)(7) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

[9] A defendant's criminal history category is determined pursuant to USSG §4A1.1.

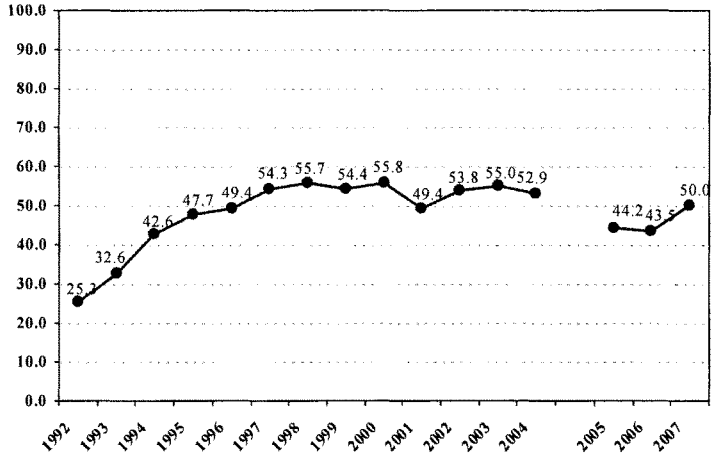
**Updated Figure 2-2**
**Trend in Prison Sentences for Powder Cocaine and Crack Cocaine Offenders**
**FY1992-Preliminary FY2007**




Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation, or any sentence of intermittent confinement, community confinement, or home detention, are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. This figure also excludes cases sentenced on or after the Supreme Court's June 24, 2004 decision in *Blakely v. Washington*, 542 U.S. 296 (2004) and before its January 12, 2005 decision in *United States v. Booker*, 543 U.S. 220 (2005), as the Commission determined it could not rely on the assumption that the federal sentencing guidelines had been uniformly applied during that period. *See* U.S. Sentencing Commission Final Report on the Impact of *United States v. Booker* on Federal Sentencing at 53 (March 2006).

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 2007 Datafiles, MONFY92 – USSCFY06 and Pre20_OPAFY07, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

**Updated Figure 2-3**
**Trend in Proportional Differences Between Average Cocaine Sentences**
**FY1992-Preliminary FY2007**




Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation, or any sentence of intermittent confinement, community confinement, or home detention, are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. This figure also excludes cases sentenced on or after the Supreme Court's June 24, 2004 decision in *Blakely v. Washington*, 542 U.S. 296 (2004) and before its January 12, 2005 decision in *United States v. Booker*, 543 U.S. 220 (2005), as the Commission determined it could not rely on the assumption that the federal sentencing guidelines had been uniformly applied during that period. *See* U.S. Sentencing Commission Final Report on the Impact of *United States v. Booker* on Federal Sentencing at 53 (March 2006). The figure shows, for each year, the percentage difference between prison sentences for crack cocaine and powder cocaine. For example, in Fiscal Year 1992, crack cocaine sentences were 25.3 percent greater than powder cocaine sentences. The percentage was calculated by dividing the difference between the average crack cocaine sentence and the average powder cocaine sentence by the average powder cocaine sentence.

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 2007 Datafiles, MONFY92 – USSCFY06 and Pre20_OPAFY07, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

### B. Demographics

African-Americans still comprise the majority of crack cocaine offenders, but that is decreasing, from 91.4 percent in 1992 to 82.2 percent, according to preliminary fiscal year 2007 data. White offenders comprise 8.3 percent of crack cocaine offenders, compared to 3.2 percent in 1992.[10]

Powder cocaine offenders are now predominantly Hispanic. Hispanics accounted for 55.9 percent of powder cocaine offenders, according to preliminary fiscal year 2007 data. African-Americans accounted for 27.5 percent of powder cocaine offenders, and white offenders comprised 15.4 percent of these cases.

[10] *See* Table 2-1, USSC 2007 Cocaine Report.

**Updated Table 2-1**
**Demographic Characteristics of Federal Cocaine Offenders**
**Fiscal years 1992, 2000 & 2007**

| | Powder Cocaine | | | | | | Crack Cocaine | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1992 | | 2000 | | 2007 | | 1992 | | 2000 | | 2007 | |
| | N | % | N | % | N | % | N | % | N | % | N | % |
| **Race/Ethnicity** | | | | | | | | | | | | |
| White | 2,113 | 32.3 | 932 | 17.8 | 952 | 15.4 | 74 | 3.2 | 269 | 5.6 | 435 | 8.3 |
| Black | 1,778 | 27.2 | 1,596 | 30.5 | 1,693 | 27.5 | 2,096 | 91.4 | 4,069 | 84.7 | 4,356 | 82.2 |
| Hispanic | 2,601 | 39.8 | 2,662 | 50.8 | 3,444 | 55.9 | 121 | 5.3 | 434 | 9 | 414 | 7.9 |
| Other | 44 | 0.7 | 49 | 0.9 | 78 | 1.3 | 3 | 0.1 | 33 | 0.7 | 29 | 0.6 |
| Total | 6,536 | 100 | 5,239 | 100 | 6,167 | 100 | 2,294 | 100 | 4,805 | 100 | 5,234 | 100 |
| **Citizenship** | | | | | | | | | | | | |
| U.S. Citizen | 4,499 | 67.7 | 3,327 | 63.9 | 3,870 | 62.8 | 2,092 | 91.3 | 4,482 | 93.4 | 5,051 | 96.5 |
| Non-Citizen | 2,147 | 32.3 | 1,881 | 36.1 | 2,291 | 37.2 | 199 | 8.7 | 318 | 6.6 | 185 | 3.5 |
| Total | 6,646 | 100 | 5,208 | 100 | 6,161 | 100 | 2,291 | 100 | 4,800 | 100 | 5,236 | 100 |
| **Gender** | | | | | | | | | | | | |
| Female | 787 | 11.8 | 722 | 13.8 | 584 | 9.5 | 270 | 11.7 | 476 | 9.9 | 442 | 8.4 |
| Male | 5,886 | 88.2 | 4,518 | 86.2 | 5,590 | 90.5 | 2,032 | 88.3 | 4,330 | 90.1 | 4,797 | 91.6 |
| Total | 6,673 | 100 | 5,240 | 100 | 6,174 | 100 | 2,302 | 100 | 4,806 | 100 | 5,239 | 100 |
| **Average Age** | Average=34 | | Average=34 | | Average=34 | | Average=28 | | Average=29 | | Average=31 | |

This table excludes cases missing information for the variable required for analysis.

SOURCE: U.S. Sentencing Commission, 1992, 2002, and Preliminary 2007 Datafiles, MONFY92, USSCFY00 and Pre20_OPYFY07.

### C. Offender Function

In its May 2007 report, the Commission determined the offender's function in the offense by a review of the narrative of the offense conduct section of the Presentence Report[11] independent of any application of sentencing guideline enhancements, reductions, or drug quantity.[12] Offender function was assigned based on the most serious trafficking function performed by the offender in the offense and, therefore, provides a measure of culpability based on the offender's level of participation in the offense, independent of the offender's quantity-based offense level in the Drug Quantity Table in the drug trafficking guideline.[13]

To provide a more complete profile of federal cocaine offenders, particularly their function in the offense, the Commission undertook a special coding and analysis

[11] The Presentence Report is one of the five documents courts are required to submit to the Commission pursuant to 28 U.S.C. § 994(w). The other documents are: (1) the charging document; (2) the judgment and commitment order; (3) the plea agreement (if there is one); and (4) the Statement of Reasons form. It is from these five documents that the Commission extracts the data necessary to analyze and report on national sentencing trends and practices.

[12] *See* May 2007 Report at 17. Enhancements for aggravating conduct, such as possession of a dangerous weapon, distribution in protected places or to protected persons, aggravating role, and criminal history, including career offender status, are available within the sentencing guidelines for application in drug trafficking offenses.

[13] *See* May 2007 Report at 17 and A-3. Table A-1 of the Appendix to the May 2007 Report defines 21 categories of offender functions in drug trafficking offenses.

project using a sample of fiscal year 2005 federal offenders.[14] Each offender was assigned a separate function category[15] based on his or her most serious conduct described in the Presentence Report. The function category with the largest portion of powder cocaine offenders was couriers/mules (33.1 percent), which was consistent with the Commission's findings in 2002.[16] The largest portion of crack cocaine offenders fell within the street-level dealer category (55.4 percent).[17] This portion of crack offenders whose most serious conduct was as a street-level dealer is lower than reported in 2002 (66.5 percent).[18]

The sources of the two drug types likely account for these differences in offender functions. Powder cocaine is produced outside the United States and must be imported. In contrast, with rare exception, crack cocaine is produced and distributed domestically. This is demonstrated by Commission data, which suggest that 42.0 of powder cocaine offenses are international in scope whereas 56.6 percent of crack cocaine offenses may be classified at the neighborhood level.[19]

The Commission's data analysis also is consistent with the presence of a pyramid structure in drug trafficking, with the largest number of federal cocaine offenders performing lower-level functions.[20]

### D. Drug Quantity and Dosages

Drug type and quantity are the two primary factors that determine offense levels under the federal sentencing guidelines, combining to establish the base offense level for drug trafficking offenses. According to the Commission's analysis, in fiscal year 2006, the median drug weight for powder cocaine offenses was 6,000 grams. The median drug weight for crack cocaine offenses was 51 grams.[21] According to preliminary fiscal year 2007 data, the median drug weights increased to 6,240 grams for powder cocaine offenses and 53.5 grams for crack cocaine offenses.

With respect to doses, one gram of powder cocaine generally yields five to ten doses, whereas one gram of crack cocaine yields two to ten doses. Thus, 500 grams of powder cocaine – the quantity necessary to trigger the five-year statutory mandatory

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[14] The findings on offender function contained in this section are derived from the fiscal year 2005 drug sample. The fiscal year 2005 drug sample consists of a 25 percent random sample of powder cocaine (1,398 of the 5,744 cases) and crack cocaine (1,172 of the 5,397 cases) offenders sentenced under the primary drug trafficking guideline (USSG §2D1.1) in fiscal year 2005 after the January 12, 2005 Supreme Court decision in *United States v. Booker*, 543 U.S. 220 (2005). *See* May 2007 Report at A-2.

[15] For a complete discussion of the categories to which an offender was assigned, *see* May 2007 Report at 18.

[16] A "courier/mule" transports drugs with the assistance of a vehicle or other equipment, or internally, or on his or her person. May 2007 Report at 18.

[17] A "street-level dealer" distributes retail quantities (less than one ounce) directly to users. May 2007 Report at 18.

[18] *See* May 2007 Report at Fig. 2-6.

[19] *See* May 2007 Report at Fig. 2-7. For a detailed description of geographic scope, *see* Table A-2 of the May 2007 Report. "Neighborhood" indicates that the largest scope of the offense conduct occurs at or around a street corner of the few blocks within that immediate area. By contrast, "international" indicates that the largest scope of the offense conduct crosses the United States border.

[20] *See* May 2007 Report at 85.

[21] *See* May 2007 Report at Table 2-2.

minimum penalty – yields between 2,500 and 5,000 doses. In contrast, five grams of crack cocaine – the quantity necessary to trigger the five-year statutory mandatory minimum penalty – yields between ten and 50 doses.[22]

### E. Offender Conduct

According to the Commission's analysis, only a minority of powder cocaine offenses and crack cocaine offenses involve the most egregious aggravating conduct. As categorized by the Commission, aggravating conduct includes weapon involvement, violence, and aggravating role in the offense. Such conduct does continue to appear more frequently associated with crack cocaine offenses than powder cocaine offenses, but its presence in both offenses occurs in less than seven percent of the cases.

Weapon involvement is the most common aggravating conduct in both crack cocaine and powder cocaine offenses. According to the Commission's fiscal year 2005 data sample, weapon involvement, broadly defined,[23] occurred in 27.0 percent of powder cocaine offenses and 42.7 percent of crack cocaine offenses.[24] Under a narrower definition of weapon enhancement (i.e., one that relies exclusively on offender conduct and excludes weapon involvement of others), 15.7 percent of powder cocaine offenders had access to, possessed, or used a weapon, compared to 32.4 percent of crack cocaine offenders in the Commission's fiscal year 2005 drug sample.[25] Further limiting the analysis to cases in which a guideline or statutory weapon enhancement applied, in fiscal year 2006, 8.2 percent of powder cocaine offenders received a weapon enhancement under the guidelines, and 4.9 percent were convicted pursuant to 18 U.S.C. § 924(c). By comparison, 15.9 percent of crack cocaine offenders received the guideline weapon enhancement, and 10.9 percent were convicted pursuant to 18 U.S.C. § 924(c).[26]

According to the Commission's analysis, the prevalence of violence, as indicated by the occurrence of any injury, death, and threats of injury or death,[27] has decreased for both powder and crack cocaine since the Commission's review of cocaine sentencing in 2002. It continues to occur in only a minority of offenses. According to the Commission's fiscal year 2005 data sample, 93.8 percent of powder cocaine offenses did not have violence associated with them, as compared to 89.6 percent of crack cocaine offenses. Death was associated with 1.6 percent of powder cocaine cases and 2.2 percent of crack cocaine offenses. Any injury occurred in 1.5 percent of powder cocaine offenses and 3.3 percent of crack cocaine offenses. The threat of violence occurred in 3.2 percent of the powder cocaine offenses and 4.9 percent of the crack cocaine offenses.[28]

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[22] *See* May 2007 Report at 63.
[23] *See* May 2007 Report at 31. For purposes of this analysis, "weapon involvement" was defined as weapon involvement by *any* participant, ranging from weapon use by the offender to access to a weapon by an un-identified co-participant. *Id.*
[24] See May 2007 Report at Figure 2-15.
[25] *See* May 2007 Report at 33; figure 2-16.
[26] See May 2007 Report at Table 2-2. For a more detailed analysis of application of weapons enhancements, *see* May 2007 Report at pages 31-36.
[27] *See* May 2007 Report at 38; Figure 2-20.
[28] *See* May 2007 Report at Fig. 2-20.

## III. Recommendations

The Commission believes that there is no justification for the current statutory penalty scheme for powder and crack cocaine offenses. The Commission remains committed, however, to its recommendation in 2002 that any statutory ratio be no more than 20-to-1. Specifically, consistent with its May 2007 Report, the Commission strongly and unanimously recommends that Congress:

- Increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to focus the penalties more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act.

- Repeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.

- Reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses, as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.

The Commission further recommended in its May 2007 report that any legislation implementing these recommendations include emergency amendment authority[29] for the Commission to incorporate the statutory changes in the federal sentencing guidelines. Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.

The Commission believes that sentencing guidelines continue to provide Congress a more finely calibrated mechanism to account for variations in offender culpability and offense seriousness than was available at the time the 100-to-1 drug quantity ratio was established in 1986, and the Commission recommends to Congress that any concerns it has about harms associated with cocaine drug trafficking are best captured through the sentencing guideline system.

## IV. Conclusion

The Commission is strongly and unanimously committed to working with Congress to address the statutorily mandated disparities that currently exist in federal cocaine sentencing. The Commission also is committed to working with Congress on all other issues related to maintaining just and effective national sentencing policy in a manner that preserves the bipartisan principles of the Sentencing Reform Act.

Thank you for the opportunity to testify before you today and I look forward to answering your questions.

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[29] "Emergency amendment authority" allows the Commission to promulgate amendments outside of the normal amendment cycle described in footnote 3, *supra*.

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CHARLES J. HYNES
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February 11, 2008

The Honorable Joseph R. Biden
Chairman, Subcommittee on Crime and Drugs
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

As you did with the Second Chance Act of 2007 (S.1060), you have once again displayed admirable leadership on the issues of drug crime and drug treatment by introducing the Drug Sentencing Reform and Kingpin Trafficking Act of 2007 (S.1711).

For many years now, the U.S. Sentencing Commission, federal judges, researchers, academics, and community leaders throughout the country (including many right here in Brooklyn, New York), have decried the extreme disparity between federal sentences for crack cocaine and powder cocaine offenses. The inequality in this sentencing scheme, marked by the 100-to-1 quantity ratio between crack and powder cocaine and by the mandatory minimum prison penalty for simple possession of crack, has been most acutely felt in African American communities. In 2006, according to the U.S. Sentencing Commission's May 2007 report, federal crack cocaine sentences were 43.5 percent longer than powder cocaine sentences, and 81.8 percent of those who received those crack cocaine sentences were Black. Outrage has intensified because many of the grounds that were originally cited in support of the grossly disproportionate treatment of crack cocaine versus powder cocaine offenders can no longer serve as justification in light of the research and data now available. The differences in punishments simply do not fit the crimes, and it is imperative that Congress reassess the federal sentencing scheme to redress this lack of proportionality.

Even though as a state prosecutor I do not have to seek the enforcement of these disproportionate federal sentences (and, indeed, New York State itself makes no statutory distinction between crack and powder cocaine offenses), I nevertheless have a keen interest in them because of their impact on our communities. First, because minority communities both have the sense that the current disparate sentences are irrational and also know that over three-quarters of those receiving the harsh crack cocaine sentences are Black, they begin to lose faith in the criminal justice system. There is an unfortunate public perception in some quarters that those seeking to

enforce drug laws — even state drug laws — have a racist agenda. This has a detrimental effect on a state prosecutor's efforts to enlist community assistance in combating crime, especially drug-related crime.

Moreover, lengthy incarceration of non-violent, small-quantity drug offenders can be detrimental to a community in the long run. Drug-related crime is one of the most destructive forces that law enforcement must tackle. Drugs and violence are often intertwined (although, notably, we in Brooklyn have not seen any greater degree of violence related to crack dealers versus cocaine dealers). It is all too evident that drug use and drug dealing, be it of crack cocaine or powder cocaine, take a devastating toll on individuals, families, and neighborhoods. However, long-term incarceration is not always the best response if the ultimate goal is to improve public safety.

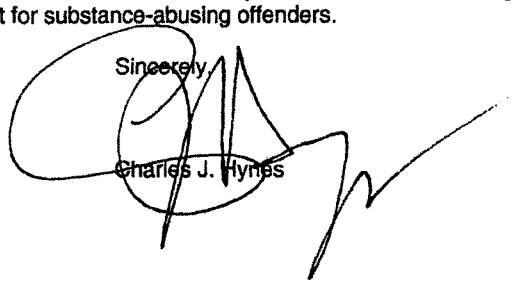
While the drug-related activity of a particular individual may stop during the offender's period of incarceration (clearly beneficial to the community), the incarceration of the individual may also break up a family, or lead to the loss of a home or the loss of child-support payments. Additionally, when these offenders eventually leave prison, they too often fail to re-integrate into society and lead law-abiding lives. They have difficulty re-establishing ties to their families, landing jobs, and getting the drug or mental health treatment that they need. The ex-offenders end up returning to drug-related crime, and can become involved in the state criminal justice system. This vicious cycle is a social nightmare and fiscal drain. Funds that could have been spent on social services pour into prisons instead. Incarceration is a powerful crime-fighting tool, but it is also an expensive one and it can have long-term negative effects which ultimately outweigh shorter-term benefits. As a state prosecutor, I believe public safety would be better served if the mandatory minimums for crack offenses were modified so that fewer non-violent drug offenders faced lengthy mandatory incarceration, and the monies otherwise earmarked for prisons were re-directed to provide drug and mental health treatment, as well as other social services, for ex-offenders re-entering their communities.

It is important that the lengthiest prison sentences target violent offenders, and that non-violent offenders get any substance abuse treatment that they need to successfully re-integrate into society. Your legislation wisely addresses both issues: first, by providing for sentencing enhancements for drug offenses involving dangerous weapons or violence, and second, by authorizing the Attorney General to fund local programs aimed at reducing drug and alcohol abuse among incarcerated defendants and parolees.

In short, the vastly disparate treatment of federal crack cocaine versus powder cocaine offenders cannot be justified by the evidence now known. If such unfair treatment is allowed to continue, the fallout from unnecessarily long and costly terms of incarceration as well as from a perception of racism in law enforcement will hamper state prosecutors in their efforts to fight crime at a local level. I applaud your bold legislative step to redress the current crack cocaine/powder cocaine imbalance in

federal sentences and refocus attention on increased punishment for violent kingpins and increased drug treatment for substance-abusing offenders.

Sincerely,



Charles J. Hynes

**(Long Statement for Record)**

**Statement of Edward M. Kennedy**
**Hearing on "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity"**
**February 12, 2008**

I commend my colleague, Senator Biden, for holding this hearing on one of the most serious problems in our criminal justice system – the disparity in sentences for crack and powder cocaine offenses. Last November, the Sentencing Commission finally amended the federal sentencing guidelines to reduce the disparity from 100 to 1 to 20 to 1. In December, the Commission took the further step of making the reduction retroactive, so that prisoners already sentenced can obtain the benefit of the reduction.

Unfortunately, Attorney General Mukasey is trying to disrupt this advance, by urging Congress to prevent current prisoners from obtaining retroactive relief for their excessive sentences. In testimony before the House Judiciary Committee last week, he warned that the improvements in the law would result in the release of "violent gang members" and cause more crime. We can't let such scare tactics by the Administration deter us from our goal of achieving fairness and legitimacy in the criminal justice system.

The very purpose of the Sentencing Reform Act when it was enacted over 20 years ago was to reduce unfair disparities and assure proportionality in punishment. But the severity of crack-cocaine sentences shows that disparities remain. It's had a harsh impact on low-income and Africa-American communities, and it's undermined confidence in the fairness of the criminal justice system, since it feeds the perception that our laws unjustly target poor and minority communities.

The harsh sentences for crack cocaine were intended to punish those at the highest levels of the illegal drug trade – the kingpins and the traffickers. But the low amount of the drugs needed to trigger the harsh sentences means that these sentences are not limited to high-level drug dealers: As the Sentencing Commission reported in 2005, only 15% of the defendants were high-level dealers. The overwhelming majority of those convicted were low-level offenders, and their harsh sentences had only a limited impact on the drug trade. The mass incarceration resulting from such sentences has done nothing to reduce drug use.

Also, at this time these laws were enacted, there was widespread belief in the extraordinary dangers of crack cocaine. Medical experts have now determined however, that the effects of crack were overstated, and it doesn't incite violent behavior. As with other drugs, the violence is tied to the distribution of the drug, not its use.

Changes in the drug market have also taken place. Demand for crack cocaine by new users has declined significantly, and so has the violence associated with its use.

How can Congress continue to support a policy we know is flawed? Under current law, one gram of crack cocaine triggers the same penalty as 100 grams of powder cocaine. Possession of 5 grams of crack triggers a 5 year mandatory minimum penalty. It's also the only drug with a mandatory prison sentence for first-time possession. In fact, judges, experts, and practitioners in the federal criminal justice system have long opposed all mandatory minimum sentences, because they undermine the goals of the Sentencing Reform Act by creating unwarranted disparities, subjecting defendants with different levels of culpability to the same punishment, and adding another unnecessary layer of complexity to the sentencing process.

Senator Hatch and I have introduced legislation that would take two important steps to alleviate the harsh consequences of cocaine sentences. The legislation writes into law the Sentencing Commission's reduction in the ratio from 100:1 to 20:1. It also raises the amount of crack cocaine triggering a mandatory minimum sentence from 5 grams to 25 grams in order to target the most serious traffickers. These changes will make our cocaine laws more consistent with the penalties for other types of drugs that require large amounts to trigger a mandatory minimum.

Drug abuse and addiction are increasingly recognized as public health issues, not just as crimes. More resources are needed to break the cycle of drug addiction, which often leads to involvement in crimes. More resources must also be given to drug courts, which provide non-violent drug offenders with treatment. We know that since punishment and incarceration addresses only one part of the overall drug problem.

Our goal is to restore the original intent of these laws and direct our limited resources more toward arresting and prosecuting high-level drug dealers and traffickers. Our harshest punishments should be reserved for those who truly deserve them.

**STATEMENT OF A. J. KRAMER**
Federal Defender for the District of Columbia
On Behalf of the Federal Public and Community Defenders

BEFORE THE SUBCOMMITTEE ON CRIME AND DRUGS
OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

**February 12, 2008 Hearing**
**Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity**

Mr. Chairman and Members of the Subcommittee:

Thank you for holding this hearing and for the opportunity to provide this written statement on behalf of the Federal Public and Community Defenders regarding reform of the federal cocaine sentencing laws. The Defenders have offices in 90 of 94 federal judicial districts. We represent thousands of people charged with federal crack cocaine offenses, 82% of whom are African American.[1] In the District of Columbia, where I have been the Federal Defender since 1990, 52% of the federal drug cases are crack cases, two and a half times the national average.[2] The injustice of federal crack cocaine sentencing laws is acutely felt in the District of Columbia, where the population is 55.4% African American,[3] 92.8% of the incarcerated population is African American,[4] and well over 50% of young black males are incarcerated or under supervision.[5]

As well-documented by the Sentencing Commission in its four reports to Congress, the severity of crack cocaine penalties based on drug type is unjustified and

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[1] USSC, Cocaine and Federal Sentencing Policy 16, May 2007.

[2] U.S. Sentencing Commission, Statistical Information Packet, Fiscal Year 2005, District of Columbia, Figure A, http://www.ussc.gov/JUDPACK/2005/dc05.pdf.

[3] U.S. Census Bureau, American Community Survey 2006, http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=Search&_lang=en&_sse=on&geo_id=04000US11&_state=04000US11.

[4] Human Rights Watch, *Incarcerated America*, April 2003, http://www.hrw.org/backgrounder/usa/incarceration/.

[5] By 1997, the percentage was 50%. *See* Eric Lotke, *National Center on Institutions and Alternatives, Hobbling a Generation: Young African American Men in D.C.'s Criminal Justice System Five years Later* (August 1997), available at http://66.165.94.98/stories/hobblgen0897.html. The national incarceration population has grown 3.4% annually since then. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, Bulletin NCJ 213133, *Prison and Jail Inmates at Midyear 2005*, p. 2 (May 2006) (Table 1).

unfair, has a disproportionate impact on African Americans, and creates the widely-held perception that the penalty structure promotes unwarranted disparity based on race.[6]

The Sentencing Commission has taken a first step to "somewhat alleviate" these "urgent and compelling problems."[7] With the overwhelming support of the Judiciary, U.S. Probation, the Defenders, and community groups, it promulgated a two-level reduction, effective November 1, 2007, with congressional acquiescence. On December 11, 2007, as with prior amendments benefiting offenders of other races and more serious offenders, the Commission voted unanimously for a policy statement making the amendment retroactive.[8] At the two mandatory minimum quantity levels for an offender in Criminal History Category I, the amended guideline range now includes, but no longer exceeds, the mandatory minimum penalty; guideline ranges continue to be keyed to the mandatory minimum penalties above, between and below the mandatory minimum quantity levels.[9] Before the amendment, guideline sentences for crack were three to over six times longer than for powder cocaine;[10] now they are two to five times longer.[11] In the Commission's view, the amendment is "only a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio," and requires a "comprehensive solution" from Congress, at which time the guidelines can be further amended.[12]

On December 10, 2007, the Supreme Court recognized that the sentencing guidelines for crack undermine the purposes of sentencing and create unwarranted disparity, even as amended, based on the Sentencing Commission's findings. Thus, a sentencing court does not abuse its discretion when it imposes a below-guideline sentence for those reasons.[13] Again, however, this is only a partial remedy. A judge cannot sentence below a mandatory minimum, and many courts remain hesitant to sentence outside the guidelines.

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[6] USSC, Cocaine and Federal Sentencing Policy (February 1995); USSC, Cocaine and Federal Sentencing Policy (April 1997); USSC, Cocaine and Federal Sentencing Policy (May 2002); USSC, Cocaine and Federal Sentencing Policy (May 2007).

[7] USSC, Cocaine and Federal Sentencing Policy 9 (May 2007).

[8] Amendments to the LSD and marijuana guidelines, impacting mostly White offenders, were made retroactive, as was the lowering of the maximum base offense for trafficking in all types of drugs from 42 to 38.

[9] USSC, Cocaine and Federal Sentencing Policy 9-10 (May 2007).

[10] *Id.* at 3.

[11] 72 Fed. Reg. 28558, 28571-72 (2007).

[12] USSC, Cocaine and Federal Sentencing Policy 9-10 (May 2007).

[13] *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

Thus, until Congress acts, the cocaine penalty structure continues to undermine the purposes of sentencing and create unjustified disparity. A person with no criminal history who possesses 5 grams of crack, whether for personal use or sale, is subject to a guideline sentence of 51-63 months (after the 2007 amendment) and a mandatory minimum of five years. A person possessing the same amount of powder cocaine with intent to distribute receives a guideline sentence of only 10-16 months, or if for personal use, no more than 12 months. That amount of powder cocaine converts to about 4 ½ grams of crack cocaine by simply adding baking soda, water and heat. The sentence for possessing or distributing 5 grams of crack is the same as the guideline sentence for dumping toxic waste knowing that it creates an imminent danger of death, the same as that for theft of $7 million, and double that for aggravated assault resulting in bodily injury.

For the reasons below, the Defenders urge Congress to adopt the following reforms:

1. Penalties for crack and powder cocaine should be equalized at the current powder cocaine quantity level.

2. The Sentencing Commission should be directed to review, and if appropriate, amend the guidelines applicable to all drug types, to account for aggravating and mitigating circumstances that may or may not be present in individual cases.

3. The mandatory minimum for simple possession of crack cocaine should be repealed.

4. Mandatory minimums for all drug offenses should be repealed.

5. A pilot program for federal substance abuse courts should be established.

6. If Congress authorizes the appropriation of funds for additional salaries and expenses for the prosecution of a substantial number of additional drug trafficking cases, it should authorize the appropriation of additional funds for the defense of such cases.

## I. Equalization At The Current Powder Cocaine Quantity Level, With Aggravating and Mitigating Circumstances Taken Into Account If They Are Present In Individual Cases, Is The Right Solution.

### A. Based on the Evidence, a 1:1 Ratio at the Current Powder Cocaine Quantity Level is the Only Correct Remedy.

Although the Commission has proposed different possible quantity ratios, ranging from 1:1 to 20:1, the consistent import of its actual findings has been that *if* there is any additional harm in crack cocaine offenses, it should not be addressed through the blunt

instrument of higher penalties based on the type of cocaine, but by enhancements that may or may not exist in individual cases.[14]

A 20:1 ratio, in which 25 grams would be subject to a five-year sentence and 250 grams would be subject to a ten-year sentence, would not focus law enforcement resources on kingpins or major drug traffickers. A quantity of 25 grams of crack is half that associated with a mere street-level dealer.[15] A quantity of 250 grams is orders of magnitude less than that associated with a high-level supplier or organizer/leader,[16] is in the neighborhood of that associated with such lowly roles as manager and cook, and is far less than that associated with a mere courier.[17]

As these figures suggest, quantity is a poor and imprecise measure of culpability, and both quantity and type are subject to happenstance and manipulation. For example, I represented a defendant on appeal who can only be described as a small time street dealer. He is mentally ill, supervised no one, and made little profit from selling crack. He was convicted of selling 188 grams of crack to an undercover officer in multiple sales over a one-month period. The amount could have reached 250 grams, except that my client became suspicious of the undercover officer and refused to sell him any more, at which point he was arrested and charged.

A true high-level dealer is one who imports a large quantity of powder before it is ever cooked into crack. A sentencing differential based on different quantities of powder and crack would perpetuate the inversion problem.

Congress should "reject addressing the 100-1 drug quantity ratio by decreasing the . . . threshold quantities for powder cocaine offenses, as" the Commission has found that "there is no evidence to justify an increase in quantity-based penalties for powder cocaine offenses."[18]

### B. Any Sentence Disparity Based on Drug Type Invites Manipulation of Type and Quantity, Resulting in Longer Sentences for Low Level Offenders and Shorter Sentences for Serious Offenders.

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[14] *See* Reports, *supra* note 6; 60 Fed. Reg. at 25,077.

[15] USSC, Cocaine and Federal Sentencing Policy at 45, Figure 10 (May 2002) (median drug weight for street-level crack dealers was 34 grams in 1995, 52 grams in 2000).

[16] *Id.* (median weight for high-level supplier of crack was 590 grams in 1995, 2962 grams in 2000).

[17] *Id.* (median weight of crack for managers was 253 grams in 2000; for cooks was 155 grams in 1995 and 180 grams in 2000; for couriers was 337 grams in 1995 and 338 grams in 2000).

[18] *See* USSC, Cocaine and Federal Sentencing Policy 8 (May 2007).

The Commission has found that drug quantity manipulation and untrustworthy information provided by informants are continuing problems in federal drug cases.[19] These problems are particularly pronounced in cocaine cases because the simple process of cooking powder into crack results in a drastic sentence increase, and because a very small increase in the quantity of crack results in a very large increase in the sentence. The result is that agents and eager-to-please informants insist that powder be cooked into crack, arrange to buy the threshold amount in a single sale, or make additional buys, all for the purpose of arriving at the higher crack sentence.[20]

A "major goal" of the Anti-Drug Abuse Act of 1986 was "to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources" on "major" and "serious" drug traffickers.[21] Rather than encouraging law enforcement to focus on existing "major" and "serious" drug traffickers, the unfortunate fact is that agents and informants often take advantage of the crack/powder disparity to create long sentences for low-level offenders while more culpable offenders receive shorter sentences in return. This is the very definition of unwarranted disparity, wastes taxpayer dollars, is indefensible, and should be excised from the federal cocaine sentencing laws.

Defenders see this on a regular basis. In a case in my district, a DEA agent testified that it was his regular practice, when street dealers offered to sell him powder, to ask them to cook it into crack, in order to obtain the mandatory minimum sentence. A recent client of mine was caught with ½ gram of heroin but is serving a 17 ½ year sentence based on the uncorroborated testimony of a gang leader that my client had once sold him 62 grams of crack. The gang leader served less than a year in prison in exchange for his testimony against petty street dealers, including my client, who had no information to give.

In a case in the District of Massachusetts, an informant facing state charges after being caught with 50 grams of powder cocaine began cooperating with the FBI. He and a close friend, the eventual defendant, had occasionally sold each other powder cocaine, never crack. The informant asked the defendant to get him two ounces of cocaine. The

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[19] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50, 82 (2004).

[20] *See, e.g., United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F.Supp.2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14."); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

[21] H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596 (Background).

FBI directed the informant to accept only crack, not powder, though the defendant had never sold crack to anyone. When the defendant showed up with two ounces of powder, the informant refused to accept it, insisting on crack. The defendant returned the powder to the supplier, who eventually replaced it with two ounces of crack. The agent testified at the sentencing hearing that he directed the informant to buy only crack because it would result in a higher sentence. The sentence for two ounces of cocaine powder would have been 30-37 months with no mandatory minimum. The sentence for two ounces of crack carried a guideline sentence of 140-175 months and a mandatory minimum of ten years. The district court found that the FBI agent's primary purpose was to procure the highest possible penalty, which was not a legitimate law enforcement purpose. The district court reduced the guideline sentence by fourteen months and imposed a sentence of 126 months. The state charges against the informant were dismissed, he was charged federally, and received a sentence of only 24 months for his cooperation in creating a crack trafficking case.

In a case in Los Angeles, a female informant, at the government's direction, twice sought to buy crack from the defendant, but the defendant brought powder cocaine instead. The informant requested crack a third time, and the defendant again showed up with powder. By then, the informant had established a sexual relationship with the defendant. At her insistence, the defendant cooked the powder into crack. For the fourth transaction, the defendant again showed up with powder, and again, at the informant's insistence, cooked the powder into crack. In this way, the government purposely doubled the defendant's guideline range from 84-105 months to 168-210 months and subjected him to a ten-year mandatory minimum sentence rather than a five-year mandatory minimum. By the time the defendant was indicted, three years had passed since the last sale, he had established his own plumbing company, and he had a stable home life with his fiance and their daughter.

In a case tried in the Eastern District of Louisiana, the defendant made an initial sale of less than 30 grams of crack to an undercover agent. The agent acknowledged on the stand that he could have arrested the defendant then and there, but went back for a second sale in order to obtain a higher mandatory minimum sentence. Because the defendant had a prior conviction for possession of a crack pipe with residue in it and another for possession of six marijuana cigarettes (for neither of which he received a prison or jail sentence), he was sentenced to mandatory life in prison. Absent the second sale, the defendant would have been subject to a mandatory minimum of ten years.

### C. While Devastating Individuals, Families and Communities and Undermining Public Confidence in the Justice System, the Harsh Federal Penalties for Crack Offenses Do Not Prevent Drug Crime.

John P. Walters, the Director of the Office of National Drug Control Policy, told Congress in early 2005 that the current policy of focusing on small-time dealers and users was ineffective in reducing crime, while breaking generation after generation of poor minority young men.[22] As the Sentencing Commission has found, "retail-level drug

[22] Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor, May 27, 2005.

traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else."[23]

At the same time, the persistent removal of persons from the community for lengthy periods of incarceration weakens family ties and employment prospects, and thereby contributes to increased recidivism.[24] Reputable studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by many tons and save billions of taxpayer dollars.[25]

Though some have said that higher penalties for crack offenses protect and benefit African American communities, this claim is unsupportable. Over 32% of black males born in 2001 are expected to go to prison during their lifetimes if current incarceration rates continue. In 2001, the percentage of black males in prison was twice that of Hispanic males and six times that of White males.[26] One of every fourteen African American children has a parent in prison, and thirteen percent of all African American males are not permitted to vote because of felony convictions.[27] The harsh treatment of federal crack offenders has contributed to this deplorable situation.

Defenders see the pointless destruction of our clients' lives and families on a frequent basis. Under the statute and guidelines, even a first offender must spend a substantial period of time in prison, cutting off education and meaningful work, and

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[23] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004). *See also* USSC, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported that dealers were immediately replaced).

[24] The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005) (hereinafter "*Incarceration and Crime*"), available at http://www.sentencingproject.org/pdfs/incarceration-crime.pdf.

[25] Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* at xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), http://www.nicic.org/Library/020074.

[26] U.S. Department of Justice, Bureau of Justice Statistics, *Special Report: Prevalence of Imprisonment in the U.S. Population, 1974-2001* (August 2003).

[27] *See* American Civil Liberties Union, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* 3-4, October 2006; Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* 10 (2002); Human Rights Watch & the Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 8 (1998).

greatly diminishing prospects for the future. My office recently represented a 22-year-old young man who was working toward his GED and taking a weekly class in the plumbing trade when he was sentenced to prison for selling 7 grams of crack to a cooperating informant. He had no prior convictions or even any prior arrests, no history of drug or alcohol abuse, was in a stable relationship, and had two small children to whom he was devoted. He was a random casualty of an investigation of a serious drug trafficking conspiracy in which he was not involved. A cooperator in that investigation, who happened to live in the same housing project, approached our client to get him some crack, and he unwisely agreed to get cash to support his family. The government prosecuted our client in federal court, not because he was involved in the conspiracy under investigation, but to make a record for its cooperator. If our client had been prosecuted in superior court, he would have received a sentence of probation. If he had been prosecuted in federal court for selling 7 grams of powder cocaine, he would have received a sentence of probation. He is now serving a prison sentence, while the cooperator, who had a very substantial record, was sentenced to time served.

In a recent case handled by the Defender in Los Angeles, the client was just finishing up a sentence for being a felon in possession of a firearm. He had completed the 500-hour drug treatment program, had served as a suicide watch companion in prison for over a year, had been released to a halfway house, was working full time, and was about to regain custody of his son. On the eve of his return home and just before the statute of limitations would have expired, the government indicted him for a sale of four ounces of crack to a confidential informant, which had occurred seven months *before* the felon in possession offense. In that case, the informant, at the direction of law enforcement officers, rejected the four ounces of powder cocaine the client brought him and insisted on four ounces of crack instead. If the government had indicted the client for both offenses at once, he would have received a concurrent sentence. If the informant had not insisted on crack, the entire sentence would be wrapped up, the client would be working, and his son would have a parent to care for him. Instead, he is now serving a ten-year mandatory minimum sentence.

In a case handled by the Defender in the Southern District of Alabama, a forty year old mother of three and grandmother of two with no criminal history was convicted of conspiring to distribute crack. The only evidence against her was the uncorroborated testimony of serious drug dealers, one a former boyfriend, who had gun charges dismissed and received lower sentences in return. Her lawyer moved for a mistrial when he learned that the cooperators were placed in the same holding cell and were coordinating their testimony. The witnesses assured the judge that they did not discuss their testimony and the motion was denied. The woman was sentenced to twenty years in prison. Her 20-year-old daughter was forced to leave college to support and care for the family.

## II. Aggravating Circumstances, Rather Than Being Built Into Every Crack Sentence, Should Affect the Sentence Only If Present In The Individual Case.

The Sentencing Commission should be directed to review, and if appropriate, amend the guidelines applicable to all drug types, to account for aggravating and mitigating circumstances that may or may not be present in individual cases. This directive should give the Commission the leeway to independently determine which circumstances should be added and how much they should affect the guideline range. Many of the aggravating circumstances identified in the pending legislative proposals are already available under the guidelines and various statutes. The Commission is in the best position to determine if additional ones are needed and to what extent.

### A. An Assumption of Violence Cannot Be Built Into the Penalty for All Crack Offenses Because Crack Offenses are Predominantly Non-Violent.

The Commission defines "violence" as the occurrence of death, any injury, or a threat. In crack cases in 2005, death occurred in 2.2% of cases, any injury occurred in 3.3% of cases, and a threat was made in 4.9% of cases.[28] Thus, 94.5% of cases involved no actual violence, and 89.6% involved no violence or threat of violence. Only 2.9% of crack offenders in 2005 used a weapon.[29]

The Commission also found that although "weapon involvement, by the broadest of definitions," *i.e.*, ranging from weapon use by the defendant to mere access to a weapon by an un-indicted co-participant, "has increased since 2002 in both powder cocaine and crack cocaine offenses, the rate of actual *violence* involved in the offense, *already relatively low*, has declined further during this period."[30] Further, the crack cocaine population is aging without replacement by younger users, and older users are less violent.[31]

Weapon involvement and violence, if it occurred, should be taken into account through enhancements in individual cases.

### B. An Assumption of Recidivism Cannot Be Built Into the Penalty for All Crack Offenses Because This Would Over-punish Offenders With a Low Risk of Recidivism, Would Double Count Criminal History, and Would Exacerbate Racial Disparity.

[28] *Id.* at 38.

[29] *Id.* at 33.

[30] *Id.* at 87 (emphasis in original and added).

[31] *Id.*

For Criminal History Categories II and higher, drug offenders have the lowest rate of recidivism of all offenders.[32] Further, across all criminal history categories and for all offenders, the largest proportion of "recidivating events" that count toward rates of recidivism are supervised release revocations, which are based on anything from failing to file a monthly report to failing to report a change of address.[33] Drug trafficking accounts for only a small fraction – as little as 4.1% – of recidivating events for all offenders.[34]

While it is true that crack cocaine offenders generally have higher criminal history categories than powder cocaine offenders,[35] as the Commission has explained, "African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers" because of "the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished neighborhoods."[36] Indeed, though African Americans comprise only 15% of drug users, they comprise 37% of those arrested for drug offenses, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.[37]

Because African Americans have a higher risk of conviction than similar White offenders, they already (1) have higher criminal history scores and thus higher guideline ranges, (2) are sentenced more often under the career offender guideline, (3) are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and (4) are more often disqualified from safety valve relief.

In short, criminal history is already accounted for in a host of ways in individual cases. Building it into every crack cocaine sentence would effectively double count criminal history and exacerbate racial disparity.

## III. The Mandatory Minimum for Simple Possession of Crack Cocaine Should Be Repealed.

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[32] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

[33] *Id.* at 4, 5 & Exs. 2, 3, 13.

[34] *Id.* at Ex. 13. "[S]erious violent offenses," which include domestic violence and weapon possession, account for up to no more than 16.8% of recidivating events for all offenders. *Id.*

[35] USSC, Cocaine and Federal Sentencing Policy 44 (May 2007).

[36] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004).

[37] *See* Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

Congress should repeal the mandatory minimum for simple possession of crack, so that the penalty for simple possession of crack is the same as that for simple possession of powder cocaine, as the Commission has unanimously and repeatedly recommended.

## IV. Mandatory Minimums for All Drug Offenses Should Be Repealed.

Seventeen years ago, the Sentencing Commission found that mandatory minimums create unwarranted disparity and unwarranted uniformity, and transfer sentencing power from impartial judges to interested prosecutors.[38] Today, there is a solid consensus in opposition to mandatory minimums among an ideologically diverse range of judges, governmental bodies and organizations dedicated to policy reform, including the Judicial Conference of the United States, the U.S. Conference of Mayors, the American Bar Association's Justice Kennedy Commission, and Justice Kennedy himself.[39] According to the Constitution Project's Sentencing Initiative, chaired by former Attorney General Edwin Meese III, "Experience has shown that mandatory minimum penalties are at odds with a sentencing guideline structure."[40]

Mandatory minimum statutes result in sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense, and racially discriminatory. The Commission, in its Fifteen Year Report, detailed many of these problems with support from many sources, including evidence from the Department of Justice "that mandatory minimum statutes [are] resulting in lengthy imprisonment for many low-level, non-violent, first-time drug offenders."[41] The Commission concluded: "Today's sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into

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[38] *See* USSC, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (1991).

[39] *See* Statement of Hon. Paul J. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee on Behalf of the Judicial Conference of the United States (June 26, 2007); U.S. Conference of Mayors, Resolution Opposing Mandatory Minimum Sentences 47-48 (June 2006); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003); Leadership Conference on Civil Rights, Justice on Trial (2000); Federal Judicial Center, The Consequences of Mandatory Prison Terms (1994).

[40] Constitution Project, Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems: A Background Report 12 (June 7, 2005).

[41] *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 51 (2004), citing U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994).

account by judges in the discretionary system in place immediately prior to guidelines implementation."[42]

The Commission recently reported that in 2006, black offenders were the only racial group comprising a greater percentage of offenders convicted under a mandatory minimum statute (32.9%) than their percentage in the overall offender population (23.8%). In drug cases, only Hispanics and blacks comprised a greater percentage of offenders convicted under a mandatory minimum statute (42.4% and 32% respectively) than their percentage in all drug cases (41.7% and 29.2% respectively).[43]

## V. A Pilot Program For Federal Substance Abuse Courts As A Sentencing or Diversion Option Should be Established.

We urge Congress to establish a pilot program for federal substance abuse courts that would be available as a sentencing or pretrial diversion option. We believe that this should take priority over funding state drug courts or prison treatment programs.

Substance abuse or addiction is the cause not only of drug possession and trafficking offenses, but many other federal crimes. Recidivism rates are lower for offenders who have not used, abused or been addicted to drugs in the recent past, for offenders who are or were employed, and for offenders who have some level of education. Thus, rehabilitation programs that require a combination of substance abuse treatment and employment or the pursuit of a degree have a high cost-benefit value.[44]

Many states have adopted substance abuse court programs as a way to reduce both recidivism and the cost of unnecessary incarceration.[45] These programs are used on the front end, as an alternative to a lengthy prison sentence. The person may be sentenced to probation with successful completion of substance abuse court as a condition, followed by no incarceration or a shorter term of incarceration, or the case may be held in abeyance and eventually dismissed upon successful completion. The purpose and effect is to reduce recidivism, keep offenders employed and with their families and in their communities, and save taxpayer dollars that need not be wasted on ineffective incarceration.

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[42] *Id.* at 135.

[43] *See* Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 3, 12 (June 26, 2007).

[44] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12-13, 15-16 & Ex. 10 (May 2004).

[45] Ryan S. King, *Changing Direction? State Sentencing Reforms 2004-2006* (March 2007), http://www.sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf.

The only similar rehabilitative program available in federal court operates at the supervised release stage, after the offender has already completed what is usually a lengthy prison sentence. Substance abuse courts are currently in operation in three districts, and "re-entry courts" are in operation in two other districts.[46] Participation is voluntary and results in a reduced term of supervised release upon successful completion of a total of twelve months. Participants meet regularly as a group with the federal magistrate and/or district court judge in charge of the program. The judge assigns each person goals to achieve between meetings, and each person must account for those goals to the judge and the entire group. They must, among other things, remain sober and be employed. When issues arise, treatment may be changed (e.g., the person may be required to live in a sober house because her home environment does not support recovery), and/or graduated sanctions imposed, ranging from writing an essay to a brief period in jail. Judges, Defenders and Probation Officers report that individual attention from the judge and peer pressure from others who are succeeding in the face of the same problems are what make these programs work. Judges and Probation Officers are so enthusiastic about these programs that six other district courts are opening similar programs within the next few months, and proposals are pending in four other districts.

The success of these programs demonstrates that prison first, drug courts only later, is not the answer. Participants are still addicted when released from prison. Spending years in prison makes recidivism more likely by breaking up families and making offenders less employable. If offenders were given the tools and incentives to overcome bad habits, work, and live in the community on the front end, recidivism would be reduced at less cost.

If Congress believes that substance abuse courts are a good idea, it should take the lead and establish them in the federal system. Funding more state drug courts without creating federal substance abuse courts would increase unwarranted federal/state disparity, and do nothing positive for the federal system. The existence of drug courts in the state system but not the federal system in the same district creates unwarranted disparity. Federal authorities can and do take cases from state court, where sentences are generally lower and drug courts are available. As often as not, this has nothing to do with the seriousness of the offense. If drug courts were established in the federal system, this source of unwarranted disparity would be removed. Funding more state drug courts without creating the same option in federal court would exacerbate the problem.

The Department of Justice claims that federal drug courts are inappropriate because the federal system "deals overwhelmingly with drug trafficking defendants who have committed more serious drug trafficking offenses, are often violent, and are not eligible for, or amenable to, drug-court-type programs." DOJ Report to Congress on the Feasibility of Federal Drug Courts 1 (June 2006). While serious and violent drug trafficking may be what Congress had in mind for the federal system, the reality is that

[46] No legislation was needed for these programs. They were implemented by Probation Offices, District Courts, and Defenders, with the assent of U.S. Attorneys. Legislation is needed, however, to create such programs at the front end.

most federal drug defendants are low-level, non-violent street dealers, couriers, and users.[47] These offenders are amenable to substance abuse treatment, and so are other types of federal offenders (*e.g.*, fraud offenders) who suffer from addiction and whose crimes are often the result of addiction.

The Department also claims that "state drug court programs as well as federal programs during pretrial release, incarceration, and supervised release, are already available as an alternative to a new federal drug court program." *Id.* As noted above, there is no effective federal drug court program available on the front end where it could do the most good and save the most resources, and the existence of state drug court programs creates unwarranted disparity and does not rehabilitate federal offenders or save federal dollars.

The Department's claim that treatment is available during incarceration as an alternative to federal drug courts is not accurate. In January 2005, BOP unilaterally terminated the boot camp program enacted by Congress in 1990. The only study of the federal boot camp program showed it to be effective and efficient. Nonetheless, BOP terminated it, without congressional consultation or approval, depriving judges of a mitigating sentencing option that benefited first time non-violent offenders,[48] the very ones DOJ concluded in its own study were receiving unnecessary time and wasting taxpayer dollars.[49] Similarly, after Congress created the residential drug and alcohol program, the BOP, by unilateral regulation, placed many restrictions on the ability to obtain the accompanying one-year sentence reduction, thus removing the incentive to participate. Those convicted of being a felon-in-possession, no matter how non-violent, are ineligible. Those who received the two-level weapon enhancement under the guidelines are ineligible, thus excluding many people who were convicted of a drug offense in which a gun was merely possessed or accessible to someone other than the defendant. Anyone with certain crimes of violence in his criminal history, no matter how old, e.g., a 30-year-old bar fight, is ineligible for the reduction.

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[47] Over 51% of federal drug offenders have 0-1 criminal history points and over 83% had no "weapon involvement," broadly defined as anything from use by the defendant to mere access to a weapon by an un-indicted co-participant. *See* U.S. Sentencing Commission, 2006 Sourcebook, Tables 37, 39. The largest proportion of powder cocaine offenders are mules and the largest proportion of crack cocaine offenders are street level dealers. *See* USSC, Cocaine and Federal Sentencing Policy 19 (May 2007). A study by the Department in 1994 found that a substantial number of federal drug offenders played minor functional roles, had engaged in no violence, and had minimal or no prior contacts with the criminal justice system, and that this was a waste of taxpayer dollars. U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994), available at http://fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf.

[48] Update on BOP Issues Affecting Clients Before And After Sentencing at 5-6, http://or.fd.org/BOPNotesOnIssuesJan07.pdf.

[49] U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994), available at http://fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf.

**VI. The Need for Parity Between Prosecution and Defense.**

Section 10 of S. 1711 would authorize the appropriation of $46,000,000 for salaries and expenses for the prosecution of high-level drug offenders. This would result in many additional cases for Defenders and CJA counsel. Defenders handle 75% of federal criminal cases at the trial level. Of the other 25%, the majority are multi-defendant cases, typically drug cases, in which the Defender represents one of the defendants and CJA counsel is appointed for the others.

Prosecutors have vast investigative support outside of their agency and outside of their budget, and have the ability to bring witnesses to their offices. Defense counsel must perform all or much of the investigation themselves. They frequently meet with clients and witnesses in far flung jails and correctional institutions. They may spend an entire day for a brief meeting with a client or one witness. For these and other reasons, it takes more lawyer time to defend a case than to prosecute it. Because of budgetary constraints and hiring freezes, there has been no appreciable increase in Defender hires over the past few years, as our caseload increases annually.

The Sixth Amendment guarantees every indigent defendant the right to appointed counsel and every defendant the right to effective assistance of counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984). Defender Offices, already strained, cannot provide effective representation if their caseloads are substantially increased. Thus, if the prosecution's budget for drug cases is increased, a corresponding increase for the defense is necessary.

**VII. Retroactivity**

Finally, I would like to briefly address the Attorney General's recent statements regarding prisoners who are eligible for release under the retroactive crack guideline amendment.

If the government believes that any particular prisoner poses a public safety risk, it is invited to bring this to the judge's attention, and judges are required to consider this factor whether or not the government raises it. *See* USSG 1B1.10, comment. (n.1(B)). Each prisoner released will be under supervision. If the government wishes to request some additional form of re-entry preparation for a particular prisoner, it can do so. For those prisoners due for immediate release, the government should be bringing any concerns in this regard to the attention of the sentencing judge now.

There should be few such concerns, however, because the Attorney General's claim that retroactive guideline "will pose significant public safety risks" is contrary to the evidence showing that this population is predominantly non-violent. *See* Part II, *supra*. The Attorney General's claim that "many" of the 1600 or so prisoners eligible for immediate release are "among the most serious and violent offenders in the federal system" is refuted by data recently prepared by Commission staff, which is available

upon request from the Commission. Moreover, most prisoners due for immediate release are quite a bit older than when they committed the offense, and both violence and recidivism decline markedly with age.[50] By the Attorney General's logic, no one should ever be released from prison.

The Attorney General also claims that retroactive application would be "difficult for the legal system to administer." This rings hollow, given that District Court Judges, Probation Officers, Defenders, the Bureau of Prisons and U.S. Attorneys' Offices have been working in a spirit of cooperation for the past two months to ensure an efficient and fair process. U.S. Probation has held two summits attended by hundreds of judges, probation officers, defenders, prosecutors and prison officials. Information and ideas were shared, and consensus on issues of consequence was reached. DOJ representatives announced that they would cooperate in the process. It would be a massive waste of resources and goodwill to derail the process now, as the Attorney General suggests.

In conclusion, I again thank you for your attention to the urgent and compelling need for reform of the federal cocaine sentencing laws. Please do not hesitate to contact me should you have any questions or need further information.

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[50] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12 & Exhibit 9 (May 2004); USSC, Cocaine and Federal Sentencing Policy 87 (May 2007).

**Statement Of Senator Patrick Leahy (D-Vt.),**
**Chairman, Senate Judiciary Committee,**
**Hearing On "Federal Cocaine Sentencing Laws:**
**Reforming The 100:1 Crack Powder Disparity"**
**February 12, 2008**

Today, we examine the differing penalties for crack and powder cocaine offenses and consider how best to make our drug laws more rational, more fair, and more consistent with our basic values. This Committee last held a hearing on reforming these drug penalties in 2002, when I previously served as Chairman.

I thank Senator Biden for holding this important hearing before the Crime and Drugs Subcommittee. It can be another step forward in our efforts to restore public confidence in our criminal justice system.

For more than 20 years, our Nation has had a federal cocaine sentencing policy that treats "crack" offenders one hundred times more harshly than cocaine offenders. We know that there is little or no pharmacological difference between crack and powder cocaine, yet the resulting punishments for these offenses is radically different—and some have observed racially different in that it is different populations that are largely affected.

A first-time offender caught selling five grams of powder cocaine would typically receive a six month sentence, and often be eligible for probation. That same offender selling the same amount of crack would face a mandatory five year prison sentence, with no possibility of leniency. This policy has needlessly swelled our prisons and drained precious Federal resources. Even more disturbing, this policy has had a disparate impact on racial and ethnic minorities, who make up 96 percent of those affected. It is no wonder this policy has sparked a nationwide debate about racial bias in our justice system and contributed to the difficulties in convincing people to cooperate as witnesses in crack cases.

The penalties Congress created in the 1980s have proven poorly suited to the concerns we sought to address. The goal of these policies was to punish severely those who were bringing crack into our neighborhoods, the major traffickers and drug kingpins. Many people were concerned about the effects of the crack epidemic on our young people in urban areas. Instead, the U.S. Sentencing Commission reports that over half of Federal crack cocaine offenders are street dealers or users, not the major traffickers Congress meant to target in the 1986 Anti-Drug Abuse Act.

We revisit this issue at a time when attitudes are changing in our Nation about sentencing policy. I thank the U.S. Sentencing Commission for its contributions to the debate and for its careful and judicious work. Its latest report to Congress makes clear that many of the principles that guided Congress when these sentences were adopted were based on reasoning that has not withstood the test of time and is not supported by the empirical evidence.

These findings have been a driving force behind recent actions by the Sentencing Commission and underlie the efforts in our courts to fix these unjust drug laws. Last year, the Sentencing Commission voted to change the Sentencing Guidelines, reduce the sentences of crack offenders and bring a measure of fairness to the process. And, just two months ago, this bipartisan, independent agency voted unanimously to apply this change retroactively in fairness. The United States Supreme Court recently ruled, as well, that our federal courts have power to address the unfair disparity in Federal sentencing laws between crack and powder cocaine.

I welcome these important changes. They are consistent with the goals of the Sentencing Reform Act, including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," and they bring our Nation closer to a more rational drug policy. I also join in welcoming the President's friend and his appointment to chair the Sentencing Commission, the Honorable Ricardo Hinojosa.

Two days before taking office, more than seven years ago, President Bush said that he favored making sure that the sentences for powder and crack cocaine were the same. Many respected members of our Federal judiciary, those appointed by Republican Presidents and Democratic Presidents, have raised concerns and urged that action to promote greater fairness. We are fortunate to have with us today another of this Nation's outstanding judges, the Honorable Reggie Walton.

Most disappointing is this administration's failure to support even modest reforms of unjust, overreaching mandatory drug penalties. Last week the new Attorney General testified before the House Judiciary Committee in ways designed to raise fear and create the false impression that 1,600 violent gang members and dangerous drug offenders will be instantaneously and automatically set free to prey on hapless communities. As the Attorney General, himself a former Federal judge, should have known, and as he had to concede when questioned before that Committee, no one can be released without a hearing before a Federal judge who is obligated to evaluate each case and to consider factors such as the criminal history and violence. And the Justice Department participates in those hearings.

Hilary Shelton, the respected Director of the Washington Bureau of the NAACP, reacted to the Attorney General's testimony by noting it "is not only inaccurate and disingenuous, but it is alarmist and plays on the worst fears and stereotypes many Americans had of crack cocaine users in the 1980s." I hope we will not see a repeat of that type of testimony here today from the representative of the administration. Having been corrected, it should not be repeated. Having been shown the divisive nature of its impact, it should not be continued.

Outside of Washington, D.C., Justice Department lawyers who are prosecutors in the field have supported reducing sentences in particular cases. That is what American justice is about, fairness to each individual. Americans must have faith and confidence that our drug laws are fair and administered fairly. I hope this hearing will move us one step closer to reaching that goal.

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February 11, 2008

The Honorable Patrick J. Leahy
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224 Dirksen Senate Office Building
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The Honorable Arlen Specter
Ranking Member
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The Honorable Lamar S. Smith
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**Re: Hearings on "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity"**

Dear Chairmen and Ranking Members:

Enclosed is a letter which I am submitting on behalf of a group of former Federal Judges who served on the United States Circuit Courts of Appeal or the United States District Court.

Respectfully submitted,

John S. Martin, Jr.

cc: The Honorable Joseph R. Biden, Jr.

February 11, 2008

The Honorable Patrick J. Leahy
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**Re: Hearings on "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity"**

Dear Chairmen and Ranking Members:

The undersigned are all former federal judges who served on the United States Circuit Courts of Appeal or the United States District Courts. We write in support of the legislation introduced by Senator Biden which would eliminate the 100-to-1 ratio between crack and powder cocaine.

Having served as federal judges each of us has had occasion to see in practice the injustice that results from the application of this ratio. Those of us who have served as District Court Judges have had the troubling experience of having to impose extremely

harsh and unwarranted sentences on minor violators. Not only does this result in injustice in a particular case but it creates disrespect for the law among those minor violators who present some hope for rehabilitation. Each of us who served on the District Courts could provide poignant examples of the injustice that results from the application of the 100-to-1 ratio. The two that follow are illustrative.

A young man, who was himself an addict, was arrested for selling slightly more than 5 grams of crack on the street. While on bail he turned his life around: he dealt with his addiction; he married and had a child; and he got a job. When he appeared for sentencing the judge had no choice but to impose a five year mandatory sentence. When asked whether he had anything to say before the court imposed sentence, the young man said: "Your Honor I sold this tiny amount of crack [indicating a small space between his fingers] but you are sentencing me the same as someone who sold this amount of cocaine [holding his hands apart]. That's not fair." All the sentencing judge could say in response was: "You are right. It is not fair. But I hope that the fact that you have been treated unfairly here will not dissuade you from continuing the life you have been building with your wife and family when you are finally released from prison."

In another case a man, who was an addict, sat on the stoop outside an apartment building in a poor neighborhood. Occasionally people asked him if he knew where they could purchase crack and he told them the number of an apartment where people were selling crack. As a reward for this conduct, the crack dealers would occasionally give him some crack for his personal use. He faced a guideline sentence of 16 years and a mandatory minimum sentence of 20 years because he had prior convictions for minor street sales of narcotics.

In enacting the mandatory minimums, it was the view of Congress that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or heads of organizations, which are responsible for creating and delivering very large quantities of drugs...." H.R. Rep. No. 99-845, at 11, 99th Cong. (1986). Thus, the quantities adopted to trigger the application of the mandatory minimum were based on the minimum quantity that might be controlled or distributed by a trafficker in a high place in the processing and distribution chain." Id. at 12. As the cases above indicate, experience demonstrates that the application of the 100-to-1 ratio results in the imposition of harsh mandatory sentence on individuals who are at the lowest end of "the processing and distribution chain."

We strongly disagree with those who suggest that the disparity in treatment of powder and crack cocaine should be remedied by increasing the penalties for powder cocaine. The sentences for powder cocaine are harsh enough to provide necessary punishment for serious violators. However, as a result of aggregating small quantities of drugs distributed over an extended period of time and conspiracy charges linking those who play a minor role in the distribution network with the major traffickers by whom they

are employed, the mandatory minimum sentences are often applied to lower level violators, which was not Congress' intent. While the mandatory minimum sentences may be appropriate for the leaders of narcotics conspiracies they are not appropriate for the addict who sells small quantities on the street or for the woman who lives with the major violator and whose children he supports and who does no more than take messages for him from his associates. However, under the mandatory minimum statutes they all receive the same sentence. To lower the amount of powder cocaine triggering a mandatory minimum sentence would simply exacerbate this problem.

The legislation proposed by Senator Biden will remedy an injustice that the United States Sentencing Commission recognized in 1995, when it recommended elimination of the 100-to-1 ratio and which judges and lawyers who practice in the federal court have long decried.

Respectfully submitted,

John W. Bissell, United States District Court for the District of New Jersey, 1982 – 2005

Edward N. Cahn, United States District Court for the Eastern District of Pennsylvania, 1975-1998

Robert J. Cindrich, United States District Court for the Western District of Pennsylvania, 1994 – 2004

Kenneth Conboy, United States District Court for the Southern District of New York, 1987-1993

Edward Davis, United States District Court for the Southern District of Florida, 1979 – 2000

David Warner Hagen, United States District Court for the District of Nevada, 1993-2005

Joseph Hatchett, United States Court of Appeals for the Fifth Circuit, 1979 – 1981; United States Court of Appeals for the Eleventh Circuit, 1981 – 1999

Larry Irving, United States District Court for the Southern District of California, 1982-1990

Nathaniel R. Jones, United States Court of Appeals for the Sixth Circuit, 1979 – 2002

Timothy K. Lewis, United States District Court for the Western District of Pennsylvania,

1991-1992; United States Circuit Court of Appeals for the Third Circuit, 1992 - 1999

F. A. Little, Jr., United States District Court for the Western District of Louisiana, 1984-2006

John S. Martin, Jr., United States District Court for the Southern District of New York, 1990 - 2003

Stephen M. Orlofsky, United States District Court for the District of New Jersey, 1996-2003

Layn R. Phillips, United States District Court for the Western District of Oklahoma, 1987-1991

Sam C. Pointer, United States District Court for the Northern District of Alabama, 1970 - 2000

H. Lee Sarokin, United States District Court for the District of New Jersey, 1979 – 1994; United States Circuit Court of Appeals for the Third Circuit, 1994-1996

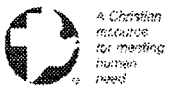
Abraham D. Sofaer, United States District Court for the Southern District of New York, 1979-1985

Stanley Sporkin, United States District Court for the District of Columbia, 1986 – 2000

Herbert J. Stern, United States District Court for the District of New Jersey, 1974-1987

Alfred Wolin, United States District Court for the District of New Jersey, 1988 – 2004

cc: The Honorable Joseph R. Biden, Jr.
Chairman
Subcommittee on Crime and Drugs
Committee on the Judiciary
United States Senate
201 Russell Senate Office Building
Washington, DC 20510




Mennonite
Central
Committee
U.S.
Washington Office

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Dear ,

Mennonite Central Committee (MCC) strongly urges you to support the **Drug Sentencing Reform and Kingpin Trafficking Act (S. 1711, H.R. 4545)** introduced by Sen. Joe Biden (D-DE) and Rep. Sheila Jackson-Lee (D-TX). MCC works in more than 70 countries, including the United States, to provide development and peacebuilding resources to marginalized communities. In this country, MCC workers and partners (particularly in urban settings) have witnessed the effects of unfair sentencing regimes that disproportionately affect people of color. The proposed legislation will make cocaine sentencing more equitable and will allow federal law enforcement officers to focus more of their resources on stopping high-level drug trafficking.

In May 2007, the U.S. Sentencing Commission repeated its call for Congress to reform the sentencing requirements for crack cocaine offenses. The USSC's report suggested raising the quantity of crack cocaine that triggers five- and ten-year mandatory minimum sentences and removing the mandatory minimum penalty for simple possession of crack cocaine.

These mandatory minimums, instituted by the Anti-Drug Abuse Act of 1986, were meant to target "serious" and "major" drug traffickers. However, the last two decades have shown this policy to be counter-productive. Because federal officials are forced by law to intervene in cases of small and moderate crack cocaine possession, they cannot focus on targeting drug kingpins. Indeed, only 7 percent of federal cocaine cases are directed at high-level traffickers.

Additionally, the unintended side effect of the Anti-Drug Abuse Act has been the **increased and disproportionate incarceration of African Americans.** The quantity of crack cocaine required for a mandatory minimum sentence is 100 times less than that of powder cocaine, even though the pharmacological effects of using crack and powder cocaine have been shown to be similar. But since African Americans are the primary users of crack cocaine while whites and Hispanics are the primary users of powder cocaine, mandatory minimums unintentionally target African Americans. In fact, while African Americans only make up 15 percent of drug users in the United States, they make up 74 percent of those sentenced to prison for a drug offense ("Cracks in the System," ACLU October 2006). This high level of incarceration has resulted in broken families and weakened communities.

The Drug Sentencing Reform and Kingpin Trafficking Act (S. 1711, H.R. 4545) addresses these problems. By increasing the quantity of crack cocaine required to trigger a mandatory sentence and by removing the mandatory minimum sentence for simple possession, the act treats all people, regardless of race, equally during drug sentencing. It will also allow federal law enforcers to free up resources currently being squandered by targeting street-level cocaine dealers. This will allow the federal government to focus on stopping the drug trade at the source: major traffickers and kingpins. While other legislative proposals address the sentencing disparity between crack and powder cocaine, this act is strongest in ensuring that federal law enforcement resources are used wisely.

We strongly urge you to support the Drug Sentencing Reform and Kingpin Trafficking Act (S. 1711, H.R. 4545).

Sincerely,

Rachelle Lyndaker Schlabach
Director, Washington Office

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February 11, 2008

Chairman Biden and
Subcommittee on Crime and Drugs
U.S. Senate
Washington, D.C.

Dear Mr. Chairman and Members of the Subcomittee:

On behalf of The NAACP Legal Defense & Educational Fund, Inc. (LDF), I write to urge you immediately to enact legislation that eliminates completely both the unjust and discriminatory 100 to 1 crack/powder cocaine sentencing ratio in federal law, *see* Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841(b), and the mandatory minimum sentences for simple possession of crack cocaine, *see* Anti-Drug Abuse Act of 1988, 21 U.S.C. § 844. These laws, which have had a pronounced disparate impact on the African-American community, violate longstanding principles of equal justice and unnecessarily invite significant skepticism and distrust in the criminal justice system. It is therefore LDF's view that Congress must take immediate action to eliminate this unfair sentencing disparity.

LDF is the nation's oldest non-profit civil rights law firm and has been engaged in criminal justice litigation and policy reform since its inception. Founded by the NAACP under the direction of its first Director-Counsel, Thurgood Marshall, in 1940, LDF is now an entirely separate and legally independent entity. Due to LDF's long-standing concern with the effects of racial discrimination on the criminal justice system, it has consistently advocated for pragmatic reform of "War on Drugs" laws, policies and practices that impose a disproportionately negative impact on communities of color and undermine the legitimacy of the criminal justice system.[1] LDF has, therefore, consistently opposed the federal 100:1 crack/powder ratio and the mandatory minimum sentences for simple possession of crack cocaine.

Since the enactment of the 1986 and 1988 Anti-Drug Abuse Acts that created the 100:1 crack/powder sentencing ratio and the mandatory minimum sentences for simple crack possession, African Americans have suffered a panoply of direct and indirect harms, including pronounced disparities in rates of conviction and incarceration for drug possession and trafficking, disparities in length of prison sentence, and subsequent collateral consequences, as compared to whites. As a result,

[1] For example, LDF represented Kemba Smith, a young mother who received a 24 ½ year federal prison sentence for her minor role in a cocaine conspiracy. President William J. Clinton granted her clemency in December, 2000, after extensive litigation. Most recently, LDF filed an *amicus* brief in *Kimbrough v. United States*, No. 06-6330, arguing that the extensive evidence of racial disparity associated with the 100:1 ratio and its associated harm is an appropriate consideration for a court when fashioning an individualized sentence.

the 100:1 ratio and the mandatory minimum sentence for simple possession of crack have become one of the most notorious symbols of racial discrimination in the modern criminal justice system and have provoked criticism from many sectors of American society. Although the impact is easiest and perhaps most starkly measured in terms of statistics, we must remain aware that the impact is on real peoples' lives.

The evidence of racial disproportionality arising from the 100:1 crack/powder ratio and the mandatory minimum sentence for possession of crack cocaine abounds. Since the enactment of the Anti-Drug Abuse Acts, far more African Americans have been convicted of federal crack-related offenses than whites, even though statistics show that a higher percentages of whites use crack cocaine than blacks. In 1995, the Sentencing Commission reported to Congress that the federal government's 1991 "National Household Survey on Drug Abuse" found that while 52% of reported crack users were white, whites represented only 10.3% of federal convictions for crack offenses.[2] U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy, at 34 (1995) ("1995 Report"). African Americans, on the other hand, represented one-third of reported crack users but a startling 82% of federal convictions for crack-related offenses. The Sentencing Project, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society* at 21. Since "drug users generally purchase drugs from sellers of the same racial or ethnic background," the overrepresentation of African Americans among convicted drug offenders cannot be attributed to a rate of drug trafficking that exceeds the proportion of drug use within the African-American community. The Sentencing Project, *Federal Crack Cocaine Sentencing* at 4 (citing Dorothy Lockwood, Anne E. Pottieger, and James A. Inciardi, *Crack Use, Crime by Crack Users, and Ethnicity*, *in* ETHNICITY, RACE AND CRIME 21 (Darnell F. Hawkins ed., 1995)). Notwithstanding this fact, African Americans are significantly overrepresented among federal drug trafficking convictions -- over 88% of those sentenced in federal court for crack cocaine trafficking offenses were African American and only 4.1% were white. *Id.* at 152. *See also* U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing Statistics, Table 34 (2003); Substance Abuse and Mental Health Services Administration, 2004 National Survey on Drug Use and Health, Population Estimates 1995, Table 1.43a (2005).[3]

The mechanical application of the 100:1 ratio through the Guidelines has also contributed to marked racial disparities in sentence length. In 1986, prior to the institution of the 100:1 ratio and the Guidelines, the average federal drug sentence for African Americans was 11% higher than it was for whites. Four years later, and after the institution of the 100:1 ratio and the Guidelines, the average federal drug sentence for African Americans was 49% higher. *See* B.S. Meierhoefer, Federal Judicial Center, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentence Imposed* 20 (1992). Between 1994 and 2003, the average time served by an African American for a drug-related offense increased by 77%, whereas the average sentence of white offenders increased only by 28%. Bureau of Justice Statistics, *Compendium of Federal Justice Statistics*, 1994 (1998). African Americans now serve almost as much time in prison for a drug offense in the federal system (58.7 months) as whites do for a violent offense (61.7 months). *Compendium of Federal Statistics, 2003* (Oct. 2005), Table 7.16, p. 112.

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[2] Simple possession refers to cases where the defendant is accused of possessing less than 5 grams of crack cocaine, an amount associated with personal use. Possession of 5 grams or more is presumed to be associated with trafficking in drugs.

[3] 96% of federal drug cases involve trafficking charges. See U.S. Sentencing Commission, 2006 Annual Report, at Figure 1 (2006), available at http://www.ussc.gov/ANNRPT/2006/fig1.pdf.

These unreasonable sentencing disparities have had a devastating impact on the African-American community. For the individuals unfairly sentenced, of course, the lengthy confinement is itself unconscionable. But by requiring lengthy prison terms for crack offenses, the 100:1 sentencing disparity also subjects the broader African-American community to a host of consequences that far exceed the initial sentence:

**Impaired Capacity for Re-Entry.** The lengthy sentences imposed on even first-time crack cocaine offenders significantly undermines the offenders' capacity for successful community reintegration. Prolonged incarceration frequently causes attenuated family and community relationships; thus, eroding an individual's support network makes reintegration and reentry upon release more difficult. *See* James P. Lynch and William J. Sabol, The Urban Institute Justice Policy Center, Prisoner Reentry in Perspective 17-19 (2001), available at http://www.urban.org/UploadedPDF/410213_reentry.PDF.

**Dilution of Voting Rights.** The exponentially longer sentences required for federal crack cocaine-related convictions significantly contributes to the diminution of African-American voting power by exacerbating the problem of African-American felon disfranchisement. Some forty-six states and the District of Columbia deny incarcerated prisoners the right to vote. *See* Joint Report by Human Rights Watch and The Sentencing Project, available at http://www.hrw.org/reports98/vote/usvot98o.htm#FELONY, last visited on February 10, 2008. In thirty-two states, convicted offenders may not vote while they are on parole, and twenty-nine of these states disfranchise offenders on probation. *Id.* Only fifteen of these states permanently disfranchise all ex-felons and, therefore, once ex-offenders are no longer under court supervision, they may regain the opportunity to vote in the remaining states. *Id.* In the majority of states, as a result, sentence length therefore becomes a critical factor that determines how long an individual remains disenfranchised. The corrosive effects should not be underestimated: because political participation is largely a learned behavior, intergenerational disfranchisement can leave some communities largely cut-off from the political process.

**Other Harms to the Community.** The lengthy prison terms associated with crack cocaine offenses also reach beyond individual families and contribute to the breakdown of such community social structures as churches and schools, and generate a critical shortage of male community leaders. *See* Steve Rickman, *The Impact of the Prison System on the African Community*, 34 How. L.J. 524, 526 (1991); Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. Gender Race & Just. 253, 259 (2002).

The serious problems caused by the crack/powder sentencing disparity and the mandatory minimum sentence for simple possession of crack have provoked members of the African-American community, the legal community, and the public at large to view the criminal justice system with skepticism, and resentment.

On four separate occasions, including in a report issued last year, the Sentencing Commission has articulated its "consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act." United States Sentencing Comm'n, Cocaine and Federal Sentencing Policy 7-8 (2007) ("2007 Report"); *see also* 2002 Report; United States Sentencing Comm'n, Cocaine and Federal Sentencing Policy 8 (1997) ("1997 Report"); 1995 Report (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006). It has also concluded that eliminating the 100:1 sentencing disparity -- by increasing the threshold weight requirement for crack cocaine to match that of powder cocaine -- would do more to reduce the sentencing gap between blacks and whites "than any other single policy change" and would "dramatically improve the fairness of the federal sentencing system." United States Sentencing Commission, Fifteen Years of Guidelines Sentencing (Nov. 2003), p. 132. In response to these, and other concerns, the Sentencing Commission recently enacted an amendment that will reduce the average crack sentence by 15 months. After holding a hearing and receiving extensive public comment, the Commission voted unanimously to apply this sentencing reduction retroactively. United States Sentencing Commission, Supplement to the 2007 Guidelines Manual, (March 2008) § 1B1.10, available at http://www.ussc.gov/2007guid/20080303_Supplement_to_2007_Guidelines.pdf, last visited on February 10, 2008. At the same time, however, the Commission recognized that the "urgent and compelling" disparity caused by the 100:1 ratio could only be partially remedied by such an amendment; Congressional action is required to fully address the inequities associated with this sentencing scheme. 2007 Report at 9-10.

Similar concerns have been echoed by members of the federal judiciary, who witness firsthand the unfairness that the 100:1 crack/powder ratio and the mandatory minimum sentence for simple possession of crack currently impose. Federal judges have repeatedly concluded that the 100:1 ratio is "greater than necessary" to accomplish the purposes of punishment. In 1997, for example, 27 federal judges, all of whom had previously served as U.S. Attorneys, sent a letter to the U.S. Senate and House Judiciary Committees stating that "[i]t is our strongly held view that the current disparity between powder cocaine and crack cocaine in . . . the guidelines cannot be justified and results in sentences that are unjust and do not serve society's interest." Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), reprinted in 10 FED. SENT'G RPTR. 195 (1998). More recently, U.S. Circuit Judge Michael McConnell of the Tenth Circuit has called the federal crack laws "virtually indefensible," *United States v. Pruitt*, 502 F.3d 1154, 1170 n.2 (10th Cir. 2007) (McConnell, J., concurring). Numerous other courts – both district courts and Courts of Appeals – have likewise questioned the fairness of the 100:1 ratio.[4] Indeed, these views are widely shared throughout the legal

[4] *See also, e.g., United States v. Ricks*, No. 05-4832 (3d Cir. July 20, 2007) slip op. at 18 (100:1 ratio "leads to unjust sentences"); *United States v. Moore*, 54 F.3d 92, 102 (2d. Cir. 1995) (concluding that crack disparity "raise[s] troublesome questions about the fairness of the crack cocaine sentencing policy"); *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994) (concluding that "[a]lthough Singleterry has not established a constitutional violation, he has raised important questions about the efficacy and fairness of our current sentencing policies for offenses involving cocaine substances"); *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994) (citing *United States v. Walls*, 841 F. Supp. 24 (D.D.C. 1994), "the disparity between the crack and powder penalties and the heavy impact of that disparity on black defendants is manifestly unfair"); *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (concurring opinion) (affirming 15-year crack sentence but suggesting that Congress had no "sound basis to make the harsh distinction between powder and crack cocaine," and quoting with approval district judge's description of

community: as the Sentencing Commission itself recognized, the crack sentences have been resoundingly condemned by "representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups" alike. 2007 Report at 2.[5] On December 10, 2007, in *Kimbrough v. United States,* the United States Supreme Court expanded the power of federal judges to address this unfair sentencing disparity when it ruled that trial judges may consider the effects of the 100:1 ratio and depart downward from a Guidelines sentence where the punishment is "greater than necessary" to serve Congress's objectives.

The public shares the legal community's concern about the fairness of the 100:1 crack/powder sentencing ratio and the mandatory minimum sentence for simple possession of crack cocaine. Dr. Peter H. Rossi of the University of Massachusetts, Amherst, and Dr. Richard A. Berk of the University of California at Los Angeles, published a study that assessed public opinion of federal sentences. They found that the public is highly critical of the heavy federal sentences for crack offenses and, instead, believes that cocaine and crack offenses deserve identical terms of imprisonment. See Peter H. Rossi & Richard A. Berk, *National Sample Survey: Public Opinion on Sentencing Federal Crimes* 66-67, 80, & Table 4.7 (1995), available at http://www.ussc.gov/nss/jp_exsum.htm (noting that there is "little support in public opinion for especially severe sentences for drug trafficking and little support for singling out crack cocaine for special attention"). *See also Id.* at 78 ("the public does not regard trafficking in [crack cocaine] as more serious than dealing in either powder cocaine or heroin . . . and trafficking in crack cocaine should not be singled out for especially severe punishments.").

This widespread perception of the 100:1 crack/powder disparity, and mandatory minimum sentence for simple possession of crack as unjust, results in a denigration of the principle of equality under the law which may actually increase crime and make law enforcement more difficult. *See, e.g.*, Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1165 (2006) (explaining that "prominent legal theorists" and "a broad array of recent empirical studies" support the notion that "[w]hen citizens perceive the state to be furthering injustice . . . they are less likely to obey the law, assist law enforcement, or enforce the law themselves"); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STANFORD L. REV. 571, 597-98 (2003); *see also* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1399 (2005) (reviewing the literature and reporting new experimental evidence that "the perceived legitimacy of one law or legal outcome can influence one's willingness to comply with unrelated laws"); Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1185 (2004) ("As penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught."); Tom R. Tyler, WHY PEOPLE OBEY THE LAW 3-4 (1990) (explaining that cooperation with the law depends on the perception that the law is "just"). Moreover, the "perceived improper unwarranted disparity based on race fosters disrespect for and lack of confidence in the criminal justice system

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the sentence as a "tragedy"); *United States v. Clary*, 846 F. Supp. 768, 792 (E.D. Mo. 1994); *United States v. Patillo*, 817 F. Supp. 839, 843 - 44 & n.6 (C.D. Cal. 1993).

[5] *See, e.g.*, William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1799 (1998); ("If there is anything at all to the proposition that biased enforcement and punishment undermine the law's normative force, this sentencing disparity ought to be abolished, or at least dramatically reduced."); *see also* Alfred Blumstein, *The Notorious 100:1 Crack:Powder Disparity – The Data Tell Us That It Is Time to Restore the Balance*, 16 FED. SENT'G REP. 87, 87 (2003); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America, 46 UCLA L. REV. 1751 (1999);* William J. Spade, Jr., *Beyond the 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy,* 38 ARIZ. L. REV. 1233, 1255 (1996); David A. Sklansky, *Cocaine, Race, and Equal Protection,* 47 STAN. L. REV. 1283, 1288-99 (1995).

among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine." United States Sentencing Comm'n, Cocaine and Federal Sentencing Policy 103 (2002) ("2002 Report").

In light of all of these problems, the disparate sentences for crack and powder cocaine represent a stain on the criminal justice system. The disproportionate affect on African Americans and the lack of penological justification for the disparity engender a disrespect for the law that undermines the criminal justice system itself. This inequity and the explosion in the incarceration rates for non-violent drug offenders demands immediate attention and reform. LDF strongly urges you to enact legislation that eliminates the sentencing disparities for crack and powder cocaine.

Thank you for considering our views.

Sincerely,

Theodore M. Shaw
Director-Counsel
NAACP Legal Defense &
Educational Fund, Inc.

Date: 2/5/2008 Time: 3:29 PM To: Leahy, Sen. Patrick @ 224-3479
Page: 001



# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

February 5, 2008

Senators
US Senate
Washington, D.C.

**Re: S. 1711, "The Drug Sentencing Reform and Cocaine Kingpin Trafficking Act."**

Dear Senators:

The National Association of Criminal Defense Lawyers, a bar association with thousands of criminal defense lawyers who practice in the federal courts across our nation., fully supports elimination of the unwarranted disparity in federal cocaine sentences pursuant to S. 1711, "The Drug Sentencing Reform and Cocaine Kingpin Trafficking Act." Federal sentences for drug offenses are based on the weight of the controlled substance. For two decades, federal sentencing laws have treated possession of one gram of cocaine base as the equivalent of 100 grams of powder cocaine.

As repeatedly documented by United States Sentencing Commission, there is no sound basis -- scientific or otherwise -- for this excessive disparity, perhaps the most notorious symbol of racism in the modern criminal justice system. Eighty-one percent of defendants sentenced in the federal system for crack cocaine are black, and their sentences are 50 percent longer than inmates serving time for cocaine powder. This is true even though two-thirds of crack defendants are low-level street dealers. Also troubling is the fact that the average sentence for possession of crack cocaine is far longer than the average sentences for violent crimes such as robbery and sexual abuse. Because even the appearance of discrimination erodes public confidence in our justice system, Congress should correct this longstanding injustice.

The current penalty scheme not only skews law enforcement resources towards lower-level crack offenders, it punishes those offenders more severely than their powder cocaine suppliers. This is incongruous with Congress's intended targets for the 5- and 10-year terms of imprisonment, mid-level managers and high-level suppliers, respectively.

In light of these well-established factors, the Sentencing Commission took action last year to reduce its crack guidelines without deviating from the mandatory minimum statutes passed by Congress. At the same time, the Commission called on Congress to enact a more comprehensive solution. On behalf of NACDL, I urge you to help complete the unfinished reform process and co-sponsor the "Drug Sentencing Reform and Cocaine Kingpin Trafficking Act." Thank you for considering our views.

Sincerely,

Carmen D. Hernandez
President

"LIBERTY'S LAST CHAMPION"

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02/05/2008 3:30PM

**Written Testimony of**

**Bill Piper**
**Director of National Affairs, Drug Policy Alliance**

**Submitted to the Crime and Drugs Subcommittee**
**Committee on the Judiciary**
**United States Senate**

**Hearing on "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity"**

**February 12th, 2008**

I want to thank Chairman Biden for providing the Drug Policy Alliance with the opportunity to submit written testimony and for introducing the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 (S.1711), which would eliminate the crack/powder cocaine sentencing disparity. I want to thank Senator Sessions and Senator Hatch for introducing bills to reduce the disparity and Senator Feingold, Senator Feinstein and Senator Specter for co-sponsoring reform bills.

The Drug Policy Alliance (DPA) is the leading organization promoting alternatives to the failed war on drugs. Headquartered in New York City, DPA also has offices in Berkeley, Los Angeles, Sacramento, San Francisco, Santa Fe, Trenton, and Washington, DC. Our mission is to institute a new bottom line for U.S. drug policy, one that focuses on reducing the problems associated with both drugs and the war on drugs. In 2005 the Drug Policy Alliance spearheaded a successful campaign in Connecticut to eliminate that state's crack/powder sentencing disparity, and we're currently working in Ohio to do the same there.

DPA strongly supports the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act, the only bill in the Senate that would completely eliminate the crack/powder sentencing disparity. This disparity has devastated black communities, wasted taxpayer dollars, and undermined public safety by encouraging federal law enforcement agencies to target low-level drug law offenders instead of major crime syndicates. While we commend Senators Sessions and Hatch for their leadership on this issue, we are disappointed that neither of their bills fully eliminates the disparity.

Reducing the 100-to-1 crack/powder disparity to 20-to-1, as the Sessions (S.1383) and Hatch (S.1685) bills do, is like amending the Constitution's three-fifths clause to make African-Americans fourth-fifths citizens, or integrating 60% of public establishments instead of all of them. Policymakers should seek to eliminate discrimination not just reduce it.

Additionally, unlike the Biden or Hatch bill, the Sessions bill lowers the amount of powder cocaine it takes to trigger a federal mandatory minimum sentence. This would encourage the U.S. Justice Department to target low-level powder cocaine offenders instead of high-level offenders. To the bill's credit it would significantly reduce racial disparities for African-

Americans, but by lowering powder thresholds it would most likely increase racial disparities for Hispanics – an unacceptable trade-off.

When the crack/powder sentencing disparity was enacted into law in the 1980s, crack cocaine was believed to be more addictive and more dangerous than powder cocaine. Copious amounts of research, including a recent study by the U.S. Sentencing Commission, have shown that the myths first associated with crack cocaine, and the basis for the harsher sentencing scheme, were erroneous or exaggerated. For over two decades, powder cocaine and crack cocaine offenders have been sentenced differently at the federal level, even though scientific evidence, including a major study published in the Journal of the American Medical Association, has proven that crack and powder cocaine have similar physiological and psychoactive effects on the human body.

Perhaps no other single federal policy is more responsible for gross racial disparities in the federal criminal justice system than the crack/power sentencing disparity. Even though two-thirds of crack cocaine users are white, more than 80% of those convicted in federal court for crack cocaine offenses are African American. Moreover, two-thirds of those convicted have only a low-level involvement in the drug trade. Less than 2% of federal crack defendants are high-level suppliers of cocaine. Taxpayer money should be spent wisely, and concentrating federal law enforcement and criminal justice resources on arresting and incarcerating low-level, largely nonviolent offenders has done nothing to reduce the problems associated with substance abuse.

Furthermore, the current sentencing policy, and the targeting of low-level offenders, has proven devastating for families and communities that suffer high incarceration rates. According to a 2006 report by the American Civil Liberties Union, 1 in 14 black children has a parent in prison, and approximately 1.4 million black men – 13% of all adult African American males - are disfranchised because of felony drug convictions. Single-parent homes, unemployment, disillusionment with the justice system and stigmas from felony convictions and incarceration can contribute to the degradation of already disadvantaged communities and increase crime rates. The U.S. Sentencing Commission has noted that even "perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system."

Most U.S. states do not differentiate between crack and powder cocaine when it comes to sentencing and neither should the federal government. The Drug Policy Alliance urges members of the Crime and Drugs Subcommittee to stand up for justice and public safety by quickly passing the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act. We also urge you to re-think federal drug policy more broadly.

More than half of all people incarcerated in federal prison are there for drug law violations, and through various law enforcement grant programs the federal government encourages the mass incarceration of nonviolent drug offenders at the local and state level as well. Police make more than 1.8 million drug arrests in the U.S. every year (nearly 700,000 for nothing more than simple marijuana possession). Those arrested are separated from their loved ones, branded criminals, denied jobs, and in many cases prohibited from accessing public assistance for life. The United States incarcerates more of its citizens for drug violations than all of Western Europe incarcerates for all crimes combined (and Western Europe has 100 million more people).

Yet despite spending hundreds of billions of dollars and arresting millions of Americans, illegal drugs remain cheap, potent and widely available in every community, and the harms associated with them continue to mount. Meanwhile, the war on drugs is creating problems of its own - broken families, racial disparities, and the erosion of civil liberties. The crack/powder disparity may be one of the worst excesses of U.S. drug policy but it is still just the tip of the iceberg.

In a recent op-ed in New Orleans' Times-Picayune, former ACLU Executive Director and current Drug Policy Alliance President Ira Glasser makes the case that the war on drugs is one of the major civil rights issues of our day.

> [T]he racially discriminatory origin of most [drug] laws is reinforced by the disparate impact they have on racially targeted drug felons. In the states of the Deep South, 30 percent of black men are barred from voting because of felony convictions. But all of them are nonetheless counted as citizens for the purpose of determining congressional representation and electoral college votes. The last time something like this happened was during slavery, when three-fifths of slaves were counted in determining congressional representation.
>
> Just as Jim Crow laws were a successor system to slavery in the attempt to keep blacks subjugated, so drug prohibition has become a successor system to Jim Crow laws in targeting black citizens, removing them from civil society and then barring them from the right to vote while using their bodies to enhance white political power in Congress and the electoral college.

Eliminating the crack/powder cocaine sentencing disparity is a good start in tearing down this new Jim Crow, but more needs to be done.

As I told members of the House Subcommittee on Crime, Terrorism and Homeland Security during Chairman Scott's Crime Policy Summit last year, Congress should restore the right to vote to Americans who have served their time; require law enforcement agencies receiving federal funding to document their arrests, seizures, and searches by race and ethnicity; repeal policies that bar former drug law offenders from receiving student loans, public housing and TANF; and raise the threshold amount of drugs it takes to trigger federal mandatory minimum sentences to encourage the Justice Department to prosecute high-level traffickers.

If you would like to be bold, pass legislation requiring federal agencies to set short- and long-term goals for reducing the problems associated with both drugs and punitive drug policies. The Office of National Drug Control Policy (ONDCP), for instance, is already statutorily required to set annual goals for reducing drug use and drug availability. Why not also require the agency to set annual goals for reducing overdose deaths, the spread of HIV/AIDS from injection drug use, the number of Americans who cannot vote because of a felony conviction, and other criteria. If ONDCP, the Justice Department and other agencies were graded and funded in part on their ability to reduce racial disparities in the criminal justice system, then those agencies would probably be supporting crack/powder reform instead of opposing it or standing on the sidelines.

Reforming federal cocaine sentencing laws should unquestionably be the Crime and Drugs Subcommittee's top priority this year. The crack/powder disparity is causing great harm to families, taxpayers, and the criminal justice system. Eliminating it would be one of the biggest civil rights accomplishments of this decade. The disparity, however, is just one part of a larger set of failed drug policies that need to be reformed.

**********

Attachment: Ira Glasser Op-ed.

## Times-Picayune (New Orleans)

December 6, 2007

### How the drug war targets black Americans

BYLINE: Ira Glasser

SECTION: METRO - EDITORIAL; Point of View; Pg. 7

LENGTH: 757 words

This week, more than 1,000 people will gather for the 2007 International Drug Policy Reform Conference in New Orleans. There could not be a better venue for us to discuss how the drug war has become a war against black Americans.

Louisiana's rate of incarceration for nonviolent drug-law violations is among the highest in the nation. But all over America, including states like New York, drug-war arrests, convictions and imprisonment have increased dramatically, and are disproportionately targeted against African-Americans, making this a major, though largely unrecognized, civil rights issue.

In the late 1960s there were fewer than 200,000 people in state and federal prisons for all offenses. By 2004, there were more than 1.4 million people incarcerated in state and federal prisons, and more than 700,000 in local jails -- about 2.2 million in all, an explosion in prison population heavily due to nonviolent drug offenses. Since 1980, the proportion of all state prisoners who are there because of a drug offense increased from 6 percent to 21 percent. In federal prisons, the proportion increased from 25 percent to 57 percent. Drug arrests have tripled to 1.6 million annually, more than 40 percent for marijuana -- and 88 percent of those are for possession, not even sale or manufacture.

At the same time, the racial disparity of arrests, convictions and imprisonment have become pronounced. According to federal statistics gathered by The Sentencing Project, only 13 percent of monthly users of all illegal drugs are black, roughly corresponding to their proportion of the

population. In other words, black people do not use illegal drugs disproportionately to their numbers in the population. But nationwide they are arrested, convicted and imprisoned disproportionately. Thirty-seven percent of drug-offense arrests are black; 53 percent of convictions are of blacks; and 67 percent -- two-thirds of all people imprisoned for drug offenses -- are black.

This is not because more black than white Americans use drugs: About eighty percent of drug users are white. There is no evidentiary justification for racially targeted stops and searches or for racially targeted arrests and convictions. The law is being enforced as if skin color were a credible proxy for evidence amounting to probable cause. It is this kind of targeting that has resulted in the explosion of racially disparate incarceration in our prisons.

These racially targeted patterns affect more than imprisonment: They have effectively eroded much of the voting rights victories won by the civil rights movement during the 1960s. Until recently, many states have barred former felons from voting, some permanently, some in a way that allowed -- theoretically but often not as a practical matter -- for the restoration of voting rights.
Nearly 5 million people are now barred from voting because of felony disenfranchisement laws. The United States is the only industrial democracy that does this. And the origin of most of these law is the post-Reconstruction period after slavery, when many states sought to undermine the 15th Amendment, which had newly granted former slaves the right to vote.

Today, the racially discriminatory origin of most of these laws is reinforced by the disparate impact they have on racially targeted drug felons. In the states of the Deep South, 30 percent of black men are barred from voting because of felony convictions. But all of them are nonetheless counted as citizens for the purpose of determining congressional representation and electoral college votes. The last time something like this happened was during slavery, when three-fifths of slaves were counted in determining congressional representation.

Just as Jim Crow laws were a successor system to slavery in the attempt to keep blacks subjugated, so drug prohibition has become a successor system to Jim Crow laws in targeting black citizens, removing them from civil society and then barring them from the right to vote while using their bodies to enhance white political power in Congress and the electoral college.

That people of good will have been at best timid in opposing the drug war and at worst accomplices to its continued escalation is, in light of the racial politics of drug prohibition, a special outrage. People of good will should instead stand with us in this fight against the racist war on drugs, and not only in New Orleans.

. . . . . .

Ira Glasser directed the ACLU for nearly 25 years. He is president of the board of the Drug Policy Alliance.

Reason. Compassion. Justice.

Ethan A. Nadelmann
Executive Director

Ira Glasser
President

February 7, 2008

## ATTN: Judiciary Staffer

Dear Senator:

The Drug Policy Alliance urges you to co-sponsor and support Senator Biden's **Drug Sentencing Reform and Cocaine Kingpin Trafficking Act** of 2007 (S.1711), which would eliminate the 100-to-1 crack/powder cocaine sentencing disparity. The crack/powder disparity has devastated black communities and undermined public safety by encouraging federal law enforcement agencies to target low-level offenders instead of major crime syndicates. S.1711 would reprioritize federal law enforcement resources towards major traffickers, reduce racial disparities in the criminal justice system, and save taxpayer money.

When the crack/powder disparity was enacted into law in the 1980s, crack cocaine was believed to be more addictive and more dangerous than powder cocaine. Copious amounts of research, including a recent study by the U.S. Sentencing Commission, have shown that the myths first associated with crack cocaine, and the basis for the harsher sentencing scheme, were erroneous or exaggerated.[i] For over two decades, powder cocaine and crack cocaine offenders have been sentenced differently, even though scientific evidence, including a major study published in the Journal of the American Medical Association, has proven that crack and powder cocaine (two forms of the same substance) have similar physiological and psychoactive effects on the human body.[ii]

The crack/powder disparity has accomplished two things: it has devastated black communities and wasted federal resources. **Even though two-thirds of crack cocaine users are white, more than 80% of those convicted in federal court for crack cocaine offenses are African American.**[iii] Moreover, two-thirds of those convicted have only a low-level involvement in the drug trade. **Less than 2% of federal crack defendants are high-level suppliers of cocaine.**[iv] Taxpayer money should be spent wisely, and concentrating federal law enforcement and criminal justice resources on arresting and incarcerating low-level, largely nonviolent offenders has done nothing to reduce the problems associated with substance abuse.

The Drug Policy Alliance joins with countless criminal justice, social justice, religious and public heath organizations and substance abuse treatment providers in calling for an end to this sentencing disparity. The best bill in the Senate is Senator Biden's Drug Sentencing Reform and Cocaine Kingpin Trafficking Act. This bill completely eliminates the crack/powder sentencing disparity by increasing the quantities of crack cocaine it takes to generate a mandatory minimum sentence to equal the current levels of powder cocaine. It also increases penalties for major cocaine kingpins, allocates additional

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resources to the Departments of Justice, Treasury, and Homeland Security for the investigation and prosecution of kingpins, and establishes a grant program to provide substance abuse treatment to people in prison.

Momentum is building in the House too. Congresswoman Sheila Jackson-Lee (D-TX) and Congressman Chris Shays (R-CT) have introduced a companion bill to S. 1711 (H.R. 4545). Congressman Charlie Rangel (D-NY) has introduced a similar bill to eliminate the crack/powder disparity (H.R. 460). Congressman Bobby Scott (D-VA) has introduced legislation that would not only eliminate the disparity but also eliminate mandatory minimum sentences for crack and powder cocaine offenses (H.R. 5035).

You and your staff will have an opportunity to learn more about this important issue at upcoming hearings. The Senate Judiciary Committee's Crime and Drug Subcommittee will be holding a hearing on Tuesday, February 12, 2008. The House Judiciary Committee's Crime, Terrorism, and Homeland Security Subcommittee will be holding a hearing later in February.

We urge you to stand up for both racial justice and public safety by co-sponsoring and supporting the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act. This bill will right a 20-year wrong.

Sincerely,

Bill Piper
Director of National Affairs

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[i] US Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy. (Washington, DC: US Sentencing Commission, May 2007).
[ii] The Sentencing Project, "Federal Crack Cocaine Sentencing," July 2007.
[iii] US Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy. (Washington, DC: US Sentencing Commission, May 2007).
[iv] Ibid.

Date: 2/8/2008 Time: 2:14 PM To: Leahy, Sen. Patrick @ 224-3479
Page: 001

Religious Action Center
of Reform Judaism

*The Religious Action Center pursues social justice and religious liberty by mobilizing the American Jewish community and serving as its advocate in the nation's capital.*

Rabbi David Saperstein
Director and Counsel

Mark J. Pelavin
Associate Director

Jane Wishner
Chair
Commission on Social Action of Reform Judaism

Rabbi Marla J. Feldman
Director
Commission on Social Action of Reform Judaism

The Religious Action Center operates under the auspicies of the Commission on Social Action of Reform Judaism, a joint instrumentality of the Central Conference of American Rabbis and the Union for Reform Judaism with its affiliates:

American Conference of Cantors

Association of Reform Zionists of America

Canadian Association of Reform Zionists

Early Childhood Educators of Reform Judaism

National Association of Temple Administrators

National Association of Temple Educators

North American Federation of Temple Brotherhoods

North American Federation of Temple Youth

Program Directors of Reform Judaism

Women of Reform Judaism

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February 8, 2008

Dear Member of Congress,

On behalf of the Union for Reform Judaism, whose more than 900 congregations across North America encompass 1.5 million Reform Jews, I urge you to eliminate the current disparity in federal sentencing guidelines for crack and powder cocaine offenses as included in the Drug Sentencing Reform and Kingpin Trafficking Act (H.R. 4545/S. 1711).

The Anti-Drug Abuse Act of 1986 has resulted in harsh penalties for low-level offenses involving crack cocaine. Despite evidence that the effects of crack and powder cocaine are physiologically and pharmacologically identical, defendants are subject to a minimum five-year sentence for possession or sale of only five grams of crack cocaine, while the same five-year sentence is given for sale of 500 grams of powder cocaine. As a result, the prison population has ballooned with scores of low-level drug offenders punished by unnecessarily harsh mandatory penalties.

Furthermore, these sentencing disparities disproportionately affect African American offenders. Although this population comprises only 15% of drug users in the United States, 74% of those sentenced to prison for a drug offense are African American.

Preventing and punishing criminal conduct are among the government's primary obligations, but it is also the obligation of government to ensure that no one is unjustly accused, convicted or punished. In Deuteronomy 16:20, the Torah commands us, *Tzedek, tzedek tirdof* ("Justice, justice you shall pursue"); the sages explained that the word *tzedek* is repeated not only for emphasis but to teach us that in our pursuit of justice, our means must be as just as our ends.

As people of faith, we cannot tolerate unjust sentencing characterized by disparity and racism. I strongly urge you to support efforts to end these disparities as included in the Drug Sentencing Reform and Kingpin Trafficking Act (H.R. 4545/S. 1711).

Sincerely,

Rabbi David Saperstein
Director and Counsel

02/08/2008 2:15PM

Date: 2/6/2008 Time: 12:48 PM To: Leahy, Sen. Patrick @ 224-3479
Page: 001

THE SENTENCING PROJECT

February 6, 2008

**Attn: Judiciary Staffer**

Dear Senator:

As a national reform organization working towards a fair and effective justice system, The Sentencing Project applauds the bipartisan call to address unfairness in federal penalties for crack cocaine offenses and is pleased to support **S. 1711**, the **Drug Sentencing Reform and Cocaine Kingpin Trafficking Act**. I urge you to endorse and co-sponsor this legislation with its lead sponsor, Senator Joseph R. Biden.

Americans believe in a system of justice where all individuals are treated equally and where laws do not single out groups for different treatment. Unfortunately, the 1986 and 1988 Anti-Drug Abuse Acts established harsh and excessive penalties for crack cocaine compared to powder cocaine based largely on misinformation and media distortions. Current federal policy maintains a 100 to 1 quantity-based sentencing disparity between crack and powder cocaine. Possessing just 5 grams of crack cocaine (10 to 50 doses) results in the same five year mandatory minimum prison sentence as selling 500 grams of powder cocaine (2,500 to 5,000 doses).

In the 1980s, lawmakers believed that crack cocaine was a substantially more addictive and dangerous drug than powder cocaine. Decades of research and extensive analysis by scientists, academics and the U.S. Sentencing Commission now reveal that those assertions are not supported by sound evidence. A study published in the *Journal of the American Medical Association* reported that the physiological and psychoactive effects of crack and powder cocaine are the same.

Moreover, the U.S. Sentencing Commission stated in its May 2007 report to Congress that the current penalties for cocaine offenses "sweep too broadly and apply most often to lower level-offenders." More than 60% of federal crack cocaine convictions involved low-level drug activity, such as street-level dealing, in 2006. State criminal justice systems are well equipped to handle these kinds of cases but are unable to pursue the importers and international traffickers who bring drugs into the country. Targeting drug kingpins is the domain of federal law enforcement, but federal resources are being misdirected towards prosecution of low-level offenders. Raising the crack cocaine quantities that trigger mandatory minimum sentences to the levels for powder cocaine will help to focus enforcement and penalties on major traffickers.

Perhaps the most troubling effect of the harsh penalties for crack cocaine is the significant racial disparity that exists. African Americans comprise 81.8% of the defendants sentenced to federal prison for crack cocaine offenses, even though two-thirds of crack cocaine users are white or Hispanic. African Americans account for just 27% of powder cocaine offenders.

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02/06/2008 12:49PM

Recent changes to the Sentencing Guidelines for offenses involving crack cocaine are encouraging but represent only incremental progress in the effort to reform the federal crack cocaine law, and do not address the harsh mandatory sentences for low-level offenses. Only Congress can eliminate the 100 to 1 sentencing disparity between crack and powder cocaine. Other Senate proposals to reduce the sentencing quantity disparity between crack and powder cocaine move the policy debate in a constructive direction, but S. 1711 goes the farthest to shift federal law enforcement focus from street-level dealers towards high-level traffickers.

The Sentencing Project believes that unequal sentencing for crack and powder cocaine is unjustifiable and not supported by research. I urge you to support the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act.

Sincerely,

Marc Mauer
Executive Director

# Department of Justice

**STATEMENT OF**

**GRETCHEN C. F. SHAPPERT**
**UNITED STATES ATTORNEY**
**WESTERN DISTRICT OF NORTH CAROLINA**
**UNITED STATES DEPARTMENT OF JUSTICE**

**BEFORE THE**

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**
**SUBCOMMITTEE ON CRIME AND DRUGS**

**CONCERNING**

**"FEDERAL COCAINE SENTENCING LAWS:**
**REFORMING THE 100-1 CRACK/POWDER DISPARITY"**

**PRESENTED**

**February 12, 2008**

Mr. Chairman, members of the Subcommittee -

Thank you for inviting the Department of Justice to appear before you today to discuss federal cocaine sentencing policy. My name is Gretchen Shappert, and I am the United States Attorney for the Western District of North Carolina. I have been in public service most of my professional life, both as a prosecutor and as an assistant public defender. Last week, I completed 4 ½ consecutive weeks of trial, including two trials in my district involving crack cocaine distribution. Indeed, much of my professional career has been defined by the ravages of crack cocaine, both as a defense attorney and as a prosecutor.

The Department of Justice recognizes that the penalty structure and quantity differentials for powder and crack cocaine created by Congress as part of the Anti-Drug Abuse Act of 1986 are seen by many as empirically unsupportable and unfair because of their disparate impact. As this subcommittee knows, since the mid-1990s, there has been a great deal of discussion and debate on this issue. There have been many proposals but little consensus on exactly how these statutes should be changed.

We remain committed to that effort today and are here in a spirit of cooperation to continue working toward a viable solution. We continue to insist upon working together on this issue that we get it right not just for offenders, but also for the law-abiding people whom we are sworn to serve and protect.

It has been said, and certainly it has been my experience, that whereas cocaine powder destroys an individual, crack cocaine destroys a community. The emergence of crack cocaine as the major drug of choice in Charlotte during the late 1980's dramatically transformed the landscape. We saw an epidemic of violence, open-air drug markets, and urban terrorism unlike anything we had experienced previously. The sound of gunfire after dark was not uncommon in some communities. Families were afraid to leave their homes after dark and frightened individuals literally slept in their bathtubs to avoid stray bullets.

I have also seen the dramatic results when federal prosecutors, allied with local law enforcement and community leaders, make a commitment to take back neighborhoods from the gun-toting drug dealers who have laid claim to their communities. The successes of our Project Safe Neighborhoods (PSN) initiatives, combined with Weed & Seed, have literally transformed neighborhoods. In Shelby, North Carolina, for example, federal prosecutions of violent crack-dealing street gangs have slashed the crime rate and have enabled neighborhood groups to begin a community garden, truancy initiatives, and sports programs for young people. Traditional barriers are breaking down, and Shelby is thriving as an open and diverse small southern city. This transformation would not have been possible without an aggressive and collaborative approach to the systemic crack cocaine problem in that community.

In the jury trial I completed last Wednesday night, the jury convicted the remaining two defendants in a seventy-person drug investigation that originated in the furniture manufacturing community of Lenoir, North Carolina. Several years ago, street drug dealers literally halted

traffic to solicit crack cocaine customers in several Lenoir communities. At trial, the jury heard of an episode where drug dealers kidnapped and held for ransom one of their coconspirators, demanding repayment of a drug debt. After pistol-whipping their hostage, they finally released him. This is the kind of violent activity we have come to expect from crack cocaine traffickers, even in relatively tranquil small communities.

I am pleased to be able to tell you that we used the tools that Congress gave us to stop these dealers. We built strong cases against them. Local law enforcement officers, in conjunction with federal agents, have seized substantial quantities of crack and firearms from these dealers and dismantled their operations. It is a testament to the courage of people who live in these communities that they have been willing to cooperate with law enforcement and testify. Our most powerful witnesses are the citizens who have been victimized by crack-related violence. Cooperation from citizens in these communities is based upon their trust in our ability to prosecute these violent offenders successfully and send them away for lengthy federal prison sentences.

I know from my conversations with state and federal prosecutors from around the country that our experience in North Carolina is not unique or uncommon. When considering reforms to cocaine sentencing, we must never forget that honest, law-abiding citizens are also affected by what these dealers do. Unlike the men and women who chose to commit the crimes that terrorized our neighborhoods, the only choice many of the residents of these neighborhoods have is to rely on the criminal justice system to look out for them and their families. Let us make sure

the rules we make at the federal level allow us to continue to do so.

Toward that end, we believe that any reform to cocaine sentencing must satisfy two important conditions. First, any reforms should come from the Congress and not the United States Sentencing Commission. Second, any reforms, except in very limited circumstances, should apply only prospectively. I will discuss the reasons necessitating each condition in turn.

First, bringing the expertise of the Congress to this issue will give the American people the best chance for a well-considered and fair result that takes into account not just the differential between crack and powder on offenders, but the implications of crack and powder cocaine trafficking on the communities and citizens whom we serve. Congress struck the present balance in 1986. Since then, although there have been many policy objections raised in debate, these statutes have been repeatedly upheld as constitutional. As a federal prosecutor, I have done my best to enforce these laws for the benefit of our communities.

Cleared of hyperbole, what we are talking about is whether the current balance between the competing interests in drug sentencing is appropriate. We are trying to ascertain what change will ensure that prosecutors have the tools to effectively combat drug dealers like those who terrorized western North Carolina while addressing the concerns about the present structure's disparate impact on African-American offenders. That is a decision for which Congress and this Subcommittee are made. At some level, the United States Sentencing Commission itself recognized that when it delayed retroactive implementation of the reduced

crack cocaine guideline until March 3, 2008, thereby giving Congress a short window to review and consider the broader implications of their policy choice.

In considering options, we continue to believe that a variety of factors fully justify higher penalties for crack offenses. In the cases I have prosecuted, I have seen the greater violence at the local level associated with the distribution of crack as compared to powder. United States Sentencing Commission data and reports confirm what I have seen, as they show that in federally prosecuted cases, crack offenders are more frequently associated with weapons use than powder cocaine offenders. According to the United States Sentencing Commission 2007 report on Crack Cocaine, powder cocaine offenders had access to, possession of, or used a weapon in 15.7 percent of cases in 2005. In contrast, crack cocaine offenders had access to, possession of, or used a weapon in 32.4 percent of cases in 2005.

That said, we understand that questions have been raised about the quantity differential between crack and powder cocaine, particularly because African-Americans constitute the vast majority of federal crack offenders. The Department of Justice is open to discussing possible reforms of the differential that are developed with victims and public safety as the foremost concerns, and that would both ensure no retreat from the success we have had fighting drug trafficking and simultaneously increase trust and confidence in the criminal justice system.

Second, reforms in this area, except in very limited circumstances, should apply prospectively. Notwithstanding the wide differences in the bills addressing the crack-powder

differential, there is one great commonality. Across the board, they are all drafted to apply only prospectively.

Without finality, the criminal law is deprived of much of its deterrent effect. Even where the Supreme Court has found constitutional infirmities affecting fundamental rights of criminal defendants, it rarely has applied those rules retroactively. For example, the United States Supreme Court has not made its constitutional decision in *United States v. Booker*, the most fundamental change in sentencing law in decades, retroactive.

The shortcomings of retroactive application of new rules are illustrated starkly in the Sentencing Commission's recent decision to extend eligibility for its reduced crack penalty structure retroactively to more than 20,000 crack dealers already in prison.

Proponents of retroactivity argue that we should not be worried about the most serious and violent offenders being released too early because a federal judge will still have to decide whether to let such offenders out. But that misses an important point. The litigation and effort to make such decisions in so many cases forces prosecutors, probation officers, and judges to marshal their limited resources to keep in prison defendants whose judgments were already made final under the rules as all the parties understood them and reasonably relied on them to be.

The swell of litigation triggered by the Commission's decision will affect different districts differently. Where it will have the most impact, however, will be in those districts that

have successfully prosecuted the bulk of crack cases over the past two decades. Fifteen districts will bear a disproportionate 42.8 percent of the estimated eligible offenders. Similarly, more than 50 percent of the cases will have to be handled by the Fourth, Fifth, and Eleventh Circuits. The 536 estimated offenders in my district who are eligible for resentencing is the equivalent of 66 percent of all criminal cases handled in my district in 2006.

The litigation, furthermore, is likely to be greater than that envisioned by the Commission. Notwithstanding strict guidance to the contrary, the federal defenders already have issued guidance telling defense counsel to argue that the Supreme Court's decision in *United States v. Booker* applies and that, therefore, every court should consider not only the two-level reductions authorized by the Commission but conduct a full resentencing at which any and all mitigating evidence may be considered. If courts accept this argument, the administrative and litigation burden will far exceed the estimates the Commission relied upon in making their new rule retroactive and will create the anomalous result that only crack defendants – many of whom are among the most violent of all federal defendants - will get the benefit of the retroactive effect of *Booker*.

With retroactivity, many of these offenders, probably at least 1600 at a minimum, will be eligible for immediate release. Others will have their sentences cut in such a fashion that they may not have the full benefit of the Bureau of Prison's pre-release programs to prepare them to come back to their communities. I am deeply concerned that the success we are experiencing in some of our most fragile, formerly crack-ravaged communities will be seriously interrupted if

these communities are forced to absorb a disproportionate number of convicted felons, who are statistically among the most likely persons to re-offend.

Because Congress only has until March 3, 2008 to have a say in that decision, Attorney General Mukasey last week asked Congress to quickly enact legislation to prevent the retroactive application of the United States Sentencing Commission amendments. Specifically, he asked Congress to ensure that serious and violent offenders remain incarcerated for the full terms of their sentences. In calling for action, he emphasized that "we are not asking this Committee to prolong the sentences of those offenders who pose the least threat to their communities, such a first-time, non-violent offenders. Instead, [he said,] our objective is to address the Sentencing Commission's decision in a way that protects public safety and addresses the adverse judicial and administrative consequences that will result."

The Federal Sentencing Guidelines assign to each offender one of six criminal history categories. The categorization is based upon the extent of an offender's past convictions and the recency of those convictions. Criminal History Category I is assigned to the least serious criminal record and includes many first-time offenders. Criminal History Category VI is the most serious category and includes offenders with the lengthiest criminal records. The Sentencing Commission's data shows that nearly 80 percent of the offenders who will be eligible for early release have a criminal history category of II or higher. Many of them will also have received an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role in the offense.

Almost none of these offenders were new to the criminal justice system. The data shows that 65.2 percent of potentially eligible offenders had a criminal history category of III or higher. That fact alone tells us that these offenders will pose a much higher risk of recidivism upon their release.

The Sentencing Commission's 2004 recidivism study shows that offenders with a criminal history category of III have a 34.2 percent chance of recidivating within the first two years of their release. Those with criminal history category of VI have a 55.2 percent chance of recidivating within the first two years of their release.

Our concern about the early release of these offenders is amplified by the fact that retroactive application of the crack amendment would result in many prisoners being unable to participate in specific pre-release programs provided by the Bureau of Prisons (BOP). Preparation to reenter society intensifies as the inmate gets closer to release. As part of this process, BOP provides a specific release preparation program and works with inmates to prepare a variety of documents that are needed upon release, such as a resume, training certificates, education transcripts, a driver's license, and a social security card. BOP also helps the inmate identify a job and a place to live. Finally, many inmates receive specific pre-release services afforded through placement in residential re-entry centers at the end of their sentences.

With no adjustments to BOP's prisoner re-entry processes, any reductions in sentence such as those contemplated by the retroactive application of the guideline may reduce or eliminate inmates' participation in the Bureau's re-entry programs. Without that, the offender's chance of re-offending will likely increase.

Mr. Chairman, the Department of Justice is open to addressing the differential between crack and powder penalties as part of an effort to resolve the retroactivity issue. It is our hope that as we work together we can make sure that there is no retreat in the fight against drug trafficking and no loss in the public's trust and confidence in our criminal justice system.

I would ask that the written portion of my statement be made a part of the record. I would be happy to answer any questions you may have. Thank you.

WASHINGTON BUREAU · NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
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**TESTIMONY OF HILARY O. SHELTON**
**DIRECTOR**
**NAACP WASHINGTON BUREAU**
**BEFORE THE SENATE JUDICIARY SUBCOMMITTEE**
**ON CRIME AND DRUGS**

*February 12, 2008*

Good morning. My name is Hilary Shelton and I am the Director of the NAACP Washington Bureau, the federal legislative and national policy and advocacy department of our Nation's oldest and largest grassroots civil rights organization. We currently have over 500,00 members and more than 2200 membership units in every state in our Nation.

I am here today because the federal mandatory minimum sentence for crack cocaine is a unfair, immoral and racially discriminatory.

And it is because of our unwavering support for fairness and equality and consequently opposition to current law that the NAACP strongly supports S. 1711, the *Drug Sentencing Reform and Kingpin Trafficking Act of 2007*. As such, we are very appreciative of Chairman Biden's courage, wisdom and leadership in being the primary sponsor of this legislation.

Despite the fact that cocaine use is roughly equal among the different populations of our nation, the vast majority of offenders who are tried, convicted and sentenced under federal crack cocaine mandatory minimum sentences are African Americans. Our people, and our communities, continue to be disproportionately devastated by this law on a large scale.

As you are probably aware, the report issued last year by the nonpartisan United States Sentencing Commission found, among other things, that –

- The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine.
- The current severity of crack cocaine penalties mostly disparately impacts racial and ethnic minorities.

African Americans still comprise the majority, almost 82% in 2006, of people convicted and sentenced of federal crack cocaine offenses, while White offenders comprise less than 9% of crack cocaine defendants in 2006. I should remind you that according to the federal government's most recent survey, less than 18% of our nation's crack cocaine users were African American. The reasons for these disparities are numerous and varied, but the results are discriminatingly consistent.

Quoting from the US Sentencing Commission's 2002 report,

> "...even the perception of racial disparity (is) problematic. Perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine."

Few people today argue that policy makers could have foreseen twenty years ago the vastly disparate impact the 1986 law would have on communities of color. Yet the facts that African Americans, and especially low-income African Americans, continue to be severely penalized at much greater rates than white Americans for drug use, and that the policy of the federal government is having a devastating effect on our neighborhoods and that these laws continue to be maintained show, at the very least, a callous disregard for people of color and our communities.

And it is this disregard for the fate of our people that continues to erode our confidence in our nation's criminal justice system. How can African Americans trust or respect policy makers, those who enforce the policies, or those who perpetuate a law that clearly has such a racially discriminatory and devastating impact?

And, because it is only human nature to punish the messenger, the resulting mistrust, disrespect and anger that the African American community feels is also taken out on law enforcement representatives and the criminal justice system as well.

Before I get into the where the NAACP would like us to go from here. I would like to take a minute to talk about what we have learned about crack cocaine since the 100-to-1 sentencing ratio became law. We have learned conclusively that crack and powder cocaine are pharmacologically indistinguishable. Furthermore, several respected medical authorities have found that crack cocaine is no more addictive than powder cocaine. And, as the US Sentencing Commission concluded in its 2002 report, the violence that was often associated with crack cocaine is related to the nature of the drug trade and not to the effects of the drug itself, much like the violence our Nation experienced during prohibition.

Finally, the myth that crack cocaine was responsible for thousands of innocent babies being born addicted to cocaine because their mothers had smoked crack

cocaine during their pregnancies has effectively been debunked in medical, scientific and academic circles. Unfortunately the myth of the "crack baby" persists in the minds of much of the American public. Perhaps most troubling to the NAACP, the image of the "crack baby" that comes to most Americans' minds is that of an African American infant, crying inconsolably in an incubator.

It is the myth of the differences between crack and powder cocaine and the "crack baby" that perhaps best reflects one of the reasons the NAACP would welcome an open, honest national debate on federal crack cocaine policies: we need a candid assessment of crack cocaine – who uses it and what its impact is on our communities.

We also need to change the law.

Though illegal drug trafficking devastates our communities, and indeed communities across the nation, the debilitating affects of crack cocaine on African Americans has proven to come not only from the abuse of the drug, but also from the resulting unjust federal sentencing policy. The average sentence for a powder cocaine conviction is 85 months versus the average sentence for a crack cocaine conviction, the less expensive version of the same illegal substance, which is 122 months. This difference of 37 months, or slightly more than 3 years, is huge to African Americans, as it would be to any American, considering that the large majority of those sentenced under crack cocaine penalties are black.

In a misguided quest for fairness and justice, some argue that the answer would be to increase the penalties for powder cocaine so that they are more in line with those of crack cocaine. The NAACP rejects this proposal, however, as it does not take into consideration the more even-handed, informed and balanced approach that went into the development of powder cocaine sentencing ranges. And, as our more recent experiences have taught us, it would only fill even more prison cells with low-level offenders serving mandatory sentences which in turn would create an even larger drain on our nation's financial and human resources while undermining the trust and respectability needed by law enforcement officials to be effective in protecting our communities.

I should also state for the record that the NAACP is opposed to all mandatory minimum sentences, and that the proposal to increase the penalty for powder cocaine is yet another example of politicians trying to prove themselves "tough on crime" to the detriment of sound and effective policy, undercutting the wisdom, integrity and balanced discretion empowered in our Nation's judges who serve in courtrooms across America.

The NAACP applauds the efforts of the US Sentencing Commission which has consistently sought to end the disparity between federal penalties for crack and powder cocaine, and cited the glaring racial inequities as one of the motivators

behind its position. We further would like to applaud the efforts of Congresswoman Sheila Jackson Lee (TX), Congressman Robert "Bobby" Scott (VA), Congressman Charles Rangel (NY) as well as other members of the Congressional Black Caucus and the Congress who have tried, through legislation, to correct this inequity.

Finally, I would like to extend the appreciation of the NAACP, as well as my own gratitude and admiration, to some of my colleagues in this fight, among them the Sentencing Project, the ACLU, the Open Society Institute and others for all they have done to shed light on and correct this very real problem.

I would also like to take a minute to briefly address the recent statements by Attorney General Michael Mukasey regarding people currently in prison for crack cocaine possession and the decision by the U.S. Sentencing Commission to apply their May 2007 decision to allow a reduction in some crack cocaine sentences retroactively. The NAACP was both saddened and offended by Attorney General Michael Mukasey's call for Congress to override the decision by the U.S. Sentencing Commission.

Attorney General Mukasey's characterization of people currently in prison for crack cocaine convictions, and of the impact that a potential reduction in their sentences could have on our communities, is not only inaccurate and disingenuous, but it is alarmist and plays on the worst fears and stereotypes many Americans had of crack cocaine users in the 1980s. The fact that a federal judge will be called on to review each and every case individually and take into account if there were other factors involved in the conviction, whether it be the use of a gun, violence, death, gang membership or the defendant's criminal history before determining if the retroactivity can apply, appears to have eluded the Attorney General.

Furthermore, because more than 82% of those currently in prison for federal crack cocaine convictions are African Americans and 96% are racial or ethnic minorities, the NAACP is deeply concerned at the Attorney General's callous characterization that many of the people in question are "violent gang members. The NAACP has steadfastly opposed the mandatory minimum for crack cocaine possession and the disparity in sentences for crack and powder cocaine convictions.

In fact, in addition to repeatedly testifying before the Sentencing Commission in strong opposition to the crack / powder disparity, in November 2007 I personally testified in on behalf of the NAACP in support of retroactivity. Changes in sentencing have been applied retroactively in the cases of marijuana, LSD and oxycodone – all of which overwhelmingly benefited racial and ethnic groups other than African Americans. To not apply the sentencing changes for crack cocaine retroactively would perpetuate, and perhaps even intensify, the sense of injustice among the African American community and other communities of color.

The bottom line is this: Until the racial inequalities in our nation's "War on Drugs" and other crime initiatives are addressed, communities of color across the nation will continue to distrust the American criminal justice system. The federal government's crack cocaine policy is one glaring example of how the American government has failed an entire segment of its population.

I thank you again, Chairman Biden, for your courageous leadership on this issue and would welcome any questions you may have.

WASHINGTON BUREAU · NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
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February 8, 2008

Members
United States Senate
Washington, DC 20510

*via fax*

**RE: NAACP SUPPORT FOR S. 1711, THE *DRUG SENTENCING REFORM AND KINGPIN TRAFFICKING ACT OF 2007*, ELIMINATING THE CRACK / POWDER COCAINE SENTENCING DISPARITY**

Dear Senator;

On behalf of the National Association for the Advancement of Colored People (NAACP), our nation's oldest, largest and most widely-recognized grassroots civil rights organization, I strongly urge you to co-sponsor and support S. 1711, the *Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007*. This legislation would restructure the sentencing range for a conviction of crack cocaine possession and bring the current disparate sentencing range in line with that for powder cocaine.

The tremendous disparity in the punishment for possession of crack cocaine and powder cocaine is unjust, racially disparate and undermines the authority of the 14th Amendment, which guarantees equal protection under the law from disproportionate punishment. Furthermore, the current 100 to 1 quantity ratio has had a disproportionate and devastating impact on the African American community. Everyone seems to agree that crack cocaine use is higher among Caucasians than any other group: most authorities estimate that more than 66% of those who use crack cocaine are white. Yet in 2006, 82% of those sentenced under federal crack cocaine laws were African American. When you add in Hispanics, the percentage climbs to above 96%.

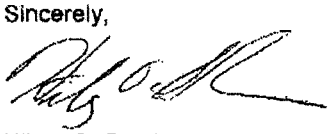
Under current law, a person convicted of possessing 5 grams of crack cocaine is facing a mandatory minimum sentence of 5 years in jail; while an individual convicted of possessing 499 grams of powder cocaine may face a misdemeanor charge and a maximum sentence of one year behind bars. This is especially unjust in light of the fact that pharmacologically, crack and powder cocaine are identical drugs.

Elimination of the unjust 100 to 1 quantity ratio between crack cocaine and powder cocaine would be the first step toward restoring to judges the discretion to impose fair, informed and responsible sentences. I therefore urge you again, in the strongest terms possible, to support and work for the enactment of

legislation to completely eliminate the sentencing disparity between crack and powder cocaine convictions and for the restoration of fairness in our legal system. Please contact me as soon as possible and let me know what I can do to help you ensure that this unfair policy is repealed.

Thank you in advance for your attention to the NAACP position. Should you have any questions or comments, please do not hesitate to contact me at my office at (202) 463-2940.

Sincerely,



Hilary O. Shelton
Director

Date: 2/7/2008 Time: 11:18 AM To: Leahy, Sen. Patrick @ 224-3479
Page: 001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February 7, 2008

**Please address the 100-to-1 federal sentencing disparity between crack and powder cocaine by supporting S. 1711, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act**

Dear Senators:

As an organization representing thousands of American college students concerned with the negative impact that both drug abuse and overly-punitive drug policies have on our campuses and communities, Students for Sensible Drug Policy (SSDP) and its more than 120 campus chapters strongly urge you to support S. 1711 which would equalize sentencing for crack and powder cocaine to the current level for the latter.

As you know, the amount of crack that currently triggers an automatic felony charge and a mandatory minimum sentence upon conviction (5 grams) is 100 times lower than the amount necessary to trigger a felony charge and mandatory minimum for powder cocaine (500 grams).

Students have a particular interest in seeing these penalties equalized because the current sentencing scheme can hamper their eligibility for the Hope Scholarship Credit. The credit, which is unavailable to taxpayers with felony drug convictions, can be applied to the first $1,000 of a student's education expenses and half of the next $1,000 over the first two years of college. In 2003 alone, just under 3.5 million taxpayers took advantage of the credit.

By equalizing the penalties for crack and powder cocaine, fewer students convicted of possessing relatively small amounts of crack cocaine for personal use will be deemed ineligible for the Hope Credit. Low- to middle-income students who are unable to take advantage of the credit may be more likely to leave school and never return. Such individuals are increasingly disposed to develop serious drug problems, commit crimes, or rely on costly social service programs, instead of becoming law abiding and productive members of society.[1]

Young people also suffer collateral damage when their parents are convicted of drug offenses. Youth whose parents are incarcerated are often left without the familial grounding and/or financial resources needed to get accepted to, and stay enrolled in,

[1] Institute for Higher Education Policy. *The Investment Payoff: A 50-State Analysis of the Public and Private Benefits of Higher Education.* February 2005.

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college. Adolescents and children can also lose access to housing, food stamps, or other government assistance programs when their parents are convicted of drug offenses.

Students are also very concerned with the racial implications of the sentencing disparity. In 2000, there were more African American men incarcerated in prisons and jails than there were enrolled in colleges and universities, thanks in large part to our nation's drug sentencing policies.[2]

In 2003, 80% of defendants sentenced under crack cocaine laws were African Americans, despite the fact that greater than 66% of crack cocaine users in the United States are Hispanic or white.[3]

The disparity in sentencing between powder and crack cocaine has had a devastating impact on African American individuals, communities, and families by inhibiting educational opportunity and by breaking up families through incarceration.

For these and other reasons, we respectfully urge you address the alarming disparity between sentences for powder and crack cocaine by co-sponsoring S. 1711.

Sincerely,

Kris Krane, Executive Director
Students for Sensible Drug Policy

[2] Justice Policy Institute, Cellblocks Or Classrooms?: The Funding Of Higher Education And Corrections And Its Impact On African American Men 10 (2002).
[3] U.S. Sentencing Commission, 2003 Sourcebook Of Federal Sentencing, Table 34 (2003), available at http://www.ussc.gov/ANNRPT/2003/table34.pdf.

Testimony

of

Nkechi Taifa, Esq.
Senior Policy Analyst
Open Society Policy Center

and

Convener
Justice Roundtable

Before the

Crime and Drugs Subcommittee

of the

Senate Judiciary Committee

Regarding

Examination of Federal Cocaine Sentencing Laws

February 12, 2008

Thank you for this opportunity to submit written testimony for the record, in support of hearings to examine federal cocaine sentencing laws focusing on reforming the 100-to-1 crack/powder disparity. My name is Nkechi Taifa, and I serve as Senior Policy Analyst for the Open Society Policy Center, and as convener of the Washington-based policy network, the Justice Roundtable.

The Open Society Policy Center is a non-partisan organization that engages in policy advocacy on U.S. and international issues, including foreign operations, criminal justice reform, human rights, women's rights, and civil liberties. The Justice Roundtable is a broad network of organizations working on issues which span the criminal justice continuum of law enforcement, sentencing, prison, and reentry. The Roundtable's participants support criminal justice policies that are sensible, just, and fair. We applaud the Crime and Drugs Subcommittee for making review of cocaine and federal sentencing policy a priority.

## I. Background

In 1986 Congress enacted the Anti-Drug Abuse Act that differentiated between two forms of cocaine distribution – powder and crack – and singled out crack cocaine for dramatically harsher punishment. A five year mandatory minimum sentence is required for dealing in five grams of crack cocaine. It takes trafficking in 100 times as much powder cocaine – 500 grams – to trigger the same five year sentence. Fifty grams of crack cocaine yields a ten year sentence, whereas 5000 grams of powder cocaine yields the same sentence. Thus, in what has come to be known as the 100-to-1 ratio, it takes

100 times more powder cocaine than crack cocaine to trigger the harsh five and ten year mandatory minimum sentences, which have been anchored to the Sentencing Guidelines.

In 1988 Congress further distinguished crack cocaine from both powder cocaine and every other drug by creating a mandatory felony penalty of five years in prison for simple possession of five grams of crack cocaine. In 2002, 81.4% of those convicted of crack cocaine offenses in federal court were African American. Although there are larger numbers of documented White crack cocaine users, federal law enforcement and prosecutorial practices have resulted in the "war on drugs" being targeted at inner-city communities of color. This has caused an overwhelming number of arrests from these communities, with Blacks disproportionately impacted by the facially neutral yet unreasonably harsh, crack penalties. It has been reported that the higher proportion of African Americans charged with crack offenses is the single most important difference accounting for longer sentences imposed on them, relative to other racial groups. Revising this one sentencing rule, the Sentencing Commission has concluded, would do more to reduce the sentencing gap between Blacks and Whites than any other single policy change.

It is recognized that two decades ago, little was known about crack, other than vague perceptions that this new derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public health, and greatly increase drug-related violence. Since that time, copious documentation and analyses by the Sentencing Commission have revealed that many assertions were not supported by sound data and, in retrospect, were exaggerated or simply incorrect.

In 1995 the bipartisan U.S. Sentencing Commission transmitted to Congress recommendations that would equalize the penalty triggers between crack and powder cocaine possession and distribution, at current powder cocaine triggers.[1] It is instructive to stress that the Commissioners unanimously agreed that the penalty triggers for simple possession of crack and powder cocaine should be equal. A majority of the Commissioners supported not differentiating the triggers for distribution as well. Indeed, the only dissenting Commissioner to provide an alternative ratio for distribution stated that a five-to-one ratio "may be a good starting point for analysis."[2] Although the Commission exhaustively researched and analyzed the issue of cocaine and federal sentencing policy "from every conceivable angle and for many, many, many months," making "every effort to consider this critical matter in a thorough and professional manner,"[3] the recommendations were summarily rejected by Congress,[4] which voted to "disapprove" of the Commission's recommendations, sending the issue back to the Commission for further study.[5] Indeed, out of over 500 recommendations submitted by

[1] 60 Fed. Reg. 25074, amend. No. 5 (proposed May 1, 1995).
[2] (This was the view of Commissioner Goldsmith, dissenting in part from the Commission's proposed amendment.) See Letter from Richard A. Conaboy, Chairman, U.S. Sentencing Commission, to J. Orrin Hatch, Chairman, Senate Judiciary Committee (May 1, 1995), in U.S. Sentencing Commission: Materials Concerning Sentencing for Crack Cocaine Offenses, 57:0 CRIM L. RP. 2127 (1995); See also Powder Cocaine and Crack Cocaine Sentences, 1995: Hearings Before the Subcommittee on Crime of the House of Representatives' Committee on the Judiciary, 104th Cong., 1st Sess. 1 (1995) (statement of J. Deanell Reece Tacha, U.S. Sentencing Commission), "the similarities between the majority and the dissent on this issue are much greater than our differences." Id. Also, in the words of then Commission Chair Conaboy: "We have all worked very hard on this issue, and I want to stress first the Commission's unanimity. We all agreed on the conclusions contained in our report to Congress as well as the facts that form the bases of the conclusions. And while we certainly differ on parts of our final specific recommendations, our differences are relatively small ... the Commissioners who dissented from our recommendations did not seriously discuss any ratio greater than 5-to-1." Id. Statement of Richard P. Conaboy.
[3] Conaboy Letter
[4] CONG. REC. H10255-56 (daily ed. Oct. 18, 1995), H. Res. 237, 104th Cong.; CONG. REC. sec.14645-56 (daily ed. Sept. 29, 1995), S. 1254, 104th Cong.
[5] Se 141 CONG. REC. H10, 255-02, 281 (daily ed. Oct. 18, 1995). The House of Representatives voted 316-98 to disapprove of the Sentencing Commission's recommendations. Although the Senate earlier voted to disapprove of the recommendations, there was no roll call vote in that chamber. See 141 CONG. REC. S14, 645-06, 782 (daily ed. Sept. 29, 1995).

the Sentencing Commission to Congress since its inception, this represented the first time Congress disregarded its advice. Even more egregiously, Congress instructed that the Commission revise its recommendations so as to maintain sentences for crack cocaine trafficking that exceeded those for powder cocaine trafficking.[6]

In its 15 year review of guidelines sentencing, the Sentencing Commission reported that revising this one sentencing rule would do more to reduce the sentencing gap between Blacks and Whites "than any other single policy change," and would "dramatically improve the fairness of the federal sentencing system."[7]

## II. Justice Roundtable's Advocacy

On January 1, 2006 the Justice Roundtable launched a national campaign, "Time to Mend the 'Crack' in Justice" using the 20 year anniversary of the crack law's passage as a catalyst to encourage public and legislative discussion of the issue. The campaign has featured Letters to Congress, Hill Briefings and Reports, creative "Show and Tell," as well as advocacy before an international body. The Campaign's rallying cry has been: "Twenty years of discriminatory crack cocaine sentencing is enough. The studies are completed. The research is compelling. The analysis is sound. Now is the time to mend this 'crack' in our system of justice."

On October 27, 2006, two decades from the day President Ronald Reagan signed the Anti-Drug Abuse Act of 1986, the Justice Roundtable hosted a Senate Staff Briefing, "The 20-Year Legacy of Crack and Powder Cocaine Sentencing." During this briefing the Sentencing Project moderated a stellar panel which included representatives from the

[6] See Pub.L.No. 104-38, 109 Stat. 334 (Oct. 30, 1995)
[7] United States Sentencing Commission [USSC], Fifteen Years of Guidelines Sentencing (Nov. 2004), p. 132.

U.S. Sentencing Commission, Office of Senator Jeff Sessions, Criminal Justice Policy Foundation, and the American Civil Liberties Union. The diverse group of panelists engaged in frank discussion to an impressive, capacity-filled Senate meeting room.

Criminal Justice Policy Foundation President Eric Sterling, who served as Counsel to the House Judiciary Subcommittee on Crime during the passage of the 1986 mandatory minimum laws, made a vivid demonstration. He described the minuscule quantities which yield lengthy five and ten year sentences for crack cocaine trafficking, emphasizing that the proper federal anti-drug role must focus on the highest level traffickers, as opposed to "candy bar crack cases."

Sterling graphically illustrated some analogies: five grams is the weight of the tiny amount of powder in five packets of artificial sweetner. Fifty grams is the weight of a common candy bar. Five hundred grams is a little more than a pound – imagine about half the size of a common two pound box of sugar. And 5000 grams – about twelve pounds – two five-pound bags of sugar plus a two pound box. All of this fits in a large lunch box or small briefcase, he described. As someone who was actively engaged as House Crime Subcommittee counsel during the passage of the crack cocaine mandatory sentences over 20 years ago, Sterling explained that the trigger designations of 5 grams and 500 grams were a complete accident, as opposed to a policy or a deliberate decision. "No one in Congress said this is the proper relationship of harmfulness," he stressed.

One third of all federal cocaine cases involve an average of 52 grams, while only 7 percent of federal cocaine cases are directed at high level traffickers. For the past twenty years low level crack cocaine offenders selling sugar packet and candy bar size quantities of crack cocaine, have been punished far more severely than their wholesale

drug suppliers who provided the powdered cocaine from which the crack is produced. Indeed, the Sentencing Commission has reported that local street-level crack offenders receive average sentences comparable to intrastate and interstate powder cocaine dealers, and both intra- and- interstate crack sellers receive average sentences longer than international powder cocaine traffickers.[8]

The Justice Roundtable has sought to educate the public and policymakers about such flawed sentencing policies that have created decades of racially biased and unjust drug policy. Results such as these are surely not what Congress intended to stem the tide of crack cocaine abuse.

## III. Response to Concerns of Violence and Harm

> When one form of a drug can be rather easily converted to another form of the same drug and when that second form is punished at a quantity ratio 100 times greater than the original form, it would appear reasonable to require the existence of sufficient policy bases to support such a sentencing scheme ... [especially] when such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population....[9]

Two of the most cited concerns regarding crack cocaine relate to violence and harm. Sufficient policy bases, however, have never been raised to justify the 100:1 quantity ratio in punishment between the two methods of ingesting the same drug.

Although it is a common assumption that there is more violence associated with the use of crack than with the use of powder cocaine, there is no evidence that such violence is attributed to the pharmacological effects of smoking crack. Professor Paul Goldstein asserts that there are no valid and reliable sources of data for policymakers, in

[8] U.S. SENTENCING COMM'N, 104TH Cong., 2nd SESS., SPECIAL REPORT TO CONGRESS; COCAINE AND FED. SENTENCING POL'Y (1995) AT 175-77 (Figures 10 & 11).
[9] Special Report to Congress, at xii. (1995)

either the criminal justice or the health care systems that adequately explain the relationship between violence and drugs. [10] Media reports of violence, he contends, are unclear and misleading, with distinctions between drug use and drug trafficking often not made.[11] Goldstein asserts that he has found little pharmacological violence attributed to either powder or crack cocaine; most of this violence is attributed to alcohol.[12] Similarly, Goldstein has found very little "user-trying-to-support-his-habit" economic violence. He found that almost all cocaine-related violence is found in the cocaine marketplace and system of distribution.

Goldstein's findings provide evidence that certain common assumptions about drug-related violence are incorrect or exaggerated. For example, although it is commonly believed that violent, predatory acts by drug users to obtain money to purchase drugs are an important threat to public safety, Goldstein's data indicates otherwise. He found that violence is most likely to occur with respect to the drug marketplace, and to involve others similarly situated. He also theorizes that police procedures substantially add to cocaine-related violence.[13]

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[10] Professor Paul Goldstein teaches at the University of Illinois at Chicago, School of Public Health, and has authored studies probing the relationship between drugs and violence. He has studied drug-related violence in New York State and New York City, funded by the National Institute on Drug Abuse and the National Institute of Justice.

[11] Paul J. Goldstein, Ph.D., School of Public Health, University of Illinois at Chicago, The Relationship Between Drugs and Urban Violence: Research and Prevention Issues 1 (1993).

[12] Goldstein believes that the figures often used in media for drug-related violence include alcohol-related violence, which is not made clear when the figures are used. He is also suspicious of police-reported "drug-related violence," having found that police often target specific areas such that *any* crime therein committed is "drug-related."

[13] Professor Goldstein remarked: Intensified law enforcement efforts probably contributed to increased levels of violence. Street sweeps, neighborhood saturation, buy-bust operations, and the like lead to increased violence in a number of ways. For example, removing dealers from their established territory by arresting them leaves a vacuum that other dealers fight to fill. By the time these hostilities have ended, convicted dealers may have returned from prison and attempted to reassert their authority, resulting in a new round of violence.

The Sentencing Commission has also cited analyses establishing that systemic violence is not limited to the crack cocaine market. A 1990 study compared crack and powder cocaine dealers and found that significant percentages of both powder and crack offenders regularly engaged in a range of violent activity associated with cocaine trafficking.[14]

The use of crack cocaine has, without a doubt, been devastating to already distressed urban areas.[15] However, the deterioration of inner city neighborhoods and communities is closely tied to the issue of social maladies and occurs whenever there is an influx of drugs into a community. To single out a particular drug among many that contribute to the deterioration of neighborhoods, and especially a specific form of that drug, for characterization of a harm as one hundred times greater than its pharmacological counterpart, is untenable.

Another issue often raised and highlighted is the difference in harms associated with the use/trafficking of crack versus powder cocaine. The Department of Justice and some Members of Congress in the past have argued for stiffer penalties for crack users because, they assert, crack is a more dangerous and harmful substance than powder cocaine, and the "uniquely harmful" nature of crack should be reflected in sentencing policy.

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[14] Special Report to Congress, note 23 at 97 (citing Drugs and Violence: Causes, Correlates and Consequences 36 (M. De la Rosa, et al., eds., 1990)

[15] The majority in the Commission's 1995 report stated:

"We are aware that a host of social maladies have been attributed to the emergence of crack cocaine, such as urban decay or parental neglect among user groups. After careful consideration, the Commission majority concluded that increased penalties are not an appropriate response to many of these problems. We are unable to establish these social problems result from the drug itself rather than from the disadvantaged social and economic environment in which the drug is used. We note that these problems are not unique to crack cocaine, but are associated to some extent with abuse of any drug or alcohol. Conaboy Letter.

Cocaine, however, in any form produces the same physiological and psychological effects. It is the onset, intensity, and duration of the effects which vary, and these variations are tied to the manner in which the drug is administered, as opposed to any distinctions in the chemical make-up of the drug. Indeed, pharmacologically, "cocaine is cocaine is cocaine, whether you take it intranasally, intravenously or smoked."[16] "Injecting powder cocaine is as dangerous as or more dangerous than smoking crack."[17] The term "crack baby" is now widely understood to be a misnomer, with research indicating that the negative effects of both prenatal crack and powder cocaine exposure are identical and significantly less severe than previously believed.[18] The rate of HIV infection is nearly equal between crack smokers (due to risky sexual practices) and powder injectors (due to risky needle sharing).

However, even if crack were a more dangerous substance than powder cocaine, increased penalties should not be justified on that basis. Cocaine powder is easily transformed into crack.[19] Thus, to apply a stiffer penalty between cocaine which is sold directly as crack, and cocaine which is in powder form but which can be treated by the consumer and easily transformed into crack, is irrational. As the Sentencing Commission has previously emphasized, "[I]n light of the fact that crack cocaine can easily be

[16] Hearings on Crack Cocaine Before U.S. Sentencing Commission, 103rd Cong., 1st Sess. 112 (1993) (statement of Dr. Charles Shuster).
[17] Letter from Richard A. Conoboy, Chairman, U.S. Sentencing Commission, to J. Orrin Hatch, Chairman, Senate Judiciary Committee (May 1, 1995).
[18] See Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission, Panel Five – Medical and Treatment Communities, November 14, 2006, testimonies of Dr. Nora Volkov and Dr. Harolyn Belcher, pp. 159-196 for a comprehensive discussion dispelling many of the myths associated with crack cocaine.
[19] "It takes 15 minutes to turn powder cocaine into crack cocaine – a box of baking soda, a pot of water, and a microwave or stove and you have crack cocaine." Hearings on Crack Cocaine Before the U.S. Sentencing Commission, 103rd Cong., 2d Sess. (1993), at 32 (statement of Sgt. Brennan).

produced from powder cocaine, the form of cocaine is simply not a reasonable proxy for dangerousness associated with use."[20]

In sum, although families and communities have been ravaged by drugs, both have also been subjected to the devastations wrought by draconian crack sentences. We often lose sight of the fact that those impacted are real people with real lives. Hamedah Hasan, a mother of three, was pregnant with her youngest daughter when she began serving a 27-year sentence in 1993. A first-time offender convicted of a nonviolent crack cocaine conspiracy offense, when Hasan is released, her daughter will be a grown woman. Two decades of stringent crack sentencing has not abated or reduced cocaine trafficking, nor improved the quality of life in deteriorating neighborhoods. What it has done, however, is incarcerate massive numbers of low-level offenders, predominately African American and increasingly women, who are serving inordinately lengthy sentences at an enormous cost to taxpayers and society, with no appreciable impact on the drug trade.

## IV Enact the Drug Sentencing Reform and Kingpin Trafficking Act of 2007 (S. 1711)

Attention to reform of crack cocaine sentences has gained considerable momentum over the past several months. Decisions from the U.S. Sentencing Commission and the U.S. Supreme Court highlight the need for change. President Bush recently commuted the prison sentence of an individual convicted of a crack offense who served 15 years of his 19 year sentence. A change in the mandatory minimum crack statutes, however, can only occur legislatively.

[20] Conaboy Letter, (statement of the Commission Majority).

We urge that the Senate support and enact the Drug Sentencing Reform and Kingpin Trafficking Act of 2007 (S.1711), introduced by Senator Joseph Biden (D-DE). Although we wholeheartedly applaud the bipartisan recognition that there must be reform of the mandatory minimum statute that treats one gram of crack cocaine the same as 100 grams of powder cocaine, S.1711 is the Senate bill that comes closest to fair and rational reform of crack cocaine penalties. This proposal begins the process of shifting the federal law enforcement focus from low level street sellers towards higher-level traffickers. It eliminates the current disparity in federal sentencing for crack versus powder cocaine offenses, without a shift in the current powder cocaine penalty. It also repeals the only mandatory minimum penalty for simple possession of crack cocaine.

We do acknowledge Senator Sessions (R-AL) for taking the first step in the Senate towards legislative reform (S.1383), narrowing the gap between crack and powder cocaine to a 20-to-1 quantity ratio. However, this bill decreases the amount of powder cocaine that would trigger a sentence. There has been no evidence that current penalties for powder cocaine are not tough enough.

We commend Senators Hatch (R-UT) and Kennedy (D-MA) for introducing legislation (S.1685) that reduces the federal crack cocaine disparity without a shift in the current trigger for powder cocaine. This bill also eliminates the mandatory minimum sentence for simple possession of crack cocaine, bringing it in line with simple possession of any other drug. It maintains, however, without compelling evidence, a 20-to-1 disparity between crack and powder cocaine.

The Drug Sentencing Reform and Kingpin Trafficking Act (S. 1711), however, is favored in that it follows the original 1995 recommendation to Congress from the U.S.

Sentencing Commission to conform crack cocaine penalties at current powder cocaine triggers. Senator Biden's bill will serve to finally correct the gross unfairness that has been the legacy of the 100-to-1 quantity ratio, and will begin to place the focus of federal cocaine drug enforcement on major traffickers, where it should be. We urge expeditious passage of this long overdue remedy.

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Rob Keithan
Director

February 8, 2008

Dear Member of Congress:

On behalf of the over 1000 congregations that make up the Unitarian Universalist Association, I urge you to support S.1711/H.R. 4545, the Drug Sentencing Reform and Kingpin Trafficking Act of 2007. This bill, introduced by Sen. Joseph Biden and Rep. Shelia Jackson-Lee, would eliminate the current disparity in federal sentences for crack versus powder cocaine offenses, and establish a grant program to provide drug treatment and rehabilitative services within prisons, jails, and juvenile facilities.

Current federal sentencing guidelines require that an individual convicted of distributing or possessing five grams of crack cocaine be subject to a five-year mandatory minimum prison sentence. To receive a five-year sentence for a powder cocaine offense, an individual would have to distribute 500 grams of powder cocaine. This is a 100 to one disparity for drugs which have the same effects on users and contain nearly the same number of doses gram for gram. With crack cocaine more common in inner-city black communities and powder cocaine more prevalent in white suburban communities, the sentencing disparity between the two forms of the same drug amounts to institutional racism; the average sentence for a federal drug offense for black Americans is 49% longer than it is for whites.

This racism is also present in national drug enforcement. In spite of the fact that there are more white cocaine users, who tend to use powder cocaine, national drug enforcement practices have overwhelmingly targeted inner-city communities of color, causing a disproportionate number of prosecutions of black Americans. According to the ACLU, although black Americans make up only 15% of the nation's drug users, they comprise 37% of persons arrested for drug violations, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.

The Drug Sentencing Reform and Kingpin Trafficking Act of 2007 would revise this unjust disparity in sentencing and would provide funds for drug treatment programs for cocaine offenders. Furthermore, this bill would focus federal law enforcement efforts on serious drug traffickers instead of the neighborhood crack dealers it currently targets.

As a religious organization with a strong, longstanding commitment to racial justice, we stand behind Senator Biden and Representative Jackson-Lee's commendable effort to eliminate the disparity and make our criminal justice system truly just. I urge you to support S.1711/H.R. 4545.

In Faith,

Robert C. Keithan, Director

02/11/2008 9:01AM

*Testimony*
*Before the Subcommittee on Crime and Drugs*
*Committee on the Judiciary*
*United States Senate*

# Scientific Research on the Scope, Pharmacology, and Health Consequences of Cocaine Abuse and Addiction

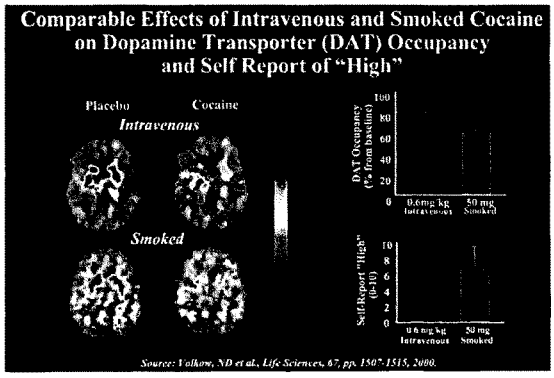
**Statement of**
**Nora D. Volkow, M.D.**
**Director**
**National Institute on Drug Abuse**
**National Institutes of Health**
**U.S. Department of Health and Human Services**

*For Release on Delivery*
*Expected at 2:00 p.m.*
*Tuesday, February 12, 2008*

Thank you, Mr. Chairman and members of the Subcommittee, for the opportunity to contribute to this important discussion. I am Dr. Nora Volkow, Director of the National Institute on Drug Abuse (NIDA), a component of the National Institutes of Health, an agency of the Department of Health and Human Services (HHS). NIDA is the world's leading supporter of research on the health aspects of all drugs of abuse. The research we fund has taught us much about what drugs can do to the brain and how best to use science to approach the complex problems of drug abuse and addiction.

I want to focus my comments today on what our research has taught us about the scope, pharmacology, and health consequences of cocaine abuse and addiction, particularly with regard to two forms of cocaine—powder and freebase (aka "crack")—and the effects of various routes of administration. My testimony will support the scientific view that cocaine's effects vary depending on how it is administered. My testimony will also make it clear that cocaine in all its forms poses serious health risks, including addiction.

Research supported by NIDA has found cocaine to be a powerfully addictive stimulant. Like other central nervous system (CNS) stimulants, such as amphetamine and methamphetamine, cocaine produces alertness and heightens energy. Cocaine, like many other drugs of abuse, produces a feeling of euphoria or "high" by increasing the neurotransmitter dopamine in the brain's reward circuitry. It does this by blocking dopamine transporters (DAT), which have the critical task of removing dopamine from in between neurons, thereby shutting off the neural signal once a rewarding stimulus is no longer present. The normal functioning of DAT is critical to the healthy operation of the brain's reward system, which allows us to register pleasure from everyday rewards. Cocaine, in any form, produces similar physiological and psychological effects once it reaches the brain, but the onset, intensity, and duration of its effects are directly related to the route of administration and to how rapidly cocaine enters the brain.




***Cocaine has similar effects on the brain and behavior, whether it is injected or smoked.***

Oral absorption is the slowest form of administration because cocaine has to pass through the digestive tract before it is absorbed into the bloodstream. Intranasal use, or snorting—the process of inhaling cocaine powder through the nostrils—leads to quicker absorption through the nasal tissue. Intravenous (IV) use, or injection, is faster still, introducing the

drug directly into the bloodstream and heightening the intensity of effects. Finally, and similar to injection, the inhalation of cocaine vapor or smoke into the lungs is also a very effective method of delivering the drug into the bloodstream. Compared to the injection route, however, smoking produces quicker and higher peak blood levels in the brain – hence, a faster euphoria – and is devoid of the risks attendant to IV use, such as exposure to HIV from contaminated needles. Importantly, all forms of cocaine, regardless of route of administration, result in a similar level of DAT blockade in the reward center of the brain (see Figure). This is why repeated use of any form and by any route can lead to addiction and other adverse health consequences.

**Scope of the Problem**

Although marijuana remains the most commonly used illicit drug in the country (an estimated 25.4 million past-year users 12 or older), according to the 2006 National Survey on Drug Use and Health (NSDUH), administered by HHS's Substance Abuse and Mental Health Services Administration's (SAMHSA), more than 6 million (2.5 percent) persons aged 12 years or older used cocaine in the year prior to the survey, and 2.4 million (1 percent) were current (past month) cocaine users. This percentage has remained fairly intractable for the past 5 years, with little variance occurring among persons aged 12 or older.

In 2006, roughly 1.5 million persons 12 years or older (0.6%) used crack (cocaine freebase) in the past year, and 702,000 (0.3%) were current (past month) crack users. Crack was first added to the NSDUH in 1988, and over successive years of the survey, estimates of past-month use have never exceeded 0.3% of the population 12 and older. However, past-month use of crack among Blacks 12 or older in 2006, at 0.8%, reflects a prevalence much higher than in the White (0.2%) or Hispanic (0.3%) populations, although American Indians/Alaska Natives have a higher percentage (2.7%) than any other race/ethnic group.

The NIDA-supported Monitoring the Future (MTF) study, an annual survey that elicits information about drug use and attitudes among high school students, provides valuable information about the changing patterns of drug use in selected populations. The MTF reports that past year use of cocaine in any form has been essentially unchanged since 2003 among 12th, 10th, and 8th graders. Past-year abuse of cocaine (including powder and crack) was reported by 5.2% of 12th graders, 3.4% of 10th graders, and 2.0% of 8th graders in 2007. For crack cocaine, the rates were 1.9%, 1.3%, and 1.3%, respectively.

A decline has occurred in the number of people admitted to treatment for cocaine addiction, according to the Treatment Episode Data Set (TEDS), a SAMHSA-supported data system providing information about the number and characteristics of admissions at State-funded substance abuse treatment programs. Primary cocaine admissions have decreased from approximately 278,000 in 1995 (17% of all admissions reported that year) to around 256,000 (14%) in 2005. Smoked cocaine (crack) represented 72% of all primary cocaine admissions in 2005. Among smoked cocaine admissions, 52% were Black, 38% White, and 8% Hispanic, whereas a reverse pattern was evident among

Blacks and Whites (28% and 52%, respectively, and 17% were Hispanic) for non-smoked cocaine.

In contrast to the generally downward or stable trends reflected in most nationally conducted surveys, other indicators appear to suggest that cocaine abuse may be on the rise in some localities. For example, one study looking at cocaine deaths in the State of Florida revealed a dangerous upward trend, with cocaine-related deaths nearly doubling from 2001 to 2005, from 1,000 to 2,000. The study also showed dramatic increases in the popularity of cocaine among the young and affluent, by all routes of drug administration. In addition, Department of Justice statistics demonstrate that the percentage of state and local law enforcement agencies that reported methamphetamine as their greatest drug threat declined between 2004 and 2007, but the percentage of these agencies that reported cocaine as their greatest drug threat increased overall during that time. These indicators are of grave concern to NIDA.

**The Two Forms of Cocaine**

The two forms of cocaine—powder and crack—correspond to two chemical compositions: the hydrochloride salt and the base form, respectively. The hydrochloride salt, or powdered form of cocaine, dissolves in water and when abused can be administered intravenously (by vein), intranasally, designated insufflation (through the nose), or orally. The "base" forms of cocaine include any form that is not neutralized by an acid to make the hydrochloride salt. Depending on the method of production, the base forms can be free-base or "crack". The medical literature is often ambiguous when differentiating between these two forms, which actually share similar properties when vaporized. In its "base" forms (freebase and crack), cocaine can be effectively smoked because it vaporizes at a much lower temperature (80°C) than cocaine hydrochloride (180°C). The higher temperature can result in chemical degradation of cocaine.

With regard to route of administration, the picture is not complete. Among those entering treatment in 2005 with cocaine as their primary drug, 72% (185,236) were in treatment for smoked cocaine (inhalation), and 28% (71,255) for cocaine used in another form. Of the latter, 81% reported insufflation as the route of administration, and 11% reported injection, so it is clear that powder cocaine is overwhelmingly inhaled. Moreover, it is widely accepted that the intranasal route of administration is often the first way that many cocaine-dependent individuals use cocaine.

**Acute Effects of Cocaine**

Cocaine's stimulant effects appear almost immediately after a single dose and fade away within minutes to hours, depending on route of administration and dose. Taken in small amounts (up to 100 milligrams), cocaine usually makes the abuser feel euphoric, energetic, talkative, and mentally alert, especially to the sensations of sight, sound, and touch. It can also temporarily decrease the perceived need for food and sleep. Some abusers find that the drug helps them to perform simple physical and intellectual tasks more quickly, while others can experience the opposite effect.

The short-term physiological effects of cocaine include constricted blood vessels, dilated pupils, and increased temperature, heart rate, and blood pressure. Larger amounts (several hundred milligrams or more) intensify the abuser's high but may also lead to erratic, psychotic and even violent behavior. These abusers may experience tremors, vertigo, muscle twitches, paranoia, or, with repeated doses, a toxic reaction closely resembling amphetamine poisoning. Some cocaine abusers report feelings of restlessness, irritability, and anxiety. In rare instances, sudden death can occur on the first use of cocaine or unexpectedly thereafter. Cocaine-related deaths are often a result of cardiac arrest or seizures followed by respiratory arrest. While tolerance to the "high" can develop, abusers can also become more sensitive to cocaine's adverse psychological or physiological effects with repeated doses.

**Medical Consequences of Cocaine**

**Cocaine abuse can cause significant medical complications, both acutely and after repeated use**. Some of the most common stem from cardiovascular effects, including disturbances in heart rhythm and heart attacks; respiratory effects such as chest pain and respiratory failure; neurological effects, including strokes, seizures, and headaches; and gastrointestinal complications, including abdominal pain and nausea. Because cocaine has a tendency to decrease appetite, chronic abusers may also become malnourished. Different modes of administration can induce different adverse effects. Regularly insufflating ("snorting") cocaine, for example, can lead to loss of the sense of smell, nosebleeds, problems with swallowing, hoarseness, a chronically runny nose, and damage to the nasal septum; and ingesting cocaine can cause severe bowel gangrene due to reduced blood flow. Research has also revealed a potentially dangerous interaction between cocaine and alcohol, as evidenced by enhanced negative consequences when these substances are taken in combination.

**Cocaine abuse can cause addiction**. Cocaine is a powerfully addictive drug. Cocaine's stimulant and addictive effects are thought to be mainly a result of its effects on the dopamine transporter, a brain protein that regulates dopamine concentrations in the vicinity of nerve cells. Cocaine blocks the transport system, leading to a supraphysiological excess of dopamine in the brain. With repeated use, adaptation to the surge of dopamine sets in, and cocaine abusers often develop a rapid tolerance to the "high," sometimes referred to as tachyphylaxis. That is, even while the blood levels of cocaine remain elevated, the pleasurable feelings begin to dissipate, causing the user to crave more. This effect often leads to the compulsive pursuit and use of the drug, despite devastating consequences—the essence of addiction. Indeed, a recent study indicates that about 5% of recent-onset cocaine abusers become addicted to cocaine within 24 months of starting cocaine use. The risk of cocaine addiction, however, is not distributed randomly among recent-onset abusers. For example, in one study looking at a 2-year period, female initiates were three to four times more likely to become addicted to cocaine than males, and non-Hispanic Black/African American initiates were approximately nine times more likely to become addicted to cocaine than non-Hispanic Whites. Importantly, this excess risk was not attributable to crack-smoking or injecting cocaine.

**The use and abuse of illicit drugs, including cocaine, is one of the leading risk factors for new cases of HIV**. Cocaine abusers who inject the drug put themselves at increased risk for contracting such infectious diseases as HIV/AIDS and hepatitis through the use of contaminated needles and paraphernalia. Crack smokers constitute another high-risk group for HIV/AIDS and other infectious diseases. Research has long shown the strong epidemiological relationship between crack cocaine smoking and HIV, which appears to be due mainly to the greater frequency of high-risk sexual practices in the population.

Additionally, hepatitis C virus (HCV) has spread rapidly among injection drug users; studies indicate approximately 26,000 new acute HCV infections occur annually, of which approximately 60% are estimated to be related to intravenous drug use.

**Prenatal exposure to cocaine requires urgent attention**. Among pregnant women aged 15 to 44 years, 4%, or 100,000 women, used an illicit drug in the past month, according to combined 2005 and 2006 NSDUH data. Thus, an estimated 100,000 babies were exposed to abused psychoactive drugs before they were born. In 2002, compared to non-pregnant admissions, pregnant women aged 15 to 44 entering drug abuse treatment were more likely to report cocaine than other illicit drugs (22% vs. 17%) as their primary substance of abuse.

Babies born to mothers who abuse drugs during pregnancy can suffer varying degrees of adverse health and developmental outcomes. This is likely due to a confluence of interacting factors that frequently characterize pregnant drug abusers. Among these are poly-substance abuse, low socioeconomic status, poor nutrition and prenatal care, and chaotic lifestyles. These factors have made it difficult to tease out the contribution of the drug itself to the overall outcome for the child.

However, with the development of sophisticated instruments and analytical approaches, several findings have now emerged regarding the impact of *in utero* exposure to cocaine; notably, these effects have not been as devastating as originally believed. They include a greater tendency for premature births in women who abuse cocaine. In addition, recent follow-up study of 10-year-old children who were prenatally exposed uncovered subtle problems in attention and impulse control, placing them at greater risk of developing significant behavioral problems as cognitive demands increase. Still, estimating the full extent of the consequences of maternal cocaine (or any drug) abuse on the fetus and newborn remains a challenging problem, one reason we must be cautious when searching for causal relationships in this area, especially with a drug like cocaine. NIDA is supporting additional research to understand this relationship and to determine if any other subtle, or not so subtle, short- or long-term outcomes can be attributed to prenatal cocaine exposure.

**Treatment**

Currently, the most effective treatments for cocaine addiction are behavioral therapies, which can be delivered in both residential and outpatient settings. Several approaches

have shown efficacy in research-based and community programs, including (1) cognitive behavioral therapy, which helps patients recognize, avoid, and cope with situations in which they are most likely to abuse drugs; (2) motivational incentives, which use positive reinforcement, such as providing rewards or privileges, for staying drug free or for engaging in activities, such as attending and participating in counseling sessions, to encourage abstinence from drugs; and (3) motivational interviewing, which capitalizes on the readiness of individuals to change their behavior and enter treatment, performed at intake to enhance internal motivation to actively engage in treatment.

To date, no medication is approved to treat cocaine addiction. Consequently, NIDA is aggressively evaluating several compounds, including some already in use for other indications (e.g., epilepsy or narcolepsy) and a vaccine. These and others have shown promise for treating cocaine addiction and preventing relapse in early clinical studies. Ultimately, the integration of both types of treatments, behavioral and pharmacological, will likely prove the most effective approach for treating cocaine (and other) addictions.

The same treatment principles that have proven effective in the general population should also be applied among incarcerated individuals. Approximately half of federal and state prisoners are beset with drug abuse or addiction problems (a rate more than 4 times that of the general population), and yet fewer than 20 percent of those who need treatment get it. We know from research that the enforced abstinence that occurs in prison does not "cure" a drug–addicted person, and that treatment within the criminal justice system, particularly when followed by ongoing care during the transition back to the community, reduces drug abuse and criminal recidivism and offers the best alternative for interrupting the vicious cycle of drug abuse and crime which is associated with economic costs and societal burden.

**Summary**

Cocaine abuse remains a significant threat to the public health. Regarding specific questions surrounding powder versus crack cocaine, research consistently shows that the form of the drug is not the crucial variable; rather it is the route of administration that accounts for the differences in its behavioral effects.

Thank you for inviting me to participate in this important public hearing. I will be happy to respond to any questions you may have.

# JUDICIAL CONFERENCE OF THE UNITED STATES

**STATEMENT OF**

**JUDGE REGGIE B. WALTON**
**UNITED STATES DISTRICT COURT FOR THE**
**DISTRICT OF COLUMBIA**

**BEFORE**

**THE SUBCOMMITTEE ON CRIME AND DRUGS**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**ON**

**"FEDERAL COCAINE SENTENCING LAWS"**

**February 12, 2008**

Thank you for affording me the opportunity to appear before you today on behalf of the Judicial Conference of the United States and to convey my own experience and perspectives on this very important matter. The disparity between sentences imposed for powder-form cocaine and cocaine base ("crack") is one of the most serious challenges facing the federal criminal justice system today, and I am grateful for the chance to share the views of the courts.

Most informed commentators now agree that the infamous 100-to-1 ratio between crack and powder is unwarranted,[1] but legislative remedies have proved elusive. Some believe that the answer lies in reducing the penalties associated with crack; others believe that the answer lies in increasing the penalties associated with powder; others believe that the penalties associated with powder should be increased *and* that crack penalties should be reduced. Any of these approaches, if adopted by Congress, will have reverberating consequences for the criminal justice system: while the Sentencing Commission estimates that there are 19,500 inmates eligible for sentence reduction, there are more than 26,383 inmates in the custody of the Bureau of Prisons whose offenses involved crack[2] (approximately 13 percent of the total prison population).[3]

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[1]*See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007) [hereafter, U.S. SENTENCING COMM'N, 2007 REPORT].

> Federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission.

*Id.* at 2.

[2]*See* U.S. SENTENCING COMM'N, *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive* (Oct. 3, 2007), *available at* http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf.

[3]Federal Bureau of Prisons, Inmate Population as of December 29, 2007, was 199,616 http://www.bop.gov/news/quick.jsp. In 2006, there were 5,397 individuals sentenced in federal

In recent years, the disparity between crack and powder cocaine sentences is a subject that has captured the attention of the Criminal Law Committee (of which I am a member) and the Judicial Conference. In June 2006, the Criminal Law Committee discussed the fact that 100 times as much powder cocaine as crack is required to trigger the same five-year and ten-year mandatory minimum penalties, resulting in crack sentences that are 1.3 to 8.3 times longer than their powder equivalents.[4] The Committee concluded that the disparity between sentences was unsupportable, and that it undermined public confidence in the courts. Upon the Committee's recommendation, in September 2006, the Judicial Conference voted to "oppose the existing differences between crack and powder cocaine sentences and support the reduction of that difference."[5] I conveyed that view on behalf of the Criminal Law Committee at a Sentencing Commission hearing on cocaine sentencing policy in November 2006.[6] In 2007, the Sentencing Commission, implementing the policy conclusions that follow from its series of special congressional reports on cocaine and sentencing policy,[7] amended downward the guideline for

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courts for crack, compared to 5,744 sentenced for powder cocaine. Between 1996 and 2006, the number of sentenced crack offenders ranged from 4,350 to 5,397. U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at 12 (Figure 2-1).

[4]*See* U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 19 (Mar. 17, 2002), *available at* http://www.usdoj.gov/olp/cocaine.pdf/crack_powder2002.pdf

[5]JCUS-SEP 06, p. 18.

[6]*Public Hearing on Cocaine Sentencing Before the U.S. Sentencing Comm'n* 103-111 (Nov. 14, 2006) (testimony of Judge Reggie B. Walton), *available at* http://www.ussc.gov.

[7]The Commission has repeatedly condemned the crack-powder disparity in its reports to Congress. *See, e.g,.* U.S. SENTENCING COMM'N, 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Feb. 1995); U.S. SENTENCING COMM'N, 1997 SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Apr. 1997); U.S. SENTENCING COMM'N, 2002

crack cocaine.[8] And Congress, with virtually no debate or opposition, permitted the amendment to move forward and become effective on November 1, 2007.

Soon thereafter, I testified before the Commission on the issue of retroactive application of its guideline amendment for crack.[9] The Criminal Law Committee of the Judicial Conference recommended that the amendment should be made retroactive,[10] and on December 11, 2007, the Commission voted unanimously to apply the guideline retroactively.[11] This was a courageous and promising first step in ameliorating the disparity that exists between crack and powder sentences. But as the Commission itself acknowledges, the promulgation of the guideline amendment was only a partial solution to a much-larger problem, and the ultimate solution lies with Congress.

Congress established the crack-powder disparity with the passage of the Anti-Drug Abuse Act of 1986.[12] Legislative history suggests that it did so not out of contempt for the Sentencing Reform Act of 1984 (which, *inter alia*, sought to eliminate unwarranted sentencing disparity in

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REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002); U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1.

[8]Notice of Submission to Congress of Amendments to Sentencing Guidelines Effective November 1, 2007, 72 Fed. Reg. 28558 (May 21, 2007).

[9]*Public Hearing on Retroactivity Before U.S. Sentencing Comm'n* 14-20 (Nov. 13, 2007)(testimony of Judge Reggie B. Walton), *available at* http://www.ussc.gov.

[10]Letter from Judge Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the U.S., to Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n (Nov. 2, 2007), *available at* http://www.ussc.gov.

[11]Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Comm'n Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec.11, 2007), *available at* http://www.ussc.gov.

[12]Pub. L. 99–570, 100 Stat. 3207 (1986).

the federal courts),[13] but because it held a particular set of beliefs about crack cocaine. For example, the record reflects Congress's concern that crack cocaine was uniquely addictive,[14] was associated with greater levels of violence than was powder cocaine,[15] and was especially damaging to the unborn children of users.[16]

I understand the circumstances under which Congress passed the 1986 Act because many of those same beliefs about crack cocaine were in force during the late 1980s, when I served as the White House's Associate Director of the Office of National Drug Control Policy. But twenty years of experience have taught us all that many of the beliefs used to justify the 1986 Act were wrong. Research has shown that the addictive properties of crack have more to do with the fact that crack is typically smoked than with its chemical structure.[17] The national epidemic of crack

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[13]*See, e.g.*, 18 U.S.C. § 3553(a)(6)(2007) ("The Court, in determining the particular sentence to be imposed, shall consider...the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); 28 U.S.C. § 991(b)(1)(B)(2007) ("The purposes of the United States Sentencing Commission are to...provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

[14]*See, e.g.*. U.S. SENTENCING COMM'N, 2002 REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002) 93, *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm ("Crack cocaine can only be readily smoked, which means that crack cocaine is always in a form and administered in a manner that puts the user at the greatest potential risk of addiction.").

[15]*See, e.g., id.* at 100 ("An important basis for the establishment of the 100-to-1 drug quantity ratio was the belief that crack cocaine trafficking was highly associated with violence generally.").

[16]*See, e.g., id.* at 94 ("During the congressional debates surrounding the 1986 Act, many members voiced concern about the increasing number of babies prenatally exposed to crack cocaine and the devastating effects such exposure causes.").

[17]*See, e.g.*. U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at 63 (linking risk of addiction to mode of administration).

use that many of us feared never actually materialized,[18] and recent studies suggest that levels of violence associated with crack are stable or even declining.[19]

Because experience has shown that many of the foundations of the 1986 Act were flawed, and because the existing disparity may actually frustrate (instead of advance) the goals of the Sentencing Reform Act,[20] there is now widespread support by many in the United States to reduce the existing sentencing disparity between crack and powder cocaine.[21]

The federal courts must be fundamentally fair, but that is not enough: they must also be *perceived as fair* by the public. And today, that is not always the case. More than once, I have had citizens refuse to serve on a jury in my courtroom because they are familiar with the existing disparity between crack and powder sentences, and believed that federal statutes (and the courts that interpret those statutes) are racist.

I do not believe that the 1986 Act was intended to have a disparate impact on minorities, but while African-Americans comprise approximately only 12.3 percent of the United States population in general,[22] they comprise approximately 81.8 percent of federal crack cocaine

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[18]*See id.* at 72-76 (noting that use of crack has been very stable in recent years).

[19]*See id.* at 86-87 (reporting research showing declining levels of actual violence).

[20]*See id.* at 8 ("[T]he Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.").

[21]*See e.g., Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Comm'n* (Nov. 13, 2006) , *available at* http:www.ussc.gov

[22]www.census.gov/main/www/cen2000.html (follow American Fact Finder; then follow Fact Sheet link).

offenders, but only 27 percent of federal cocaine powder offenses.[23] (Hispanics, though, account for a growing proportion of powder cocaine offenders. "In 1992, Hispanics accounted for 39.8 percent of powder cocaine offenders. This proportion increased to over half (50.8%) by 2000 and continued increasing to 57.5 percent in 2006."[24]) Furthermore, because crack offenses carry longer sentences than equivalent powder cocaine offenses,[25] African-American defendants sentenced for cocaine offenses wind up serving prison terms that are greater than those served by other cocaine defendants.[26] I have a concern that disparate impact of crack sentencing on African-American communities shapes social attitudes. When large segments of the African-American population believe that our criminal justice system is racist, it presents the courts with serious practical problems. People come to doubt the legitimacy of the law–not just the law associated with crack, but *all* laws. I have experienced citizens refusing to serve on juries, and there are reports of juries refusing to convict defendants.[27] Skepticism about the judiciary also

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[23]U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at 15 ("Historically the majority of crack cocaine offenders are black, but the proportion steadily has declined since 1992: 91.4 percent in 1992, 84.7 percent in 2000, and 81.8 percent in 2006.").

[24]*Id.* at 15.

[25]*See supra* note 4 (noting crack sentences that are 1.3 to 8.3 times longer than their powder equivalents).

[26]*See, e.g.*, U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at B-18 ("In 1986, before the enactment of the federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11 percent higher than for whites. Four years later, the average federal drug sentence for African Americans was 49 percent higher than for whites.").

[27]*See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1282 (1996) ("Moreover, the 100:1 ratio is causing juries to nullify verdicts. Anecdotal evidence from districts with predominantly African-American juries indicates that some of them acquit African-American crack defendants whether or not they believe them to be guilty if they conclude that the law is unfair." (citing Jeffrey

presents us with symbolic problems. The facade of the Supreme Court of the United States is an evocative image, an icon that connotes the rule of law. It is important that the federal courts are recognized as places in which the citizens stand as equals before the law. If, instead, some segments of the population view the courts with scorn and derision, as institutions that mete out unequal justice, the moral authority of the federal courts is dimmed.

The Judicial Conference strongly supports legislation to reduce the unsupportable sentencing disparity between crack and powder cocaine. The Criminal Law Committee and the Judicial Conference have no established view on whether the disparity should be reduced by raising penalties for powder, reducing penalties for crack, or through some combination of both approaches,[28] but Congress may find it prudent to reconsider whether existing minimum penalties are necessary to achieve the goals of sentencing. This would be consistent with the parsimony provision of the Sentencing Reform Act.[29]

Although the Judicial Conference does not have an established view on how to reduce the disparity, it does have an established and longstanding opposition to mandatory minimum penalties.[30] For more than thirty years, it has been the view of the Judicial Conference that mandatory sentences unnecessarily prolong the sentencing process, increase the number of

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Abramson, *Making the Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at A15); Symposium, *The Role of Race-Based Jury Nullification in American Criminal Justice*, 30 J. MARSHALL L. REV. 911 (1997).

[28]For specific legislative recommendations, see, *e.g.*, U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at 8-9.

[29]*See* 18 U.S.C. § 3553(a) (2007).

[30]*See, e.g.*, JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93; JCUS-MAR 90, p. 16; JCUS-SEP 91, p. 56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 94, p. 42; JCUS-SEP 95, p. 47 (all opposing mandatory minimum sentences).

criminal trials and engender additional appellate review, and increase the expenditure of public funds without a corresponding increase in benefits.[31] Accordingly, as a general matter, the Conference favors legislation that leaves sentencing decisions to judges, those individuals best situated to apply general rules to the particular circumstances. Crack legislation that increases the drug weights required to trigger mandatory minimum penalties would be more consistent with Judicial Conference policy inasmuch as they narrow the pool of defendants subjected to mandatory minimum provisions.

I would like to thank you for the opportunity to testify before you today. The disparity in crack and powder sentences is an important issue with both symbolic and practical consequences for the federal courts. I believe that existing cocaine policy in general, and the 100-to-1 ratio in particular, has a corrosive effect upon the public's confidence in the federal courts. As a representative of the Judicial Conference and as a sentencing judge who is regularly called upon to impose sentences on crack defendants, I encourage Congress to pass legislation that would reduce the disparity between crack and powder cocaine sentences.

I thank you for your attention and would be happy to answer any questions that you might have.

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[31]JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93.

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# Reforming crack-cocaine law

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By J.C. Watts and Asa Hutchinson - Both of us are former Republican congressmen; one of us is the former head of the Drug Enforcement Administration; and neither of us has ever been accused of being "soft on crime." That is why some may find it surprising that we respectfully disagree with our attorney general with regard to federal sentencing guidelines on crack and powder cocaine.

Simple standards of fairness call for the attorney general to support the recommendations of the U.S. Sentencing Commission, which reduce the disparity of sentences and make the changes retroactive.

Attorney General Michael Mukasey recently implied that America's streets will be flooded with violent felons if the Sentencing Commission proceeds with its plans to retroactively apply amended sentencing guidelines to individuals convicted of using crack cocaine. In testimony last week before the House Judiciary Committee, Mr. Mukasey said, "Unless Congress acts by the March 3 deadline, nearly 1,600 convicted crack dealers, many of them violent gang members, will be eligible for immediate release into communities nationwide." This ignores reality and fairness.

Unfortunately, the attorney general failed to consider the process that is in place to protect the public. First, the federal courts will be required to review each case and determine whether the offender should be released. Individuals convicted of violent crimes will not have their sentences reduced, regardless of whether they are in prison for a crack-related offense. Second, we do recognize that some individuals convicted only of drug charges may have simply plea-bargained down their cases from more serious and violent crimes. However, anybody who may pose a threat to society should not be released; and anybody released will have served his mandatory-minimum sentence.

Congress created a federal criminal penalty structure for the possession and distribution of crack cocaine that is 100 times more severe than the penalty structure relating to powder cocaine. African Americans comprise more than 80 percent of federal crack cocaine offenders. That statistic does not make sense given that two-thirds of all users of crack are white or Hispanic. The disparity in the arrest, prosecution and treatment has led to inordinately harsh sentences disproportionately meted out to African American defendants that are far more severe than sentences for comparable offenses by white defendants. Indeed, the U.S. Sentencing Commission reported that revising this one sentencing rule would do more to reduce the sentencing gap between blacks and whites "than any other single policy change."

The truth is that for years our legal system has enforced an unfair approach to sentencing of federal crack cocaine offenders. The attorney general's approach will perpetuate this unfairness. As Judge Reggie Walton, who represents the Federal Judicial Conference, said, "I just don't see how it's fair that someone sentenced on October 30th gets a certain sentence when someone sentenced on November 1 gets another."

And it makes no sense that somebody arrested for a crack cocaine offense should receive a substantially longer prison term than somebody who is convicted of a powder cocaine offense. When disparities like this exist it offends the high principles of equal treatment under the law and fundamental fairness. The disparate racial impact of the sentencing rules undermines our nation's larger goal of instilling respect for the criminal justice system.

Congress should let stand the unanimous decision of the Sentencing Commission, which was made in December. But Congress must also act to change the federal crack cocaine statute in order to reduce this unfair disparity. A Senate Judiciary subcommittee is scheduled to hold a hearing today to consider reforming the crack cocaine law. We urge Congress to take this opportunity to revisit this injustice in federal law and pass legislation to remedy the unfairness.

*Former Rep. J.C. Watts is chariman of J.C. Watts Cos. Former Rep. Asa Hutchinson, a former U.S. Attorney who served as director of the Drug Enforcement Administration under President Bush, is founding partner of the Hutchinson Group, LLC.*