UNFAIRNESS IN FEDERAL COCAINE SENTENCING: IS IT TIME TO CRACK THE 100 TO 1 DISPARITY?

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

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UNFAIRNESS IN FEDERAL COCAINE SENTENCING: IS IT TIME TO CRACK THE 100 TO 1 DISPARITY?

THURSDAY, MAY 21, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:04 a.m., in room 2237, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Scott, Jackson Lee, Waters, Cohen, Quigley, Gohmert, Poe, and Lungren.

Also present: Representative Smith.

Mr. SCOTT. The Subcommittee will come to order. I am pleased to welcome you today to the hearing before the Subcommittee on Crime, Terrorism, and Homeland Security on the issue of "Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity?"

We will be discussing and considering legislation pending before the House regarding the issue, including H.R. 1495, the "Fairness in Cocaine Sentencing Act of 2009;" H.R. 1466, the "Major Drug Trafficking Prosecution Act of 2009;" H.R. 265, the "Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009;" H.R. 2178, the "Crack-Cocaine Equitable Sentencing Act of 2009;" and H.R. 18, the "Powder-Crack Cocaine Penalty Equalization Act of 2009."

The full Committee of the Judiciary has scheduled a hearing at noon today, so I want to alert the Members and witnesses that we will have to conclude the hearing in time for Members to attend the noon hearing on the auto industry bankruptcies.

Turning to today's hearing, it appears that many Members of Congress, as well as the general public, agree that the current disparity in crack and powder cocaine penalties makes no sense, is unfair and not justified, and it should be fixed. However, there is not yet a consensus on how to do it.

After extensive study on the issue over the last 20 years, there appears to be no convincing scientific, medical or public policy rationale to justify the current or any other disparity in penalties for the two forms of cocaine.

Scientific and medical research has found that crack and powder cocaine have essentially the same pharmacological and physiological effects on a person.

The indicated method of how powder cocaine becomes crack cocaine is to cook the powder in the form—to cook the powder form with the water and baking soda until it hardens into a rocklike formation. This diluted and cheaper form of powder cocaine is then generally ingested by users through smoking a pipe.

No other illegal drugs has a severe penalty differential based on the different formations of the drug, and certainly not for a lesser amount of the illegal substance, nor is the amount of the—nor is a method of the ingestion of cocaine or any other drug a justification for a different penalty, whether it is smoked, snorted, injected or otherwise consumed.

Moreover, neither violence nor any other associated history of use between the two forms of the drug seems to justify penalties. The Sentencing Commission reports that 97 percent of crack offenders do not use weapons, compared to 99 percent of product transactions do not use weapons.

Such a small difference in the use of weapons in crack and powder could be adjusted by sentences based on the particular case, not whether crack or powder was used in the crime.

The original basis for the penalty differential was certainly not based on science, evidence or history, but on media hysteria and political bidding based on who could be the toughest on the crack epidemic then believed to be sweeping America.

While there are no real differences between crack and powder cocaine, the distinction between the penalties of the two drugs have very severe consequences.

More than 80 percent of the people convicted in Federal court for crack offenses are African-Americans. They are serving extremely long sentences, while people who have committed more serious drug offenses or more violent crimes serve significantly shorter sentences.

Many people in African-American communities have lost confidence in our criminal justice system because of unfair policies such as the Federal crack cocaine laws.

So while some point to the fact that African-American citizens, like all citizens, demand that a legal drug peddlers be removed from their communities, those same African-Americans are strongly in favor of removing the disparate sentencing between crack and powder cocaine.

The U.S. Sentencing Commission has released four reports in the last 15 years on this subject, each time urging Congress to amend the cocaine sentencing laws. Unfortunately, those pleas have fallen onto deaf ears in Congress.

The commission, as well as the Federal Judicial Conference, has urged Congress to remove the unfair mandatory minimum sentences. Each time they remind us that those mandatory minimums often violate common sense.

One example that frequently point to is the 5-year mandatory minimum sentence for mere possession of five grams of crack. Crack is the only illegal substance for which there is a mandatory minimum sentence for mere possession.

Mere possession of a ton or more of any other illegal substance does not result in any mandatory minimum sentence. Only crack cocaine has a mandatory penalty for mere possession. Any other drug mandatory minimum requires criminal distribution.

Mandatory minimum sentences have been studied extensively and have been found to distort any rational sentencing process. They discriminate against minorities. They waste money, compared to traditional sentencing approaches. And again, they often violate common sense.

Under the law and general sentencing policy where person deserves a sentence of a particular length, it can be given, so long as it is within the maximum sentence of the crime.

However, with mandatory minimums, even when everyone agrees that the mandatory minimum is not appropriate, based on the nature of the involvement in the crime and background of the offender, a judge has to impose the mandatory sentence anyway.

For these and other reasons, the Federal Judicial Conference has recommended on many occasions this Congress eliminate mandatory minimum sentences under all circumstances, and I can't think of a more fitting place to start such a process then to do it with the most notorious, unfair mandatory sentences in the Federal system, the crack cocaine penalties.

My bill, H.R. 1459, the "Fairness in Cocaine Sentencing Act of 2009," does just that. First, it eliminates the legal distinction between crack and powder by removing the definition of crack, thereby leaving cocaine to be penalized in any form at the penalty levels presently there for powder cocaine.

Second, the bill eliminates all mandatory minimum sentences for cocaine offenses, handing back the sentencing decisions to the Sentencing Commission and judges, who are best equipped to determine an appropriate sentence based on the amount and other factors taken into account with respect to other—and other factors taken into account with other dangerous illegal drugs.

It will also allow judges to consider the role the defendant played in the crime and to avoid the so-called girlfriend problem, where someone has very little to do with the actual distribution of the drugs, but had some small role in the distribution network.

Unfortunately, with the present situation that person would be held accountable for the entire weight of all of the drugs in the conspiracy, often resulting in decades of jail time for relatively minor criminal activity.

The commission and our judges know how to do their job, so you need to let them do it.

We would like for this hearing to continue discussion about the best way to eliminate the unfair crack penalties and begin building a consensus on the way to solve the problem.

I hope our other Members will co-sponsor my bill, H.R. 1459, and listened to the increased calls to end the decades of illegal discrimination. And if you don't want to co-sponsor that bill, at least co-sponsor some of the others so that we can come to a consensus on what to do.

It is my pleasure to recognize the esteemed Ranking Member of the Subcommittee, my colleague, the gentleman from Texas, Judge Gohmert.

Mr. GOHMERT. Thank you, Chairman Scott.

I would like to also welcome the witnesses. Thank you for joining us today to discuss this important topic.

The Anti-Drug Abuse Act of 1996 established the sentencing levels for Federal crack cocaine offenses. Congress created a 100 to 1 ratio basically for the quantities of power cocaine and crack cocaine that trigger a mandatory minimum penalty.

The law imposes a mandatory 10-year term for offenses involving five kilograms of cocaine or 50 grams of crack or a mandatory 5-year term for offenses involving 500 grams of cocaine or five grams of crack.

This sentencing disparity between powder and crack cocaine raises important public policy issues, on the one hand, because African-Americans comprise the majority of crack cocaine offenders to crack cocaine penalties that resulted in a disproportionate number of African-Americans serving longer sentences than powder cocaine offenders.

On the other hand, many argue that more severe treatment of crack cocaine offenders is justified because of the high rate of firearms possession violence and recidivism associated with crack cocaine traffic.

I hope today's hearing will shed light on these competing concerns. But many express concerns that despite the intent to apply these penalties to mid-level and high-level traffickers, a large percentage of those subjected to disparate crack penalties are in fact the low-level street dealers.

If this is the case, I think it demands further examination by this Committee and Congress into the differences in which crack and powder cocaine are trafficked.

For instance, it is my understanding that whether it is sold on the street as powder or crack, most, if not all, cocaine enters the U.S. in the same form. At some point in the process, cocaine is cooked down into crack, but at what point? Do mid-level traffickers do this, or is this done by the street dealers?

If we are truly serious about focusing Federal drug penalties on those who traffic in crack and powder cocaine, then we need to fully understand how these drugs are trafficked.

Many also claim that our Federal prisons are full of first-time, nonviolent drug offenders. As a former prosecutor and judge, I find it a little hard to believe. The likelihood of a first-time offender, even a drug offender, being sentenced to Federal prison, not simple jail or probation, is pretty slim.

To be sure, in March 2000 nonviolent offenders housed in Federal bureaus or prison facilities accounted for 53.2 percent of the total population of inmates. And in fiscal year 2000 over 77 percent of the 5,841 crack offenders sentenced under Federal drug laws had some prior criminal history.

I believe we must have all the facts before we undertake the reexamination of Federal drug sentencing laws. Congress must balance a desire to reform the current sentencing disparity with the need to ensure that our Federal drug laws maintain appropriate tough penalties for crack cocaine trafficking.

One thing that I do believe with all my heart is that when these laws were passed, the proponents of these laws, like Chairman Rangel, believed it was the best thing.

I have talked to my friend, Dan Lungren, who was here at the time. He said we were told if you don't pass these tougher sentences on crack cocaine, then it is a racist move. You don't care about the communities in Black neighborhoods, because this is killing Black youth. This crack is such a scourge.

I have got the Congressional Record remarks of Congressman Rangel. I have got, you know, the co-sponsorship of the bill. It seemed to be heartily supported by so many African-American Members of Congress.

Some have said more recently, though, to have that kind of disparity, it has to have been a racist law. Well, it wasn't a racist law. It was born out of the best intention on how to deal with this scourge, and apparently it was not the best way to deal with it. And so now we want to make sure that we do it appropriately.

Of course, President Reagan said there had been some real champions in the battle to get this legislation through Congress, which was the Anti-Drug Abuse Act of 1996, congratulating Congressman Rangel for his work in getting that done.

So obviously, this was not a racist bill when it was passed. It was done to try to deal with the difficult problem that I saw as a judge was adversely affecting our African-American youth.

So hopefully we can work together to figure out the best way to address this problem so there isn't a disparity in treatment and we deal with the issues appropriately.

So, Chairman Scott, I appreciate you calling this hearing. We do have a lot to figure out in what is the best way to approach this. I appreciate my friends being here to testify. Thank you for your interest.

Mr. SCOTT. Thank you.

And we have two panels of witnesses today to help us consider this important issue. Our first panel consists of four Members of Congress, who are sponsoring reform bills.

And before we get to our witnesses, we have the Ranking Member of the full Committee with us today, the gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. I won't unduly delay us, and I sneaked in behind you, but thank you for that——

In response to an epidemic of drug abuse associated with the trafficking of crack cocaine in the 1980's, a bipartisan majority in Congress approved the 100 to 1 ratio in penalties between crack and powder cocaine.

Faced with plummeting powder cocaine crisis, drug dealers decided to convert the powder to crack, a smokable form of cocaine. Crack was cheap, simple to produce, easy to use, and highly profitable.

One dose of crack could be bought on the street for as little as $2.50. Never before had any form of cocaine with such a high purity been available at such low prices. Crack produced an instant high, and its users became addicted in a much shorter time than powder cocaine users.

Along with the spread of crack trafficking and crack addiction came crack-related violence. By the late 1980's over 10,000 gang members were dealing drugs in nearly 50 cities across America. Crack-related murders in many large cities were skyrocketing. New York City crack use was tied to 32 percent of all homicides.

A Democratic-controlled Congress responded to this epidemic with adoption of Federal drug sentencing policies, including the different penalties for selling crack and powder cocaine. And sentencing policies were effective in reducing drug-related violence in cities.

Today crime rates, particularly violent crime rates, are at their lowest in 30 years, thanks to tough penalties for drug offenses and violent crime. We know from years of criminal research that a relatively small number of criminals commit a disproportionately large number of crimes. Incarceration works because it incapacitates offenders, preventing them from committing even more crime.

A solution to the sentencing disparity cannot be simply to eliminate the ratio. If Congress considers revising the sentencing disparity, we should not discount the severity of crack addiction or ignore the differences between crack and powder cocaine trafficking, nor should we presume that the only solution to the disparity is to lower the crack penalties.

Cocaine is still one of the most heavily trafficked and dangerous drugs in America. Congress should also consider whether to increase the penalty as to powder cocaine.

Scenting Commission data show that crack cocaine is associated with violence to a greater degree than most other controlled substances. Last year 28 percent of all Federal crack offenders possessed a weapon, compared with 17 percent of powder cocaine offenders.

Crack offenses are also more likely to involve offenders with a prior criminal history. In 2008 the average criminal history category for crack cocaine offenders was category four, indicating a greater number of prior convictions for more severe offenses than powder cocaine offenders, who averaged a category to criminal history.

Any sentencing reform undertaken by Congress to address the disparate impact of crack penalties must not result in a resurgence of crack dealing and crack abuse similar to what we experienced in the 1980's.

The American philosopher, George Santanaya, cautioned, "Those who cannot remember the past are condemned to repeat it."

Mr. Chairman, I look forward to the hearing and to hearing from our witnesses as well and yield back the balance of my time and thank you for the recognition.

Mr. SCOTT. Thank you.

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Andrew would also like to recognize the presence of the gentleman from Illinois, Mr. Quigley; the gentleman from California, Mr. Lungren; and the gentleman from Texas, Mr. Poe.

Our first witness is the Honorable Charles Rangel. He is serving his 20th term as a representative from the 15th Congressional District of New York. He is Chairman of the Committee on Ways And Means, chairman of the board of the Democratic National Cam-

paign Committee. He is a former prosecutor and the sponsor of H.R. 2178, the "Crack-Cocaine Equitable Sentencing Act of 2009."

Our second witness will be the Honorable Sheila Jackson Lee, who represents the 18th District of Texas. She serves on the Judiciary Committee, including the subcommittee, the Foreign Affairs Committee and the Homeland Security Committee. She is a former judge in Texas, and she is sponsoring H.R. 265, the "Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009."

Our next witness is not with us yet, but he is expected—Congressman Roscoe Bartlett of Maryland, who has introduced H.R. 18, the "Powder-Crack Cocaine Penalty Equalization Act of 2009." He represents the 6th District of Maryland and is serving his ninth term in the House of Representatives. In this Congress he serves as the Ranking Member of the Air and Land Forces Subcommittee and the House Arms Services Committee and on the Small Business Committee. He is one of three scientists in Congress and is a senior member of the Science and Technology Committee.

Our last witness will be the gentlelady from Texas, Maxine Waters—as I was saying, the gentlelady from California, Maxine Waters, who is the lead sponsor of H.R. 1466, the "Major Drug Trafficking Prosecution Act of 2009." She represents the 35th District of California and is a Member of the House Committee on Financial Services and shares the Subcommittee on Housing and Community Opportunity. She is also a distinguished senior Member of the Committee on the Judiciary and the Subcommittee, as well as the Subcommittee on Immigration, Border Security, and Claims.

We will begin with the gentleman from New York. And everyone is aware of the lighting system, so we will ask you to try to keep your remarks to 5 minutes.

Mr. Rangel?

TESTIMONY OF THE HONORABLE CHARLES B. RANGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. RANGEL. Thank you for this opportunity, Judge and Mr. Smith and Members of the Committee.

This is a remarkable time in our Nation's history as we have a President that really doesn't believe that how things have acted in the past should guide our conduct in the future, whether you talk about education, climate control, health reform, and certainly we have to review what we have done with our criminal justice system that allow us to believe that putting over 2 million people in jail is the answer to some of the social problems we face.

Now, this is especially so when we find our great Nation jailing more people than the whole world together have seen fit to jail in their countries.

And since this is the Homeland Security Subcommittee, it seems that it would make a lot of sense to see how much does it cost to have these people locked up, what good purpose is being served, and what impact has it had in a positive way on our society.

When you think about the $60 billion that it actually costs with taxpayers' money, you include in that they get health care, they don't produce anything, they don't contribute to our Nation's secu-

rity in any way, and indeed they are not even available to be drafted if we had a draft or to volunteer if they wanted to volunteer.

And so the whole system I would hope that this process and the attorney general would want to address. This is especially so if you take a look and see who are these people that are being locked up?

It is not enough to say that because the system has worked against people who did not get the benefit of a good education or come from communities with low or nor incomes, that it appears to be racist.

These are the facts. You can go to the census, and if you do find out the areas of high unemployment, the areas of underserved communities in terms of medicine, where the schools have failed, you would see that the poor White minorities, the poor Whites that have not had access to the tools that keep people away from crime and away from jail.

I have personal experience, dropped out of high school when I was 17, in 1948. It was strongly suggested to me that I join the Army or that the other consequences might cause me to be in a lot more trouble. So the Army has been an alternative to kids that had little or no education and couldn't get jobs.

The whole idea of leaving a jail and putting your life together is almost unrealistic in most inner cities. I don't know what happens to the rural areas, but saying that you have that conviction, it doesn't really count to say, "I didn't know what was in the shoebox, as someone told me just to take this to the airport."

And so I think we have a great opportunity not to talk about how we got here, but this darn thing isn't working. It is not working for Blacks. It is not working for minorities. It is not working for our country.

And to take away the discretion of a judge, we don't need judges if all you have to do is put something in a computer, and you could find this to be a fact to give them 5, 10, 15, 20 mandatory years.

So I am so glad that this Committee has seen fit once again to review what is going on. But from a practical matter, it just seems to me that the whole system needs a review. And we have to see how we can make America a healthier, more productive, better educated, and give an opportunity for everybody in this great country of ours to be able to be able to produce.

Locking up people in jail doesn't make any monetary sense, doesn't make any social justice sense. And in terms of national security, they cannot produce for this country economically or defensively.

So I am glad that we have a judge here who has this responsibility that you have to enforce the law. Get off the bench. These are things that the Congress is responsible for.

But is now have been aggressive enough to take a look at everything during this fiscal crisis and see what works, what a great opportunity it would be, what a message to send to America and to the world that we have used this system.

It hasn't worked for us, and we have got to find a better system where people, one, are not going to have the temptation of going to jail in the first place, because you are not going to find any kid that is productive, that is proud of what he is doing, that has self-

esteem, that wants to serve this country in the private or public sector, that is even thinking about taking drugs.

If we can deal with that problem, then they won't have the other end to worry about as to whether or not his sentence and the disparity should or should not exist. Keep our kids out of jail. Keep them productive, have self-esteem and be able to make a contribution to this great country.

And I know this Congress is anxious and willing to make a contribution toward that effort. Thank you.

Mr. SCOTT. Thank you, Mr. Rangel.

Ms. Jackson Lee?

TESTIMONY OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. It is a privilege to have the opportunity to share with the Subcommittee on Crime, and I thank you and Ranking Member Judge Gohmert and my colleagues here for giving us the opportunity.

It is an added privilege to sit with the Chairman of the Ways and Means Committee, but someone who has been a champion for the issues of drug sense, if you will, and adding his thoughts to this discussion I think enormously important.

I don't think anyone in this room, made a large number of us, have been impacted by the horrific disparities or the unfair disparities that we have come to understand on the issue of crack cocaine.

It first came to my attention, Judge, by a brother of a extended friend of the family, if you will, who in a nonviolent way had utilized drugs and is now serving a long, long sentence of 25 years plus.

I know our Chairman worked very hard on the issue, dealing first with his constituent, a student at Hampton University, and brought this issue to us and has championed the unfairness of the sentencing process.

We also have just make note of the fact that there is something better to incarcerating nonviolent criminals, who may have been caught up in the drug controversy or conflict, if you will, and I would like to offer these thoughts.

And in the prisons of America today there are resident—there are more prisoners in America's jails than the residents than the states of Alaska, North Dakota and Wyoming combined. Over one million people have been warehoused for nonviolent and often petty crimes. In many instances the nonviolent crimes involve drug use.

The European Union, with a population of 370 million, has one-sixth the number of incarcerated persons as we do, and that includes violent and nonviolent offenders. And this is one-third the number of prisoners which America, a country with 70 million people fewer, incarcerates for nonviolent offenses.

I think what we are doing today answers those concerns, and I am delighted that included in the witness list we have the assistant attorney general of the criminal division, Lanny Breuer, and a dear, dear colleague and friend of this Committee, The Honorable Ricardo Hinojosa, who has been a leader on these issues.

H.R. 265 was introduced in the 110th Congress, and it has bipartisan support. At that time it was cosponsored by then Congressman Chris Shays. I have reintroduced it this year.

And specifically the legislation, the Drug Sentencing Reform and Cocaine Kingdom Trafficking Act of 2009, seeks to increase the amount of a controlled substance or mixture containing a cocaine base, i.e., crack cocaine, required for the imposition of a mandatory minimum prison sentence for crack cocaine trafficking to eliminate the sentencing disparity between crack and powder cocaine.

It also eliminates the 5-year mandatory minimum prison term for first-time possession of crack cocaine, very crucial in going right to the issue of giving our judges discretion.

It directs the U.S. Sentencing Commission to review and amend, if appropriate, the sentencing guidelines for trafficking in a controlled substance to reflect the use of a dangerous weapon or violence in such crimes and the culpability and role of the defendant in such crimes, taking into account certain aggregating and mitigating factors.

We know that we have to balance helping those who have made a mistake, helping those who have been nonviolent, and as well recognizing that we are also in the midst, for those of us on the border, in this whole question of drug cartels and bad actors that are really doing all of us harm.

It directs the attorney general to make grants to improve drug treatment to offenders in prisons, jails and juvenile facilities. I really believe this is a key element to this legislation.

If the bad guys are bad guys, we want to make sure that we are addressing that concern, but as it relates to the nonviolent offenders, who have been caught up in this system, then we want to make sure they have a pathway out that they can survive.

It authorizes the attorney general to make grants to establish demonstration programs to reduce the use of alcohol and other drugs by substance abusers while incarcerated until the completion of parole or court supervision, increases monetary penalties for drug trafficking and for the importation of controlled substances, and authorizes appropriations to the Department of Justice to do this.

It is important to note that the Obama administration joins U.S. District Judge Reggie Walton in urging Congress to end the racial disparity by equalizing prison sentences for dealing crack cocaine, or crack versus powder cocaine.

The assistant attorney general, Lanny Breuer, is reported as stating that the Administration believes Congress' goal should be to completely eliminate the disparity between the two forms of cocaine.

There is a racial underlying issue here, but it is also a fairness issue, because under current law, selling five grams of crack cocaine triggers the same 5-year mandatory minimum sentence as selling 500 grams of powder cocaine.

And so it is important that we address the question of kingpins that this legislation does, but at the same time we eliminate the mandatory minimum sentencing laws that require harsh automatic prison terms for those convicted of certain crimes, most often drug offenses.

And Congress did that allegedly to apply to the drug conspiracies and certain gun offenses, but we have caught in this individuals who can be rehabilitated. This legislation, H.R. 265, will address that question and ensure that we have the opportunity to get the serious drug traffickers, but at the same time we will get those who are able to be rehabilitated.

Let me just say that this sentencing scheme has had a racially discriminatory impact. For example, in 2007 82.7 percent of those sentenced federally for crack cocaine offenses were African-Americans, despite the fact that only 18 percent of crack cocaine users in the U.S. are African-Americans.

In that instance we are locking up a whole generation of individuals that can be rehabilitated. In most instances those individuals were not violent.

So, Mr. Chairman, I would ask that colleagues consider H.R. 265 and is well I would indicate to them that we can do better than incarcerating everyone that we are involved in, and also look forward to the addressing of the legislation I have on the early release H.R. 61 so that we can reform our criminal justice system.

Thank you very much.

Mr. SCOTT. Thank you.

Mr. Bartlett?

TESTIMONY OF THE HONORABLE ROSCOE G. BARTLETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. BARTLETT. Good morning Chairman Scott, Ranking Member Gohmert, and Members of this Subcommittee. Thank you for the opportunity to share my views with you today concerning the 100-1 Crack versus Powder Cocaine Disparity. I recognized in 2002 that this ratio that had been adopted in haste and driven by fear was not justified by the facts. I recognized that this disparity which discriminated against lower income individuals who more often use crack was not justified by the effects of crack compared to powder cocaine, and I introduced a bill to address it.

Since then more evidence has accumulated to strengthen my convictions. This Congress I introduced H.R. 18, the "Powder-Crack Cocaine Penalty Equalization Act of 2009," to change the applicable amount for powder cocaine to those currently applicable to crack cocaine.

I first introduced an identical bill in 2002. I am here today to specifically welcome and support the most recent position of the Justice Department that the sentencing disparity should be reduced. I would like to eliminate it.

I welcome this hearing. I hope that Congress will follow the recommendations of numerous authorities and approve reducing this ratio.

In December of 2007, the U.S. Sentencing Commission unanimously voted to reduce retroactively lengthy sentences meted out to thousands of people convicted of crack cocaine related offenses over the past two decades.

That same month the U.S. Supreme Court ruled that a Federal judge hearing a crack cocaine case, "may consider the disparity between the guidelines treatment of crack and powder offenses."

Both of these decisions reflect a growing concern that there should not be a 100 to 1 ratio in the amount of powder cocaine and crack cocaine that trigger mandatory minimum sentences.

We now have more and better information than we did in the past in order to assess the ratio and make adjustments. Any changes to the ratio must be based on empirical data. I am a scientist. I have a Ph.D. in human physiology.

With the substantially more evidence that we have now, the 100 to 1 unequal treatment is not justified. Our laws should reflect the evidence of harm to society. If we don't adjust this ratio by reducing it, we would be clinging to fear instead of facts.

There seems to be bipartisan support for the adjustment in the ratio. The law places great value on maintaining precedent, but precedent based on fear should not be protected.

I am also an engineer. As an engineer I know that in order to make improvements, we should be in a constant state of reexamination. The past good faith reasons for the 100 to 1 disparity cannot be justified by the current evidence that has accumulated. Politics and the law must catch up to scientific evidence.

I noted in 2002 I first introduced—that in 2002 I first introduced a bill to eliminate the disparity in sentencing between crack and powder cocaine with regard to trafficking, possession, importation and exportation of such substances by changing the applicable amounts for powder cocaine to those currently applicable to crack cocaine.

Several of my colleagues have introduced legislation to address the same issue to little effect. However, we have recently been bestowed an opportunity. Last month the Justice Department—it was the first time—called upon Congress to pass legislation that would eliminate the significant disparities for those convicted of crack and powder possession, trafficking, importation and exportation.

For too many years unjustified disparate treatment of crack and powder cocaine has had a racially disproportionate and unjust impact upon our poor people and minority communities. Congress should not support the status quo.

I hope that my colleagues will not allow the pursuit of the perfect to prevent the potential adoption of a compromise that would reduce the unjustified current 100 to 1 disparate ratio in the treatment of crack compared to powder cocaine.

I thank you for your efforts on behalf of the Congress and to advance the goal of justice in our society. I thank you for having me here today, and I ask your leave that I might go back to my Subcommittee. Thank you very much for having me.

[The prepared statement of Mr. Bartlett follows:]

PREPARED STATEMENT OF THE HONORABLE ROSCOE G. BARTLETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Good morning Chairman Scott, Ranking Member Gohmert and Members of this Subcommittee. Thank you for the opportunity to share my views with you today concerning the 100–1 Crack vs. Powder Cocaine Disparity. I recognized in 2002 that this ratio that had been adopted in haste and driven by fear was not justified by the facts. I recognized that this disparity which discriminated against lower income individuals who more often use crack was not justified by the effects of crack compared to powder cocaine and I introduced a bill to address it. Since then, more evidence has accumulated to strengthen my conviction. This Congress, I reintroduced H. R. 18 The Powder Crack Cocaine Penalty Equalization Act of 2009 to change the

applicable amounts for powder cocaine to those currently applicable to crack cocaine. I first introduced an identical bill in 2002. I am here today to specifically welcome and support the most recent position of the Justice Department that the sentencing disparity should be reduced. I welcome this hearing. I hope that Congress will follow the recommendations of numerous authorities and approve reducing this ratio.

In December of 2007, the U.S. Sentencing Commission unanimously voted to reduce retroactively lengthy sentences meted out to thousands of people convicted of crack cocaine-related offenses over the past two decades. That same month, the U.S. Supreme Court ruled that a federal judge hearing a crack cocaine case "may consider the disparity between the Guidelines' treatment of crack and powder offenses."

Both of these decisions reflect a growing concern that there should not be a 100:1 ratio in the amounts of powder cocaine and crack cocaine that trigger mandatory minimum sentences. We now have more and better information than we did in the past in order to assess the ratio and make adjustments. Any changes to the ratio must be based on empirical data. I am a scientist; I have a Ph.D. in human physiology. With the substantially more evidence that we have now, the 100–1 unequal treatment is not justified. Our laws should reflect the evidence of harm to society. If we don't adjust this ratio by reducing it, we would be clinging to fear instead of facts.

There should be bipartisan support for the adjustment in the ratio. The law places great value on maintaining precedent, but precedent based on fear should not be protected. I am also an engineer. As an engineer, I know that in order to make improvements, we should be in a constant state of reexamination. The past good faith reasons for the 100–1 disparity cannot be justified by the current evidence that has accumulated. Politics and the law must catch up to scientific evidence.

I noted that in 2002, I first introduced a bill to eliminate the disparity in sentencing between crack and powder cocaine, with regard to trafficking, possession, importation, and exportation of such substances, by changing the applicable amounts for powder cocaine to those currently applicable to crack cocaine.

Several of my colleagues have introduced legislation to address the same issue to little effect. However, we have recently been bestowed an opportunity. Last month, the Justice Department for the first time called upon Congress to pass legislation that would eliminate the significant disparities for those convicted of crack and powder possession, trafficking, importation and exportation. For too many years, unjustified disparate treatment of crack and powder cocaine has had a racially disproportionate and unjust impact upon on poor people and minority communities. Congress should not support the status quo. I hope that my colleagues will not allow the pursuit of the perfect to prevent the potential adoption of a compromise that would reduce the unjustified current 100–1 disparate ratio in the treatment of crack compared to powder cocaine. I thank you for your efforts on behalf of the Congress to advance the goal of justice in our society and I thank you for having me here today.

Mr. SCOTT. Without objection, you will be excused.

Ms. Waters?

TESTIMONY OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. WATERS. Thank you very much. Good morning, Chairman Scott, Members of the Committee.

I thank you for the opportunity to appear before you today to discuss mandatory minimum sentences for drug offenses and my proposal to eliminate drug sentencing disparities and to redirect Federal prosecutorial resources toward major drug traffickers.

I first introduced this proposal 10 years ago in the 106th Congress. And I have held town hall meetings at the CBC legislative weekends for about 12 years. I have also worked with Families Against Mandatory Minimums and the Open Society Institute that is represented by Ms. Nkechi Taifa, who is here today. And I have traveled the country sharing the stage with Kenda Smith, who be-

came the poster child for what is wrong with these mandatory minimum sentences.

And yet this is the first legislative hearing to consider the bill, and I thank you for that. I sincerely hope that today's hearing is the start of legislation that will end the sentencing disparities so that we can begin to refocus Federal resources to lock up the major drug traffickers.

The current sentencing requirements fail to accomplish the legislative intent in the 1986 Anti-Drug Abuse Act and inadvertently waste government resources on low-level drug offenders.

Moreover, the act has had a disparate impact on the African-American community, resulting in incarceration of a disproportionate number of African-Americans, often for many, many years.

And on March 12, 2009, I re-introduced the "Major Drug Trafficking Prosecution Act," H.R. 1466, to end mandatory minimum sentence for drug offenses and refocus scarce Federal resources to prosecute major drug kingpins.

This bill would eliminate all mandatory minimum sentences for drug offenses, curb Federal prosecutions of low-level drug offenders, and give courts and justice greater discretion to place drug users on probation, or as appropriate, to suspend the sentence entirely.

This bill restores discretion to judges and allows them to make individualized determinations that take into account a defendant individual and unique circumstances instead of being forced to apply stringent sentencing requirements that don't necessarily fit the crime.

The Major Drug Traffickers Prosecution Act of 2009 goes to the root of the problem by creating a more just system that will apply penalties actually warranted by the crime instead of mandating sentences regardless of individuals' circumstances, as required under current mandatory minimum laws.

It does so by eliminating the mandatory minimum sentences for simple possession, including the notorious 5-year mandatory for possession of five grams of crack cocaine, distribution, manufacturing, importation and other drug related offenses and allows the United States Sentencing Commission to set appropriate proportionate sentences with respect to the nature and seriousness of the offense and the role and background of the offender.

That bill also addresses other problems relating to the use of mandatory minimum sentences by curbing prosecutions of low-level drug offenders in Federal court and by allowing Federal prosecutors to focus on the major drug kingpins and other high-level offenders.

Additionally, my bill would strip current statutory language that limits the court's ability to place a person on probation or suspend the sentence, this allowing for discretion as appropriate under certain circumstances.

I would like to make sure the record today includes several documents that provide much greater detail than I can provide in this testimony today.

Mr. Chairman, with your permission, I am submitting for the record that letter from Judge Lake, the statement from U.S. District Court Judge Castle, and the report by Families against Man-

datory Minimums, "Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums."

In the Drug Abuse Act of 1986, Congress reinstated mandatory prison terms by defining the amount of certain drugs they believed would be in the hands of major drug kingpins. Accordingly, individuals possessing a certain threshold amount of crack powder cocaine face a mandatory minimum sentence.

The original intent was to concentrate Federal resources toward the prosecution of major sources responsible for trafficking drugs into the United States. The rationale for this policy decision was to disrupt the supply of drugs from their source and remove dangers of criminal enterprises from communities.

When effectively carried out, this approach was expected to reduce the availability of drugs on the streets and weaken some of the activities leading to increased drug use and drug related crimes. Twenty years later, the so-called war on drugs has not been long, and mandatory drug sentences have utterly failed to achieve these congressional objectives.

Mandatory minimum sentences are not stopping major drug traffickers. They are, however, resulting in the incarceration of thousands of low-level sellers and addicts. Moreover, these length and drug sentences have increased the need for more taxpayer dollars to build more prisons.

Finally, the sentences are disproportionately impacting African-Americans. While African-Americans comprise only 12 percent of the U.S. population and 14 percent of drug users, we are 20 percent more like putting to be sentenced to prison than White defendants. Much of this disparity is due to the severe penalties for crack cocaine.

In 2007—it is my time? It is. I will yield back my time and try and answer the questions, which may help complete testimony.

Thank you very much, Mr. Chairman.

Mr. SCOTT. Thank you, Ms. Waters.

And on your bill dealing with mandatory minimums specifically, we are holding a hearing in July on mandatory minimums, and we would appreciate your operation. We will see what we can do about mandatory minimums generally, not just drug offenses.

Thank you very much.

I would like to recognize the presence of the Chairman of the Committee, Mr. Conyers, and the gentleman from Tennessee, Mr. Cohen.

Are there questions for the Members? If not, we will——

Mr. GOHMERT. I know we normally don't ask questions of Members, but I was just wanting to have an opinion question of Chairman Rangel, because I know that this is a passion of yours for decades now.

As a judge, one of the things that are there to meet in Texas is that they are not complying should have with the Texas constitution, which required that we educate and rehabilitate people—at least try, while they were in prison.

I was pleased in Texas started building what we will call substance abuse felony punishment facilities. What they were, you were locked up, but the purpose was to deal with your addiction.

And as the Chairman knows, then said 20 years ago, is addictive stuff.

And so I am told that of all the judges in our area, I think many more people to the substance abuse facility than other judges. But it was lockdown facility for 10 months. If you didn't have your GED, you have got in there.

The people in there went through 12-step program. If they had their GED or diploma from high school, then they could get college. We would call some other training they could get back in high school vocational training, carpentry training, things that they could be equipped with where they could get a job when they got out.

It was about 50 percent successful as far as recidivism or getting back into cocaine. It was my experience that 30-day programs didn't work so well. I even had a couple come out. They had met at the treatment facility, and they planned all along on celebrating tonight of graduation from the 30-day facility by using cocaine, which brought them back to me again when I got a call.

But anyway, what do you think of facilities like that—say, a 10-months treatment program. You work on your education. The deal was 12-step program. You learn a trade, something you can get a job with. What is your opinion about facilities like that?

Mr. RANGEL. Judge, when I was a Federal prosecutor, I thought as a Federal prosecutor. After we sent them to jail, I just went off to the next case.

Once they get to the jail, what you are saying, Judge, just makes common sense. Try to make certain that while you have that person, expose them to a different way of life, and try to avoid from getting the education from criminals, that that is all they know while they are in jail.

But right now at 79 years old, Judge, I am trying to think of why they hell did they go to jail in the first place? What were the conditions and surroundings that allowed them to believe that using and carrying cocaine was the only way that they could survive as young people in a community?

And so there is no question that if someone is in intensive care, the treatment should be sensitive, since he is in intensive care. But as we do with medicine, I am more concerned with preventive then I am in what happens when they make a big mistake.

But you are 100 percent right. Without showing some compassion, some sensitivity, it is just a merry-go-round, and it is just a short amount of time where 70 percent of those that are in are going to return.

So anything that you try to do in terms of stopping addiction, educating and preparing someone to deal with the real world has to be complimented. But there is no question in my mind that more often than not they didn't have to go to jail in the first place.

Mr. GOHMERT. But you said, you know, you wonder why, if we send them to jail, if I send somebody to the substance abuse facility, the whole purpose, it was a condition of probation, and the whole goal for sending them, even though they were locked up, was because of their addiction and to deal with that.

And you know, I had friends from Rotary. I have seen kids through Safe-P, and they were furious at me and couldn't believe,

but the whole purpose was to get them cured, or at least treat their addiction. So that was really the purpose. It wasn't to lock them up. It was to force them to deal with——

Mr. RANGEL. Once they got to you, the system had broken. You were courageous for taking those steps, because once you got them, you are limited in what you could do, and you chose to do what you thought was in the best interest of this human being.

So I remember, when I was prosecuting in the Southern District of New York, to make certain they got long time, I would have the cases transferred to Texas. [Laughter.]

Mr. GOHMERT. Oh, appreciate the Chairman's—thank you.

Mr. SCOTT. The gentleman from Michigan?

Gentleman?

Mr. POE. Thank you, Mr. Chairman.

Thank you all for being here.

After serving 22 years on the criminal court bench in Houston, hearing 25,000 felonies, later in my career, as Ms. Jackson Lee knows, I tried a lot of innovative things. I call it poetic justice, but be that as it may.

My real question goes deeper than some of the things that you all have talked about, and I really want your opinion. One thing about our system in state courts as opposed to Federal system as you said, Mr. Chairman, Federal judges really don't sentence folks. They just stick something in a computer, and it comes out and tells them what they are supposed to do—no discretion, no common sense.

Congress has set such tight reins on sentencing that Federal judges have no discretion. That is one reason I would never want to be a Federal judge. Federal judges have told me many times that the hard fast system promotes, you know, injustice each way—too high sentences, too low a sentence. So sentencing guidelines in general is what my question is.

Do you think Congress should revisit that whole concept of hard fast sentencing guidelines, go to more discretion across the board, or just discretion on this area of crack and powder cocaine? That is my question to all three of you.

Mr. RANGEL. Well, let me answer first, because across the board you don't need judges if they don't have discretion. They have a human being in front of them. They have factors that you just can't get into statutes. We don't know the sensitivity as judges do.

That is why we select them, hopefully, with the ability to understand each and every case where justice is what prevails and not a mandatory sentence. It has just been in these cases. When you are talking about 20 and 25 and 30 years, it just shoots that at you.

But, Judge, if we got to respect the judiciary, we should give them to discretion in all cases.

Mr. POE. I agree with you. There is no substitute for a good judge. The system will never work if we have bad judges on the bench, regardless of what system we use.

Ms. Jackson Lee?

Ms. JACKSON LEE. Thank you, Judge. And we are reminded, certainly, of those good works of poetic justice, so we thank you for

that—and I must say provocative, with some agreeing and not agreeing, but the discretion was there, and that is important.

I do think we make steps, and I think the present structure of looking at at least equalizing the sentencing and giving discretion as it relates to crack cocaine, and then building on that is very important. I think to add to the judge's discretion should be the tool.

H.R. 265, of course, has the opportunity for grants to be rendered to ensure that there is some rehabilitation aspect to it, and this is the Federal system. You well know that we have been successful—and, however, the funding has been short—on what we called drug courts in Texas.

And I would like to cite Catherine Griffin, who came out of the drug courts, rehabilitated herself and has organized prostitutes who are drug addicted, trying to get them to reform their lives.

So I do think there is a direct relationship to the discretion of the judge to help in the fairness of treatment of that particular offender that is before them, to give them a pathway out or to be able to determine that they are such a bad actor at this point that they can't be rehabilitated.

I also think there is something valid as we go forward in this legislation about the question of retroactivity. And my legislation is now being reviewed to eliminate the language that might say that you couldn't address the question of those incarcerated presently. I believe we should go forward, but as well look at those who are nonviolent.

So that would be at the discretion of the judge as to whether or not a petition would come forth from a lawyer, asking for their incarcerated client to be considered under these laws. Discretion of the judge I think is crucial.

Mr. POE. Ms. Waters?

Ms. WATERS. I basically share that opinion. I cannot reconcile that we require judges to be qualified. We rate them. We have commissions and committees that review them. We basically try and determine whether or not they are fit, whether or not they are qualified to make decisions.

And then to have a cookie-cutter kind of regulation or operations that would dictate exactly what they are to do in sentencing just does not make good sense. It is a contradiction.

And so I generally disagree with mandatory sentencing. I am particularly outraged by what has happened over the years with crack cocaine. I respect that there are those who say that they did it to help the Black community, but it certainly has hurt the Black community.

What you have, particularly now indicates that these young people like Kenda Smith, who is in college at Morgan State, come from a great family. Mother was a teacher, father, community leaders. And she just happened to be at the wrong place at the wrong time with the wrong individual. There was no reason this young lady should have been sentenced, I think, to over 10 years for, you know, crack cocaine.

And so you have a lot of families that have been destroyed, communities that have been upset with these kinds of sentencing. We have young people, yes, who have been caught with small amounts in their possession. They are not dope dealers. They are not king-

pins. They are just stupid. They don't know—in a dare—and they deserve to be reprimanded, to be punished in some way, but not this way.

And so I have been on this issue for so long and so many years and traveled around the country on that, because I think it is one of the issues that we as public policy makers really need to straighten out. So I thank you very much.

Mr. POE. Thank you, Mr. Chairman. I yield back. Thank you.

Mr. SCOTT. Thank you.

Mr. COHEN. Is this on? Special thing we have got here. I guess it is on. If not, I can project pretty well.

I don't want to put you all on the spot on kind of a separate issue, but it is related. And that is some of Chairman Conyers' most deified people, his heroes—and mine, too—jazz musicians in the 1930's were known to smoke marijuana.

And Harry Anslinger started a war on marijuana, which was not legal up to that time, but it was known as something that was basically smoked by or referenced to Hispanics and African-Americans, and they made this war on marijuana.

A lot of people have been arrested for marijuana and have a record that make it difficult for them to get jobs later on in life, because they have got the scarlet letter. And we spend a lot of time in our Federal enforcement working on marijuana laws rather than crack and cocaine and meth and heroin.

Yesterday FBI Director Mueller first suggested people have died because of marijuana. He later retracted that and said no, he didn't know anybody that died because of smoking marijuana. But he didn't believe that we should change our policies, because he thought it was a gateway drug.

Do any of you feel that marijuana maybe should be less of a priority, considering that Mexico is producing so much and causing so many problems on our borders and our communities, leaving scarlet letters on people for a drug that has become recognized as being less harmful than any of the other drugs that bother America?

Mr. RANGEL. I don't remember the last time anyone was arrested in the state of New York for marijuana. I mean, smoking marijuana in the streets of Manhattan, you know, the cop may say, "Don't do it on my beat," but nobody is getting arrested.

There is no question that with the limited resources we have and they have restrained what we put on law enforcement, that we ought to decriminalize it. I would suggest that we should do things to discourage people from using cigarettes as well as marijuana.

But the whole idea that we have a law in the book that we have to go do heavy research to see who has ever been arrested for it means that has to be reviewed and decriminalize.

Ms. JACKSON LEE. I think the scarlet letter—I agree with my good friend on this issue of resources, and I think the scarlet letter has hampered many young people, who are now moving away from using, who had an incident during college years, for example.

I have worked with college students, who are forbidden from getting loans or other benefits, because they have had a conviction or a citation or a misdemeanor of sorts on this whole question of marijuana.

We have larger fish to fry. I think there are issues dealing with addiction, and someone who needs treatment period and overuse of anything. I certainly think we have made mistakes in penalizing people for medicinal use. We saw some cases that were absolutely ludicrous, people who are raising it for those purposes, who have been directed to use it.

I think we should open up this whole can of worms, and I would hope that the Justice Department could work with this Committee and work with the Members of Congress and other advocates as to how better to assess the use of marijuana.

Ms. WATERS. Let me just say that I wish that we as elected officials had the courage to deal with difficult issues rather than get whipped into line because of the necessity of re-election.

In California you know we have medical marijuana. This attorney general, one of the first things he has done is to back off the feds from interfering in California state law, where medical marijuana appears to be helping so many people with cancer and glaucoma in particular.

And so we need to view marijuana a lot differently. I am glad that FBI Director Mueller backed off of saying marijuana had caused the deaths, because no one can credibly represent that that is the case.

We need to view marijuana the same way that we view cocaine and other drugs in this way. If in fact you are a drug dealer with huge amounts of drugs—I don't care what they are—you need to be dealt with.

If you are a kid on the street smoking marijuana and you happen to be a user, you should be dealt with a lot differently than someone who is out there selling large amounts of marijuana.

So I think we have to just, you know, gain the courage to say that we are not going to view marijuana in the same ways as we view crack—I mean cocaine and other very, very hard drugs. And it is a difference between small amounts of possession for use and large amounts of possession for sale, period.

Mr. COHEN. Mr. Chairman, thank you for the time. If I am correct, I know I am about over. I think if you have a conviction for marijuana possession, you can't get a scholarship now. And that is just unbelievable——

Ms. WATERS. Stupid.

Mr. COHEN [continuing]. And that it affects largely people of color disproportionately, who have their convictions and then need the scholarships and don't get them. And what does that do? Put them in a spiral of failure. That needs to stop.

Thank you, Mr. Chairman.

Mr. LUNGREN. Thank you very much.

I hear a lot here and can't get in a full debate. Today's marijuana is not what your father or your grandfather had in terms of the THC.

Mr. COHEN. My grandfather didn't have it, though.

Mr. LUNGREN. No, no, no, no. [Laughter.]

Every gentleman knows that is an expression.

Ms. WATERS. He had snuff.

Mr. LUNGREN. THC amount is much higher today, and even though in California we do have legalized medical marijuana, we

have some of the worst rows in the entire country, devastating wilderness areas, national parks, by and large controlled by foreign nationals armed with assault weapons in some cases, a far more serious situation today than it was 10 years ago, 20 years ago, 30 years.

But I would like to—also, you bring up the Sentencing Commission. As one of the authors of the Sentencing Commission, I tell you the reason why we put in was because of the disparity that existed with respect to sentences given by Federal judges across the way.

I had someone visit me in my office. Daughter had been sentenced to something on the order of 25 years by a judge in Texas, where similarly-situated defendants were being sentenced to 1, 2 or 3 years in other Federal courts.

And this disparity we saw by Federal judges across the country is what gave rise to the sentencing. Tried to establish guidelines within which sentences could be made, but did allow—and still allows—Federal judges go above or below the guidelines in their sentence for specific reasons, as long as they can articulate it on the record and both sides are able to appeal, both to go above or below.

What I would like to ask, with all respect, Chairman Rangel, because you and I were here. You were Chairman of the Select Committee on Drug Abuse. I was the Ranking Republican on the Crime Subcommittee. I was the Chairman of the Republican task force on crime when we—in fall 1986.

I recall the Subcommittee meeting vividly. Bill Hughes, our colleague from New Hampshire—I mean from New Jersey—our Subcommittee meetings, we were remarking this bad devastation had begun in New Jersey in this run, crack cocaine, terrible, and we had to do something about it.

And if I am not mistaken, at that time we offered an amendment to increase the penalties. I recall it being supported by you and by others. I am not trying to criticize here. What I am asking you is this question.

I bought that argument at that time. I bought the argument presented by people representing largely African-Americans. Said to me, "We are being devastated by this. You have to do something about it. The crack cocaine epidemic is causing endless violence in our community." So we passed it.

I guess my question to you is this. And I am always willing to take a look at something we did before. That is the difference between us and lifetime Federal judges. We can be knocked out. They can't. That is something we have to keep in mind.

And I guess my question is, were we wrong, Charlie? Or was it that our application of the law has been wrong? Did we incorrectly diagnose the problem? And has there been no benefit to this approach?

I mean, we have talked about some of the probably unintended consequences, but was there no benefit given? Was there no relief given to these communities' violence?

And I guess that we were we wrong at that time? Or did facts overwhelm us? Where did we go too far, even though we should have gone somewhat?

Mr. RANGEL. I think some of us, Congressman, did their best with the facts that we had to work with. It occurred to me as a prosecutor that if we had an ingredient coming into a community that didn't grow it, didn't manufacture it, and people took risk in bringing it into that community, I think when you said, "You do this," that the danger that you will be going away to jail for a long time, that it would be such a threat, such a deterrent that people would say, "It is just not worth going into this Black community with crack. It is just too much time involved, and if I have to be involved in a vehicle trafficking of drugs, I will leave this one alone."

It didn't turn out that way at all, because within that community, once you got a piece of this, then you became a person that good judgment had nothing to do with your need to get this drug, because it just controlled the mind and destroyed judgment.

Another big problem that we had is that—and the Chairman remarked about this—we had young girls locked up in jail because their boyfriend or drug dealer sent them to the Caribbean for a vacation, but while they are there, pick up the suitcase one of my buddies there will give you—number of carriers that just did not know what they were doing.

And perhaps the judges found out they should have known, but they had such a small role to play in this big massive drug trafficking that we have in the world. And so a lot of us still have a problem, Congressman, a very serious problem.

And that is why do the areas with the highest poverty, with the highest high school dropout, who do not—men don't grow marijuana, don't grow cocoa leaves, have nothing to do with opium growing—how do they become the centers?

And that is where we make mistakes and saying that we got to jail you if you are the victim. And so deterrents you would hope would work, it just didn't work. When the mind is gone, judgment is gone. And you over penalize the victim and anyone surrounded in that, because there are just so many people that are stupid, but innocent of a crime. They just caught in that web.

And most of the cases we always talk about, the judges in Texas, once they got that stuff over there at El Paso, that carries a ticket to New York. We had options as to where to prosecute—in El Paso and get 5, 10, 15 years or in southern district, where they may just dismiss it?

It was poor judgment—very, very poor judgment.

Ms. WATERS. If I may, Mr. Lungren, I would just like to say this before I leave. My problem with the way this has been approached is this. We know that tons of cocaine was coming out of Nicaragua during the time of the confrontation between the Sandinistas and the Contras. It has been documented.

We also know that drug dealers such as Danilo Blandon, who brought cocaine into Los Angeles that was cooked into crack by Ricky Ross, who is getting out of prison—just got out of prison now, who told us where it came from. And we also know that Danilo Blandon was on the payroll first at the DEA and then at one point on the CIA.

They never delved into why and how all of these tons of cocaine was coming into first Los Angeles, cooked into crack cocaine and

spread out across this country. It is an issue that we really didn't want to deal with, because we knew—many of us knew or believed—that if we got deeply involved, we will understand that there was a blind eye turned, why much of this cocaine got into our country.

I spent 2 years investigating. I go to Nicaragua. I talked with drug dealers, and I worked with Ricky Ross, and I understand that, yes, there was devastation in the African-American community. Yes, it was flowing freely—cocaine that was turned into crack that made it cheaper and easier for people to access.

But we never talked about the root causes and how it got there and who is responsible for. And that is my problem with the victims of this crack cocaine serving all of this time, and the origin of the cocaine was never really dealt with.

Ms. JACKSON LEE. Very quickly, let me just add, Mr. Lungren, to say to you that yes, I believe we were wrong. We were good in our intentions, but I think the evidence shows where 87 percent of those being prosecuted and convicted now for using crack cocaine are African-Americans.

I think the other side of the coin is that we didn't distinguish, as you have heard all of our testimony here, between kingpins, violent orchestrators of the marketplace versus the casual user, the young user, the silly user.

We have an opportunity to do that. Give the discretion back to the Federal courts with guidelines. I think guidelines are important. That helps to at least have an oversight over large sweeps of distinctions between low sentencing for the same crime and high. Guidelines are important.

But I think that what we have found out is that with the—disparities are so glaring. Then on the back end, it didn't focus on the rehabilitation, whether it is in a state prison system or whether it is when someone gets out, and so we just had people recycled, because there is nothing else to do.

We have learned our lesson. I think it is now time to change, and change as quickly as we can.

Mr. SCOTT. Thank you.

The gentleman's time has expired.

Does the gentleman from Illinois have questions?

Mr. QUIGLEY. Thank you, Mr. Chairman.

Really just two quick thoughts. In your experience are any of the states starting to address this disparity in their sentencing laws that you are aware of?

Mr. RANGEL. Mandatory sentences and the disparity. It took a long time, but they just did it last month.

Mr. QUIGLEY. If anyone else knows—I mean, the other issue is I probably did 200 trials on the other side as a criminal defense attorney in Cook County in the 1990's, and my first ventures were rooms probably twice this size filled with people in preliminary hearings. And the first thing that strikes you is—and I said to a sheriff there—doesn't anyone from my neighborhood get arrested for cocaine?

Is there something about the disparity in how investigations or arrests take place that also magnifies this and the fact that how crack is purchased versus perhaps powder in the White community

that also enhances this disparity and sheer numbers of prosecutions?

Ms. JACKSON LEE. Well, let me just quickly say you hit the nail on the head. First of all, coming from Chicago, very large city, Houston, the fourth largest city in the Nation, the whole criminal justice system skews itself to inner city neighborhoods.

So from the top to the bottom, from the number of police officers on the street, the conspicuousness of how crack cocaine is sold to the purchaser, if you will, there is nothing that is inconspicuous about side corner conversations, the passing of the bag. A lot of that is done very conspicuously.

City councils make determinations. County governments make determinations. Police chiefs make the determination, "Let us go to this area." They target the area with intense utilization of police officers. Arrests are made. It is almost like a revolving door. Prosecutors load up on Friday night, and then Monday morning you are in court where you happen to be, I do see the large loads.

Cocaine has usually been the silk stocking drug. And in fact you probably are least likely to see the exchange, where you can visibly be in some neighborhoods in America and see the exchange. And it was treated like that. So you would be in a penthouse versus somewhere else.

The resources are all focused on crack cocaine. It was easy to run people through state courts, and certainly it was easy to run them through Federal courts.

You also have the conspiracy element as well, which was what generated the sentence for the person that I know, the brother of a friend, who was in for 25 years. Allegedly, that person was in a conspiracy.

So I think it was clearly blatant, if I might say inequitable treatment, maybe even discrimination because of how you got it and who you got it from and where you were seen getting it.

Ms. WATERS. That basically describes what has happened with the arrest and convictions of these young Black men for the most part, as you have just alluded to. I think there were resources directed toward African-American and inner city communities that identified and picked up and arrested young people because of the way that crack cocaine was distributed.

There were gangs that got involved with crack cocaine. And again it was quite obvious that something was going on on the street. Unemployed youth just became a subculture of young people getting involved with penny amounts, where they would get a few dollars, but they were not involved for any length of time in it.

It may vary—you know, happen to be able to access a small amount for this day or this week, and then of course the addiction that came along with it.

And so what you find basically, those of you who have spent time in the criminal justice system, you know and you understand very well that poor people, who don't have representation, who depend basically on defenders who don't—I mean, who have huge caseloads—don't get the defense.

You also know that oftentimes more resources are directed toward arresting in these communities than in richer communities. And so it is a problem in the criminal justice system, period, where

if you happen to be poor, if you happen to be Black or Latino, nine times out of 10, if you are a male in particular, before you are 21 years old, you are going to have an encounter with the police, because the police are targeted. This is what they look for. This is what they do.

If you happen to be in Beverly Hills in my state, you may be involved as a teenager in high schools, where young people are trading drugs and giving it to each other, but you are not going to get busted. It just happens that way.

Mr. QUIGLEY. Thank you, Members.

I yield back, Mr. Chairman.

Mr. SCOTT. Thank you.

And I thank our witnesses for being with us today.

Our second panel will come forward. I will begin.

The first witness on the second panel will be the assistant attorney general for the United States, recently confirmed, Lenny Breuer. He began his career as the assistant district attorney in Manhattan and continued his career in private practice, specializing in white-collar criminal and complex civil litigation and congressional investigations.

From 1997 to 1999, he served as special counsel to President Clinton and received his BA from Columbia University and his JD from Columbia Law School.

If people could move quietly, we would appreciate it.

Our second witness is Judge Ricardo Hinojosa, who has served on the U.S. Sentencing Commission since 2003. He was appointed chair in 2004. He is the U.S. district court judge of the 7th District of Texas.

Before joining the judiciary, he was an adjunct professor at the University Of Texas School of Law and a partner at a law firm in Texas. He graduated Phi Beta Kappa with honors from the University of Texas at Austin and earned his law degree from Harvard Law School.

The third witness is Scott Patterson, who is state's attorney for Talbot County, Maryland, who is testifying on behalf of Joseph Cassilly, the president of the National District Attorneys Association.

He has been state's attorney for Talbot County, Maryland, for over 20 years and serves as the Maryland director for the National District Attorneys Association's Board of Directors. He graduated from the University of North Carolina Capitol Hill with a degree in political science and Washington and Lee University School of Law.

Or fourth witness is Willie Mays Aikens. He is a former major league baseball player, who played first base for the California Angels, Kansas City Royals and Toronto Blue Jays from 1977 to 1984. In 1980 Mr. Aikens hit two home runs in the same game twice during the same World Series, a record that still stands.

In 1994 he was sentenced to over 20 years in prison as a result of a Federal crack cocaine charges. He spent 14 years in Federal prison and was released in June of 2008. He is currently living and working in Kansas City and has come here today to share his story with us.

Our first witness is Bob Bushmann, vice president of the National Narcotics Officers Association Coalition. He is the statewide gang and drug task force coordinator at the Minnesota Department of Public Safety.

He began his law enforcement career 30 years ago as a Minnesota state trooper. He has a bachelors degree from St. Cloud State University and is a graduate of the DEA Drug Unit Commander's Academy, as well as the FBI National Academy.

Our next witness is Veronica Coleman-Davis, president and CEO of the National Institute of Law and Equity, and to be introduced by the gentleman from Tennessee.

Mr. COHEN. Thank you, Mr. Chairman. We are responsible for Texas, but we are not from there.

Ms. Veronica Coleman-Davis is the former United States attorney, having served our Western District of Tennessee from 1993 to 2001. And she and 12 former U.S. attorneys have formed a group called NILE, a river which Memphis, Egypt, sits on. We sit on the Mississippi, of course.

And the NILE is an acronym for National Institute for Law and Equity, which is based in Memphis and is looking into long-term solutions to racial disparity that exists in the criminal justice system and as such has been the inspiration for the bill that I filed with Senator Cardin on the Justice Integrity Act to try to set up a system within the Justice Department to look at 10 jurisdictions to see if there are and what the racial disparities are in prosecutions, sentencing and all types of issues in criminal justice, not just sentencing.

She attended the Howard University here in Washington, but beyond that she attended the Memphis State University School of Law when I attended the Memphis State University School of Law.

A good friend and a proud, effective member of the community—in Shelby County in Memphis, I am pleased that she is here, a former public defender, public prosecutor, juvenile court referee and, of course, U.S. attorney. Thank you.

Mr. SCOTT. Thank you. Thank you.

And our last witness will be Mr. Marc Mauer, executive director of the Sentencing Project. He is one of the country's leading experts on sentencing policy, race and the criminal justice system.

He has directed programs on criminal justice policy for over 30 years and is the author of some of the most widely cited reports and publications in the field, including "Young Black Men in the Criminal Justice System" and the "Americans Behind Bars" series comparing international rates of incarceration.

He is a graduate of Stony Brook University and earned his Masters of Social Work at the University of Michigan.

Now, each of our witnesses' written statements will be entered into the record in its entirety, and I ask each witness to summarize his testimony for 5 minutes or less.

And to help you stay within that time, there is a lighting device that is in front of you, which will turn from green to yellow when you have 1 minute left and will turn to red when the 5 minutes is up. I hope you can stay within that time better than the Members did. [Laughter.]

Okay. Or at least try.

We have been called for at least one vote, so let us see if we can get Mr. Breuer's testimony and before we leave for the vote.

Mr. Breuer?

TESTIMONY OF LANNY A. BREUER, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. BREUER. Mr. Chairman, Ranking Member Gohmert, distinguished Members of the Subcommittee. Thank you for giving the Department of Justice the opportunity to appear before you today to share our views on the important issue of disparities in Federal cocaine sentencing policy.

The Obama administration firmly believes that our criminal and sentencing laws must be tough, predictable, fair, and not result in unwarranted racial and ethnic disparities.

Criminal and sentencing laws must provide practical, effective tools for Federal, state and local law enforcement, prosecutors and judges, to hold criminals accountable and deter crime.

Ensuring fairness in the criminal justice system is also especially important. Public trust and confidence are essential elements of an effective criminal justice system. Our laws and their enforcement must not only be fair, but they must also be perceived as fair.

The perception of unfairness undermines governmental authority and the criminal justice process. It leads victims and witnesses of crimes to think twice before cooperating with law enforcement, tempts jurists to ignore law and facts when judging a criminal case, and draws the public into questioning the motives of government officials.

Changing these perceptions will strengthen law enforcement. And there is no better opportunity to address these perceptions then through a thorough examination of Federal cocaine sentencing policy.

Cocaine and other illegal drugs pose a serious risk to the health and safety of Americans. The Administration is committed to rooting out drug trafficking organizations in gangs that manufacture and traffic these drugs.

In the 1980's crack cocaine was the newest form of cocaine to get American streets. In 1986, the midst of this exploding epidemic, Congress passed the Anti-Drug Abuse Act, which set the current Federal penalty structure for crack and powder cocaine trafficking, punishing the crack form of cocaine far more severely than the powder cocaine.

Since that time, in four separate reports dating back to 1995, the Sentencing Commission has documented in great detail all of the science of crack and powder cocaine, as well as the legislative and law enforcement response to cocaine trafficking.

I will not review all of that information here, other than to note the mounting evidence documented by the commission that the current sentencing policy disparity is difficult to justify based on the facts and science, including evidence that crack is not inherently more addictive substance and powder cocaine.

Moreover, the Sentencing Commission has shown that the quantity-based cocaine sentencing scheme often punishes low-level crack

offenders far more harshly than similarly situated powder cocaine offenders.

Additionally, commission data confirmed that in 2008, 80 percent of individuals convicted of Federal crack cocaine offenses were African-American, while just 10 percent were White. The impact of these cause a few to believe across the country that Federal cocaine laws are unjust.

Based in significant part on the thorough and commendable work of the commission, a consensus has now developed that Federal cocaine sentencing laws should be reassessed. Indeed, as set forth more fully in my written testimony, many have questioned whether the policy goals that Congress set out to accomplish have been achieved.

In the Administration's view, based on all that we now know, as well as the need to ensure fundamental fairness in our sentencing law, a change in policy is needed.

We think this change should be addressed in this Congress and that Congress' objective should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine.

The Administration, of course, is aware that there are some who would disagree. The supporters of the current cocaine penalty structure believe that the disparity is justified, because it accounts for the greater degree of violence and weapons involvement associated with some crack offenses.

The Administration shares these concerns about violence and guns used to commit drug offenses and other crimes associated with such offenses. Violence associated with any offense is a serious crime and must be punished, and we think the best way to address drug-related violence is to ensure that the most severe sentences are meted out to those who commit violent offenses.

However, increased penalties for this conduct should generally be imposed on a case-by-case basis, not on a class of offenders, the majority of whom do not any violence or possess a weapon.

We support the sentencing enhancements for those, for example, who used weapons in drug trafficking crimes, but we cannot ignore the mounting evidence documented by the commission that the current cocaine sentencing disparity is difficult to justify.

At bottom, the Administration believes that current Federal cocaine sentencing structure fails to appropriately reflect the differences and similarities between crack and powder cocaine. The offenses involved each form of the drug, and the goal of sentencing serious and major traffickers is significant prison sentences.

We also believe the structure is especially problematic, because a growing number of our citizens view it as fundamentally unfair.

Finally, as I mentioned a moment ago, the Administration believes Congress' goal should be to completely eliminate the disparity.

Last month the attorney general asked the deputy attorney general to form and chair a working group to examine Federal sentencing and corrections policy. This group's comprehensive review will include possible recommendations to the President and Congress for new sentencing legislation affecting the structure of Federal sentencing.

In addition to studying issues related to prisoner reentry, department policies and charging and sentencing and other sentencing-related topics, the group will focus on formulating a new Federal cocaine sentencing policy, one that aims to completely eliminate the sentencing disparity between crack and powder cocaine, but also to fully account for violence, chronic offenders, weapons possession, and other aggravating factors associated in individual cases with both crack and powder trafficking.

We look forward to working closely with Congress, with this Committee and the Sentencing Commission on this important policy issue and finding a workable solution.

As I stated at the outset, this Administration believes our criminal laws should be tough, smart, fair, and perceived as such by the American public, but at the same time promote public trust and confidence in the fairness of our criminal justice system.

Ultimately, we all share the same goals of ensuring that the public is kept safe, reducing crime, and minimizing the wide-ranging negative effects of illegal drugs.

Mr. Chairman, I know I went a little long, but thank you for this opportunity to share the Administration's views. And I welcome your questions.

[The prepared statement of Mr. Breuer follows:]

PREPARED STATEMENT OF LANNY A. BREUER

Department of Justice

STATEMENT OF

LANNY A. BREUER
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

HEARING ENTITLED

"UNFAIRNESS IN FEDERAL COCAINE SENTENCING: IS IT TIME TO CRACK THE 100 TO 1 DISPARITY?"

PRESENTED

MAY 21, 2009

Introduction

Mr. Chairman, Ranking Member Gohmert, distinguished members of the Subcommittee —thank you for giving the Department of Justice the opportunity to appear before you today to share our views on the important issue of disparities in federal cocaine sentencing policy.

The Obama Administration firmly believes that our criminal and sentencing laws must be tough, predictable, fair, and not result in unwarranted racial and ethnic disparities. Criminal and sentencing laws must provide practical, effective tools for federal, state, and local law enforcement, prosecutors, and judges to hold criminals accountable and deter crime. The certainty of our sentencing structure is critical to disrupting and dismantling the threat posed by drug trafficking organizations and gangs that plague our nation's streets with dangerous illegal drugs and violence; it is vital in the fight against violent crime, child exploitation, and sex trafficking; and it is essential to effectively punishing financial fraud.

Ensuring fairness in the criminal justice system is also critically important. Public trust and confidence are essential elements of an effective criminal justice system – our laws and their enforcement must not only be fair, but they must also be perceived as fair. The perception of unfairness undermines governmental authority in the criminal justice process. It leads victims and witnesses of crime to think twice before cooperating with law enforcement, tempts jurors to ignore the law and facts when judging a criminal case, and draws the public into questioning the motives of governmental officials.

Changing these perceptions will strengthen law enforcement through increased public trust and cooperation, coupled with the availability of legal tools that are both tough and fair. This Administration is committed to reviewing criminal justice issues to ensure that our law enforcement officers and prosecutors have the tools they need to combat crime and ensure public safety, while simultaneously working to root out any unwarranted and unintended disparities in the criminal justice process that may exist.

There is no better place to start our work than with a thorough examination of federal cocaine sentencing policy. Since the United States Sentencing Commission first reported 15 years ago on the differences in sentencing between crack and powder cocaine, a consensus has developed that the federal cocaine sentencing laws should be reassessed. Indeed, over the past 15 years, our understanding of crack and powder cocaine, their effects on the community, and the public safety imperatives surrounding all drug trafficking has evolved. That refined understanding, coupled with the need to ensure fundamental fairness in our sentencing laws, policy, and practice, necessitates a change. We think this change should be addressed in this Congress, and we know that many of you on this Committee have already introduced legislation to address the disparity between crack and powder cocaine. We look forward to working with you and other Members of Congress over the coming months to address this issue.

In committing ourselves to pursuing federal cocaine sentencing policy reform, we do not suggest in any way that our prosecutors or law enforcement agents have acted improperly or imprudently during the last 15 years. To the contrary, they have applied

the laws as passed by Congress to address serious crime problems in communities across the nation.

Many in the law enforcement community now recognize the need to reevaluate current federal cocaine sentencing policy – and the disparities the policy creates. Law enforcement leaders have repeatedly and clearly indicated that the current federal cocaine sentencing policy not only creates the perception of unfairness, but also has the potential to misdirect federal enforcement resources. They have stressed that the most effective anti-drug enforcement strategy will deploy federal resources to disrupt and dismantle major drug trafficking organizations and violent drug organizations present in our neighborhoods.

For these and others reasons I will describe in the remainder of my testimony, we believe now is the time for us to re-examine federal cocaine sentencing policy – from the perspective of both fundamental fairness and public safety.

Background

A. *The Drug Trafficking Threat*

Cocaine and other illegal drugs pose a serious risk to the health and safety of Americans. The National Drug Intelligence Center's 2009 National Drug Threat Assessment identifies cocaine as the leading drug threat to society. Cocaine is a dangerous and addictive drug, and its use and abuse can be devastating to families regardless of economic background or social status. Statistics on abuse, emergency room visits, violence, and many other indicators tell the story of tremendous harms caused by

cocaine. We must never lose sight of these harms, their impact on our society, and our responsibility to reduce cocaine use and abuse.

Moreover, drug trafficking organizations and gangs have long posed an extremely serious public health and safety threat to the United States. The Administration is committed to rooting out these dangerous organizations. Whether it is Mexican or Colombian drug cartels moving large quantities of powder cocaine into and through the United States, or local gangs distributing thousands of individual rocks of crack in an American community, we will focus our resources on dismantling these enterprises – and disrupting the flow of money both here and abroad – to help protect the American public.

In the fight against illegal drugs, we also recognize that vigorous drug interdiction must be complemented with a heavy focus on drug abuse prevention and treatment. About 40 percent of offenders entering the federal prison system have a drug use disorder. The Violent Crime Control and Law Enforcement Act of 1994 requires the BOP, subject to the availability of appropriations, to provide appropriate substance abuse treatment for 100 percent of inmates who have a diagnosis for substance abuse or dependence and who volunteer for treatment. The Bureau's strategy includes early identification through a psychology screening, drug education, non-residential drug abuse treatment, intensive residential drug abuse treatment and community transition treatment.

Many state inmates also struggle with drug addiction. Many prisoners are unprepared to return to society. They not only re-offend, but they feed the lucrative black

market for drugs. We cannot break this cycle of recidivism without increased attention to prevention and treatment, as well as comprehensive prisoner reentry programs.

It is only through a balanced approach – combining tough enforcement with robust drug prevention, treatment, and recovery support efforts such as reentry programs – that we will be successful in stemming both the demand and supply of illegal drugs in our country. Strong and predictable sentencing laws are part of this balanced approach.

B. *The Enactment of the Current Cocaine Sentencing Scheme*

In the 1980s, crack cocaine was the newest form of cocaine to hit American streets. As this Committee well knows, in 1986, in the midst of this exploding epidemic, Congress passed the Anti-Drug Abuse Act, which set the current federal penalty structure for crack and powder cocaine trafficking.[1]

In doing so, Congress established the five- and ten-year mandatory minimum sentencing regime still in effect today. Under the law, selling five grams of crack cocaine triggers the same five-year mandatory minimum sentence as selling 500 grams of powder cocaine; those who sell 50 grams of crack are sentenced to the same ten-year mandatory minimum as those selling 5,000 grams of powder cocaine. Pursuant to its mandate to ensure that the federal sentencing guidelines are consistent with all federal laws, the U.S.

[1] In 1988, Congress also established a five gram, five-year mandatory minimum sentence for simple possession of crack cocaine, the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance. Anti-Drug Abuse Act of 1988, P.L., 100-690.

Sentencing Commission in 1987 applied this same "100-to-1" ratio to the sentencing guidelines.

Leading up to the enactment of this law, Congress was confronted with heightened public attention on the scourge of illegal drugs and high profile drug overdose deaths, including that of Len Bias, a University of Maryland and National Collegiate Athletic Association basketball star drafted by the Boston Celtics in June 1986. Proposals for making crack penalties more severe than powder penalties ranged from the Reagan Administration's proposed 20-to-1 ratio to the late-Senator Chiles' 1000-to-1 disparity.

The legislative history does not provide definitive evidence for the rationale behind the adoption of the 100-to-1 ratio. What we do know from floor statements and reports on earlier versions of the enacted legislation is that during this debate, Congress sought to focus the tough five- and ten-year mandatory minimum penalties on "serious" and "major" traffickers—the traffickers who keep the street markets operating and the heads of drug trafficking organizations, responsible for delivering very large quantities of drugs. With stiff mandatory minimum penalties for crack cocaine set at levels as low as five grams, many have questioned whether these policy goals were achieved. An analysis by the Sentencing Commission using Fiscal Year 2005 data shows that 55 percent of federal crack defendants were street-level dealers. This compares with only 7.3 percent of powder defendants who were street-level dealers. Very few federal crack or powder offenders are "kingpins."

C. *The Science of Cocaine: One Drug, Two Forms*

Since the time Congress passed the crack cocaine penalties, much of the information on the different impact and effects of crack cocaine as compared to powder cocaine has come under scrutiny. We have since learned that powder cocaine and crack cocaine produce similar physiological and psychological effects once they reach the brain. Whether in its powder or crack form, both types of cocaine are addictive and both pose serious health risks.

According to the National Institute on Drug Abuse (NIDA), the key difference in cocaine's effects depends on how it is administered – by snorting, inhaling, or injecting. The intensity and duration of cocaine's effects – in any form – depend on the speed with which it is absorbed into the bloodstream and delivered to the brain. Smoking or injecting cocaine produces a quicker, stronger high than snorting it. For that reason, the user who is smoking or injecting the drug may need more of it sooner to stay high. Because powder cocaine is typically snorted, while crack is most often smoked, crack smokers can potentially become addicted faster than someone snorting powder cocaine. Notably, however, the NIDA has found that smoked cocaine is absorbed into the bloodstream as rapidly as injected cocaine, both of which have similar effects on the brain. Evidence does not support that crack is inherently more addictive than powder cocaine.

D. *The Policy Debate*

For nearly two decades, the 100-to-1 disparity has been the subject of dynamic debate and discussion among policymakers, academics, criminal justice organizations, and others.

The supporters of the current cocaine penalty structure believe that the disparity is justified because it accounts for the greater degree of violence and weapon possession or use associated with some crack offenses, and because crack can be potentially more addictive than powder, depending on the usual method of use.

This Administration shares these concerns about violence and guns used to commit drug offenses and other crimes associated with such offenses. We recognize that data suggests that weapons involvement and violence in the commission of cocaine-related offenses are generally higher in crack versus powder cases: a 2007 Sentencing Commission report found that weapons involvement for cocaine offenses was 27 percent for powder cocaine and 42.7 percent for crack. The same sample found that some form of violence occurred in 6.3 percent of powder cocaine crimes and in 10.4 percent of crack cocaine crimes.

Violence associated with any offense is a serious crime and must be punished; we think that the best way to address drug-related violence is to ensure the most severe sentences are meted out to those who commit violent offenses. However, increased penalties for this conduct should generally be imposed on a case-by-case basis, not on a

class of offenders the majority of whom do not use any violence or possess a weapon. We support sentencing enhancements for those who use weapons in drug trafficking crimes, or those who use minors to commit their crimes, or those who injure or kill someone in relation to a drug trafficking offense. We also support charging separate weapons offenses to increase a sentence when an offender uses a weapon in relation to a drug trafficking offense.

But we cannot ignore the mounting evidence that the current cocaine sentencing disparity is difficult to justify based on the facts and science, including evidence that crack is not an inherently more addictive substance than powder cocaine. We know of no other controlled substance where the penalty structure differs so dramatically because of the drug's form.

Moreover, the Sentencing Commission has documented that the quantity-based cocaine sentencing scheme often punishes low-level crack offenders far more harshly than similarly situated powder cocaine offenders. Additionally, Sentencing Commission data confirms that in 2006, 82 percent of individuals convicted of federal crack cocaine offenses were African American, while just 9 percent were White. In the same year, federal powder cocaine offenders were 14 percent White, 27 percent African American, and 58 percent Hispanic. The impact of these laws has fueled the belief across the country that federal cocaine laws are unjust. We commend the Sentencing Commission for all of its work on this issue over the last 15 years. The Sentencing Commission

reports are the definitive compilation of all of the data reflecting federal cocaine sentencing policy. We cannot ignore their message.

Moving Forward: A Tide of Change

Since 1995, at Congress's request, the Commission has called for legislation to substantially reduce or eliminate the crack/powder sentencing disparity. Most recently, in 2007, the Commission called the crack/powder disparity an "urgent and compelling" issue that Congress must address. Both chambers of Congress have held multiple hearings on the topic, and legislation to substantially reduce or eliminate the disparity has been introduced by members of both political parties, several of whom sit on this Committee.

In addition, the overwhelming majority of states do not distinguish between powder cocaine and crack cocaine offenses.

For the reasons outlined above, this Administration believes that the current federal cocaine sentencing structure fails to appropriately reflect the differences and similarities between crack and powder cocaine, the offenses involving each form of the drug, and the goal of sentencing serious and major traffickers to significant prison sentences. We believe the structure is especially problematic because a growing number of citizens view it as fundamentally unfair. The Administration believes Congress's goal should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine.

Last month the Attorney General asked the Deputy Attorney General to form and chair a working group to examine federal sentencing and corrections policy. The group's comprehensive review will include possible recommendations to the President and Congress for new sentencing legislation affecting the structure of federal sentencing. In addition to studying issues related to prisoner reentry, Department policies on charging and sentencing, and other sentencing-related topics, the group will also focus on formulating a new federal cocaine sentencing policy; one that completely eliminates the sentencing disparity between crack and powder cocaine but also fully accounts for violence, chronic offenders, weapon possession and other aggravating factors associated – in individual cases – with both crack and powder cocaine trafficking. It will also develop recommendations for legislation, and we look forward to working closely with Congress and the Sentencing Commission on this important policy issue and finding a workable solution.

Until a comprehensive solution – one that embodies new quantity thresholds and perhaps new sentencing enhancements – can be developed and enacted as legislation by Congress and as amended guidelines by the Sentencing Commission, federal prosecutors will adhere to existing law. We are gratified that the Sentencing Commission has already taken a small step to ameliorate the 100:1 ratio contained in existing statutes by amending the guidelines for crack cocaine offenses. We will continue to ask federal courts to calculate the guidelines in crack cocaine cases, as required by Supreme Court decisions. However, we recognize that federal courts have the authority to sentence outside the guidelines in crack cases or even to create their own quantity ratio. Our prosecutors will

inform courts that they should act within their discretion to fashion a sentence that is consistent with the objectives of 18 U.S.C. § 3553(a) and our prosecutors will bring the relevant case-specific facts to the courts' attention.

Conclusion

As the history of this debate makes clear, there has been some disagreement about whether federal cocaine sentencing policy should change, and, if so, how it should change. This Administration and its components, including the Justice Department and the Office of National Drug Control Policy, look forward to working with this Committee and members of Congress in both chambers to develop sentencing laws that are tough, smart, fair, and perceived as such by the American public. We have already begun our own internal review of sentencing and the federal cocaine laws. Our goal is to ensure that our sentencing system is tough and predictable, but at the same time promotes public trust and confidence in the fairness of our criminal justice system. Ultimately, we all share the goals of ensuring that the public is kept safe, reducing crime and substance abuse, and minimizing the wide-reaching, negative effects of illegal drugs.

Thank you for the opportunity to share the Administration's views, and I welcome any questions you may have.

Mr. SCOTT. Well, thank you. Thank you very much. And we look forward to that report.

We have three votes pending on the floor, and we will return. It will probably be about 20 minutes, but shortly before noon before we can get back.

[Recess.]

Mr. SCOTT. We apologize for the delay. There was a little procedural issue that had to be resolved, and it took a little longer than we thought. As soon as the Ranking Members here, we will be——

We just got a message from the Ranking Member asking us to continue. I understand the delay has called some scheduling problems from several of our witnesses, but we will begin with Judge Hinojosa and make sure that Mr. Aikens can testify and be out of here before 1:30.

Is that what I understand, Mr. Aikens?

Judge Hinojosa?

TESTIMONY OF THE HONORABLE RICARDO H. HINOJOSA, U.S. DISTRICT COURT JUDGE, SOUTHERN DISTRICT OF TEXAS, AND ACTING CHAIR U.S. SENTENCING COMMISSION, WASHINGTON, DC

Judge HINOJOSA. Thank you. And Chairman Scott, I appreciate the opportunity to appear before you on behalf of the United States Sentencing Commission to discuss Federal cocaine sentencing policy.

As you all are aware, the commission has considered cocaine sentencing issues for many years and has worked closely with Congress to address the disparity that exists between the penalties for crack cocaine and powder cocaine offenses.

In 2007 the commission promulgated a crack cocaine guideline amendment to address some of this disparity, but was and continues to be of the view 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 urges Congress to take legislative action on this important issue. In the interest of time, I will briefly cover some of the information submitted in my written statement.

From the information sent to the commission in fiscal year 2008, we have found that there were 5,913 crack cocaine defendants sentenced in that fiscal year, about 24 percent of the drug trafficking cases. And 5,769 powder cocaine defendants were sentenced in that fiscal year, about 23 percent of the drug trafficking cases.

So combined, the cocaine sentences were about 47 percent of the drug trafficking cases sentenced in fiscal year 2008.

African-Americans continue to comprise the substantial majority of Federal crack cocaine offenders, about 80.6 percent in fiscal year 2008, while Hispanics comprise the majority of powder cocaine offenders, approximately 52.5 percent of the defendants.

Federal crack cocaine offenders consistently have received longer average sentences than powder cocaine offenders. In fiscal year 2008 the average sentence for crack cocaine offenders was 115 months, compared to 91 months for powder cocaine offenders, a difference of 24 months or 26.4 percent.

Most of the difference is due to the statutory mandatory minimum penalties. In fiscal year 2008 crack cocaine and powder co-

caine offenders were convicted under mandatory minimums at virtually equal rates, about 80 percent of the defendants, even though the median drug rate for powder cocaine offenses was 7,000 grams compared to 52 grams for crack cocaine offenses.

In fiscal year 2008 only 14.3 percent of crack cocaine offenders, compared to 42.4 percent of powder cocaine offenders, received relief from the statutory mandatory minimum penalties pursuant to statutory and guidelines safety valve provisions.

This is partly attributable to differences in criminal history and weapon involvement. In fiscal year 2008, 28.1 percent of crack cocaine offenders, compared to 16.9 percent of powder cocaine offenders, either received a guideline weapon enhancement or were convicted pursuant to Title 18 U.S. Code Section 924(c).

Crack cocaine offenders generally have more extensive criminal history, and 77.8 percent of crack cocaine offenders were ineligible for the safety valve, because they were in a criminal history category higher than criminal history category one, compared to 40 percent of powder cocaine offenders.

Also, with regards to the mitigating role adjustment that is made by the courts, it was approximately 5.1 percent for crack cocaine offenders as opposed to 20 percent for powder cocaine offenders.

The sentencing disparity, as has also been noted, has been the subject of recent Supreme Court case law. In *Kimbrough v. United States,* the court relied on the commission's conclusion that the disparity between the treatment of crack cocaine and powder cocaine offenses fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Anti-Drug Abuse Act in holding that a sentencing court may consider the disparity when determining an appropriate sentence in a crack cocaine case.

In the Spears case the court held that under *Kimbrough,* a sentencing court may vary from the crack cocaine guidelines based on policy disagreements and may substitute its own drug quantity ratio.

With regards to the operation of the commission's retroactive application of the 2007 crack cocaine amendment in the 1 year since the amendment went into effect and was made retro active, the commission has received documentation on approximately 19,239 sentence reduction motions.

In those, 13,408—approximately 69.6 percent of them—were granted, and the average reduction was 24 months, from 140 months to 116 months.

Five thousand eight hundred thirty-one—about 30.3 percent—have been denied. Of these, some were denied because the conviction did not involve crack cocaine or the defendant was otherwise not eligible, most often because the statutory mandatory minimum applied or a career offender or on career offender status and/or were denied on the merits for other reasons.

In closing, I must say that the commission continues to believe that there is no justification for the current statutory penalty scheme for powder cocaine and crack cocaine offenses and is of the view that any comprehensive solution requires revision of the current statutory penalties by Congress.

The commission remains committed to its 2002 recommendation that statutory drug quantity ratios should be no greater than 20 to 1 and recommends to Congress that Congress increase the 5-year and 10-year statutory mandatory minimum threshold quantities for crack cocaine offenses, repeal the mandatory minimum penalty for simple possession of crack cocaine, and reject addressing the 100 to 1 drug quantity ratio by decreasing the 5-year and 10-year mandatory minimum threshold quantities for powder cocaine offenses.

The commission believes that the Federal sentencing guidelines continue to provide the best mechanism for achieving all of the principles of the Sentencing Reform Act of 1984 and recommends the congressional concerns about the harms associated with crack cocaine are best captured through the sentencing guidelines system.

The bipartisan U.S. Sentencing Commission continues to offer its help, support and services to all—the Congress, the executive, the judicial branches and anyone else interested on the subject, anyone who is interested in this important issue, and would request that any congressional action including emergency amendment authority.

On behalf of the commission, I again thank you, Chairman Scott and Members of the Committee, for holding this very important hearing on this subject that the commission obviously feels is important and has felt so for many years.

Thank you, sir. And I did go over my time, and I guess life tenure doesn't help here, and I am sorry. [Laughter.]

[The prepared statement of Judge Hinojosa follows:]

PREPARED STATEMENT OF THE HONORABLE RICARDO H. HINOJOSA

Statement of Ricardo H. Hinojosa
Acting Chair, United States Sentencing Commission
Before the House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

May 21, 2009

Chairman Scott, Ranking Member Gohmert, and members of the Subcommittee, I appreciate the opportunity to appear before you on behalf of the United States Sentencing Commission to discuss federal cocaine sentencing policy.

The Commission has considered cocaine sentencing issues over a number of years[1] and has worked closely with Congress to address the sentencing disparity that exists between the penalties for powder cocaine and crack cocaine offenses. The Commission amended the federal sentencing guidelines in 2007 to partially address the sentencing disparity and, pursuant to its authority under 28 U.S.C. § 994(u),[2] gave retroactive effect to that amendment effective March 3, 2008. The Commission continues to be of the view, however, 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 urges Congress to take legislative action on this important issue.

Part I of this statement briefly summarizes the statutory and guideline penalty structure for crack cocaine offenses. Part II provides an analysis of federal cocaine sentences, including information on differences in average sentence length between crack cocaine and powder cocaine offenses. Part III provides a brief update on case law concerning crack cocaine sentencing and data on recent cocaine sentencing practices. Part IV provides information concerning the retroactive application of the 2007 crack cocaine guideline amendment. Part V sets forth the Commission's recommendations for statutory penalty revisions.

I. Statutory and Guideline Penalty Structure

The Anti-Drug Abuse Act of 1986[3] 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.

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[1] *See* United States Sentencing Commission (hereinafter "USSC" or "Commission"), *Report On Cocaine and Federal Sentencing Policy* ("May 2007 Report"), USSC, *2002 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002); USSC, *1997 Special Report to Congress: Cocaine and Federal Sentencing Policy* (as directed by section 2 of Pub. L. 104–38) (April 1997); USSC, *1995 Special Report to Congress: Cocaine and Federal Sentencing Policy* (as directed by section 280006 of Pub. L. 103–322) (February 1995).

[2] 28 U.S.C. § 994(u) 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." *See also* USSG, App. C, Amendment 713 (March 3, 2008).

[3] Pub. L. 99–570, 100 Stat. 3207 (1986) (hereinafter "1986 Act").

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"). Because of congressional concern at that time about the dangers associated with crack cocaine,[4] the 1986 Act 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 at least five grams of crack cocaine, or at least 500 grams of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving at least 50 grams of crack cocaine, or at least 5,000 grams 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." In addition, unlike for any other drug, in 1988 Congress enacted a five-year statutory mandatory minimum penalty for simple possession of at least five grams of crack cocaine.[5]

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 at least five grams of crack cocaine or at least 500 grams 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 at least 50 grams of crack cocaine or at least 5,000 grams 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 offenses and powder cocaine offenses involving quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.

The Commission's 2007 crack cocaine guideline amendment reduced by two levels the base offense levels assigned to the various quantities of crack cocaine. Consequently, for crack cocaine offenders, the base offense levels now correspond to guideline ranges that include rather than exceed the five-year and ten-year mandatory minimum terms of imprisonment.[6] Offenses involving quantities of crack cocaine above

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[4] *See* USSC, *2002 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002) at 7-10 for a discussion of the legislative history of the 1986 Act as it pertains to crack cocaine.

[5] *See* 21 U.S.C. § 844.

[6] USSG, App. C, Amendment 706 (Nov. 1, 2007). Specifically, the 2007 crack cocaine guideline amendment reduced the base offense level for offenses involving at least five grams of crack cocaine by two levels, from level 26 to level 24, which corresponds to a sentencing guideline range of 51 to 63 months for a defendant in Criminal History Category I. The base offense level for offenses involving at least 50 grams of crack cocaine similarly was reduced by two levels, from level 32 to level 30, which corresponds to a sentencing guideline range of 97-121 months for a defendant in Criminal History Category I. If a statutory mandatory minimum applies, the applicable guideline range is 60 to 63 months

and below the mandatory minimum threshold quantities similarly were adjusted downward by two levels.

The Commission promulgated the 2007 crack cocaine guideline amendment after an extensive review of the issues associated with federal cocaine sentencing policy. Consistent with previous Commission conclusions that the 100-to-1 drug quantity ratio should be modified[7] but recognizing Congress's authority to establish federal cocaine sentencing policy through statutory mandatory minimum penalties, the Commission tailored the 2007 crack cocaine guideline amendment to fit within the current statutory penalty scheme.

II. Analysis of Federal Cocaine Sentences

A. Federal Cocaine Offenses and Offenders

1. Number of Offenses

Powder cocaine and crack cocaine offenses together historically have accounted for nearly half of the federally sentenced drug trafficking offenders. As indicated in Figure 1, of 24,605 total drug trafficking cases in fiscal year 2008, there were 5,913 crack cocaine cases (24.0% of all drug trafficking cases) and 5,769 powder cocaine cases (23.4% of all drug trafficking cases). Of 24,748 total drug trafficking cases in fiscal year 2007, there were 5,248 crack cocaine cases (21.2% of all drug trafficking cases) and 6,172 powder cocaine cases (24.9% of all drug trafficking cases).[8]

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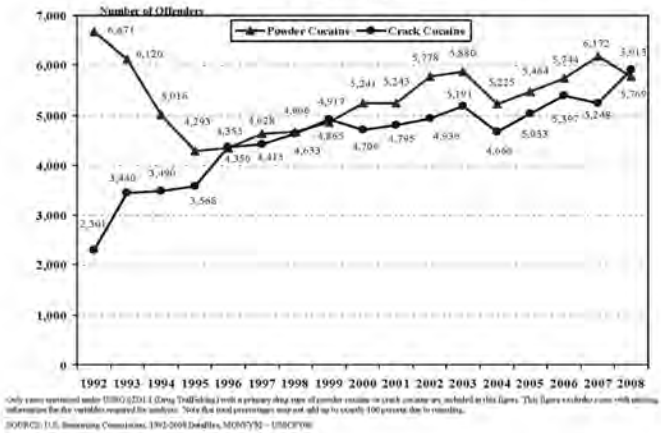
in a case in which the five-year mandatory minimum applies, and 120 to 121 months in a case in which the ten-year mandatory minimum applies. *See* USSG §5G1.1 (Sentencing on a Single Count of Conviction).

[7] *See supra* note 1.

[8] In fiscal year 2008, there were 105 federal cases for simple possession of crack cocaine, in which 58 offenders were subject to the statutory mandatory minimum penalty. In fiscal year 2007, there were 109 such cases, in which 49 offenders were subject to the statutory mandatory minimum penalty.

Figure 1
Trend in Number of Powder Cocaine and Crack Cocaine Offenders
FY1992-FY2008



2. Demographics

As indicated in Table 1, Black offenders continue to comprise the majority of federal crack cocaine trafficking offenders, but that has decreased from 91.4 percent in fiscal year 1992 to 80.6 percent in fiscal year 2008. White offenders comprised 10.2 percent of crack cocaine offenders in fiscal year 2008, compared to 3.2 percent in 1992. Hispanic offenders comprised 8.2 percent in fiscal year 2008, compared to 5.3 percent in 1992.

Hispanic offenders comprise the majority of powder cocaine offenders, having increased from 39.8 percent in fiscal year 1992 to 52.5 percent in fiscal year 2008. Black offenders comprised 30.2 percent of powder cocaine offenders in fiscal year 2008, compared to 27.2 percent in fiscal year 1992. White offenders comprised 16.4 percent of powder cocaine offenders in fiscal year 2008, compared to 32.3 percent of powder cocaine offenders in fiscal year 1992.

Table 1
Demographic Characteristics of Federal Cocaine Offenders
Fiscal Years 1992, 2000 & 2008

	Powder Cocaine						Crack Cocaine					
	1992		2000		2008		1992		2000		2008	
	N	%	N	%	N	%	N	%	N	%	N	%
Race/Ethnicity												
White	2,113	32.3	932	17.8	942	16.4	74	3.2	269	5.6	605	10.2
Black	1,779	27.2	1,586	30.5	1,734	30.2	2,096	91.4	4,069	84.7	4,753	80.9
Hispanic	2,601	39.8	2,692	51.8	3,019	52.5	121	5.3	434	9.0	484	8.2
Other	44	0.7	40	0.8	57	1.0	3	0.1	33	0.7	37	1.0
Total	6,536	100	5,249	100	5,751	100	2,294	100	4,805	100	5,899	100
Citizenship												
U.S. Citizen	4,499	67.7	3,327	63.9	3,630	63.1	2,092	91.3	4,482	93.4	5,702	96.4
Non-Citizen	2,147	32.3	1,881	36.1	2,127	36.9	199	8.7	318	6.6	211	3.6
Total	6,646	100	5,208	100	5,757	100	2,291	100	4,800	100	5,913	100
Gender												
Female	787	11.8	722	13.8	546	9.5	270	11.7	476	9.9	512	8.7
Male	5,886	88.2	4,518	86.2	5,222	90.5	2,032	88.3	4,330	90.1	5,401	91.3
Total	6,673	100	5,240	100	5,768	100	2,302	100	4,806	100	5,913	100
Average Age	Average=34		Average=34		Average=35		Average=28		Average=29		Average=31	

This table excludes cases missing information for the variables required for analyses.
Total percentages may not add up to exactly 100 percent due to rounding.

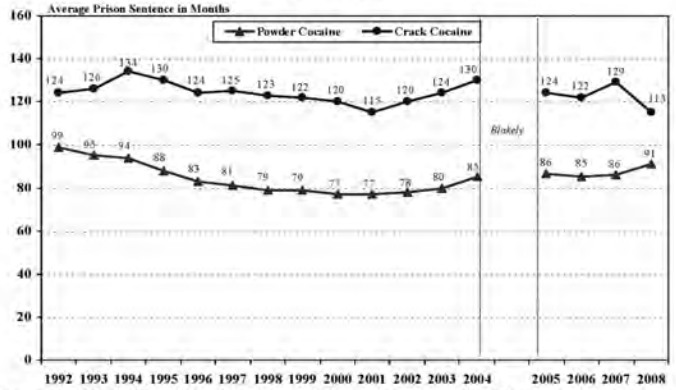
SOURCE: U.S. Sentencing Commission, 1992, 2000, and 2008 Datafiles, MONFY92, USSCFY00, and USSCFY08.

B. Average Sentence Length

Federal crack cocaine offenders consistently have received longer sentences than powder cocaine offenders. As indicated in Figures 2 and 3, the difference in average sentence length between these two groups of offenders was greater in 2007 than it was in 1992. In fiscal year 1992, the average sentence length for crack cocaine offenders was 124 months compared to 99 months for powder cocaine offenders, amounting to a difference of 25 months, or 25.3 percent. That difference widened to 43 months, or 50.0 percent, in fiscal year 2007, when the average sentence length for crack cocaine offenders was 129 months compared to 86 months for powder cocaine offenders.

In fiscal year 2008, the difference in average sentence length between crack cocaine and powder cocaine offenses narrowed. This occurred not only because of the implementation of the 2007 crack cocaine guideline amendment but also because of an increase in the average sentence length for powder cocaine offenders. In fiscal year 2008, the average sentence length for crack cocaine offenders was 115 months, compared to 91 months for powder cocaine offenders, making the average sentence length for crack cocaine offenders 26.4 percent, or 24 months, longer than the average sentence length for powder cocaine offenders. However, while the difference in average sentence length narrowed, there remains a difference.

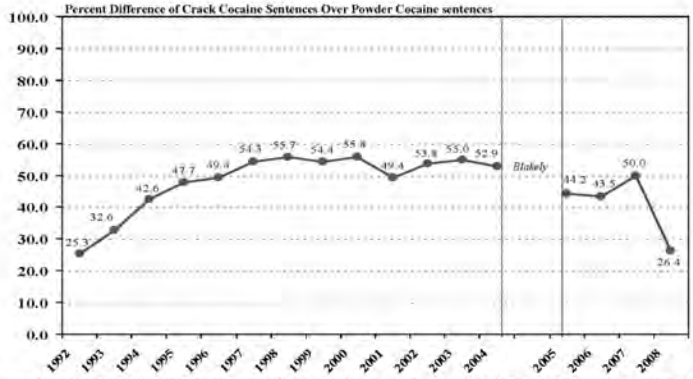
Figure 2
Trend in Prison Sentences for Powder Cocaine and Crack Cocaine Offenders
FY1992-FY2008



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 time of confinement as defined in USSG §5C1.1 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. Note that total percentages may not add up to exactly 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 – USSCFY08; 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

Figure 3
Trend in Proportional Differences Between Average Cocaine Sentences
FY1992-FY2008



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 time of confinement as defined in USSG §5C1.1 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. 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. Note that total percentages may not add up to exactly 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 – USSCFY08, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

C. Reasons for Differences in Average Sentence Length

1. Statutory Mandatory Minimum Sentences

Most of the difference in average sentence length between crack cocaine and powder cocaine offenses is attributable to the current quantity-based statutory mandatory minimum penalties and the manner in which those penalties are incorporated into the guidelines. In fiscal year 2008, the median drug weight for powder cocaine offenses was 7,000 grams, an amount 135 times greater than the median drug weight for crack cocaine offenses, which was 52 grams. In fiscal year 2007, the median drug weight was 6,370 grams for powder cocaine offenses compared to 53 grams for crack cocaine offenses.

These quantities resulted in crack cocaine and powder cocaine offenders being convicted under statutes carrying a mandatory minimum sentence at virtually equal rates. In fiscal year 2008, 80.6 percent of crack cocaine offenders were convicted of a statute carrying a mandatory minimum term of imprisonment, compared to 80.0 percent of powder cocaine offenders.

Exposure to statutory mandatory minimum sentences further contributes to the difference in average sentence length because crack cocaine offenders are less likely to receive the benefit of statutory and guideline "safety valve" mechanisms that allow certain low-level offenders to be sentenced without regard to the statutory mandatory minimums. As indicated in Tables 2 and 2A, in fiscal year 2008, 14.3 percent of crack cocaine offenders received the benefit of a safety valve provision as set forth at 18 U.S.C. § 3553(f)[9] or through the federal sentencing guidelines[10] compared to 42.4 percent of powder cocaine offenders. In fiscal year 2007, 13.6 percent of crack cocaine offenders received the benefit of a safety valve provision compared to 44.7 percent of powder cocaine offenders. The difference in rates of safety valve application between crack cocaine and powder cocaine offenders is in part attributable to differences in their criminal history scores and the extent to which weapons are involved in the offense, as discussed below.[11]

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[9] The "safety valve" at 18 U.S.C. § 3553(f) 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.

[10] The Commission uses "safety valve" to refer to cases that receive either the two-level reduction pursuant to USSG §2D1.1(b)(11) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

[11] Among the requirements to receive "safety valve" relief from the statutory mandatory minimum sentence, the defendant must not have more than one criminal history point, as determined under the sentencing guidelines, and the defendant must not have used violence or credible threats of violence or must not have possessed a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense. *See* 18 U.S.C. § 3553(f)(1).

Table 2

Guideline Sentencing Characteristics, Criminal History, and Position Relative to the Guideline Range for Crack Cocaine Offenders[1]

	Fiscal Year 2007		Fiscal Year 2008	
Average Base Offense Level	30		28	
Median Crack Cocaine Weight in Grams	53		52	
Average Prison Sentence (Months)	130		116	
	N	**%**	**N**	**%**
TOTAL	**5,037**		**5,601**	
Weapon Enhancment				
Weapon SOC (USSG § 2D1.1(b)(1))	994	19.7	1,025	18.3
18 U.S.C. § 924(c) Conviction	543	10.8	548	9.8
Safety Valve §5C1.2[2]	683	13.6	800	14.3
Guideline Role Adjustment				
Aggravating Role §3B1.1	233	4.6	260	4.6
Mitigating Role §3B1.2	286	5.7	287	5.1
Criminal History Category	**N**	**%**	**N**	**%**
I	1,052	20.9	1,242	22.2
II	596	11.8	685	12.2
III	1,015	20.2	1,093	19.5
IV	601	11.9	678	12.1
V	383	7.6	474	8.5
VI	1,390	27.6	1,429	25.5
Total	**5,037**	**100.0**	**5,601**	**100.0**
Sentence Relative to Guideline Range	**N**	**%**	**N**	**%**
Within Range	2,946	56.3	3,306	56.1
Above Range	22	0.4	39	0.7
Government Sponsored	1,596	30.5	1,637	27.8
Non-Government Below Range	673	12.9	916	15.5
Total	**5,237**	**100.0**	**5,898**	**100.0**

[1]This tables includes only cases sentenced under §2D1.1 (Drug Trafficking) where crack cocaine was the primary drug type. Total percentages may not add up to exactly 100 percent due to rounding. This table excludes cases with missing information for the variables required for analysis.

[2]Safety valve includes cases that received either a two-level reduction pursuant to USSG §2D1.1(b)(11) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

SOURCE: U.S. Sentencing Commission, 2007-2008 Datafiles, USSCFY07-USSCFY08.

Table 2A

Guideline Sentencing Characteristics, Criminal History, and Position Relative to the Guideline Range for Powder Cocaine Offenders[1]

	Fiscal Year 2007		Fiscal Year 2008	
Average Base Offense Level	30		30	
Median Powder Cocaine Weight in Grams	6,370		7,000	
Average Prison Sentence (Months)	86		91	
	N	**%**	**N**	**%**
TOTAL	**5,888**		**5,578**	
Weapon Enhancment				
Weapon SOC (USSG § 2D1.1(b)(1))	583	9.9	632	11.3
18 U.S.C. § 924(c) Conviction	274	4.7	314	5.6
Safety Valve §5C1.2[2]	2,633	44.7	2,365	42.4
Guideline Role Adjustment				
Aggravating Role §3B1.1	451	7.7	453	8.1
Mitigating Role §3B1.2	1,193	20.3	1,116	20.0
Criminal History Category	**N**	**%**	**N**	**%**
I	3,579	60.8	3,349	60.0
II	688	11.7	646	11.6
III	736	12.5	671	12.0
IV	298	5.1	301	5.4
V	144	2.4	142	2.6
VI	443	7.5	469	8.4
Total	**5,888**	**100.0**	**5,578**	**100.0**
Sentence Relative to Guideline Range	**N**	**%**	**N**	**%**
Within Range	3,236	52.7	2,879	50.1
Above Range	29	0.5	33	0.6
Government Sponsored	2,196	35.7	2,048	35.6
Non-Government Below Range	683	11.1	789	13.7
Total	**6,144**	**100.0**	**5,749**	**100.0**

[1]This tables includes only cases sentenced under §2D1.1 (Drug Trafficking) where powder cocaine was the primary drug type. Total percentages may not add up to exactly 100 percent due to rounding. This table excludes cases with missing information for the variables required for analysis.

[2]Safety valve includes cases that received either a two-level reduction pursuant to USSG §2D1.1(b)(11) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

SOURCE: U.S. Sentencing Commission, 2007-2008 Datafiles, USSCFY07-USSCFY08.

2. Aggravating and Mitigating Factors

In addition to drug quantity, the current penalty structure for drug offenses accounts for certain aggravating and mitigating factors, such as weapon involvement and role in the offense. Differences in the prevalence of these factors in crack cocaine and powder cocaine offenses also contribute to the difference in average sentence length for these offenses.

a. Weapon Involvement

Some of the difference in average sentence length is attributable to the higher rate at which a guideline[12] or statutory[13] weapon enhancement applies in crack cocaine offenses compared to powder cocaine offenses. Although a weapon enhancement applies in a minority of both crack cocaine and powder cocaine offenses, as indicated in Tables 2 and 2A, such an enhancement applies more often in crack cocaine offenses.

In fiscal year 2008, 28.1 percent of crack cocaine offenders either received the guideline weapon enhancement (18.3%) or were convicted pursuant to 18 U.S.C. § 924(c) (9.8%). By comparison, 16.9 percent of powder cocaine offenders either received the guideline weapon enhancement (11.3%) or were convicted pursuant to 18 U.S.C. § 924(c) (5.6%). In fiscal year 2007, 30.5 percent of crack cocaine offenders either received the guideline weapon enhancement (19.7%) or were convicted pursuant to 18 U.S.C. § 924(c) (10.8%). By comparison, 14.6 percent of powder cocaine offenders either received the weapon enhancement (9.9%) or were convicted pursuant to 18 U.S.C. § 924(c) (4.7%).

b. Role in the Offense

Some of the difference in average sentence length is attributable to the relative infrequency with which crack cocaine offenders receive a mitigating role adjustment under the guidelines compared to powder cocaine offenders.[14] In fiscal year 2008, 5.1 percent of crack cocaine offenders received a mitigating role adjustment compared to 20.0 percent of powder cocaine offenders. In fiscal year 2007, 5.7 percent of crack cocaine offenders received a mitigating role adjustment compared to 20.3 percent of powder cocaine offenders.

With respect to aggravating role,[15] in fiscal year 2008, 4.6 percent of crack cocaine offenders received an aggravating role adjustment compared to 8.1 percent of powder cocaine offenders. In fiscal year 2007, 4.6 percent of crack cocaine offenders received an aggravating role adjustment compared to 7.7 percent of powder cocaine offenders.

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[12] The guidelines provide a two-level enhancement (an approximate 25% increase in penalty) at §2D1.1(b)(1) if a dangerous weapon (including a firearm) was possessed.

[13] *See* 18 U.S.C. § 924(c).

[14] Pursuant to USSG §3B1.2 (Mitigating Role), a two- to four-level reduction in offense level applies in a case in which the offender's role in the offense was minimal or minor (or between minimal and minor).

[15] Pursuant to USSG §3B1.1 (Aggravating Role), a two- to four-level increase in offense level applies in a case in which the offender was an organizer, leader, manager, or supervisor of the criminal activity.

3. Criminal History

In addition to offense severity (as measured by drug quantity and applicable aggravating and mitigating factors), criminal history is a major component in determining an offender's sentence under the federal sentencing guidelines. Some of the difference in average sentence length is attributable to the fact that crack cocaine offenders generally have more extensive criminal history than powder cocaine offenders. In both fiscal years 2008 and 2007, the average criminal history category for crack cocaine offenders was Criminal History Category IV, compared to Criminal History Category II for powder cocaine offenders. Tables 2 and 2A show the distribution of crack cocaine offenders and powder cocaine offenders by criminal history category in both fiscal years 2007 and 2008.[16]

As discussed in Part IIC, the difference in criminal history between crack cocaine and powder cocaine offenders contributes to the relatively low rates at which crack cocaine offenders qualify for statutory and guideline "safety valve" provisions compared to powder cocaine offenders. An offender in a criminal history category higher than Criminal History Category I cannot receive the benefit of these provisions. In fiscal year 2008, 77.8 percent of crack cocaine offenders were in a criminal history category higher than Criminal History Category I, compared to 40.0 percent of powder cocaine offenders. In fiscal year 2007, 79.1 percent of crack cocaine offenders were in a criminal history category higher than Criminal History Category I, compared to 39.2 percent of powder cocaine offenders.

III. Recent Crack Cocaine Sentencing Case Law and Cocaine Sentencing Practices

A. Supreme Court Case Law

The sentencing disparity between crack cocaine and powder cocaine offenses has been the subject of recent Supreme Court case law. In *Kimbrough v. United States*,[17] the Court relied on the Commission's conclusion that the disparity between the treatment of crack cocaine and powder cocaine offenses "fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act"[18] in holding that a sentencing judge may consider that disparity when determining an appropriate sentence in a crack cocaine case. In *Spears v. United States*,[19] the Supreme Court clarified in a *per curiam* decision that, under its holding in *Kimbrough*, district courts have "authority to vary from the crack cocaine Guidelines based on *policy* disagreements with them, and not simply based on an individualized determination that they yield an

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[16] Of the 1,429 crack cocaine offenders who were in Criminal History Category VI in fiscal year 2008, 951 were career offenders. Of these 951 career offenders, 535 would have been in a lower criminal history category but for their career offender status. Of the 469 powder cocaine offenders who were in Criminal History Category VI in fiscal year 2008, 356 were career offenders. Of these 356 career offenders, 251 would have been in a lower criminal history category but for their career offender status.

[17] ___ U.S. ___, 128 S. Ct. 558 (2007).

[18] *Id.* at 568 (internal quotations omitted).

[19] ___ U.S. ___, 129 S. Ct. 840 (2009) (per curiam).

excessive sentence in a particular case."[20] Thus, a sentencing judge may categorically reject the existing guidelines ratio and "apply a different ratio which, in his judgment, corrects the disparity."[21]

Of the 959 crack cocaine cases sentenced after *Spears* that have been received, coded, and analyzed by the Commission as of April 24, 2009, five cases specifically cite *Spears* in the court's written statement of reasons for the sentence imposed. Of those five cases, the court applied a 20-to-1 drug quantity ratio in two of the cases and a 1-to-1 drug quantity ratio in one of the cases. In the remaining two cases, the court cited *Spears* but did not apply a different ratio, although one of those cases referred to the applicable ratio as excessive.

In two additional cases, the court cited *Spears* and applied a different drug quantity ratio. In one of those cases, the court applied a 10-to-1 drug quantity ratio[22] and in the other, the court applied a 1-to-1 drug quantity ratio.[23]

B. Sentencing Practices

As indicated in Figure 4, during the immediate years preceding *United States v. Booker*,[24] which rendered the sentencing guidelines advisory, courts imposed non-government sponsored, below-range sentences in 7.7 percent, 6.6 percent, and 5.7 percent of the crack cocaine cases sentenced in fiscal years 2002, 2003, and 2004, respectively. By comparison, courts imposed non-government sponsored, below-range sentences in 15.2 percent, 13.3 percent, and 12.9 percent of the crack cocaine cases sentenced in fiscal years 2005, 2006, and 2007, respectively. Furthermore, in fiscal year 2008, approximately 10 months of which were post-*Kimbrough*, the rate of non-government sponsored, below-range sentences increased to 15.5 percent of crack cocaine cases sentenced that year.

Courts increasingly are sentencing powder cocaine offenders to sentences below the applicable sentencing guideline range but less often than for crack cocaine offenders. As indicated in Figure 5, courts imposed non-government sponsored, below-range sentences in 11.4 percent, 8.7 percent, and 5.7 percent of the powder cocaine cases sentenced in fiscal years 2002, 2003, and 2004, respectively. By comparison, courts imposed non-government sponsored, below-range sentences in 11.6 percent, 10.3 percent, and 11.1 percent in fiscal years 2005, 2006, and 2007, respectively. In fiscal year 2008, the rate of non-government sponsored, below-range sentences increased to 13.7 percent of the powder cocaine cases sentenced that year.[25]

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[20] *Id.* at 843-44 (emphasis in original).

[21] *Id.* at 843.

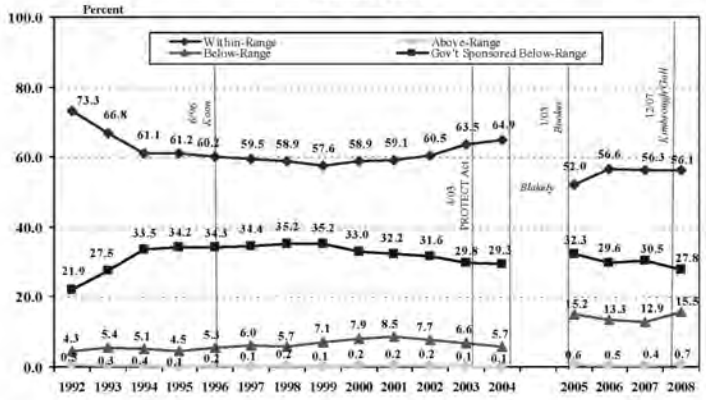
[22] *See United States v. Edwards*, 2009 WL 424464 (N.D. Ill. February 17, 2009).

[23] *See United States v. Gully*, No. CR 08-3005-MWB, slip op. (N.D. Iowa May 18, 2009).

[24] 543 U.S. 220 (2005).

[25] In addition, powder cocaine offenders also received government sponsored, below-range sentences more frequently than crack cocaine offenders. In fiscal years 2007 and 2008, the rate of government sponsored, below-range sentences for crack cocaine offenders was 30.5 percent and 27.8 percent, respectively, compared to 35.7 percent and 35.6 percent, respectively, for powder cocaine offenders.

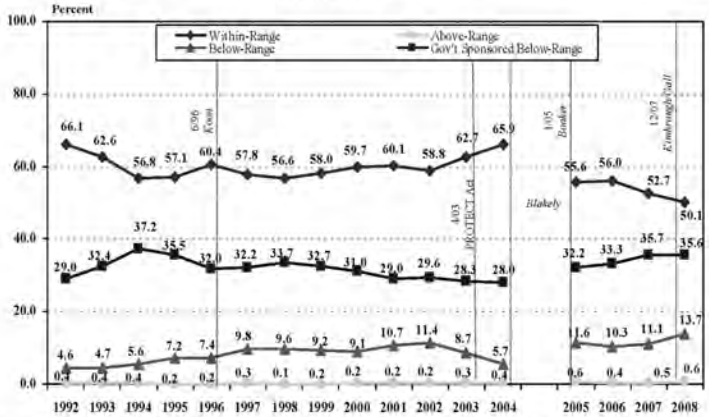
Figure 4
Rates of Within-Range and Out-of-Range Sentences for Crack Cocaine Offenses
FY1992 to FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of crack cocaine are included in this figure. Government Sponsored Below-Range is comprised of: USSG §5K1.1 Departures Only (FY92-FY02), USSG §5K3.1 and Other Government Sponsored Departures (FY03), USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures (FY04) and USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures Variances (FY05-FY08). This figure excludes cases with missing information for the variables required for analysis. Note that total percentages may not add up to exactly 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 – 09MCFY08, 2004 Pre-*Booker* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005–September 30, 2005).

Figure 5
Rates of Within-Range and Out-of-Range Sentences for Powder Cocaine Offenses
FY1992 to FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine are included in this figure. Government Sponsored Below-Range is comprised of: USSG §5K1.1 Departures Only (FY92-FY02), USSG §5K3.1 and Other Government Sponsored Departures (FY03), USSG §5K3.1, USSG §5K3.1 and Other Government Sponsored Departures (FY04) and USSG §5K3.1, USSG §5K3.1 and Other Government Sponsored Departures Variances (FY05-FY08). This figure excludes cases with missing information for the variables required for analysis. Note that total percentages may not add up to exactly 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 – 09MCFY08, 2004 Pre-*Booker* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005–September 30, 2005).

When analyzed by periods marked by the dates of the Supreme Court's decisions in *Booker*, *Kimbrough*, and *Spears*, the data suggest that the Supreme Court's decisions have had some impact on federal crack cocaine sentencing practices. Courts imposed non-government sponsored, below-range sentences in 6.9 percent of the 11,649 crack cocaine cases sentenced in the three-year period immediately before enactment of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act[26] (October 1, 2000-April 30, 2003). By comparison, courts imposed non-government sponsored, below-range sentences in 13.3 percent of the 15,044 crack cocaine cases sentenced in the post-*Booker* period (January 12, 2005 to December 9, 2007) and 16.0 percent of the 5,998 crack cocaine cases sentenced during the post-*Kimbrough* period (December 10, 2007 to January 20, 2009).

Although too few cases have been sentenced post-*Spears* to draw any conclusions about the impact of that decision, the rate of non-government sponsored, below-range sentences increased to 18.4 percent, or 176 of the 959 crack cocaine cases sentenced during the post-*Spears* period (on or after January 21, 2009) that have been received, coded, and analyzed by the Commission.[27]

IV. Retroactivity of 2007 Crack Cocaine Guideline Amendment

As discussed in Part I, the Commission promulgated a guideline amendment in 2007 that reduced by two levels the base offense levels assigned to the various quantities of crack cocaine. The Sentencing Reform Act, at 28 U.S.C. § 994(u), authorizes the Commission to determine whether a guideline amendment that reduces the sentencing range may be retroactively applied. Pursuant to that authority, the Commission voted to give retroactive effect to the 2007 crack cocaine guideline amendment effective March 3, 2008. As a result, courts were authorized under 18 U.S.C. § 3582(c)(2) to consider motions for reduced sentence based on the 2007 crack cocaine guideline amendment.[28]

In addition to voting to give the crack cocaine guideline amendment retroactive effect, the Commission amended the relevant policy statement, §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range), to provide limitations and guidance to the courts on determining whether, and to what extent, to grant a motion for reduced sentence pursuant to 18 U.S.C. § 3582(c)(2).[29] In particular, the Commission amended the policy statement to clarify that the court shall not reduce the defendant's term of imprisonment to a term less than the minimum of the amended guideline range, except in certain limited circumstances. In addition, the Commission

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[26] Pub. L. 108–21.

[27] Of those 959 cases, 500 cases (52.1%) were sentenced within the applicable guideline range, 273 cases (28.5%) were sentenced below the applicable guideline range pursuant to a government motion, and 10 cases (1.0%) were sentenced above the applicable guideline range.

[28] 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 subsequently been lowered by the Sentencing Commission pursuant 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 Sentencing Commission."

[29] USSG, App. C, Amendment 712 (Mar. 3, 2008).

amended the policy statement to require courts to consider the nature and seriousness of the danger to the community that may be posed by such a reduction and to permit consideration of an offender's post-sentencing conduct.

Prior to voting on retroactivity, the Commission also prepared a retroactivity analysis that predicted that 19,500 offenders sentenced between 1991 and 2007 might be eligible to seek a reduction.[30] The retroactivity analysis further predicted that the average sentence reduction would be approximately 27 months.[31]

The Commission has received, coded and analyzed court documentation concerning motions for reduced sentence pursuant to 18 U.S.C. § 3582(c)(2) that were decided through March 5, 2009, which represents one year of retroactive application. During that one-year period, the courts decided 19,239 motions.[32] Of the 19,239 motions, 13,408 (69.7%) were granted. Of the 13,408 motions granted, information regarding the extent of the reduction granted was available in 11,951 cases. Of those 11,951 cases, the average sentence was reduced on average by 24 months – or 17.0 percent – from 140 months to 116 months.[33]

Of the 19,239 motions, 5,831 (30.3%) were denied.[34] Of the 5,831 motions denied, 706 (11.0%) involved offenders who were ineligible for a reduction under USSG §1B1.10 because the offense did not involve crack cocaine, and 4,175 (64.9%) involved offenders who were otherwise ineligible. Of these 4,175 denials, 1,536 were denied because a statutory mandatory minimum controlled the sentence (representing 23.9% of all denials), and 1,453 were denied because applicable career offender or armed career criminal statutory and/or guideline provisions controlled the sentence (representing 22.6% of all denials).[35] Of the 5,831 motions denied, 970 (15.1%) involved offenders who were eligible for a reduction but whose motions were denied on the merits, most often (445, or 6.9% of all denials) because the offender had already benefitted from a departure or variance at the initial sentencing.[36]

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[30] *See* USSC, *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 (hereinafter "Retroactivity Analysis").

[31] Retroactivity Analysis at 23. These predictions were based on a number of assumptions. For a discussion of the assumptions and model used, *see generally* Retroactivity Analysis.

[32] USSC, *Preliminary Crack Cocaine Retroactivity Data Report*, Table 1 (March 2009) (hereinafter "March 2009 Retroactivity Report").

[33] *Id.* at Table 8.

[34] *Id.*

[35] March 2009 Retroactivity Report at Table 9. In some cases, courts cite multiple reasons for denying a motion for reduction in sentence. Reasons for ineligibility include that the offender was sentenced at the statutory mandatory minimum, the offender was sentenced as a career offender or armed career offender, or that the case involved too high a drug quantity to benefit from a reduction. *Id.*

[36] *Id.*

V. Recommendations

The Commission continues to believe that there is no justification for the current statutory penalty scheme for powder cocaine and crack cocaine offenses. The Commission is of the view that any comprehensive solution to this problem requires revision of the current statutory penalties and therefore must be legislated by Congress. The Commission remains committed 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 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 also provide emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines.[37] Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.

The Commission believes that the federal sentencing guidelines continue to provide the best mechanism for achieving the principles of the Sentencing Reform Act of 1984, including the consideration of all of the factors set forth at 18 U.S.C. § 3553(a). The Commission recommends to Congress that its concerns about the harms associated with cocaine drug trafficking are best captured through the sentencing guideline system.

VI. Conclusion

The Commission is committed to working with Congress to address the statutorily mandated disparities that still 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 of 1984. Thank you for the opportunity to appear before you today, and I look forward to answering your questions.

[37] "Emergency amendment authority" allows the Commission to promulgate guideline amendments outside of the ordinarily applicable amendment cycle provided by 28 U.S.C. § 994(a) and (p).

Mr. SCOTT. Mr. Patterson?

TESTIMONY OF SCOTT PATTERSON, DISTRICT ATTORNEY, EASTON, MD, ON BEHALF OF JOSEPH I. CASSILY, PRESIDENT OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, ALEXANDRIA, VA

Mr. PATTERSON. Thank you, sir. Mr. Chairman, Members of the Committee, my name is Scott Patterson. I am here on the behalf of Joe Cassilly, who is the president of the National District Attorneys Association, who regrettably could not be here, but has appeared before. He could not because of a conflict in his schedule.

I am here in two capacities—one, as an elected prosecutor from my home state of Maryland, but also as a member of the board of directors of the National District Attorneys Association and filling in and presenting our position in that regard.

The National District Attorneys Association is the oldest and largest organization representing state and local prosecutors. And to Mr. Cassilly's comments, which I am only going to briefly touch upon in the interest of time, we attached a resolution, which was adopted by the National District Attorneys Association back last summer, I believe, regarding the issue that is before this Committee and before the Congress concerning the sentencing disparity between crack and powder cocaine.

The NDAA agrees that some adjustment is warranted, not just that the 100 to 1 disparity cannot be justified by empirical data. We also believe that the proposed one to one realignment for penalties for crack versus powder cocaine also lacks any empirical or clinical evidence.

A random adjustment would also, we believe, have severe negative consequences as to the effects of the Nation's prosecutors to remove the destructive effects of crack and violence from our communities.

As has Mr. Cassilly, I have been a prosecutor for over 30 years, almost 33 years now. It has been my practice, both in the small jurisdiction that I am currently the elected prosecutor in and large jurisdictions that I have served in as an assistant in, that our work has been active and successful, both in task force within Maryland and also cooperating with Federal agencies and prosecutors from the office of the United States attorney for the state of Maryland.

We believe that this is a problem that affects not only the Federal jurisdiction, and as the NDAAA we really do not represent Federal prosecutors, but as the spillover to local prosecutors, depending on what happens with this legislation.

We believe this is an area that must be addressed, and we are glad that it is being addressed and looked at to handle the sentencing disparity. We do cooperate, and we do submit cases to Federal prosecutors to help with because of the sentencing guidelines.

We understand that in the state of Maryland, at least my own experience has been that simple possessors of quantities, even of five grams of crack cocaine, don't get the type of sentences, perhaps, that they received in the Federal system.

A lot of the emphasis in the state of Maryland is now on emphasizing treatment as well as punishment for offenders, that the major issues concerning traffickers and the violence and the com-

munities that occur as a result of the trafficking in crack cocaine is going to be an ongoing problem, no matter what the penalty aspects are of any legislation that comes out of the United States Congress concerning the disparity and/or Federal mandatory sentences.

The statement issued by Mr. Cassilly notes that on the issue of the racial disparity, if you will, concerning those that are prosecuted and sentenced under the drug laws also is as a result of the effect on their communities and the crime and violence that are occurring in those neighborhoods of the minorities and how they have come forth and ask for help and asked for the strong prosecutions so that they can have safe neighborhoods.

At any rate I commend the Committee and the Congress for dealing with this issue, and I direct the details of Mr. Cassilly's position to his paper. Thank you very much for allowing us to appear here today, sir.

[The prepared statement of Mr. Cassilly follows:]

PREPARED STATEMENT OF JOSEPH I. CASSILLY

I am testifying on behalf of the National District Attorneys Association, the oldest and largest organization representing State and local prosecutors. I have attached 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 1:1 realignment of Federal penalties for crack versus powder cocaine also lacks any empirical or clinical evidence. 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.

I have been a criminal prosecutor for over 31 years. My prosecutors and I work on one of the most active and successful task forces in Maryland and cooperate with federal agents and prosecutors from the Office of the U. S. Attorney for Maryland.

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. 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. There is not in reality a 100:1 difference in the sentences given to crack versus powder offenders. 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."

In recent years local prosecutors have brought hundreds 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.

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 pretrial detention, civilian witnesses are not needed for trial or sentencing hearings 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 in courts. Yet meaningful sentences are imposed, which punish the offender but also protect the community. The plea agreements often call for 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.

Let me dispel myths about controlled substance prosecutions that are propagated by those who would de-criminalize the devastation caused by illegal drugs.

1. There is a difference between the affect of crack versus powder cocaine on the user [1]

In a study entitled "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) . . . 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, at which time the user to avoid the effects of a "crash" re-uses. The Drug Enforcement Administration's (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.

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 typical user snorts between two and three lines at a time and consumes about 2 grams per month.

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 to 33:1 ratio in cost.

2. There is a 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. Studies show 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 more than twice as many crack convictions as powder.

One of the best-documented links between increased crime and cocaine abuse is the link between crack use and prostitution. 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 black crack dealers versus white powder dealers. 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. Those areas with the highest violent crime rates are the same areas with the highest crack cocaine use.

Congress should consider that many persons serving federal crack sentences have received consideration from the prosecutors in return for a guilty plea. (i.e. pleas to lesser amounts of cocaine or the option of not seeking sentence enhancements) Many criminals who could be affected by a retroactive application of a new sen-

[1] Most of the following comments are taken from reports of the United States Sentencing Commission or of the Department of Justice.

tencing scheme have already received the benefits of lower sentences and would get a second reduction. New sentencing hearings would mean that citizens from the communities that crack dealers once ruined would have to come forward to keep the sentences from being cut.

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.

Mr. SCOTT. Thank you.

TESTIMONY OF WILLIE MAYS AIKENS, KANSAS CITY, MO

Mr. AIKENS. Thank you, Chairman Scott and Members of the Subcommittee, for inviting me to testify before you today.

My name is William Aikens, and I am here to tell my story about the direct effect of crack cocaine on——

Mr. SCOTT. Mr. Aikens, can you make sure your microphone is on, or bring it a little closer to you?

Mr. AIKENS. The story I am going to tell you today began when I was drafted by the California Angels after my first year in college. I played 3 years in the minor league system before I was promoted to the major leagues. I had my first taste of the big show in 1977. I also had my first taste of powder cocaine that same year.

This is my first encounter with drugs. I was traded to the Kansas City Royals in 1979 and played in the World Series in 1980, where I hit two home runs in game one and game four of the series, a record that still stands.

But I was also using drugs on a regular basis, as were many other major league baseball players at that time. In 1983 I was convicted on misdemeanor drug charges along with three other Royals players, and we were sentenced to 3 months in prison. We were the first active major leaguers to see jail time for drugs.

After that I was traded to the Toronto Blue Jays, and my baseball career went downhill. I ended up playing in Mexico for the next 6 years, where I started back using drugs regularly. I retired from baseball in 1990 and return to Kansas City, where I became a recluse in my own home, going out mainly to buy cocaine.

I have started smoking cocaine in Mexico, so I knew all the ins and outs of preparing the drug. I went through two bank accounts of over $300,000 and didn't think twice about what I was doing. I was living a destructive lifestyle and was enjoying every bit of it.

Finally, in 1994 all of this came to a stop. One day out of nowhere a woman arrived at my house in a car, looking for someone to get her drugs. It turned out that she was an undercover officer for the Kansas City Police Department, which had started the investigation on me because of anonymous telephone calls.

Over the next several weeks, she accompanied me to my supplier's house to purchase powder cocaine, and each time she asked me to cook it into rock cocaine or crack, which I did. Four purchases of crack cocaine put me in the mandatory minimum 10-year guideline. The Kansas City police turn my case over to the Federal authorities for prosecution to make sure I got the longest sentence possible.

I took my case to trial and lost. I received a sentence of 20 years and 8 months, the highest sentence that the jurors could give me

under the sentencing guidelines. A similar amount of powder cocaine would have resulted in a sentence on drug charges of, at most, 27 months.

During my 14 years in prison, I rededicated my life to Jesus Christ. I came to realize that being taken off the streets at that time saved my life. It didn't take 14 years to change me, but it did take being incarcerated to leave that lifestyle behind.

While I was in prison, I completed three different drug rehabilitation programs, which help me realize that I have an addiction problem. I came in contact with so many other people that had the same problem I had.

I also came in contact with a lot of people that had life sentences because they were convicted of selling crack cocaine. Many of them were first-time offenders and no criminal record and had no violence in their case. My case is very sad, but theirs were sadder. These people were never going home.

After I spent 14 years of my life in prison, Congress finally allowed the Sentencing Commission to reduce the crack cocaine guidelines. I benefited from this change in law, and the courts gave me almost 5 years off my sentence. I got out of prison last June. My original release date was 2012.

Since my release from prison, I have developed a relationship with my daughters, who were small children when I went to prison. I have found a job working construction in Kansas City, and I am in the process of getting back into professional baseball.

I have been clean and sober for 15 years, and I have a strong spiritual foundation. I am writing a book. I am doing speaking engagements in and around the Kansas City area about the dangers of drugs and alcohol. God has truly blessed my life.

In closing, I would like to add that I didn't come to Washington, DC, to testify for myself. I came for all the people I left behind in prison. I made a promise to those people that if God allowed me to leave prison before them, then I would do everything in my power to help them. That is the main reason why I am sitting in this chair today.

We have so many sad cases of drug addicts being locked up, and the key is then thrown away. We have so many families that are suffering right now because a son, a father, a mother, a brother or a sister will never come home from prison.

Look at me and look at the progress that I have made in my life, because I was given another chance to live my life as a free man. I believe many more people would do the same thing, if they are given a chance.

I am praying that this will be the last time this Subcommittee will meet regarding these unfair laws. These mandatory minimum laws and the crack versus powder cocaine disparity need to be eliminated. Cocaine is cocaine, regardless of the form it comes in.

Thank you for hearing me.

[The prepared statement of Mr. Aikens follows:]

PREPARED STATEMENT OF WILLIE MAYS AIKENS

Testimony of Willie M. Aikens
Before the
Subcommittee on Crime, Terrorism, and Homeland Security
Of the
House Judiciary Committee

"Unfairness in Federal Cocaine Sentencing:
Is it Time to Crack the 100 to 1 Disparity?"

Thursday, May 21, 2009

Thank you Chairman Scott and members of the Subcommittee for inviting me to testify before you today. My name is Willie M. Aikens and I am here to tell my story about the direct effects of crack cocaine on my life. I will also testify about how the mandatory minimums and especially the sharp disparity between the penalties for crack and powder cocaine have touched me, my family, and friends I left behind in the Federal Prison System.

I grew up in Seneca, South Carolina without ever seeing or knowing who my biological father was. My stepfather was very abusive and was an alcoholic, and so was my first cousin who lived in the same house as me. They both died in 1968 from alcohol related deaths, so at an early age I saw the devastating effects of drugs and alcohol. Later on in life I didn't believe the same thing could happen to me, though it did. I didn't let any of this stop me from pursuing my goal of being an athlete. I truly believe playing sports kept me out of trouble. I went on to finish high school and I earned a football scholarship to South Carolina State College. Since baseball was my favorite sport, I asked the coaches if I could play baseball and they all agreed.

While at South Carolina State College I went on to do well in football and baseball. After my freshman year, I dropped out of college and was drafted by the California Angels in the first round. The Angels offered me a good signing bonus, so I took it. I went on to play three years in the minor league system before I was promoted to the Major Leagues. I had my first taste of the big show in 1977. I also had my first taste of powder cocaine that same year. This was my first encounter with drugs. I played for the Angels until 1979, and then I was traded to the Kansas City Royals.

My first year in Kansas City was a great one. My team had an outstanding season and we went on to play in the 1980 World Series. I also was introduced to cocaine once again and my usage increased because of my social lifestyle. I used cocaine after each game of the 1980 World Series as a member of the Kansas City Royals. We lost the series to the Philadelphia Phillies, but I became the first player in Major League history to have more than one multiple homer game. I hit two home runs in game 1 and two home runs in game 2. That had never been done before and still today no one else has done it.

During my second year in Kansas City, I was using cocaine regularly along with several other Royals players. Our supplier was a guy who was a Royals fan, and we all would go over to his house at least five days out of the week. This guy would follow us on road trips to watch us play and he would bring cocaine along too. Most of the guys on my team who used drugs knew other players on other teams that used drugs also, so we always had a way of getting cocaine. This began in 1981 and went on until 1983, when our supplier got busted with four ounces of powder cocaine. The FBI had been watching him and they put a wire tap on his telephone. Three of my teammates, Vida Blue, Willie Wilson and Jerry Martin, and I had made telephone calls to this guy. We got indicted for attempting to procure cocaine over the telephone and we eventually pled guilty to misdemeanor drug charges. At our sentencing hearing none of us thought jail time was a possibility, but the judge sentenced us to three months in prison. We were the first active Major Leaguers to serve jail time for drugs. All four of us were suspended for the entire 1984 season, though the suspensions were later reduced and we were allowed to return to our teams in May 1984. Even though I had my best season in 1983, my attitude with my manager was bad, and I have no doubt that my cocaine usage was the direct cause. After the 1983 season, I was traded to the Toronto Blue Jays and my baseball career went downhill. After playing two years in Toronto, I got released and could never find a job playing baseball again in the United States. I ended up playing in Mexico for the next six years and I started back using drugs again in 1987. While playing in Mexico two beautiful daughters were born to me.

I retired from baseball in 1990, and returned to Kansas City. For the next four years I became a recluse in my own home, going out mainly to buy cocaine. I had started smoking cocaine in Mexico, so I knew all the ins and outs of preparing the drug. I went through two bank accounts of over three-hundred thousand dollars and didn't think twice about what I was doing. I was living a destructive lifestyle and was enjoying every bit of it. Finally in 1994, all of this came to a stop.

One day out of nowhere this girl arrived at my house in a car looking for Cherry Street. I was in my yard on my way to buy some cocaine. I took her to Cherry Street, but she didn't turn off there, she kept following me. I pulled into this gas station and asked her why she didn't go to Cherry Street. She didn't give me an answer. I started rapping to her, asking her if she had a boyfriend. She said sort of, so I asked her for her telephone number. I ended up giving her my number and within the next week she called me. I asked her if she did drugs. She said she sat around on weekends and played cards with her girlfriends and got high. She told me she was looking for someone to get her drugs. I told her I knew someone who had all the drugs she wanted. That was exactly what she wanted to hear.

It turned out that she was an undercover officer for the Kansas City Police department, which had started their investigation of me because of anonymous telephone calls. The first time I sold drugs to her was in December 1993. I had just purchased 7 grams of powder cocaine to use for myself. She called me over the telephone and wanted an eight ball, which was three and a half grams. I told her to come on by. She wanted rock cocaine, so I cooked it for her. About two weeks later she called me again and wanted to buy 7 grams of cocaine. I told her over the telephone that if she wanted the drugs, we would have to go to my dealer's house to purchase them. She came and picked me up. After arriving at the dealer's house she gave me the money and I purchased 7 grams of powder cocaine. She wanted rock cocaine or crack, so we drove back to my condo and I cooked it for her again. She called me twice more and each time we went to my dealer's house and purchased powder cocaine. After this last transaction, the city police kicked in my door at my condo one week later. After four purchases of crack cocaine, she finally had 50 grams or more, which put me in the mandatory minimum ten years guidelines. The Kansas City police turned my case over to the federal authorities for prosecution to make sure I got the longest sentence possible

I took my case to trial and lost. My lawyer used the entrapment defense at my trial. Because the undercover officer knew crack cocaine carried a stiffer penalty, we wanted the jurors to see that crack was involved in my case only because the officer had asked me to cook it. She testified at my trial that she knew crack cocaine carried a harsher penalty and that was the reason why she wanted it cooked. I was convicted on four counts of distribution of crack cocaine, one count of the use of a weapon during the commission of a crime and one count of obstruction of justice. I received a sentence of 20 years and 8 months, the highest sentence that the judge could give me under the sentencing guidelines. My release date was May, 2012. I didn't believe the next fourteen years of my life would be behind prison's

walls. If I had been charged with a similar amount of powder cocaine, my sentence on the drug charges would have been at most 27 months.

During those fourteen years of incarceration I rededicated my life to Jesus Christ. In other words, I became a born again Christian. I came to realize that being taken off the streets at that time saved my life. It didn't take fourteen years to change me, but it did take being incarcerated to leave that lifestyle behind. I drank and drugged for four straight years in my condo and I had no plans of changing my lifestyle when I got caught. So, I give all honor and praise to God for saving my life. While I was in prison, I completed three different drug rehabilitation programs, which helped me realize that I had an addiction problem, which led to my criminal activity. I came to realize that the foundation of my problems was my drug usage, not the undercover officer setting me up. I came in contact with so many other people that had the same problem I had. I also came in contact with a lot of people that had life sentences because they were convicted of selling crack cocaine. Many of them were first time offenders, had no criminal record and had no violence in their case. My case was very sad, but theirs was sadder. These people were never going home.

After I had spent fourteen years of my life in prison, Congress finally allowed the Sentencing Commission to reduce the crack cocaine guidelines. The Sentencing Commission also recommended that the amended guidelines be made retroactive. In March of 2008, that became a reality. Many people sentenced for crack cocaine now became eligible for a two level reduction on the guidelines. I benefited from this change in the law, and the court gave me almost five years off my sentence. Instead of being released in 2012, I was eligible for release immediately. I got out of prison last June.

Since my release from prison I have developed a relationship with my daughters. I have found a job working construction in Kansas City and I am in the process of getting back into professional baseball. I have been clean and sober for fifteen years and I have a strong spiritual foundation. I am writing a book and I am doing speaking engagements in and around the Kansas City area about the dangers of drugs and alcohol. God has truly blessed my life.

In closing I would like to add that I didn't come to Washington, DC to testify for myself. I came to Washington, DC for all the people I left behind in prison. I made a promise to those people that if God allowed me to leave prison before them, then I would do everything in my power to help them. That is the main reason why I am sitting in this chair today. We have so many sad cases of drug addicts

being locked up and the keys being thrown away. We have so many families that are suffering right now because a son, a father, a mother, a brother and sister will never come home from prison. Look at me and look at the progress that I have made in my life because I was given another chance to live my life as a free man. I believe many more people will do the same thing if they are given a chance. These mandatory minimum laws and the crack cocaine disparity with powder cocaine need to be eliminated. Cocaine is cocaine regardless of the form it comes in. Put the power of sentencing back into the hands of the judges and let them decide what sentence is fair.

I am praying that this will be the last time the Subcommittee will meet regarding these unfair laws. The mandatory minimum laws and the crack cocaine vs powder cocaine disparity need to be changed. I could have gotten probation for 64 grams of powder cocaine, and the most I would have gotten is two years in prison. The fact that it was crack cocaine added ten years to my sentence, which is totally wrong.

Thank you for hearing me.

Mr. SCOTT. Thank you very much, Mr. Aikens. And I understand that you will have to leave shortly, so when you have to leave, we will understand.

Mr. AIKENS. Okay.

Mr. SCOTT. Mr. Bushman?

TESTIMONY OF BOB BUSHMAN, VICE PRESIDENT, NATIONAL NARCOTICS OFFICERS ASSOCIATION COALITION, WASHINGTON, DC

Mr. BUSHMAN. Thank you, Chairman Scott. I would like to thank you for inviting me to share the views of the National Narcotics Officers Coalition.

My name is Bob Bushman. I have been a law enforcement officer for 30 years. I am vice president of the NNOAC, which represents 44 state associations with more than 69,000 law enforcement officers nationwide.

I want to thank the Subcommittee for working with us on critical public safety issues, including passing both the Byrne Justice Reauthorization Second Chance Act last year.

Technically, what our NNOAC members do is we enforce laws against crime and illegal drugs legislative bodies like Congress put in place. In human terms, as we speak, there are police officers, sheriffs, deputies, state and Federal agents working to protect our communities from predators, who greatly profit by selling and distributing poisonous to our kids.

Mr. SCOTT. Mr. Bushman, there is something wrong with your mic. If you could use Mr. Aiken's mic and get it to work.

Mr. BUSHMAN. Is that better? Be glad to. Okay. How is that? All right.

These predators purposely harm not only the user, but the user's family and the communities as well, and in most instances our members are the only ones that stand in their way.

The devastation I saw it in the 1980's and 1990's as a cop working crack cases was unlike anything we have ever seen. The crack trade was responsible for dramatic increases in violent crime in our communities. Drive-by shootings, gang wars and home invasions became common.

Citizens demanded tough measures to bring the situation under control, and the current laws related to sentencing of crack offenders were a direct response to the desperate pleas of the law-abiding citizens and the families.

Yes, we continue to have a significant drug problem in this problem. We know that. But crack and cocaine use has declined in the past 25 years due in part, we believe, to tough criminal sanctions that both prevent drug use and compel cooperation of individuals to take down drug rings.

Let me be clear. We understand the sensitivities the issue of the 100 to 1 crack-powder disparity. But we need you, our Members of Congress, to understand that we law enforcement officers want you to understand what we as law enforcement officers see and experience every day during our careers and understand that we are dedicated professionals, who work hard to protect our citizens, no matter who they are, where they live, or what they believe.

We are caught in the middle on this issue. It is difficult to protect the citizens of the drug-infested, high-crime areas, who need us the most, when we cannot rid those neighborhoods of the ones who abuse them the most, the drug dealers and gangs.

We are criticized by some for not doing enough and by others for being too aggressive in our prosecution of drug violators. Tough

drug sentences are a very effective way of getting predators off the streets, the people who do the most damage to our communities.

Many violent crimes are committed by people who are under the influence of crack. Domestic violence and child abuse are common among the crack-riddled neighborhoods.

I spent money out of my own pocket to buy kids meals when we have gone into crack houses, because they haven't had enough to eat. I used to keep a bag of diapers in my car, because often we would end up changing diapers of kids, who were being neglected and living in filthy conditions in some of these homes.

We have been asked about our views on legislative proposals to reduce the crack-powder disparity. While we believe that the existing law has been a valuable law and reducing the impact of crack on communities, we also realize that it has had a negative impact on some people's perception of law enforcement.

So while we agree that it is appropriate for Congress to review the law, we also believe that Congress should consider a solution to narrow the disparity between crack and cocaine powder that includes lowering the threshold quantity for powder cocaine.

We do not believe that the best approach is to dramatically increase the threshold amount of crack that triggers the minimum penalty.

Why should we continue to maintain tougher sentences for crack down for coke powder? Smoking crack leads to a sudden, short-lived high, causing an intense immediate desire for more of it.

Just last month the director of NIDA, Dr. Nora Volkow, testified before a Senate Judiciary Committee that, "research consistently shows that the form of a drug is not the crucial variable. Rather it is the route of administration that accounts for the differences in its behavioral effects."

While science proves that smoking crack produces different effects than methods of ingesting cocaine powder, the violence associated with the crack trade is more prevalent than that associated with the powder coke trade. We have seen this happen in community after community.

Part of it has to do with the turf wars, the drug dealers and urban gangs fighting for control of an area and the customers that contains. Although much of the violence is dealer on dealer, innocent bystanders and sometimes even entire neighborhoods are often caught in the crossfire.

It is difficult to protect our communities if we can't remove those who are responsible for the crime and the violence.

Selling crack is more profitable than selling powder coke. If crack cocaine penalties are made equal to that of powder, there will be more incentive to sell crack and to make bigger profits.

While it is true that crack and powder have the same physiological effect on the brain, the negative impact on public safety due to the violence associated with the crack cocaine trade alone justifies difference in penalties.

We realize that we can't arrest our way out of the drug problem. Prevention education and treatment programs must be supported to help people avoid the criminal justice system in the first place. But those who do become users and addicts need help. And in

many cases the criminal justice system is the gateway to their recovery.

The NNOAC strongly supports drug court programs. We believe they should be strengthened and expanded to mitigate the problems caused by drugs in our communities.

But the threat of arrest, prosecution and imprisonment are important components in deterring drug use, reducing crime, and protecting our citizens from falling victim to violent and predatory criminals.

I think you again, Mr. Chairman, for the opportunity to share our views. We all want the same thing. We want to provide safe and stable neighborhoods. And we look forward to working with you on this and the other important issues. Thank you.

[The prepared statement of Mr. Bushman follows:]

PREPARED STATEMENT OF BOB BUSHMAN

Statement for the Record

Bob Bushman

Vice President, National Narcotic Officers' Associations' Coalition

Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security

Committee on the Judiciary

United States House of Representatives:

"Unfairness in Federal Cocaine Sentencing: Is it time to Crack the 100 to 1 Disparity?"

May 21, 2009

STATEMENT OF BOB BUSHMAN
VICE PRESIDENT, NATIONAL NARCOTIC OFFICERS' ASSOCIATIONS' COALITION
(NNOAC)
HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
MAY 21, 2009

Chairman Scott and Congressman Gohmert, thank you for inviting me to share the views of the National Narcotic Officers' Associations' Coalition (NNOAC). My name is Bob Bushman and I have been a law enforcement officer in Minnesota for 30 years. I am Vice President of the NNOAC, which represents 44 state associations with more than 69,000 law enforcement officers nationwide.

The NNOAC has worked with this committee to support several critical public safety measures over the past decade, and we are pleased that many, including both the Byrne Justice Assistance Grant (JAG) Reauthorization Act and the Second Chance Act that were signed into law last year, have resulted from those collaborative efforts.

Technically, what our NNOAC members do is enforce the laws against crime and illegal drugs that legislative bodies, like Congress, put on the books.

In human terms, the people we represent are dedicated law enforcement officers. As we testify here today, many police officers, sheriff's deputies, and state and federal agents are working in neighborhoods throughout our country, protecting our communities from predators who profit greatly by selling and distributing poisons to our kids with the knowledge that these poisons will make them addicts, expose them to violence, and in some instances, even kill them. These predators purposely harm not only the user, but the user's family, and the community as well. And, in most instances, our members are the only ones that stand in their way.

I remember the devastation I saw in the 1980s and 90s as a cop working crack cases in our Twin Cities. It was unlike anything I or my partners had ever seen. The highest homicide rates most

cities have ever experienced occurred during the crack epidemic of the late 80s and early 90s. Our country experienced a painful "wake-up call" and acted decisively to get a handle on the problem. The crack trade was responsible for dramatic increases in violent crime and, consequently, it consumed police resources in many of our most urban areas. The negative impact on public safety was staggering. Drive-by shootings, gang wars and home invasions were common occurrences. Citizens – through their elected representatives and leaders – demanded tough measures to bring the situation under control. The current laws related to sentencing of crack offenders were a direct response to the desperate pleas of the law abiding citizens and their families, who became victims trapped in crime infested neighborhoods.

Drug problems have existed in our nation for a long time. Most people don't realize that the height of drug addiction in this country occurred just after the Civil War when 1 in 200 Americans were addicted to drugs. During our lifetime, drug use peaked during the late 1970's. Since the height of the crack epidemic, drug use – particularly cocaine use – has declined dramatically. I don't think we hear this enough. If the incidents of AIDS or diabetes decreased as dramatically as drug use has, someone would be getting a Nobel Prize.

Yes, we continue to have a significant drug problem in this country. But we have made a huge difference in the past 20 years, due in part, to tough criminal sanctions that both prevent drug use and compel cooperation of individuals to take down drug distribution organizations.

Let me be clear - we understand the sensitivities around the issue of the 100:1 crack-powder disparity. We often work in environments where the law and those who enforce it are not respected, whether it's because of perceived racial bias or some other reason. But we need you, our members of Congress, to understand what we as police officers, sheriff's deputies and drug enforcement agents experience and work with every single day of our careers, and to understand that we are dedicated professionals who work hard to protect our citizens, no matter who they are, where they live, or what they believe.

We are caught in the middle on this issue. Our main concern is public safety – that is what we are hired and trained to do. But it is difficult to protect the citizens, especially those in the drug-

infested, high crime areas who need us most, when we cannot rid those neighborhoods of the ones who abuse them the most – drug dealers and gangs. We are criticized by some for not doing enough, and by others for being too aggressive in our prosecution of drug violators.

I can tell you that we view tough drug sentences as a very effective way of getting predators off the streets – we are talking about the dealers and profiteers, ***not*** the addicts and low-end users. As a matter of fact, many crack dealers do not use crack – they know the dangers of the drug. Mandatory sentences punish the dealers - the people who do the most damage to our communities.

As we talk about the violence associated with the crack cocaine trade, I ask you to remember that it isn't just driven by the dealer's desire to make money or the user's need to get money to purchase crack. Many violent crimes are committed by people who are under the influence of the drug itself, and unable to act rationally. Domestic violence and child abuse are common in crack riddled neighborhoods. Many police officers and I have spent our own money to purchase food to feed hungry kids who we found living in crack houses. And, as for those who label drug use or addiction as a "victimless crime", I still haven't found anyone who can explain to me how a crack baby isn't a victim.

We have been asked, repeatedly, over the past few years about our views on legislative proposals to reduce the crack-powder disparity. While we believe that the existing law has been a valuable tool in reducing the impact of crack on communities, we realize that it has also had a negative impact on some people's perception of law enforcement. So, while we agree that it is appropriate for Congress to review the law, we also believe that Congress should consider a solution to narrow the disparity between crack and powder cocaine that includes lowering the threshold quantity for powder cocaine. We do not believe the best approach is to dramatically increase the threshold amount of crack that triggers the minimum penalty.

Why should we continue to maintain tougher sentences for crack than for cocaine powder?

- Smoking crack leads to a sudden, short-lived high, causing an intense, immediate desire for more of it. Addiction to crack is quick – and powerful. Just last month, the director

of the National Institute on Drug Abuse, Dr. Nora Volkow, testified before the Senate Judiciary Committee that "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."

- The violence associated with the crack trade and perpetrated by crack users is more prevalent than that associated with the cocaine trade; public safety is compromised. We have seen this happen in community after community. Part of it has to do with the turf wars – drug dealers and urban drug gangs fighting for control of an area and the customers it contains. Although much of the violence is dealer-on-dealer, innocent bystanders and, sometimes even entire neighborhoods, are often caught in the cross-fire. These are the citizens that we, as law enforcement officers, are sworn to protect. It's difficult to protect our communities if we can't remove those who are responsible for the crime and violence.
- Selling crack is more profitable than selling powder cocaine. If crack cocaine penalties are made equal to that of powder, there will be more incentive to sell crack and make bigger profits. While it is true that crack and powder cocaine have the same physiological effect on the brain, the negative impact on public safety, due to the violence associated with the crack cocaine trade alone, justifies a difference in penalties.

We often hear from advocates of drug decriminalization and legalization that "valuable law enforcement resources" are wasted on low-level drug offenders, and that the low thresholds for crack encourage this. I can assure you that state and local law enforcement across the country are not sitting around plotting how to go after users and addicts – we don't have the time or resources to do that. Most of our anti-drug operations in the communities are in direct response to citizens' pleas for help with problems that affect their daily lives and routines – quality of life issues. To the extent that we are dealing with low-level offenders, it is because they are committing other crimes to support their habit or because their actions, while they are under the influence of drugs, threaten the safety of the citizens in our neighborhoods.

As law enforcement professionals, we value the important roles that prevention and education programs play in helping people to avoid immersion into the criminal justice system in the first

place. The NNOAC supports, and is involved with, prevention and education programs around the country. But those who do become drug users or addicts need help and, in many cases, the criminal justice system is a gateway to their recovery. We are strong advocates of Drug Court Programs and we believe that they ought to be strengthened and expanded to mitigate the problems caused by drugs in our communities. In fact, our president, Ron Brooks, was just asked to join the board of the National Association of Drug Court Professionals.

We realize we cannot arrest our way out of the drug problem. But the threat of arrest, prosecution, and imprisonment are important components in deterring drug use, reducing crime and protecting our citizens from falling victim to violent and dangerous, predatory criminals.

I thank you again, Mr. Chairman and Congressman Gohmert for the opportunity to share our views. We look forward to working with this committee and Congress as we attempt to resolve the ongoing problems associated with drug trafficking, abuse and addiction. Just like you, we, too, hope to enhance the vitality of our communities and provide safe streets and stable neighborhoods for America's families in the years ahead.

Mr. SCOTT. Thank you.
Ms. Coleman-Davis?

TESTIMONY OF VERONICA F. COLEMAN-DAVIS, PRESIDENT AND CEO, NATIONAL INSTITUTE OF LAW AND EQUITY, MEMPHIS, TN

Ms. COLEMAN-DAVIS. Thank you, Chairman Scott and distinguished Members of this Subcommittee. Thank you for giving me the opportunity to appear before you today to share my views.

I recognize that this Committee has received substantial data and anecdotal information about the impact of the sentencing disparity between crack and powder cocaine. But not much has been said about how devastating this disparity has been on generations of children and the African-American community, many of whom now view incarceration as a normative rite of passage.

I hope that through these hearings we will begin to understand that we not only need to end the disparate sentences, but we also need to ensure some means of prevention, intervention and healing for those children, who are also victims of this disparity.

In my career I have worked with many law enforcement officers who are dedicated to protecting and serving their community. They want to do their job. And if they are measured by the numbers of arrests they make, they will make a lot of arrests.

I have witnessed drug stings that were solely focused on housing projects, where sales were to people driving up in cars from outside that community. And arresting low-level street dealers selling crack is like shooting fish in a barrel.

On the other hand, going after major sellers and users of powder cocaine often meant taking the time to develop leads in order to obtain search warrants for upscale homes and then face long, drawn-out court battles with high-paid attorneys, which made lower arrest stats.

The outcome of those law enforcement practices clearly meant that more Blacks were going to be arrested than Whites.

The joint local and Federal task forces also had the added advantage and leverage of giving the low-level dealer of choice between state and Federal prosecution, if he or she was willing to lead them to the kingpin, or if they could give us someone above them in the food chain, then they would likely receive consideration in their sentence. Most could not. And first offenders with five grams of crack were sentenced to 5 years in prison instead of a lesser sentence perhaps in the state system.

As U.S. attorney and chief law enforcement officer for over 22 counties, I worked with all of the law enforcement agencies—local, state and Federal—to ensure that our limited Federal resources were focused on the most pressing problems in our communities.

When I recognized that we were spending considerable attorney resources on street drug crimes and not the serious and major drug traffickers that were intended targets under the Federal Anti-Drug Abuse Act of 1986 and 1988, I reviewed the issues with my chief assistant United States attorney of our drug task force, focused some of our judges and our district's DEA special agent in charge, and made the decision that our office would not take five-gram crack cases that were prosecutable in state court.

We increased our minimum prosecution guidelines in crack cases to 50 grams and focused our efforts on major drug dealers, including cartel. We were also very mindful that even 50 grams was in-

significant compared to the thousands of grams that were coming across our border from Mexico.

And yes, I was challenged by one reporter of not prosecuting as many cases as my predecessors. I pointed out to him that the number of defendants on a single indictment demonstrated that we were reaching the organizations, as opposed to pursuing 10 indictments against low-level individuals.

I firmly believe that it is not the duty of a prosecutor to simply obtain convictions by the numbers, but to do justice. I was never called soft on crime, and I am the first to say that people who commit crimes should be punished for their criminal activity, but bringing criminals to the bar of justice also means treating them fairly and equally.

Therefore, I do not believe that the average citizen, given what we know today, would agree that there is equal justice in sending one person to prison for 5 years for possessing five grams of crack cocaine and another receiving the same sentence for possessing 500 grams of powder.

It is now time to correct a well-known and understood mistake in our system of justice. After more than 20 years, multiple studies and recommendations from the United States Sentencing Commission, and at least two generations of families and children torn by systemic imposition of imprisonment for having one-hundredth the amount of cocaine than their White counterparts, it is surely not only not good policy, but it is surely not only good policy, but it is good politics to correct this injustice. This is what we would say as prosecutors that truth dictate and justice demands.

Thank you for conducting these hearings and allowing me to speak to this important issue.

[The prepared statement of Ms. Coleman-Davis follows:]

PREPARED STATEMENT OF VERONICA F. COLEMAN-DAVIS

STATEMENT OF

VERONICA F. COLEMAN-DAVIS
FORMER UNITED STATES ATTORNEY
FOR THE
WESTERN DISTRICT OF TENNESSEE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

HEARING ENTITLED
"UNFAIRNESS IN FEDERAL COCAINE SENTENCING: IS IT TIME TO CRACK THE 100 TO 1 DISPARITY?"

PRESENTED
MAY 21, 2009

To Chairmen Conyers and Scott, and the distinguished members of this Subcommittee – thank you for giving me the opportunity to appear before you today to share my view on the important issue of the disparities in our federal cocaine sentencing laws.

I practiced law for over 30 years, 25 of those years in the criminal justice system. I have served as an assistant public defender, private defense attorney, assistant district attorney general, juvenile court referee judge and as United States Attorney for the Western District of Tennessee (1993-2001). In 2001 along with 12 of my former U.S. Attorney colleagues as my board of directors, I founded the National Institute for Law and Equity (NILE), a public policy institute whose mission is raising discussion and understanding of our criminal and juvenile justice systems and their impact on us as a society. Given the knowledge that we have today about crack and powder cocaine it is our belief that the current disparity in sentencing should be reduced to a 1:1 ratio. This is not only consistent with good policy, but also good politics.

I recognize that this committee has received substantial data and anecdotal information about the impact of the sentencing disparity between crack and powder cocaine. But, not much has been said about the impact on the African American community and I hope that through these hearings we will begin to understand how devastating this has been on generations of children in the African American community and that too many now view incarceration as a normative rite of passage. We not only need to end the disparate sentences but we also need to ensure some means of prevention, intervention and healing for those affected by incarcerated parents. Having said that, my remarks here today are limited to my experiences in the criminal justice system and not the juvenile justice system.

Prior to leaving the U.S. Attorney's Office, I was invited to participate in a Department of Justice National Institute of Justice think tank on "Why people don't trust the justice system?" I was the only U.S. Attorney in the session and the majority of participants were from the education and civic communities. On the subject of drug prosecutions, the think tank participants discussed the disparity in crack and powder cocaine cases as

posing a major reason for the lack of trust in the justice system within the minority community. When it was pointed out that there appeared to be two separate paradigms in drug prosecutions: a law enforcement paradigm for African Americans and other minorities and a health care paradigm for whites, a senior researcher for the group, not only agreed that our system of justice is based upon those two separate paradigms in drug prosecutions, but generally for all crimes.

It is unfortunate that it is in the minority communities where crime generally and low level sales particularly are a plague on the law abiding citizens. As a result, while residents did not like the criminal activity in their neighborhoods they were often reluctant to call upon the police because they knew that the enforcement of the laws were unfairly focused on minorities, especially when it came to cocaine. And we ask "Why don't people trust the justice system?" We all agreed that systemic distrust is unhealthy for a safe and just society.

I have worked with many law enforcement officers over the years who are dedicated to protecting and serving their communities. But, let's look at the practical side of the life of a police officer or federal agent assigned to drug task forces. They want to do their jobs and if they are measured by the numbers of arrests they make, they will make a lot of arrests. There are strong incentives for cops to make large numbers of arrests to demonstrate that they are doing what the citizenry demands, knowing that these efforts will do little or nothing to stop drug trafficking.

I have witnessed drug stings that were solely focused on housing projects where sales were to people driving up in cars from outside of that community. And, arresting low level street dealers selling crack is like shooting fish in a barrel. On the other hand, going after major sellers and users of powder cocaine often means taking the time to develop leads in order to obtain search warrants for upscale homes and then face long drawn out court battles with highly paid attorneys which meant lower arrest stats and questions from the citizenry about not going after the really bad guys...a euphemism for blacks... instead of those afflicted with addiction...a euphemism for whites.

The joint task forces also had the added leverage of giving the low level dealer a choice between state and federal prosecution if he/she were willing to lead them to the "kingpin". The problem with this strategy was that low level street dealers seldom knew the top dealers, so, the lowest level dealers received some of the harshest sentences. If they could give up someone above them in the food chain, then they would likely receive consideration on their sentence. Most could not and the harsh sentence in the federal system sent first offenders with 5 grams of crack to 5 years in prison instead of probation...the likely sentence in the state system for a first offender with the same quantity of drugs.

As U.S. Attorney and chief law enforcement officer for 22 counties, I worked with all of the law enforcement agencies, local, state and federal, to ensure that our limited federal resources were focused on the most pressing problems in our communities. I recognized early in my tenure, that we were spending considerable attorney resources on street drug crimes that I prosecuted as an Assistant District Attorney and not the serious and major drug traffickers that were the intended targets under the Federal Anti-Drug Abuse Act of 1986 and 1988. After reviewing the issues with the Chief Assistant United States Attorney of our drug task force, some of our judges and our district's DEA's Special Agent in Charge, I made the decision that our office would not take 5 gram crack cases that were prosecutable in state courts. We increased our minimum prosecution guidelines of crack cases to 50 grams. Notwithstanding the fact that our efforts focused on major drug dealers including cartels, even the 50 gram guideline paled in comparison to the large quantity of drugs that is shipped into our country on a daily basis.

And, yes, I was challenged by one reporter of not prosecuting as many cases as some of my predecessors. I pointed out to him the number of defendants on a single indictment demonstrated reaching the organization as opposed to pursuing ten indictments against low level individuals. As an Assistant District Attorney and as the U.S. Attorney I was known as being both tough and fair. I firmly believe that it is not the duty of a prosecutor to simply obtain convictions by the numbers, but to do justice. As U.S. Supreme Court

Justice Sutherland, in *Berger v. United States*, 295 U.S. 78, 88 (1935) said:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The pressure to obtain convictions in order to appear to be tough on crime is not doing justi may be good politics to stand before the public and parade a hundred defendants who posse 5 grams of crack cocaine and claim that their 5 year mandatory minimum sentence was goir make the community safer. But, it is not good public policy when you know that the averag defendant is poor, black, undereducated, and unskilled and will return to the community ang the obvious disparity in the prison and jails and unable to get a job no matter how much he/s wishes to earn a living by legal means.

And to add insult to injury, we no longer forgive people who have "paid their debt to societ So, what exactly do we expect them to do?

To those citizens in our communities who are unsympathetic with the fact that someone goe jail for a crime, let me be clear, I was never called soft on crime. I am the first to say that pe who commit crimes should be punished for their criminal activity. But, bringing criminals t bar of justice also means treating them fairly and equally. Therefore, I do not believe that th average citizen, given what we know today, would agree that there is equal justice in sendin person to prison for 5 years for possessing 5 grams of crack cocaine and another receiving th same sentence for possessing 500 grams of powder cocaine.

How much longer will it take to correct a by now well known and understood mistake in ou system of justice? After more than 20 years, multiple studies debunking the myths, recommendations from the United States Sentencing Commission and at least two generatio

families and children torn by the systemic imposition of imprisonment for one 100th the amo of cocaine than their white counterparts, it is surely not only good policy but also good polit correct this injustice.

Or, from a former prosecutor's perspective the elimination of this unjust disparity is what Ti dictates and Justice demands.

Thank you for conducting these hearings and allowing me to speak to this important issue.

Mr. SCOTT. Thank you.
Mr. Mauer?

TESTIMONY OF MARC MAUER, EXECUTIVE DIRECTOR OF THE SENTENCING PROJECT, WASHINGTON, DC

Mr. MAUER. Sure. Chairman Scott, I am aware I don't have life tenure. I will try to stick to the time limit and close this out.

Let me just say—you have my written testimony. You know, obviously, we are not here to debate whether drug abuse is a problem, whether it is crack cocaine or powder cocaine or other hard drugs.

We are here to talk about what is fair and what is effective in public policy, both in how to have a better impact on the problem of substance abuse and to communicate that to the public.

When we look at the effectiveness of our current policies, I don't think we have much to recommend them at the Federal level. Federal drug policies historically were supposed to go after high-level drug importers, high-level cases. When we set the threshold at five grams of possession, that clearly flies in the face of what those objectives are.

The data from the Sentencing Commission have shown us over many years that roughly 60 percent of the crack cocaine cases are in the lower levels of the drug trade. Yes, these are not necessarily all first-time cases of five grams of possession, but they are certainly not the importers, the high-level drug operators.

If we look at questions of cost effectiveness, conservatively speaking it costs about $25,000 a year to incarcerate someone in Federal prisons, so every time a judge is required to impose a mandatory 5-year sentence, that is $125,000 of taxpayer resources.

We already have many people in Federal prison with untreated drug problems. You know, if we care about resources, if we care about addressing the problem, dealing with these low-level cases in Federal prisons does not seem to be a very wise strategy.

Secondly, I think we have seen historically the crack penalties have inappropriately been premised on an exaggerated sense of violence associated with crack. Is violence associated with crack? Yes, it is. Is the crack trade same as with powder?

And if we look back 100 years, any time a new drug comes along, it is not at all unusual that turf battles erupt over that. We have an epidemic of violence, as it is sometimes called. Most of this in regard to crack took place in the late 1980's, when crack first made its appearance in many urban areas.

There was some belief at the time it was due to the drug itself. We now know, of course, these are battles over turf and young people in particular having easy access to guns, all of that coming together.

We also know that the majority of crack cases do not involve violence in terms of offenders who actually use a weapon. As you have noted, only 3 percent of the crack cases, 1 percent of the powder cases, involve actually using a weapon.

I don't know anyone who would suggest we should not prosecute people when they are engaging in violence along with a drug offense, but we have no shortage of tools available to do that through the sentencing guidelines or through additional charges brought against them.

And in effect what we have done with the crack cocaine penalties is to treat all crack offenders as if they were engaging in violence,

rather than allowing judges to determine which cases required additional penalties because of the violence associated with that. That doesn't seem like it should be a terribly difficult thing to do. That is what judges do every day.

We also see in terms of the impact of what crack cocaine laws do in terms of law enforcement and the court—as we know, the law has to be fair. It has to be perceived as fair. And I think it is reasonable to say in many communities of color, the crack cocaine laws are not perceived to be fair.

Most Americans don't appreciate, as most people in this room do, the distinction between Federal and state laws. And when there is a perception that the laws are unjust, people are not making the distinction.

And you have many leaders in law enforcement and judges and others, who will make the argument that their ability to gain cooperation from the community is harmed.

Their ability to have people convict in appropriate cases when serving on jury may be harmed because of this widespread perception of unfairness that is increasingly prevalent, so I think if we think of public safety outcomes, we need to be concerned about this.

Finally, just a word about the equalization issue. I think there is growing sentiment that the ratio of 100 to 1 is clearly inappropriate, and many people supporting the one to one approach. Just in terms of how that should be established, I don't think there is anything on the record that shows that the penalties for powder cocaine are not sufficiently serious right now, or that they should be adjusted.

We have seen no documentation of this. The Sentencing Commission has not produced any evidence of problems with this, so the question is not, should there be penalties associated with these various forms of the drug? The question is, how much punishment is sufficient, but not overly punitive, to accomplish the goals of sentencing, to accomplish the goals of public safety?

Let me just close by saying we are at a time of evolution on all these issues right now. The Supreme Court in the *Booker* and *Kimbrough* cases has clearly opened up new ways of thinking about these issues, along with the Sentencing Commission's guideline changes.

It seems to me that it is a very appropriate moment for us to move ahead to allow judges to be judges, to use discretion appropriately. I have great confidence in what they can do, and I think we will have better public safety outcomes if we move to change these policies. Thank you.

[The prepared statement of Mr. Mauer follows:]

PREPARED STATEMENT OF MARC MAUER

THE SENTENCING PROJECT
RESEARCH AND ADVOCACY FOR REFORM

Testimony of Marc Mauer
Executive Director
The Sentencing Project

Prepared for the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security

Hearing on Unfairness in Federal Cocaine Sentencing: Is it time to Crack the 100 to 1 Disparity?

May 21, 2009

Thank you for the opportunity to testify on the issue of the sentencing disparity between crack cocaine and powder cocaine. I am Marc Mauer, Executive Director of The Sentencing Project, a national non-profit organization engaged in research and advocacy on criminal and juvenile justice policy issues. In the area of drug and sentencing policy, I have published broadly, engaged with policymakers nationally, and have frequently presented testimony before Congress and state legislative bodies.

The Sentencing Project has long been engaged in research and policy advocacy regarding federal cocaine sentencing. Our organization has published a series of policy analyses on the issue, delivered testimony before the United States Sentencing Commission ("Commission"), and submitted two amicus briefs to the United States Supreme Court on issues of sentencing in crack cocaine cases. I would like to take the opportunity in this written testimony to identify the fundamental inequities that uniquely exist within the federal drug laws for crack cocaine, as well as the inefficiencies in enforcement operations that result from these laws. I urge the members of this Committee and Congress to pass legislation to restore faith and fairness to a sentencing policy that has garnered near universal condemnation for more than two decades.

PRISON POPULATION EXPANDS WITH CHANGES IN DRUG POLICY

For more than a quarter century the "war on drugs" has exerted a profound impact on the structure and scale of the criminal justice system. The changes in sentencing and enforcement for drug offenses have been a major contributing factor to the historic rise in the prison population. From a figure of about 40,000 people incarcerated in prison or jail for a drug offense in 1980, there has since been an 1100% increase to a total of 500,000 today. To place some perspective on that change, the number of people incarcerated for a drug offense is now greater than the number incarcerated for *all* offenses in 1980.

The increase in incarceration for drug offenses has been fueled by sharply escalated law enforcement targeting of drug law violations, often accompanied by enhanced penalties for such offenses. Many of the mandatory sentencing provisions adopted in both state and federal law have been focused on drug offenses. At the federal level, the most notorious of these are the penalties for crack cocaine violations, whereby low-level crack offenses are punished far more severely than powder cocaine offenses, even though the two substances are pharmacologically identical. Despite changes in federal sentencing guidelines, the mandatory provisions still in place require that anyone convicted of possessing as little as five grams of crack cocaine (the weight of two sugar packets) receive a five-year prison term for a first-time offense.

The dramatic escalation of incarceration for drug offenses has been accompanied by profound racial and ethnic disparities. African Americans comprise 13 percent of the United States' population and 14 percent of monthly illegal drug users, but represent 37 percent of persons arrested for a drug offense and 56 percent of persons in state prison for a drug conviction.

Despite the recent findings in The Sentencing Project's report, "The Changing Racial Dynamics of the War on Drugs," that between 1999 and 2005 state incarceration of African Americans for drug offenses declined 21.6 percent, perhaps due to a decline in the crack cocaine market, the same is not true for the federal system. Indeed, the number of federal prosecutions for crack offenses remains substantial, and the overall number of people in federal prison for a drug offense rose by 32.7% from 1999 to 2005. Racial disparities persist, with African Americans constituting more than 80% of the people convicted of a federal crack cocaine offense.

THE CASE OF CRACK COCAINE

In 1986 when Congress passed the Anti-Drug Abuse Act, the stated intent of the cocaine sentencing structure was to ensure mandatory sentences for major and serious traffickers – heads of drug organizations and those involved in preparing and packaging crack cocaine in "substantial street quantities." Congress calibrated the sentencing structure based on drug quantities that were believed to reflect the different roles in the drug trade, but in its effort to swiftly address rising concern over crack cocaine, the penalty structure became dramatically skewed. The rationale voiced at the time was that the smokable form of cocaine was more addictive, presented greater long-term consequences of use, and had a stronger association with violence in its distribution than the powder cocaine market. History has proven these concerns to be unfounded, yet Congress has remained silent.

Indeed, the actual differences between the two substances are far more subtle. Crack and powder cocaine share the same pharmacological roots, but crack cocaine is cooked with water and baking soda to create a smokable, rock-like substance. Crack cocaine is sold in small quantities and is a cheaper alternative to powder cocaine. However, crack and powder are both part of the same distribution continuum. Crack is, by definition, at the lower-level end of the distribution spectrum where small batches of powder cocaine are processed and sold in an inexpensive, smokable form.

The emergence of the crack cocaine market in the 1980s in a number of major urban areas was accompanied by massive media attention paid toward the drug's meteoric rise and its associated dangers. A core component of the media coverage was the thinly-veiled (and unfounded) link between the drug's use and low-income communities of color. In a matter of weeks, crack cocaine was widely believed by the American public to be a drug that was sold and used exclusively by poor African Americans. This framing of the drug in class and race-based terms provides important context when evaluating the legislative response.

The resulting federal legislation punished crack cocaine with historically punitive sanctions. Crack cocaine is the only drug in which simple possession can result in a mandatory sentence to prison. A defendant convicted with five grams of crack cocaine – between 10 and 50 doses – will receive a five-year mandatory minimum sentence. To receive the same sentence for a powder cocaine violation, a defendant would have to have been involved in an offense involving 500 grams – between 2,500 and 5,000 doses. This is commonly referred to as the "100-to-1 sentencing disparity." In order to trigger a 10-year mandatory sentence, a defendant would need to be charged with 50 grams of crack cocaine – between 100 and 500 doses – or 5,000 grams of powder cocaine – up to 50,000 doses. The quantity levels associated with the two drugs codify an equivalency of punishment for low-level crack cocaine sellers and high-level powder cocaine traffickers.

On average, crack cocaine defendants do not play a sophisticated role in the drug trade. Nearly two-thirds (61.5 percent) of crack cocaine defendants were identified as a street-level dealer, courier, lookout, or user. Among powder cocaine defendants, this proportion was 53.1 percent. Although the distribution of offender roles is similar between the two substances, the median quantity and applicable mandatory minimum are vastly different. The median quantity for a crack cocaine street-level dealer is 52 grams, which triggers a ten-year mandatory sentence. For a powder cocaine street-level dealer, the median quantity is 340 grams, which would not even expose a defendant to a five-year mandatory sentence. This disparity has led the Sentencing Commission to conclude that crack cocaine penalties "apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility." The Commission has further remarked that "[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system."

Harsher penalties for crack cocaine offenses are sometimes supported because of the perception that crack is more likely to be associated with violence than powder cocaine. However, this is not supported by the evidence and subverts the goal of

proportionality in sentencing. While there was a significant level of violence associated with crack after its introduction to urban areas in the 1980s, that violence was a function of the new drug markets and "turf battles," rather than any effect of the drug itself. Additionally, because of inappropriate assumptions about crack cocaine and violence being implicit in the statute, crack cocaine defendants are essentially sentenced for conduct in which they did not engage or face a penalty that takes into consideration the same conduct twice.

Data from the Sentencing Commission now document that a majority of both crack and powder cocaine offenders do not engage in any associated violence, such as bodily injury or threats, and any distinction between the two drugs is not sufficient to warrant additional penalties. An analysis of federal cocaine cases for 2005 demonstrates that 73% of powder cocaine offenses and 57.3% of crack cocaine offenses did not involve a weapon, and that only in a small number of cases (0.8% for powder and 2.9% for crack) were weapons used by the offender.

Violent behavior by drug offenders should be treated seriously, but the sentencing guidelines already provide sufficient opportunity for judges to penalize such conduct. By making the inappropriate assumption that a crack cocaine offense is categorically linked with violent behavior, the statutory penalty leads to one of two key errors. First, individuals who have not engaged in any associated violent conduct are subjected to a penalty structure that presumes uncommitted conduct. Second, for persons who have been charged with a concurrent violent offense, the 100:1 ratio is tantamount to a "double counting" of the charged conduct, thereby exposing defendants to disproportionately severe punishments. The federal criminal code already has a wide range of penalties and enhancements for violent conduct at the disposal of prosecutors and the circumstances of the individual case should govern their applicability.

CRACK COCAINE AND THE AFRICAN AMERICAN COMMUNITY

The impact of crack cocaine policy on the African American community has been devastating. While two-thirds of regular crack cocaine users in the United States are either white or Latino, 80 percent of persons sentenced in federal court for a crack cocaine offense are African American. Thus, African Americans disproportionately face the most severe drug penalties in the federal system.

These racial inequities have come as the result of deliberate decisions by policymakers and practitioners. When crafting mandatory minimum sentences, Congress had sought to establish generalized equivalencies in punishment across drug types by controlling for the perceived severity of the drug via the adjustment of quantity thresholds. However, in practice, sentences are frequently disproportionately severe relative to the conduct for which a person has been convicted because mandatory minimum sentences rely upon the quantity of the charged substance as a proxy for the degree of involvement of a defendant in the drug offense. Thus, the sentencing statutes function as blunt instruments of punishment that are ineffective at appropriately assessing and calibrating sentences based on the specific circumstances of the charged crime.

Since their introduction, mandatory minimum sentences have consistently been shown to have a disproportionately severe impact on African Americans. A study by the Sentencing Commission found that African Americans were 21 percent more likely to receive a mandatory minimum sentence than white defendants facing an eligible charge. A separate study by the Federal Judicial Center also concluded that African Americans faced an elevated likelihood of receiving a mandatory minimum sentence relative to whites. More recently, the Commission, in a 15-year overview of the federal sentencing system, concluded that "mandatory penalty statutes are used inconsistently" and disproportionately affect African American defendants. As a

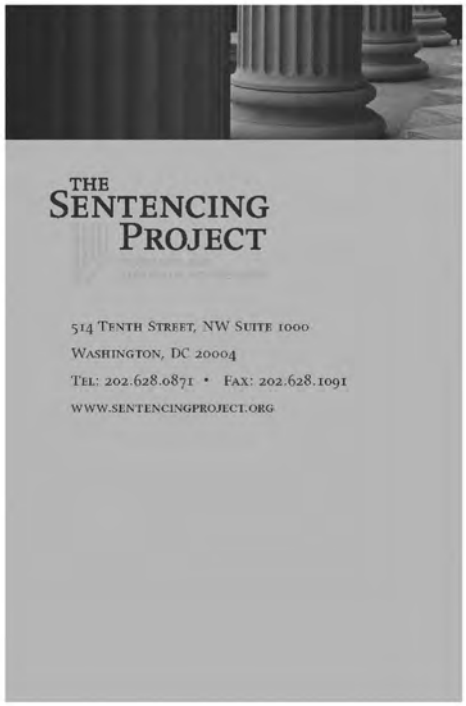
result, African American drug defendants are 20 percent more likely to be sentenced to prison than white drug defendants.

The Commission observed that federal sentencing changes in the 1980s, notably in the guise of mandatory minimum sentencing and sentencing guidelines, have had "a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system immediately prior to guidelines implementation" and that there is some question as to "whether these new policies are necessary to achieve any legitimate purpose of sentencing." In other words, the cure has proven to be worse than the disease.

CONCLUSION

Although federal crack cocaine laws were forged with the intent of targeting high-level traffickers engaged in international and interstate drug distribution, an enterprise ill-suited for state and local law enforcement for obvious jurisdictional reasons, more than two decades of practice have clearly demonstrated that the laws are excessive and ineffective. The small quantity triggers for crack cocaine mandatory sentences subject street-level sellers of crack cocaine to sentences similar to those for interstate powder cocaine dealers. And those convicted with slightly higher quantities of crack cocaine, although still considered local sellers, receive average sentences longer than international powder cocaine traffickers.

Restoring fairness to the cocaine sentencing structure requires Congress to equalize the penalties for crack and powder offenses without increasing the current mandatory sentences. Harsh mandatory drug penalties have not protected communities or stopped drug addiction. Moreover, the Commission cautioned Congress in 2007 against any reduction in the quantity trigger for the powder cocaine mandatory minimum, "as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses." Legislative efforts to address sentencing reform with incremental approaches that do not root out the fundamental unfairness of the cocaine disparity will fall short of justice. I urge this Committee and the entire Congress to support elimination of the 100 to 1 sentencing disparity and to end the harsh mandatory minimum penalties for low-level crack cocaine offenses.



Mr. SCOTT. Thank you.

And I want to thank all of our witnesses for their testimony and try to get in a few questions before we have to close the hearing.

First, Judge Hinojosa, a lot has been made about the difference in crack and powder in terms of violence, use of weapons in that kind of thing. Can the sentencing guidelines incorporate on an individualized basis whether or not a weapon was used, whether or not there was violence, whether or not you were abusing your children in the process of using drugs? Can all of that be incorporated into the sentencing guidelines for an individual case?

Judge HINOJOSA. That is definitely true, Chairman Scott. And I will say that presently the guidelines have some of these adjustments. There is an enhancement for using a weapon during a drug trafficking crime.

And we certainly have the enhancements for the use of a minor that would apply in any criminal violation, as well as the role in the offense with regards to either a mitigatory or an enhancement role.

And many of the opportunities are within the guidelines system already, and certainly they could be provided with regards to some of the other matters that you have mentioned also, sir.

Mr. SCOTT. And if in fact violence is more associated with crack and weapons are more associated with crack, then on average, if you are individualizing your punishment, to the extent that that is true they would get more serious punishment.

Judge HINOJOSA. That is true. And also the criminal history categories are also taken care within the guidelines, because if you have a higher criminal history category, obviously that will increase your suggested guideline sentence.

I will also indicate that where that does become a problem is with the safety valve with regards to any mandatory minimum policy of the Congress in that anybody who has more than one criminal history point cannot qualify for safety valve.

Mr. SCOTT. Mr. Breuer, the punishment enhancements in the code are based on the weight of the entire conspiracy, so some of the minor role in a large conspiracy would get a much more serious punishment than someone who left the conspiracy they have very little to do with, actually was dealing and left.

What can I do about the so-called girlfriend problem? We have someone with a very minor role being judged as a serious criminal by virtue of the weight of the entire conspiracy.

Mr. BREUER. Well, Mr. Chairman, what we are arguing, of course, is we now have a sentencing working group under the direction of the deputy attorney general, where we are looking at all of these issues. And the very issue you are identifying is the one that we are thinking very hard about.

And that is to really individualize as best we can through enhancements what the appropriate role is. Our goal is that those who are the most culpable, those are the most responsible are those that get the longest of the hardest punishment.

We want to be away from a construct where we are forced to give harder sentences than necessary to people who have minor roles. That is the goal, that is what we would like.

Mr. SCOTT. And one of the problems with that, obviously, is the imposition of mandatory minimums, which have been studied and found to be discriminatory—racially discriminatory—a waste of taxpayers' money, often violate common sense.

You aren't insisting that we maintain the mandatory minimums in the law while you study it, or you?

Mr. BREUER. What we are doing, Mr. Chairman, is we are considering all the issues, so we are absolutely not demanding that mandatory minimums will be part of any new construct. Frankly, Mr. Chairman, we are also hearing those who are proponents of it.

We want to have a comprehensive approach, so really at this point we are all the different points.

Mr. SCOTT. But as you consider it, you are not taking a position on what we would do legislatively to mandatory minimums.

Mr. BREUER. At this point we are not.

Mr. SCOTT. Thank you.

Mr. Bushman, you have suggested that tougher sentences may have been responsible for lower drug use. Did I understand you right? Do you have any studies that show that drug use has been lowered in those areas was more severe penalties?

Mr. BUSHMAN. Well, I can tell you that based on my personal experience, when we been able to prosecute and remove organizations and high-level dealers from the neighborhoods, the amount of violence has gone down, the numbers of shootings have gone down, the numbers of murders and the communities that were running rampant with a crack dealing have gone down.

Mr. SCOTT. Do you have any studies to show that the longer sentences, not the fact that you call people and incarcerated them, but the longer sentences were responsible for the reduction in crime?

Mr. BUSHMAN. I have seen some, but I don't have any here to cite for your.

Mr. SCOTT. Okay, if you could provide those for the record.

Mr. Mauer, do you have any studies that show that the longer sentences actually reduce crime?

Mr. MAUER. I think most of the deterrence literature in criminology suggests that any deterrent effect the system has, which it does, is more based on the certainty rather than the severity of punishment. In other words if we can increase the prospects that a given person will be apprehended, then at least some people will be deterred from committing crimes.

But merely increasing the amount of punishment we impose for people who don't expect to be caught, and unfortunately most people don't expect to be caught, has relatively little effect on adding to deterrence.

Mr. SCOTT. And, Ms. Coleman-Davis, you suggested that you recommended stopping the sweep of low-level criminals. If you arrest people who are just the street dealers, what does that do to the general amount of drugs consumed in the neighborhood?

Ms. COLEMAN-DAVIS. I wasn't suggesting that we stop sweeps or stop arresting low-level dealers. I was simply pointing out that law enforcement resources at both the state and Federal levels need to really focus on where the drug problems are all over its community, not just in the low-income communities, which are basically very easy pickings.

People have information pretty much like in Mr. Aikens' case. If they want to make the cases, they can. It just takes a little bit longer, and they have to go through more hoops to do it.

But they can make larger cases in terms of drug quantities and numbers of people using and selling, if they took the time to do it. And they do, but they just don't do it in larger numbers.

Mr. SCOTT. Is it true or not true that some street-level person being picked out and arrested and given the 5-year mandatory minimums, that that person will routinely be replaced on the street almost instantaneously?

Ms. COLEMAN-DAVIS. Absolutely. Absolutely.

Mr. SCOTT. How did we—?

Ms. COLEMAN-DAVIS. The answer is yes.

Mr. SCOTT. How did you ever—thank you—obviously, we have a vote pending that I have to make. And I want to thank all of our witnesses. Your testimony has been extremely helpful.

I think there is obviously consensus that something has to be done. There is not a consensus exactly what it should be, but we should make as much progress as we can in the near future on this issue. And I want to thank all of our witnesses.

The record will remain open for 5 legislative days for additional materials. And there being nothing more, the Committee stands adjourned.

[Whereupon, at 1:34 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
9535 Bob Casey United States Courthouse
515 Rusk Avenue
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April 25, 2005

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Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write to express the views of the Judicial Conference of the United States with regard to H.R. 1528, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005," as approved by the Subcommittee on Crime, Terrorism and Homeland Security on April 12, 2005. The first eleven sections of this legislation are similar to H.R. 4547, a bill introduced in the 108th Congress that the Judicial Conference opposed. The most significant difference between H.R. 1528 and H.R. 4547, however, is the addition of a new Section 12, "Sentencing Protections," which appears to be a response to *United States v. Booker*, 125 S. Ct. 738 (2005).

The judiciary is firmly committed to a sentencing guideline system that ensures adequate deterrence of criminal conduct and protects the public from further crimes by convicted criminals, but is also fair, workable, transparent, predictable, and flexible. We believe that an advisory guideline system can achieve all of these goals, and the sentencing data since *Booker* supports this belief.

According to the Sentencing Commission's most recent data, the number of sentences within the guideline range has remained fairly constant since *Booker* was decided and corresponds to historical sentencing practices. This is consistent with the experience of state court advisory guideline systems where most sentences fall within guideline ranges. Moreover, in the reported post-*Booker* decisions in which courts have imposed sentences outside the advisory guideline range, judges have explained why such sentences were appropriate.

Since *Booker* was decided, appellate courts have reviewed the reasonableness of district court sentences, and when they have determined that district court sentences were not reasonable, they have remanded the cases for resentencing. For example, appellate courts have concluded that a downward departure was unreasonable when it exceeded the government's downward departure recommendations based on a U.S.S.G. § 5K1.1 substantial assistance motion[1] and when the district court granted a defense motion for a substantial downward departure due to extraordinary rehabilitation.[2]

Although the sentencing guidelines are now advisory, *Booker* nevertheless requires district judges to consider the sentencing guidelines, *i.e.*, to determine the applicable guideline range and whether any departure, either up or down, is warranted under the guidelines. If a judge concludes that the guidelines as a whole do not adequately address a factor mentioned in 18 U.S.C. § 3553(a), a non-guideline sentence may be imposed. *Booker* requires appellate courts to review the reasonableness of these decisions. Sentencing data since *Booker* reflects that both district and appellate courts are accepting these responsibilities in a serious and thoughtful manner and supports the Judicial Conference's position that Congress should take no immediate legislative action in response to *Booker* but instead should allow the advisory guideline system to remain in place.

The judiciary is very concerned that the sentencing provisions of Section 12 of H.R. 1528 were included without supporting data or consultation with the judiciary. Because there is no demonstrable need to consider possible legislative responses to *Booker* at this time, and because, as explained below, Section 12 does not represent a sound alternative to the present advisory guideline system, the Judicial Conference strongly opposes this proposal.

Sentencing Guideline Range Floors Become Mandatory Minimum Sentences

Section 12(a) of H.R. 1528 would have the effect of converting the floors of the now-advisory sentencing guideline ranges into mandatory minimum sentences. Section 12(a)(1) and (3) of the bill would preclude judges from considering 36 factors concerning the history and characteristics of defendants that judges have historically regarded as appropriate in making sentencing decisions. Among the 36 excluded factors are departure grounds that the present sentencing guidelines either authorize or do not prohibit. For example, the sentencing guidelines manual states that certain factors not ordinarily relevant in determining whether a departure is warranted – such as vocational skills, mental and emotional conditions, employment record, and family ties and responsibilities – may be considered as grounds for departure in exceptional cases. If a judge unreasonably grants a downward departure based on one of these considerations, the government can appeal, and in appropriate cases, the appellate courts will reverse the departure.[3]

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[1] *United States v. Dalton*, No. 04-1361, 2005 WL 840107 (8th Cir. April 13, 2005).

[2] *United States v. Rogers*, 400 F.3d 640, 641-42 (8th Cir. 2005).

[3] See, *e.g.*, *United States v. Rogers*, 400 F.3d 640, 641-42 (8th Cir. 2005).

Section 12(a)(1) and (3) would only allow consideration of these factors as a basis for increasing a sentence from the bottom of a guideline range to a point within, or above, the range. As a practical matter, a sentence below an advisory sentencing guideline range would be available only if the government filed a substantial assistance motion, or pursuant to an Attorney General-approved early disposition (or "fast-track") program.

This proposal is similar to the earlier "topless guidelines" proposal that was formulated by Professor Frank Bowman soon after *Blakely v. Washington*, 124 S.Ct. 2531 (2004), was decided. The validity of both proposals depends on the continuing viability of *Harris v. United States*, 536 U.S. 545 (2002) (plurality opinion), which allows judicial fact-finding in applying minimum sentencing requirements. Many observers have opined that because a majority of the Supreme Court has applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to the Washington State guidelines in *Blakely* and to the federal guidelines in *Booker*, a majority of the Supreme Court would now vote to overrule *Harris*. In addition, some observers believe that converting the floors of the now-advisory sentencing guideline ranges to mandatory minimum sentences could be challenged as an unconstitutional evasion of *Blakely* and *Booker*.[4]

New Workload Requirements for Downward Departures

Judges who might identify a basis for downward departure notwithstanding the limitations imposed by Section 12(a)(3) would be subject to new, time-consuming procedural obstacles. Judges would be required to provide the parties with twenty days' written notice of the proposed below-range sentence identifying (1) specific factors supporting the sentence, (2) the reasonableness of the proposed sentence, and (3) how the sentence would avoid disparity among federal defendants with similar records or conduct. In addition, judges would be obliged to allow the parties to submit briefs and conduct an evidentiary hearing to consider the reasonableness of the proposed sentence and any unwarranted disparity that might result. These new procedures could significantly increase the judiciary's workload, requiring protracted sentencing hearings and additional written opinions explaining court findings.

Rehabilitation of Offenders

Section 12(a)(2) eliminates 18 U.S.C. § 3553(a)(2)(D), one of the cornerstone provisions of the Sentencing Reform Act, by removing any consideration of the need for a sentence "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." Prohibiting judges from considering these factors in sentencing decisions appears to be inconsistent with the interest that some in Congress have

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[4] *See Apprendi v. New Jersey*, 530 U.S. 466, 490-91 at n.16 (noting that "if such an extensive revision of the State's entire criminal code were enacted for the purpose...[of evasion], we would be required to question whether the revision was constitutional under this Court's prior decisions").

expressed in expanding reentry initiatives to provide better transition for offenders released from prison to return to the community.[5]

Mandatory Minimums

The Judicial Conference has long opposed mandatory minimum sentences.[6] Since passage of the Sentencing Reform Act, the Conference has expressed concern that mandatory minimum sentences subvert the sentencing scheme of the Sentencing Reform Act.[7]

The Sentencing Commission has adopted a similar position.[8] The Sentencing Commission has determined that mandatory minimum sentences skew the "finely calibrated smooth continuum" of the sentencing guidelines, preventing the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes.[9] This negative effect stems from the fact that mandatory minimum sentences create dramatic discrepancies in sentences between defendants who fall just below the threshold of a mandatory minimum and defendants whose criminal conduct meets the statutory criteria.

Sections 2, 4, and 10 of H.R. 1528 would expand the application of mandatory minimum sentences by creating new penalties, increasing existing penalties, expanding the scope of offenses that expose defendants to such sentences, and creating new offenses with mandatory minimum sentences. We therefore urge the Judiciary Committee to delete these provisions from the bill.

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[5] *See, e.g.*, H.R. 1704, which was introduced on April 19, 2005, by Representative Rob Portman (R-OH) along with 28 co-sponsors.

[6] *See* JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p.16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45, 56; and JCUS-MAR 93, p. 13.

[7] JCUS-MAR 90, p. 16.

[8] *See Special Report to Congress: Mandatory Minimums in the Federal Criminal Justice System*, United States Sentencing Commission, August 1991.

[9] U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991). *See also Federal Mandatory Minimum Sentencing*: Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103rd Cong., 1st Sess. 64-80 (1995) (statement of Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

Sentencing Guidelines

The Judicial Conference has also historically opposed direct congressional amendment of the sentencing guidelines because such amendments undermine the basic premise underlying the establishment of the Sentencing Commission – that an independent body of experts appointed by the President and confirmed by the Senate, operating with the benefit of the views of interested members of the public, is best suited to develop and refine such guidelines.

Sections 2(n), 3, 5, 7, and 8 of this proposed legislation would either directly amend the sentencing guidelines or impose specific directions upon the Sentencing Commission so as to be tantamount to direct amendment of the guidelines. We recommend that provisions in the bill that directly amend the guidelines, or that dictate how the Commission must amend the guidelines, be revised to direct the Sentencing Commission to study the amendment of specified guidelines.

Safety Valve

Sections 2(n)(1) and (2), 3(a), and 6 would diminish the availability of the statutory safety valve provision[10] and the corresponding sentencing guidelines.[11] Congress enacted the safety valve provision in 1994 with the support of the Judicial Conference to ameliorate some of the harshest results of mandatory minimums by permitting judges to apply the sentencing guidelines instead of the statutory minimum sentences in cases of certain first-time, non-violent drug offenders. These provisions would greatly diminish the availability of the safety valve. For example, Sections 2(n) and 6 would disqualify defendants from safety-valve eligibility if they exercised their constitutional right to a trial. Even if a defendant pleaded guilty, the bill would foreclose a district judge from considering safety valve relief unless the government certified that the defendant pleaded guilty to the most serious, readily provable offense. Such a provision would allow the government to withhold the necessary certification on the grounds that the defendant did not plead guilty "to the most serious readily provable offense," despite the fact that the government had opted to bargain away that offense.

We appreciate this opportunity to provide the views of the Judicial Conference on this significant legislation. The Committee on Criminal Law looks forward to working with the Judiciary Committee as it carefully examines whether a response to *Booker* will be needed.

The Committee, along with the Federal Judicial Center and the Sentencing Commission, is sponsoring a National Sentencing Policy Institute in Washington, D.C., on July 11-12, 2005. The purpose of the institute is to bring together over 100 judges, congressional staff, and Department of Justice officials with the members of the Committee and the Sentencing Commission (1) to discuss potential policy and practical issues arising from the *Booker* decision and (2) to provide feedback

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[10] 18 U.S.C. § 3553(f).

[11] U.S.S.G. §§ 2D1.1(b)(7) and 5C1.2.

on these issues to the Committee and the Commission. We intend to invite the leadership of both the House and Senate Judiciary Committees and their staffs to attend the institute and actively participate. We hope you will be able to join us.

If you have any questions, please contact me or have your staff contact Acting Assistant Director Dan Cunningham, Office of Legislative Affairs, Administrative Office of the United States Courts, at (202) 502-1700.

Very truly yours,

Sim Lake

cc: Honorable John Conyers, Jr.
Ranking Minority Member

Members, House Judiciary Committee

POST HEARING WRITTEN TESTIMONY

OF THE

NATIONAL AFRICAN AMERICAN DRUG POLICY COALITION, INC.

BY

SENIOR JUDGE ARTHUR L. BURNETT, SR.

NATIONAL EXECUTIVE DIRECTOR

SUBMITTED TO THE

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

IN CONNECTION WITH THE HEARING ON

THE UNFAIRNESS IN FEDERAL CRACK COCAINE SENTENCING

HELD MAY 21, 2009

It is an honor and privilege to present this statement of Written Testimony on behalf of the National African American Drug Policy Coalition, Inc. for consideration of the Subcommittee on Crime, Terrorism and Homeland Security of the Committee on the Judiciary, United States House of Representatives. The National African American Drug Policy Coalition, Inc. which commenced its organization as a coalition April 1, 2004 and was formally incorporated January 12, 2006 as a District of Columbia not-for-

profit corporation and recognized by the Internal Revenue Service as a Section 501©(3) legal entity August 30, 2006 retroactive to January 12, 2006, is now comprised of twenty-five (25) member organizations representing African American professionals in law, law enforcement, medicine in other healthcare professions and in related fields dealing with substance abuse disorders, related mental health issues and the application of the laws of the criminal and juvenile justice systems to persons so afflicted.

We conservatively estimate that these twenty-five (25) organizations represent more than 750,000 African American professionals in their respective areas of specialization. These organizations are: National Bar Association; Association of Black Psychologists; National Association of Black Social Workers, Inc.; Howard University and its School of Law; Congressional Black Caucus Foundation, Inc.; National Dental Association; National Black Caucus of State Legislators; Association of Black Sociologists; National Black Nurses Association, Inc.; National Organization of Black Law Enforcement Executives; National Association of Blacks in Criminal Justice; National Black Alcoholism & Addictions Council, Inc.; Black Administrators in Child Welfare, Inc.; Association of Black Health-System Pharmacists; National Medical Association; National Black Police Association; National Alliance of Black School Educators; National Institute for Law and Equity; National Conference of Black Political Scientists; Black Psychiatrists of America, Inc.; National Black Prosecutors Association; National Organization of African Americans in Housing; Thurgood Marshall Action Coalition (organization of African American drug court counselors, judges, lawyers and other personnel); National Historically Black Colleges and Universities Substance Abuse Consortium, Inc.; and, National Association of Health Services Executives.

The views expressed herein have been circulated to the Presidents, Executive Directors, and other Policy Leaders of each of these twenty-five (25) organizations, and this final document reflects their affirmative suggestions and/or the lack of objections to the representations made in the proposed testimony circulated to them.

Since 2005 we have exchanged with our member organizations numerous e-mails and other communications reflecting the view that the scientific studies conducted by NIDA and by other experts over the past two (2) decades do not support the view that crack cocaine is more dangerous than powder cocaine. It appears from the legislative history records that at the time in 1986 when the sentencing structure was established in the Anti-Drug Abuse Act and the amendment in 1988, when Congress established a five gram, five-year mandatory minimum sentence for simple possession of crack cocaine, the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance, there was the belief that crack cocaine was more addictive, presented greater long-term consequences of use, and had a stronger association with violence than powder cocaine. Subsequent scientific studies have established that these beliefs were unfounded and have established that pharmacologically they are the same. In our view the claim that crack cocaine produces an instant high and that its users become addicted in a much shorter time than powder cocaine users do not justify a more severe sentence for crack cocaine users. Rather, if anything, these factors suggest that they need effective medical treatment and wraparound services more quickly and more thoroughly than the powder cocaine user. Further, studies as to offenders over the past 20 years indicate that a majority of both crack and powder cocaine offenders do not engage in any associated violence, such as inflicting bodily injury or making threats, and

thus any distinction between the two drugs in this respect is not sufficient to warrant an additional penalty for crack cocaine. Where violence has been associated with crack cocaine distribution, the prosecutor can bring additional charges related to that violent conduct for enhanced sentencing potential and further, the violence appears to us to be more attributed to the profit margin and competition over drug turf areas, than to the nature of the drug itself. In this way increased sentencing penalties can be imposed for the violent conduct, including the use of a weapon, on a case-by-case basis and not on a class of offenders, the majority of whom did not engage in violence or possess a weapon during their drug crime. Thus, with unanimity we have taken the position that the sentencing structure for crack cocaine should be reduced to the existing level of the sentences authorized for powder cocaine. A consensus has developed among the leaders of our organizations that this change is necessary to return fairness and equity to the sentencing scheme in the federal criminal justice system by reducing crack cocaine sentences to the present level for powder cocaine sentences. We note that most States do not make distinctions between crack and powder cocaine for sentencing purposes.

We are strongly opposed to raising the sentences for powder cocaine in the effort to equalize the sentencing structure. Further, many of the leaders of our member organizations have expressed the view that the drug law sentences are too long in duration. Excessive sentences are inconsistent with our position that drug addiction is a disease, and that crimes committed as a result of a compulsion or craving for drugs, should not be punished by incarceration, but rather the individual should be treated with a public health approach and medical processes, including corrective wraparound services each such individual may need.

Many of the leaders of our organizations believe that African American communities are over-policed. Some research indicates that law enforcement activities are concentrated in certain African American communities based on an assumption that poverty and joblessness equals criminal activity, and especially drug trafficking. While the motives of law enforcement personnel may not be explicitly racial in targeting these low-income and high unemployment areas, it is obvious that such an enforcement strategy has resulted in discriminatory impact with a far greater proportion of African Americans being arrested, convicted and imprisoned. Even though the national surveys done by the federal government indicate that Caucasians in substantial numbers almost proportional to their numbers in society also use crack cocaine and powder cocaine, Caucasians avoid arrests because they possess the resources to be more discreet and law enforcement personnel do not deploy in their neighborhoods to the same degree as in impoverished areas in our inner cities. Reputable national surveys indicate that Caucasians abuse crack cocaine in proportion to their numbers in society, but are able to avoid arrest because their use of this illegal substance is less public and law enforcement scrutiny in majority white communities is far less intense. Thus while the explicit purpose of law enforcement officials may not be to discriminate racially and arrest more African Americans than Caucasian persons, the history of the last two decades clearly indicates this result.

There is a general consensus among the leaders of our twenty-five (25) organizations that there are several categories of individuals for whom the existing sentencing structure operates unduly harshly. The first category concerns individuals who are convicted on a theory of aiding and abetting and thus their role in the narcotics

transaction may have been very minor. Yet, under mandatory sentencing law, they get the same sentence as the principal and leader in the transaction. The second category is the female friend or live-in lover who aids and abets in a transaction under duress or coercion as a victim of domestic violence and merely to keep a roof over her head and the child or children she may have by the drug pusher She may acquiesce and participate in a transaction just to avoid being battered. Third, many youth are coerced or forced to join a gang for survival. To avoid being beaten up and robbed in the neighborhood in which they live, they participate in drug transactions. They "go along to get along" and to avoid being victimized themselves. In a sense, they are unwilling participants in the drug transaction, trapped by their economic and living circumstances. As a judge, I have repeatedly had cases of individuals falling into each of these categories where a far lesser sentence or even probation would have been appropriate, tailored to the history of the individual, but because a mandatory sentence applied, I had no discretion as to the sentence to be imposed. Furthermore, as a judge I have had defendants plead guilty to lesser offenses even though they claimed that they acted under duress or coercion, because otherwise the prosecutor would go to trial on all the counts in the indictment involving more serious charges, including mandatory sentencing charges, and if a jury rejected the coercion or duress defense, the defendant would be facing a far longer sentence in prison.

The leaders of our organizations have with almost unanimity expressed the view that the federal law enforcement resources should focus on the kingpins and the major distributors of drugs, and that they should leave the user of drugs, and those selling drugs at the street level merely to get their own supply, to State authorities either for treatment

under the States' welfare powers or criminal prosecution under State laws. They have expressed the view that Federalism should return to this area of law enforcement. They have expressed the strong view that the Federal government should restrict its role in drug law enforcement to those cases involving drugs entering the United States, drugs crossing State lines in substantial quantities, and major drug distribution networks and conspiracies. Indeed, many of our leaders have espoused the view that the harsh sentences should be reserved for these individuals who prey on the weaknesses of addicts, who in essence become their victims.

Regarding the issue of returning complete discretion in sentencing to federal judges and the disparity in sentencing which could result, our leaders are of the view that this problem could be resolved by an advisory guidelines approach, and where there is a deviation from a sentence in the guidelines range, by providing for appellate review on appeal either by the prosecutor or the defendant where the sentence appears to be arbitrary and capricious or can not be rationally justified. Using an abuse of discretion standard, with advisory guidelines, we are of the view that uniformity of sentencing can be achieved as a general matter with variations based on judicial discretion in individual cases where the facts would clearly justify a departure from a sentence within the range of the advisory sentencing structure for a particular offense. In that way we could avoid geographic variations in sentences, or greatly disparate sentences based on ideology of individual judges. Under such a sentencing scheme, we submit that all requirements for a mandatory minimum sentences for drug offenses should be repealed, and it should be left to judges to fashion the appropriate sentence based on the facts of the particular case and the history of the individual offender. Judges take an oath to uphold the Constitution

just as legislators and should be trusted to perform their duties with equal fidelity to the requirements of the Constitution and to the core principles of justice in a criminal case. We will defer to another day a more extended discussion of the need for mandatory minimum sentences in our criminal justice system.

Should there be a concern that such a change in the law would result in far more federal probation cases of drug offenders and could increase the threat to public safety, we suggest that the law could explicitly authorize Probation Review proceedings before United States Magistrate Judges patterned after a drug court approach, in which a Magistrate Judge could hold periodic review hearings even when there has been no probation violation. In this way, a judicial officer could monitor a defendant as to drug usage, arrests, job employment and stability in the community. Well managed drug court programs have demonstrated that they can reduce recidivism substantially and at far less cost to government than waiting for a probation violation, revoking probation and re-incarcerating an offender for a period of time.

CONCLUSION

Of the pending Bills, we strongly support the approach of H.R. 265, introduced by Congresswoman Sheila Jackson Lee as the major first step required to eliminate the unfairness and inequities in the sentencing structure for crack cocaine verses powder cocaine.

We thank the Subcommittee for the opportunity to submit these views for its consideration as it proceeds to deal with the several Bills before it. We hope that the views expressed herein will be of benefit to all the Members of Congress in giving

reflective and thoughtful consideration to the several Bills pending before the Congress to correct the inequities and unfairness which exist in the current law with respect to crack cocaine verses powder cocaine.

Respectfully Submitted,

Arthur L. Burnett, Sr.
National Executive Director

Dated: June 4, 2009

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
312 N. SPRING STREET
LOS ANGELES, CALIFORNIA 90012

CHAMBERS OF
J. SPENCER LETTS
JUDGE

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The Honorable Robert Scott
Chairman of the House Judiciary Subcommittee on
Crime, Terrorism and Homeland Security
1201 Longworth House Office Building
Washington DC, 20515

June 5, 2009

Re: The May 21, 2009 Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity Hearing

Dear Chairman Scott:

I heartily commend your efforts to address the disparity created by our federal sentencing laws. The Unfairness in Federal Cocaine Sentencing Hearing in the House Judiciary Subcommittee for Crime, Terrorism and Homeland Security was much needed and very productive. It is a great start toward curing a larger systemic problem that has created wholesale injustice and unwarranted disparity in sentencing for more than 20 years and has required me to impose countless sentences that I have found not only unreasonable but also unconstitutional. I do not think this is what Congress intended when it passed the drug sentencing statutes, the Sentencing Reform Act of 1984 ("SRA") and the subsequent Sentencing Guidelines.

Congress passed the drug sentencing statutes, such as 21 U.S.C. § 841, partially to limit judicial discretion, which was erroneously blamed for creating an unwarranted disparity in federal sentencing laws. But these statutes, as construed expansively by the United States Attorney's Office ("USAO") and the courts over the years, have not narrowed the scope of judicial discretion. Rather, they have eliminated judicial discretion altogether. Ironically, this total elimination has created the exact same problem that the sentencing reforms sought to cure in the 1980s – an "unwarranted" disparity in federal sentencing. Here, it is an appalling sentencing disparity between powder and crack cocaine offenders as many Congressional representatives, law enforcement officials, judges and family members agree.

Most of the bills introduced in this Congressional session propose amending statutes such as 21 U.S.C. § 841 and 21 U.S.C. § 960 to create a one-to-one ratio between the amount of powder cocaine and the amount of crack cocaine that triggers the mandatory minimum sentencing. Currently,

the statutes require 100 times the amount of powder cocaine compared with crack cocaine to trigger the mandatory minimum. Consequently, courts sentence many more low-level offenders and casual users of crack rather than powder cocaine.

This creates problems with law enforcement, according to Miami Police Department Chief John F. Timoney. At a Senate hearing addressing this disparity in April, Chief Timoney explained that if he arrests an individual carrying five grams of crack, he figures the individual is a "low-level street corner drug dealer." *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity*, 111th Cong. (April 29, 2009) (written testimony submitted by John F. Timoney, Chief of Police for the Miami Police Department). But if the individual is carrying 500 grams of powder cocaine, he figures the individual is "a serious trafficker." Id. The results of this sentencing disparity, according to Chief Timoney, is "un-American", "intolerable", and, frankly an "unmitigated disaster" that "defies logic from a law enforcement perspective." Id. (oral testimony). "The notion that both of these guys are equal and deserve the same sentences is ludicrous." Id.

Testimony aside, the current quantitative difference between powder and crack cocaine is inconsistent with the Anti-Drug Abuse Act of 1986's "goal of punishing major drug traffickers more severely than low-level dealers." Kimbrough v. United States, 128 S. Ct. 558, 568 (2007) (citing the United States Sentencing Commission's findings that the disparity was unwarranted). Ultimately, the one-to-one proposed change is crucial to repair the unequal sentencing laws. Yet the change must clearly increase the amount of crack required to equal that of powder cocaine rather than the opposite (dropping the amount of powder cocaine to equal the amount of crack cocaine). If the amount of cocaine is lowered, the statutes will continue to target low-level drug dealers and casual users rather than the high-level drug traffickers and "king pins" that these statutes originally sought to prosecute as Chief Timoney noted.

To adequately differentiate between drug king pin and low level mule, sentencing judges need the kinds of analysis made possible by judicial discretion but foreclosed by legal decisionmaking as required by the new reform laws. Yet, throughout the past twenty years, this discretion has been eliminated. Federal prosecutors and courts have consistently construed the statutes targeting crack offenders to apply to (1) casual users and to (2) anyone involved in any way in low level street transactions. This is done, in part, by the expansive interpretation of the word distribution. The drug king pins' chain of distribution stops when much smaller quantities of drugs arrive in local communities. At this moment, a new chain of distribution for resale begins. This new chain of distribution is inherently local because it necessarily involves local patterns of law, law enforcement and criminal activity, all acting within the factual confines of the crime and the city and state where the crime occurred. Similarly, "[e]ach criminal sentencing is ultimately highly 'local', a result of the strategic decisions of the prosecutor, the defense attorney, and the judge – all acting within the factual confines of the case at hand as well as the larger norms and practices of the judge's courtroom, of the federal district, and the relevant circuit." Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1425 (May 2008). But, under the precedent set by crack sentencing

case law, judges are required to superimpose federal drug law on local activity and sentence low-level offenders to five or ten years regardless of the distribution chain, the totality of circumstances, or the factors required for sentencing as set forth by 18 U.S.C. § 3553(a).

For example, 21 U.S.C. § 841 forced me to apply the ten-year mandatory minimum sentence to a defendant, a 27 year-old African American man, who simply put a federal express package in the mail. See United States v. Patillo, 817 F. Supp. 839 (C.D. Cal. 1993). While Patillo admitted in his plea agreement that he knew the package contained illegal substances because he was paid $500 to mail it, he steadfastly denied (and I held) that he did not have prior knowledge of either the type or quantity of the drug contained in the envelope (i.e., 681 grams of crack), which is what triggered the mandatory minimum sentence. Id. at 840. In review of the circumstances, I found that Patillo had never been previously involved in criminal activity, had a college education, and a steady job until he was incarcerated. Id. Moreover, at the time of the offense, he was experiencing a short break in his employment and was subject to "extraordinary financial pressures, due to an accumulation of debt for student loans, credit cards, phone bills and rent." Id. Despite these circumstances, I still had to apply the mandatory minimum sentence as required by statute. This is not justice.

Moreover, the harsher penalties for crack offenders are not succeeding in deterring drug crimes nor cleaning up our country's problems with drugs. They never will. I believe that, in every country where it has been attempted, eliminating the middleman between drug seller and buyer has proven futile if it proves impossible to eliminate the supply of as well as the demand for drugs. With the plethora of reports and testimony submitted to Congress throughout the past twenty years, Congress should be well aware that mandatory minimums triggered by the crack sentencing disparity laws force many individuals, mostly African Americans and Hispanics, to serve as prisoners working for decades even though they committed a crime of vice oftentimes with little to no culpability. Let's not repeat history and find ourselves facing a new form of slavery.

The above proposed change is crucial to help courts begin to correct bad precedent with regards to federal drug sentencing laws. Congress is not really to blame more than any other branch of government for this problem but it appears Congress may be the only branch of government that can take the first step.

If you have any questions or need any information, please call me at (213) 894-2600 or email me at Spencer_Letts@cacd.uscourts.gov. Thank you for your consideration and, again, your efforts to address this problem or, as Chief Timoney so accurately put it, this unmitigated disaster.

Sincerely,

J. Spencer Letts
United States District Court Judge for the Central District of California

STATEMENT OF

THOMAS M. SUSMAN

submitted on behalf of the

AMERICAN BAR ASSOCIATION

to the

SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES HOUSE OF REPRESENTATIVES

for the hearing on

"Unfairness in Federal Cocaine Sentencing: Is It Time to Crack 100:1 Disparity?"

May 21, 2009

Chairman Scott, Ranking Member Gohmert and Members of the Subcommittee:

My name is Thomas M. Susman, and I am pleased to submit this statement to the Subcommittee in my capacity as Director of Governmental Affairs of the American Bar Association (ABA).

The crack-powder disparity is simply wrong, and it is now time to eliminate it. It has been more than a decade since the ABA 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 toward 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 worldwide, including a broad cross-section of prosecuting attorneys and criminal defense counsel, judges and law students. The ABA continuously works to improve the American system of justice and to advance the rule of law throughout the world. I am pleased to present 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 result in crack and powder cocaine offenses being treated similarly. The Sentencing Commission also proposed taking 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 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;
- Repealing the mandatory minimum penalty for simple possession of crack cocaine; and
- Rejecting 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 have not yet been addressed. Recognizing the enduring unfairness of current policy, the Sentencing Commission returned to the issue more recently and 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 amendment "only as a partial remedy" that 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 initially imposed by 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 1980s 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 have revealed that these 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 expeditiously to correct the gross unfairness that has been the legacy of the 100-to-1 ratio. Enactment by this Congress of legislation to end unjustifiable racial disparity would restore fundamental fairness in federal drug sentencing. Its enactment is also essential to refocus federal policy away from local, low-level crime toward major drug traffickers.

Moreover, the U.S. Sentencing Commission concluded 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." Approximately 62% of federal crack cocaine convictions involved low-level drug activity, such as simple possession and street-level sales of user-level drug quantities in 2006. State criminal justice systems are well equipped to handle these kinds of cases, but are unable to pursue the importers, international traffickers and "serious and major" interstate drug traffickers. Targeting drug kingpins is the domain of federal law enforcement, but federal resources have been misdirected toward low-level, neighborhood offenders.

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 nonetheless remain badly flawed so long as mandatory minimum sentences are prescribed by

statute.

At the ABA's 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 after 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 nonviolent 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 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 in February 2007, 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 believe enactment of cocaine sentencing reform will take a major step toward refocusing federal policy in the right direction, refocusing federal prosecutorial and corrections resources on "serious and major" offenders instead of the current misguided and expensive prosecution and imprisonment of offenders who are users or who sell user quantities of crack under current law.

Several bills have been introduced in the House of Representatives this session that would eliminate the crack-powder disparity. We strongly oppose one of these bills, H.R. 18, introduced by Representative Roscoe Bartlett (R-MD), that would equalize quantity threshold amounts that trigger 5- and 10-year mandatory minimum sentences at the current level for crack offenses, thereby focusing even greater federal law enforcement efforts on low-level offenders.

We urge the members of the Subcommittee to consider supporting one or more of the four other pending crack sentencing reform bills. H.R. 265, introduced by Representative Sheila Jackson Lee (D-TX), and H.R. 2178, introduced by Representative Charles Rangel (D-NY), would equalize the quantity thresholds for 5- and 10-year mandatory minimum sentences at the current level for powder offenses (500 and 5,000 grams respectively), and repeal the current federal mandatory minimum for simple possession of crack cocaine. H.R. 1459, introduced by Representative Bobby Scott (D-VA), would repeal federal mandatory minimum sentences for all cocaine offenses and provide for broader discretion by sentencing judges. H.R. 1466, introduced by Representative Maxine Waters (D-CA), would require the Attorney General's prior written approval for a federal prosecution of an offense under the Controlled Substances Act (CSA), where the offense involves the illegal distribution or possession of a controlled substance in an amount less than that specified as a minimum for an offense under CSA or, in the case of any substance containing cocaine or cocaine base, in an amount less than 500 grams.

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."

The ABA strongly supports passage by this Congress of legislation to eliminate totally the crack/powder cocaine sentencing disparity. We applaud the Subcommittee for its leadership

in holding this hearing and urge its members to support legislation in a bipartisan effort to eliminate the sentencing disparity.

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.

Committee on the Judiciary

Subcommittee on Crime, Terrorism, and Homeland Security

Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?

May 21, 2009

Testimony of Professor Charles J. Ogletree, Jr.

Executive Director

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Dear Congressman Scott:

I am often asked to testify before Congress on difficult and complicated issues about which informed people of good intentions disagree. The focus of today's hearing—whether to end the sentencing disparities between crack and powder cocaine--however, is not one of those issues.

The crack/power cocaine disparity in sentencing is outrageous. It has no basis in terms of legislative analysis, in sentencing clarity, medical diagnosis, or law enforcement strategy. What it has done over the last few decades is to incarcerate a generation of African American men, many who have been arrested, prosecuted, convicted, and sentenced for non-violent crimes and have spent many of their most vital years in prison. At the same time, the disparity has allowed the courts routinely to treat black and white offenders differently, with those who are using powder cocaine are getting minor sentences in comparison to those who use crack cocaine. It is a travesty of justice.

There remains no valid justification—none—for maintaining these disparities. The 1986 law that imposed the 100-1 quantity disparity has produced human misery of an unprecedented scale within the African American community, while utterly failing to stop the flow of dangerous drugs into communities. We have lost a generation of mostly non-violent young black men to these unnecessarily harsh and counter-productive laws. These young men are languishing in prisons supported by taxpayers when they should be building families and careers, parenting their children and contributing to their communities. Corrections budgets are hijacking federal dollars that should be spent on schools, roads, the environment, job training, substance abuse treatment and social services. Rather than protecting communities of color, these laws are decimating them.

It is not only time that we recognize that the "experiment" with the disparity in crack cocaine and powder cocaine is not sound policy and leads to incredibly disparate treatments of people based on similar conduct. It is also time that we come up with a sane, sensible, and transparent policy on sentencing drug cases that reflects an enlightened and thoughtful society. To continue to do otherwise is not only a bad reflection on all of us as a nation, but sends a message that we are either unaware or unwilling to address the tragic consequences

of a sentencing policy that has no justification that can be defended. It is time to change the policy, and to do so now, while making an emphatic statement acknowledging our mistake and correcting it as soon as possible.

No one can doubt the serious impact of drugs, particularly in urban America in the 1980's. Crack cocaine is an addictive drug and was easily accessible and highly marketed. African American legislators and many of our urban senators found themselves at their wits end trying to address the scourge of a rapidly advancing street drug. The idea of addressing the problem of crack cocaine ignored the more critical issues of preventing its distribution and treating those who were addicted to this cheap and easily available drug. At the same time, very little was done to reduce the availability of powder cocaine. The numbers tell volumes about our disparate policies.

- Crack and powder cocaine are pharmacologically identical.
- 80 percent of individuals prosecuted for crack cocaine are African American, although 2/3 of crack users are White or Hispanic. Essentially, African Americans are being prosecuted and imprisoned because they live in heavily policed areas and are too poor to use cocaine in private homes or clubs.
- 73 percent of crack defendants had only low-level involvement in drug activity. With some compassion and assistance, they could be treated for their addictions and helped to become contributing members of their communities. Not insignificantly, they would also contribute to our economy.
- Ending sentencing disparities between crack and powder cocaine has earned bi-partisan support. Among those supporting an end to the sentencing disparity include Republican Senators Orrin Hatch of Utah, and Jeff Sessions of Alabama, and Representative Asa Hutchison of Arkansas.
- The tragedy of this gross injustice is not simply wasted individual lives, but families and communities destroyed by the ripple effects of mass incarceration. As Harvard sociologist Bruce Western has written, the U.S. penal system has become "ubiquitous

in the lives of low-education African American men," and is becoming an "important feature of a uniquely American system of social inequality." [1]

- Treatment is a more effective, cheap and humane way to reduce non-violent substance abuse than incarceration.

If you visit the website of Families Against Mandatory Minimums, you can read "profiles in injustice" --story after story of individuals who have been egregiously and tragically mis-served by these ill-begotten laws. There, you can read about men and women serving 20 and 30 years in prison for growing marijuana, for selling small amounts of cocaine for brief periods of time, and for being marginally involved in their boyfriends' drug dealing. Mothers and fathers torn from their children, young men and women's futures destroyed before they were able to start, and judges distraught by the sentences Congress forced them to hand down. Listen to the words of Judge Patrick Murphy, at the sentencing of Eugenia Jennings, a 23 year old African American woman fighting a drug addiction:

> A woman in prison for over 20 years for a relatively small amount of crack cocaine. [Eugenia's life] is just a life of tragedy, abuse, sexual abuse, physical abuse, abandonment, that's about as grim a story as I've ever read. In reality what is at the bottom of our drug laws is this: When people become just too much trouble, we quit fooling with 'em and we warehouse 'em. That's how we take care of the problem…

Eugenia is now a model prisoner who has completed business and electrician courses, and a drug treatment program in prison. She has seen her three children once in seven years, and is not slated to be released for another ten years.

I urge Congress to do the right thing. You must pass a bill that achieves complete—not partial—parity between crack and powder cocaine. Tinkering around the edges of this gross injustice is not sufficient. And this does not mean making sentences for low-level powder

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[1] Bruce Western, Incarceration, Employment, and Public Policy, New Jersey Institute for Social Justice Report, April 2003

cocaine stiffer. It means eliminating mandatory minimum sentences for the use of these drugs and legislating more sane and just drug laws and policies.

I close by reminding Congress that we live in exciting and challenging times, when America is, in effect, reinventing itself yet again. This past election revealed a willingness, even eagerness, on the part of the American public to discard failed policies in favor of more effective and fair ones. As we chart a new course in so many other areas—international relations, health care, education, the treatment of prisoners of war, regulating of the banking and housing industries—let us rediscover the moral clarity and sense of fair play that distinguishes us as a people.

We don't need more commissions or more studies to tell us what we already know. We cannot afford to throw away one more life. Congress needs to act NOW to begin to repair the damage that has been done over the past 25 years; damage that has sapped the lives, spirits and souls of far too many African Americans and their communities. It must first admit and correct this profound injustice. Then, together, we must all set about the difficult but important task of rebuilding our communities, reuniting families, and finding ways for formerly incarcerated men and women to become contributing members of our society.

It is now time for us to recognize that our thinking on this was misplaced – if not impaired -- and that our judgments were wrong. We must find the courage and character to correct the error in a comprehensive and unquestionable manner. It will take the moral courage of this Congress, supported by the unequivocal embrace of your views by the President of the United States and the Attorney General, to address the matter in a very public way, and will allow us to join so many other progressive nations in thinking about treatment rather than punishment as our priority. I look forward to working with this Congress and the Obama administration with the goal of achieving a fair, sound, and sensible sentencing policy that will not only generate comprehensive admiration and respect throughout the nation, but will also be soundly applauded among many other nations who are looking at us to set the tone for a rational sentencing policy for the future. Thank you.

Charles J. Ogletree, Jr.

Written Testimony of Mary Price,
Vice President and General Counsel
Families Against Mandatory Minimums

On
"Unfairness in Federal Cocaine Sentencing:
Is it time to Crack the 100 to 1 Disparity?"

Submitted to the
Subcommittee on Crime, Terrorism, and Homeland Security
Of the Committee on the Judiciary
United States House of Representatives

May 21, 2009

Thank you for the opportunity to submit testimony on behalf of the board, staff and 20,000 members of Families Against Mandatory Minimums (FAMM). We commend the subcommittee for its decision to address the sentencing disparity between crack and powder cocaine. This hearing gives hope to thousands, including many of our members, who have loved ones serving harsh sentences for low-level, nonviolent drug offenses.

FAMM is a national nonprofit, nonpartisan organization whose mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. FAMM works every day to ensure that sentencing is individualized, humane and no greater than necessary to impose just punishment, secure public safety and support successful rehabilitation and reentry. In our view, punishment should fit the individual and the crime. Too frequently it does not.

We recognize that two decades ago little was known about crack cocaine. There was a perception that this derivative form of cocaine was more dangerous than the powder form, would significantly threaten public and prenatal health, and would greatly increase drug-related violence. Those assumptions drove Congress to adopt a particularly harsh sentencing structure for crack cocaine when it established new, non-parolable mandatory minimums for a host of drug offenses in the Anti-Drug Abuse Act of 1986. That Act imposed the so-called "100 to 1 sentencing ratio," which dictates that crack defendants receive sentences identical to powder defendants convicted with 100 times as much drugs.

While that kind of dramatic response might have been understandable given the prevailing beliefs about the elevated threat posed by crack cocaine, we now know, 23 years later -- indeed we have known for some time -- that those beliefs are not supported by research. Crack and powder cocaine produce the same psychological and psychotropic effects; crack users are not inherently predisposed to violence; and the effects of prenatal exposure to crack are significantly less harmful than once believed – and less harmful than prenatal exposure to alcohol or tobacco.[1]

Not only is the crack penalty unwarranted and insupportable, it has also caused great harm. It punishes small-time users and dealers as or even more harshly than international drug kingpins. Moreover, it does so in a way that is discriminatory. The majority of offenders arrested, convicted, and sentenced on crack cocaine charges are African American. Intentionally or not, the harsher penalties for crack fall upon one racial group. . The end result is not drug-free cities, but devastated families and broken, suspicious communities.

The crack cocaine penalty structure is the most extreme example of a sentencing system gone seriously astray. Mandatory minimums impose one-size-fits-all sentences regardless of the culpability of the defendant. Specifically, drug mandatory minimums take into account only one variable – quantity – in determining sentence length. But drug quantity is a poor proxy for culpability.

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[1] U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (2007) at 70 ("*2007 Report*").

The federal judiciary, as well as criminal justice practitioners and experts, has long decried mandatory minimums in general and those for crack cocaine especially.[2] They point out that the current system requires courts to sentence defendants with differing levels of culpability to identical prison terms. The U.S. Sentencing Commission has for over a decade called upon Congress to address current quantity-based disparities. The Commission has noted that the current law overstates the relative harmfulness of crack cocaine compared to powder cocaine; is applied most often to lower-level offenders; overstates the seriousness of most crack cocaine offenses; fails to provide adequate proportionality; and impacts minority communities most heavily.[3]

FAMM's case files are filled with tragic but sadly predictable stories of low-level offenders sentenced to kingpin-size sentences. The 100:1 ratio can result in sentences for low-level crack offenders that exceed sentences for higher-level powder cocaine offenders. For example, "street level" crack cocaine defendants serve 97-month sentences on average, compared to 78 months for powder cocaine wholesalers.[4] Moreover, while the five- and ten-year mandatory minimums were intended by Congress to target the most serious and high-level drug traffickers,[5] in 2005 73.4 percent of street level dealers –the most prevalent type of crack cocaine offender --were subject to five and ten-year mandatory minimum sentences.[6] In 2008, nearly 80 percent of all crack cocaine offenders were convicted under statutes carrying mandatory minimums.[7]

Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration.[8]

Furthermore, unlike all other controlled substances, crack cocaine carries a mandatory minimum of five years for a first offense of simple possession of five grams of crack, about the weight of two sugar packets. That is five times longer than the maximum imposable sentence for first-time simple possession of a similar or greater quantity of any other drug.[9]

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[2] American Bar Association, *Report of the ABA Justice Kennedy Commission* (June 23, 2004); Judicial Conference of the United States, *Mandatory Minimum Terms Result In Harsh Sentencing* (June 26, 2007); Federal Public and Community Defenders, *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 2007); National Association of Criminal Defense Lawyers, *Written Statement of Carmen D. Hernandez on behalf of the National Association of Criminal Defense Lawyers before the U.S. Sentencing Commission RE: Cocaine and Federal Sentencing Policy* (November 2006).

[3] 2007 *Report* at 8.

[4] *Id.* at 30, figure 2-14.

[5] Ten-year mandatory minimum sentences were intended to target "the kingpins – the masterminds" and five year sentences targeted serious traffickers. *See* U.S. Sentencing Commission, *Report to the Congress, Cocaine and Federal Sentencing Policy*, May 2002 at 6-7 ("2002 *Report*").

[6] 2007 *Report* at 21, figure 2-6 and 29, figure 2-13.

[7] U.S. Sentencing Commission, *2008 Sourcebook of Federal Sentencing Statistics*, at Table 43 (2008) ("2008 *Sourcebook*").

[8] U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (1995).

[9] *See* 21 U.S.C. § 844(a) (2008) (permitting "a term of imprisonment of not more than 1 year" for simple possession of any drug except crack cocaine, which requires a minimum 5-year prison term).

The vast majority of prisoners serving these unconscionable sentences are black. The crack cocaine penalty structure has been widely and rightly criticized as the source of significant race-based disparity in federal sentencing.

In 2008, the average sentence length for crack cocaine was 114.5 months (fully 23 months longer than that for powder cocaine),[10] and 80 percent of all crack offenders were black.[11] Crack cocaine sentences were also, on average, 39 months longer than heroin sentences, 15 months longer than methamphetamine sentences, and 78 months longer than marijuana offenses.[12] Crack cocaine's mandatory minimum penalties appear largely responsible for ensuring that African American drug offenders serve much longer sentences than White drug offenders.[13] It is no surprise that this disparity leads to a deleterious perception of race-based unfairness in our criminal justice system.

The Sentencing Commission has found that "[t]his one sentencing rule contributes more to the differences in average sentences between African-American and White offenders" than any other factor and revising it will "better reduce the gap than any other single policy change." Doing so, the Commission points out, "would dramatically improve the fairness of the federal sentencing system."[14]

The long sentences for crack cocaine for low-level dealers, despite their irrational premises and disproportionate racial impact, were considered necessary evils: something we put up with in order to protect our communities. Copious documentation and analysis by the Commission have proven otherwise. The Commission reports that the vast majority of crack cocaine offenders were not involved in violence. In fact, violence decreased in crack cocaine offenses from 11.6 percent in 2000 to 10.4 percent in 2005.[15] In this study, an offense was defined as "violent" if any participant in the offense made a credible threat or caused any actual physical harm to another person.[16]

Nor should we fear that our communities will be overrun with crack dealers if sentences were shortened. Drug offenders actually have one of the lowest rates of recidivism of all offenders, ranging from 16.7 percent (Criminal History Category II) to 48.1 percent (Criminal History Category V).[17] More importantly, across all criminal history categories and for all offenders, the largest proportion of "recidivating events" that count toward these rates are supervised release revocations, which can include revocations based on anything, such as failing to file a monthly report or failing to file a change of address. In fact, drug trafficking accounts for only a small fraction – as little as 4.1 percent – of recidivating events for all offenders.[18]

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[10] 2008 *Sourcebook*, at Figure J.
[11] *Id.* at Table 34.
[12] *Id.* at Figure J.
[13] *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 131-32, 141 (Nov. 2004).
[14] *Id.* at 132.
[15] 2007 *Report* at 37.
[16] *Id.*
[17] U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 32.
[18] *Id.* at 17.

Most of this information, while different than the misperceptions the sentencing policy was based on 23 years ago, is not new. It became clear to me at some point in the 110th Congress that we all agreed on the facts and that the sentencing disparity between crack cocaine and powder cocaine is patently wrong. It seemed, though, that Republicans and Democrats could not agree on a solution. I am deeply afraid that we will find ourselves in the same predicament again this year. The economic and human toll of another two or four or twenty years of deliberation is too high for the American taxpayer and for the families and the communities of those who are sentenced under the law.

If Congress were to eliminate the sentencing disparity between crack and powder cocaine, we would save a minimum of over $26 million in the first year the reforms went into effect and nearly $530 million over the next fifteen years. Reform would reduce overcrowding and free funding for more effective rehabilitation efforts.

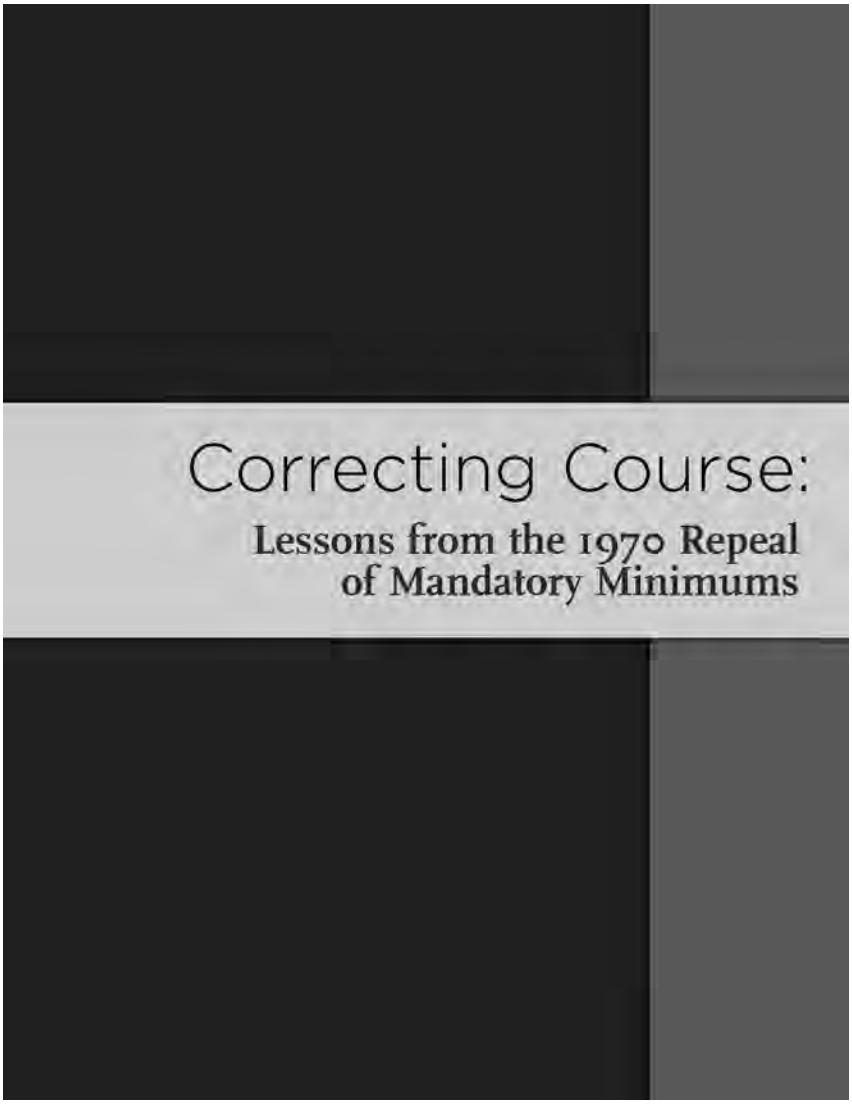
Even more than money, the impact on people serving long sentences away from their families and loved ones would be especially important. Sentences have become so inflated in the past two decades that a 10-year sentence for a nonviolent offender no longer sounds harsh. But 10 years is an extraordinarily long time to be locked away from society. It is 10 years of missed Thanksgiving dinners with family, missed birthday celebrations, missed marriages and childbirths and even missed funerals. If these sentences were appropriate, proportionate and fair, such suffering would seem warranted. But the chorus of voices and the criticisms that have been raised against them makes each individual sentencing story particularly poignant. I want to share one such story with you.

In 1992 Michael Short was sentenced for selling crack cocaine. Before then he had never spent a day in prison. He came from a good home and a good family. He had no criminal history. He was not a violent offender. He was not a gang member. But, on November 13, 1992, he was sentenced to serve nearly twenty years in federal prison. He was 21 years old.

Twenty years is the kind of sentence that drug kingpins should get, but he was no drug kingpin. His twenty year sentence was mandated because that was the mandatory minimum assigned to his sale of crack cocaine. If he had been selling powder cocaine, arrested and convicted, his sentence would have been nine years. Some might argue that nine years would be an excessive sentence; few would disagree that twenty years is unconscionable. While he was in prison, his mom died. He was unable to leave prison to attend her funeral.

Michael made a series of bad decisions. He was a small-time dealer and he broke the law. He deserved to be punished, but punishment must be both reasonable and fair. His punishment was neither.

There are so many stories like Michael's. It is time to fix the system.


Correcting Course:
Lessons from the 1970 Repeal
of Mandatory Minimums

About the Author

Molly M. Gill is the Staff Attorney and Special Projects Director for Families Against Mandatory Minimums (FAMM). Before working in sentencing reform, she served as the Gang Unit Law Clerk for the Hennepin County Attorney's Office in Minneapolis, Minnesota and later practiced corporate and construction litigation. She has a law degree from the University of Minnesota Law School and a bachelor's degree from Oral Roberts University.

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Executive Summary

The United States has the largest prison population in the world. Many of these offenders are not murderers, robbers, or rapists, but drug users, addicts, or sellers. Every year, thousands receive lengthy mandatory terms in federal prisons for these drug crimes. The mandatory sentences on the books today were designed to stop drug trafficking, but they have not. It is not the first time in American history that they have been used and failed.

In 1951, Congress established mandatory minimum prison sentences for drug crimes. Named for its sponsor, Representative Hale Boggs (D-La.), the Boggs Act imposed two-to-five year minimum sentences for first offenses, including simple possession. The Act made no distinction between drug users and drug traffickers for purposes of sentencing.

The driving force behind the Boggs Act was a mistaken belief that drug addiction was a contagious and perhaps incurable disease and that addicts should be quarantined and forced to undergo treatment. Just five years after the Boggs Act, Congress passed the Narcotics Control Act of 1956. The new law increased the Boggs Act's minimum prison sentences for drug offenses.

Far from slowing the rise in drug use among America's youth, the strict antidrug laws were followed by an explosion in drug abuse and experimentation during the 1960s. The grim statistics during that period confirmed that mandatory minimum sentencing laws were simply not working. Correctional professionals, including prison wardens and judges, expressed opposition to the mandatory sentences.

The Prettyman Commission established by President John F. Kennedy and the Katzenbach Commission created by President Lyndon B. Johnson were both created to

study ways to reduce drug use. They found that long prison sentences were not an effective deterrent to drug users, that rehabilitation should be a primary objective for the government, and that courts should have wide discretion to deal with drug offenders.

President Richard Nixon took office in 1969 determined to curtail the growing drug problem. Rather than add new arbitrary and harsh mandatory sentences, the Nixon Administration and Congress negotiated a bill that sought to address drug addiction through rehabilitation; provide better tools for law enforcement in the fight against drug trafficking and manufacturing; and provide a more balanced scheme of penalties for drug crimes. The final product, the Comprehensive Drug Abuse Prevention and Control Act of 1970, repealed mandatory minimum drug sentences except in limited and serious circumstances.

The Act was praised by both Republicans and Democrats in Congress. Then-Congressman George H.W. Bush (R-Texas) spoke in favor of the repeal because it would "result in better justice and more appropriate sentences." Supporting the repeal of drug mandatory minimums exposed members of Congress to no political jeopardy. Indeed, every senator, save one, and all but a handful of House members who voted for repeal won re-election. There is no evidence to suggest that any of the small number of defeated members lost because of their vote for repeal.

In the mid- and late- 1980s, Congress reinstated mandatory minimum laws. This time, Congress was reacting, in part, to the high-profile drug overdose of basketball star Len Bias. The new laws were enacted without any hearings, debate, or study.

Today, after 20 years of experience, it is clear that the current mandatory minimums have failed as badly as those enacted in the 1950s. The evidence leads to the following conclusions about mandatory minimum sentences:

- They have not discouraged drug use in the United States.
- They have not reduced drug trafficking.

- They have created soaring state and federal corrections costs.
- They impose substantial indirect costs on families by imprisoning spouses, parents, and breadwinners for lengthy periods.
- They are not applied evenly, disproportionately impacting minorities and resulting in vastly different sentences for equally blameworthy offenders.
- They undermine federalism by turning state-level offenses into federal crimes.
- They undermine separation of powers by usurping judicial power.

These problems have caused many former prosecutors, federal judges, and legal commentators to speak out against mandatory minimums. A report by the nonpartisan Federal Judicial Center, the education and research arm of the federal courts, concluded by agreeing with the findings of sentencing expert Michael Tonry, who said that "[a]s instruments of public policy [mandatory minimums] do little good and much harm."[1]

States are leading the reform effort with bipartisan repeals of their own mandatory sentencing policies and by turning to drug courts and other alternative solutions.

Today's Congress, as the 91st Congress did in 1970, should reform mandatory minimum sentencing. This report presents two options: excise all mandatory minimums for drug offenses found in the criminal code or expand the existing "safety valve" to allow judges to depart from the statutory sentence when that punishment would be excessive. Either solution will result in better and more cost effective criminal justice and pave the way for smarter alternatives.

Introduction

"All men make mistakes, but a good man yields when he knows his course is wrong, and he repairs the evil," Sophocles once wrote.[1] In 1970, Congress proved it had enough wise and good men and women to do something unusual – repeal a tough criminal law that it had passed 20 years earlier. By 1970, Congress had learned that the mandatory minimum prison sentences it had passed in the 1950s to combat drug trafficking crimes were a mistake. These laws failed to reduce drug trafficking or drug use, as their proponents had claimed they would.

A mandatory minimum sentence is a required minimum term of punishment (typically incarceration) that is established by Congress or a state legislature in a statute. When a mandatory minimum applies, the judge is forced to follow it and cannot impose a sentence below the minimum term required, regardless of the unique facts and circumstances of the defendant or the offense.

In 1951, Congress adopted the Boggs Act, named for its sponsor, Representative Hale Boggs (D-La.), which imposed harsh mandatory minimum sentences on those convicted of drug crimes. Five years later, Congress added even more punitive sentences, including the death penalty for drug sales to a minor.

Over the next decade and a half, drug use soared. The tough new laws did little to deter drug trafficking and abuse, as both juvenile and adult drug usage rates exploded during the 1960s. By the end of the decade, drug use had moved out of the cities, into suburbia, and onto campuses. Seemingly convinced that mandatory minimum sentences for drug offenders were ineffective, a broad, bipartisan majority in Congress voted to repeal nearly all such sentences in 1970.

Today, federal lawmakers face the same dilemma that their predecessors in the 91st Congress faced. In the 1980s, Congress responded to the media frenzy around the crack cocaine epidemic by enacting two antidrug crime bills containing new mandatory minimum sentences. Twenty years later, the results are in: the new penalties have failed. These mandatory sentences are no more effective than the similar sanctions adopted in the 1950s. The question now is simple: Will members of Congress follow the example set by their predecessors in 1970 and eliminate mandatory minimums, or will they continue to stand by a costly failed experiment?

To better educate members of Congress and the American public about the choice at hand, this report presents the history of the Boggs Act and its repeal. It then examines the record of the mandatory minimums that were enacted in the mid-1980s and finds that they have failed for the same reasons as the mandatory sentences in the Boggs Act. The report concludes that the current Congress should follow the example of the 91st Congress in 1970, correct course, and vote once again to reform mandatory minimum sentences.

The Boggs Act: Congress Adopts Mandatory Minimums

Since the founding of this nation, Congress has responded to public concern about particular crimes by passing tough mandatory sentencing laws. For example, as early as 1790, piracy triggered a mandatory sentence of life in prison without parole. Many of these older mandatory sentences are still on the books.[1]

One noteworthy exception is the Boggs Act, which codified tough mandatory drug sentences in 1951 and was repealed in 1970. The history of these sentences and their repeal is worth revisiting because it holds valuable lessons for us today.

The Boggs Act of 1951 first codified mandatory minimum sentences for the possession or sale of narcotics.[2] Findings from the heavily-publicized hearings of the Senate Special Committee to Investigate Organized Crime in Interstate Commerce revealed a growing trend in American society – drug addiction and trafficking were increasing at alarming rates, particularly among young people.[3] Representative Hale Boggs (D-La.) observed, "We need only to recall what we have read in the papers this past week to realize that more and more younger people are falling into the clutches of unscrupulous dope peddlers."[4]

The Boggs Act attempted to curtail the use and distribution of drugs with strict minimum sentences and fines for violators. A first offense – even for simple possession without intent to distribute – carried a minimum two-to-five year prison term. A second offense carried prison terms of five-to-10 years, and a third offense carried a sentence of 10-to-15 years.[5] The Act made no distinction between drug users and drug traffickers for purposes of sentencing.

Boggs Act

Sentences for drug crimes*

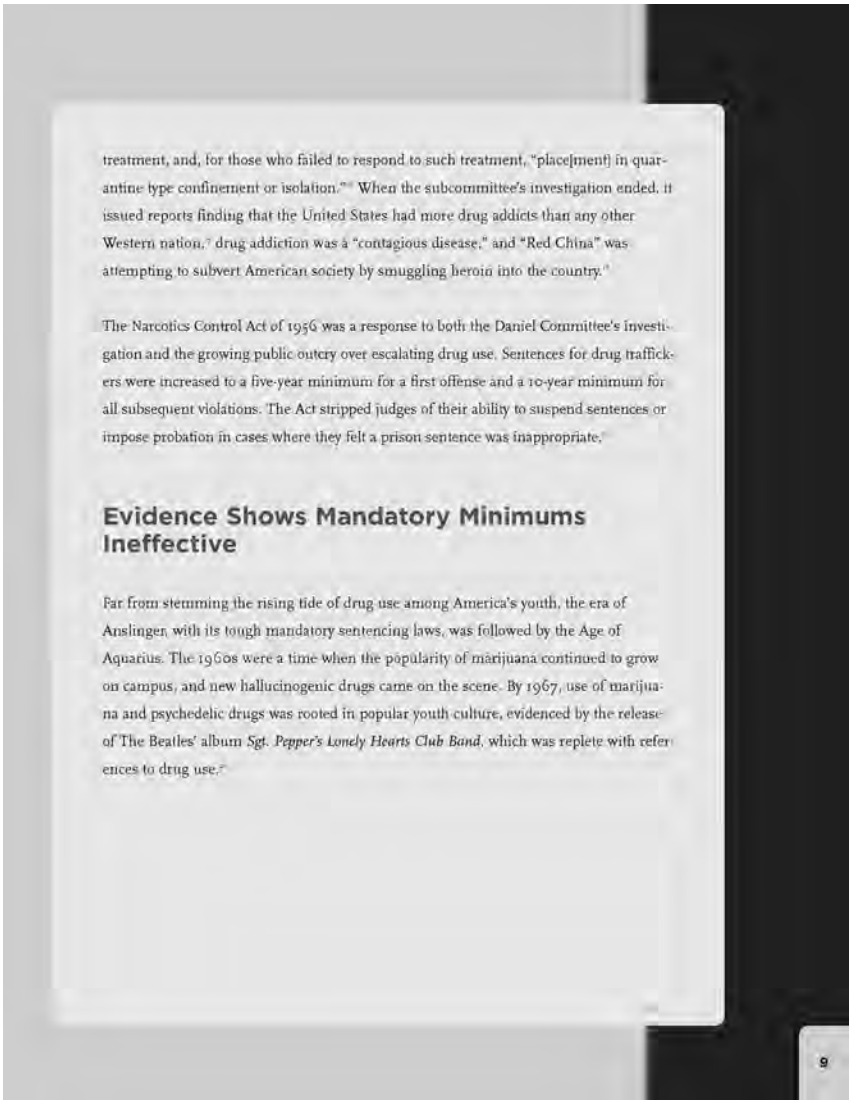
First offense	2 to 5 years
Second offense	5 to 10 years
Third offense	10 to 15 years

*The offense could include everything from simple possession to drug trafficking.

Driving this and other antidrug laws adopted during the period was Federal Bureau of Narcotics Commissioner Harry J. Anslinger.[5] Citing rising addiction and violence among juveniles, Anslinger argued that soft-hearted judges were to blame. Long prison sentences, not rehabilitation, were what young addicts needed. Anslinger described drug addicts as incurable, "spread[ing] addiction wherever they are,... contaminat[ing] other persons like persons who have smallpox."[6] Public education efforts, Anslinger said, would encourage, not deter, drug use by young people. This was one of the few points Anslinger made during his testimony that drew disagreement from the investigating committee.[7]

Anslinger's answer to the growing abuse problem was simple: Congress should pass lengthy mandatory minimum prison terms for nearly all drug crimes.[8] At a time when addiction was not well understood, Anslinger's idea proved popular, especially among members of Congress who got a chance to show their constituents that they were tough on crime. The Boggs Act passed easily.[9]

In 1955, four years after the Boggs Act became law, another Senate subcommittee, headed by Senator Price Daniel (D-Texas), launched a nationwide investigation into the traffic and sale of illegal narcotics.[10] Records of the investigation demonstrate the lack of understanding many senators had about drugs. When asked by a member of the subcommittee, Anslinger confirmed the "fact" that marijuana users "ha[ve] been responsible for many of our most sadistic, terrible crimes in this Nation, such as sex slayings, sadistic slayings, and matters of that kind."[11] The subcommittee's report concluded that "[d]rug addiction is contagious. Addicts, who are not hospitalized or confined, spread the habit with cancerous rapidity to their families and associates." The solution was compulsory



treatment, and, for those who failed to respond to such treatment, "place[ment] in quarantine type confinement or isolation."[5] When the subcommittee's investigation ended, it issued reports finding that the United States had more drug addicts than any other Western nation,[6] drug addiction was a "contagious disease," and "Red China" was attempting to subvert American society by smuggling heroin into the country.[7]

The Narcotics Control Act of 1956 was a response to both the Daniel Committee's investigation and the growing public outcry over escalating drug use. Sentences for drug traffickers were increased to a five-year minimum for a first offense and a 10-year minimum for all subsequent violations. The Act stripped judges of their ability to suspend sentences or impose probation in cases where they felt a prison sentence was inappropriate.[8]

Evidence Shows Mandatory Minimums Ineffective

Far from stemming the rising tide of drug use among America's youth, the era of Anslinger, with its tough mandatory sentencing laws, was followed by the Age of Aquarius. The 1960s were a time when the popularity of marijuana continued to grow on campus, and new hallucinogenic drugs came on the scene. By 1967, use of marijuana and psychedelic drugs was rooted in popular youth culture, evidenced by the release of The Beatles' album *Sgt. Pepper's Lonely Hearts Club Band*, which was replete with references to drug use.[9]

When President Richard Nixon took office in 1969, he decried the fact that the overall number of drug addicts in America was in the "hundreds of thousands," and the number of college students using drugs was in the millions.[11] He also said what many Americans saw firsthand: drug use had expanded beyond urban cities and into middle and upper class neighborhoods.[12]

Instead of stimulating public pressure for even stronger punishment for drug crimes, the grim statistics convinced experts that harsh mandatory minimum sentences were simply not working. Correctional professionals agreed. In a poll conducted by the Senate Judiciary Subcommittee on Juvenile Delinquency, 92 percent of federal prison wardens who responded were opposed to the mandatory minimum sentence provisions, and 97 percent were opposed to the prohibition of probation or parole. Of the responding probation officers, 83 percent were opposed to mandatory minimums, and 86 percent were opposed to the bar against probation or parole. Of the federal judges who responded, 73 percent were opposed to mandatory minimums, and 86 percent were opposed to the absence of probation or parole.[13]

Federal policymakers began to search for a Plan B. In 1963, President John F. Kennedy convened the President's Advisory Commission on Narcotics and Drug Abuse to address the public outcry over America's illegal drug addiction problem. The Prettyman Commission, as it was known, studied drug use and the laws affecting those who abused drugs.

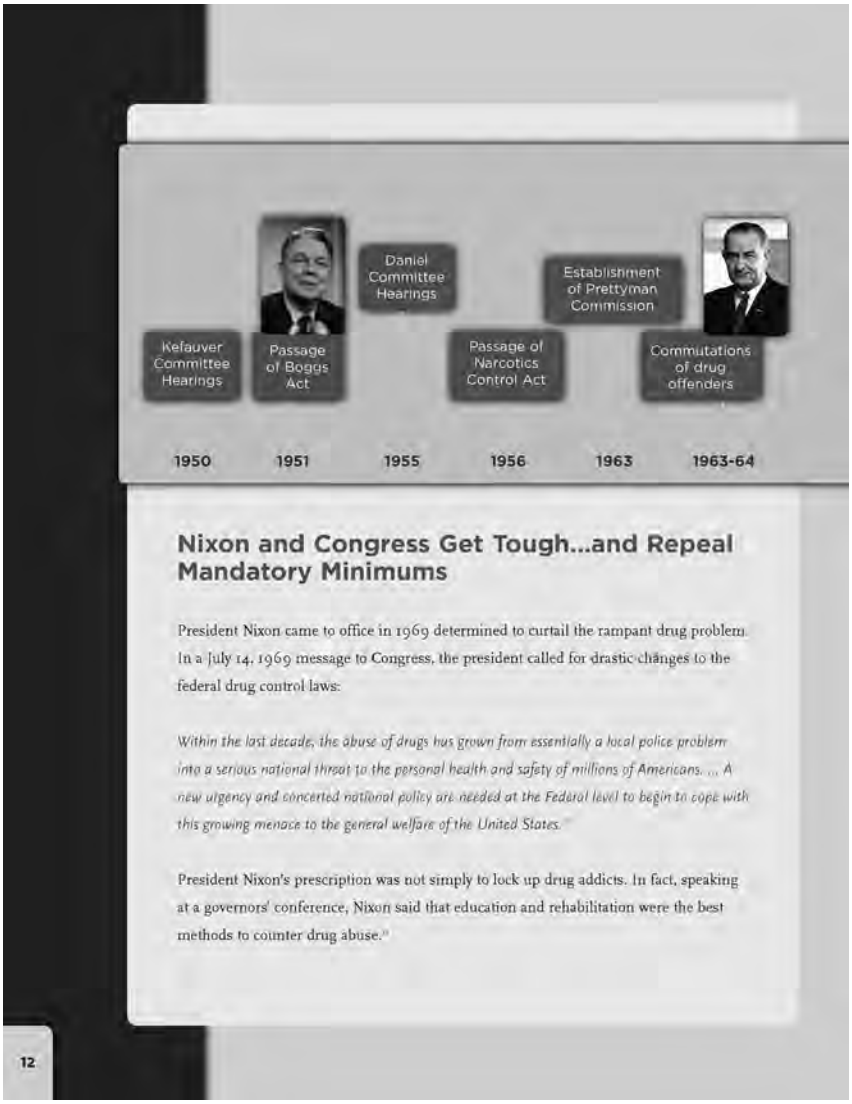
The commission recommended rehabilitating individual drug abusers and cautioned that where drug possession penalties warranted imprisonment, "the rehabilitation of the individual, rather than retributive punishment, should be the major objective."[14] "[P]enalties [should] fit offenders as well as offenses" and "be designed to permit the offender's rehabilitation whenever possible."[15] Stiff penalties and sentences were not effective deterrents: "persistence of narcotics abuse, despite severe penalties for the possession of narcotics, is persuasive evidence that the abuser will risk a long sentence to get his drug," the commission concluded.[16]

In addition to establishing the Prettyman Commission, President Kennedy seems to have used his pardon power to alleviate the impact of the mandatory minimums created by the Narcotics Control Act of 1956.[47] In 1963, the annual report from the attorney general revealed that "many long-term narcotic offenders who, by statute, were not eligible for parole but whose sentences were felt to be considerably longer than the average sentences imposed for such [drug] offenses" received commutations (reductions in their sentences) from the president.[48]

The Prettyman Commission recommended that "penalties [should] fit offenders as well as offenses."

When Attorney General Robert F. Kennedy learned that the commutations of these drug offenders boosted morale in prisons, he ordered the director of the Bureau of Prisons to review cases with unequal sentences and to present worthy cases to his office for recommendations in favor of presidential clemency.[49] Interpreted broadly, commuting lengthy drug sentences imposed under the 1956 Act was a signal to Congress that a policy change was needed.[50]

In 1966, President Lyndon B. Johnson established the President's Commission on Law Enforcement and Administration of Justice, known as the Katzenbach Commission, which produced a ten-volume study on federal criminal justice. Among its recommendations was that "[s]tate and federal drug laws should give a large enough measure of discretion to the courts and correctional authorities to enable them to deal flexibly with violators, taking account of the nature and seriousness of the offense, the prior record of the offender and other relevant circumstances."[51]

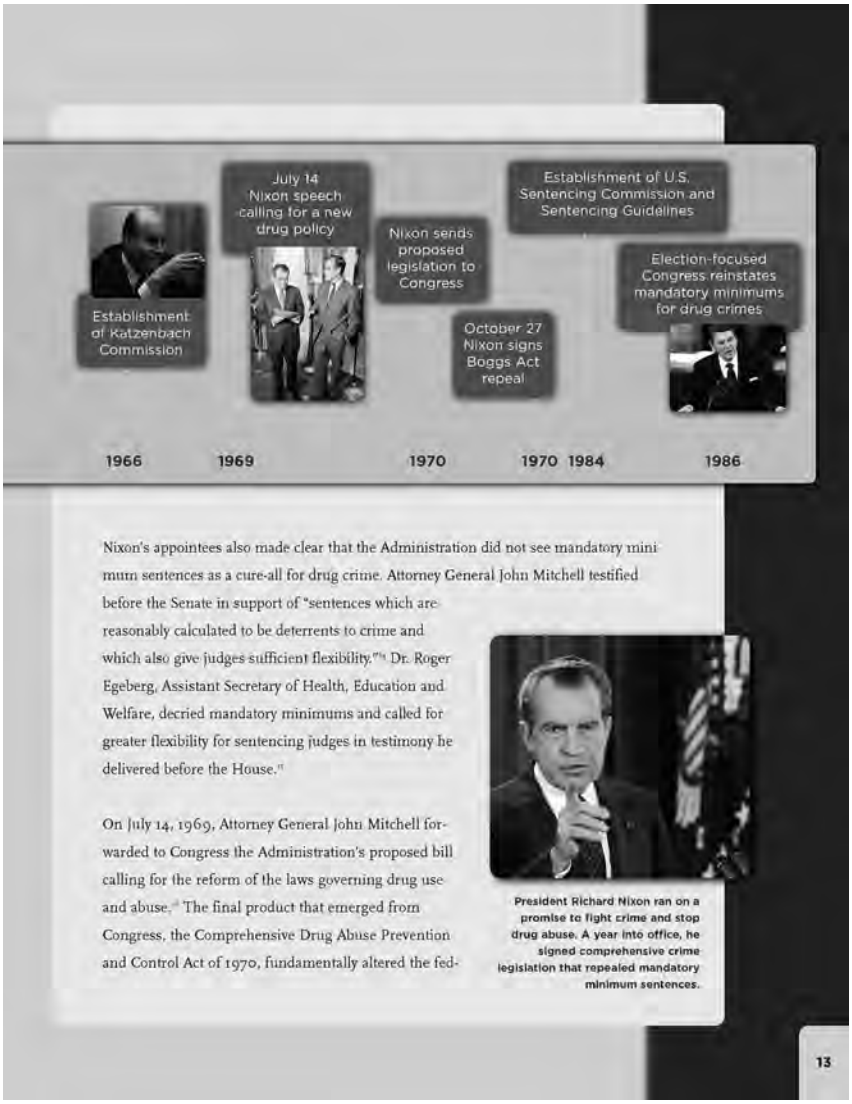


Nixon and Congress Get Tough...and Repeal Mandatory Minimums

President Nixon came to office in 1969 determined to curtail the rampant drug problem. In a July 14, 1969 message to Congress, the president called for drastic changes to the federal drug control laws:

Within the last decade, the abuse of drugs has grown from essentially a local police problem into a serious national threat to the personal health and safety of millions of Americans. ... A new urgency and concerted national policy are needed at the Federal level to begin to cope with this growing menace to the general welfare of the United States.

President Nixon's prescription was not simply to lock up drug addicts. In fact, speaking at a governors' conference, Nixon said that education and rehabilitation were the best methods to counter drug abuse.[11]



Nixon's appointees also made clear that the Administration did not see mandatory minimum sentences as a cure-all for drug crime. Attorney General John Mitchell testified before the Senate in support of "sentences which are reasonably calculated to be deterrents to crime and which also give judges sufficient flexibility."[16] Dr. Roger Egeberg, Assistant Secretary of Health, Education and Welfare, decried mandatory minimums and called for greater flexibility for sentencing judges in testimony he delivered before the House.[17]

On July 14, 1969, Attorney General John Mitchell forwarded to Congress the Administration's proposed bill calling for the reform of the laws governing drug use and abuse.[18] The final product that emerged from Congress, the Comprehensive Drug Abuse Prevention and Control Act of 1970, fundamentally altered the fed-

President Richard Nixon ran on a promise to fight crime and stop drug abuse. A year into office, he signed comprehensive crime legislation that repealed mandatory minimum sentences.

eral government's approach in dealing with drug abuse, drug manufacturing, and drug trafficking. Its purpose was threefold:

- To address drug addiction through the rehabilitation of drug users,
- To provide better tools for law enforcement's fight against drug trafficking and manufacturing, and
- To provide a "balanced scheme of criminal penalties for offenses involving drugs."[9]

It sought to change the structure of all criminal penalties for controlled substances to provide a "consistent method of treatment of all persons accused of violations."[10] **Most significantly, it eliminated all of the mandatory minimum drug sentences, save one.** The only mandatory minimum to survive repeal was for offenders who participated in a "continuing criminal enterprise," a large-scale, ongoing drug operation that earned significant profits.[11]

First-time violations of simple possession of a controlled substance without the intent to distribute were reclassified as misdemeanors carrying fines and probation; judges could dismiss such charges without a finding of guilt in instances where an offender did not violate the terms of his or her probation and could expunge the offense from minors' records.[12] Manufacturing and distributing illegal drugs carried new punishments of *up to* a maximum of 15 years imprisonment for a first violation, and *up to* a maximum of 30 years imprisonment for subsequent offenses or for adult dealers who sold drugs to minors.[13]

New drug sentences after the 1970 repeal of mandatory minimums

Drug crimes*	Term
First offense	*up to maximum of 15 years*
Second or later offense	*up to maximum of 30 years*
Selling drugs to minors	*up to maximum of 30 years*

** For drug manufacturing or trafficking offenses only*

Both Democrats and Republicans in Congress hailed the Act as a comprehensive reform that would counter America's growing drug problem by punishing drug traffickers while rehabilitating drug abusers. Representative George H.W. Bush (R-Texas) explained how reducing sentences could actually reduce drug crime while increasing fairness in and respect for the justice system:

Representative George H.W. Bush (R-Texas), the future U.S. president, supported the repeal of mandatory minimum drug laws in 1970.

[T]he complete overhaul of the existing Federal criminal provisions applicable to drug related activities...will improve law enforcement and foster greater respect for the law. The bill eliminates mandatory minimum penalties, except for professional criminals. Contrary to what one might imagine, however, this will result in better justice and more appropriate sentences. . . The penalties in this bill are not only consistent with each other, but with the rest of the Federal criminal law – something which cannot be said for present drug laws. As a result, we will undoubtedly have more equitable action by the courts, with actually more convictions where they are called for, and fewer disproportionate sentences.[40]

Members from both parties argued that the mandatory minimums then on the books limited judicial discretion, were so harsh that courts and juries avoided applying the sentences, and undermined respect for the laws in general. Congressman John Glenn Beall, Jr. (R-Md.) argued that "[f]ederal penalties for drug violations are inconsistent, illogical, and unduly severe in some cases. [Repealing mandatory sentences] would revamp the entire penalty scheme, substituting a new and flexible system of penalties which will enable courts to truly tailor the punishment in any given case to fit the crime. Current penalties have little or no deterrent value."[41] Congressman David Satterfield (D-Va.) noted the "extreme difficulty in attempting to dispense justice and in sentencing individuals who have been convicted of violations where a minimum penalty is required... [Repeal of minimum penalties] will afford our courts greater latitude to the end that greater justice will be served better."[42]

"It is the opinion of most law enforcement people that the harsh mandatory sentences in narcotics law have been a hindrance rather than an aid to enforcement."
— Former Rep. William L. Springer (R-Ill.)

Members of Congress from both parties also cited the support among law enforcement for reform: "It is the opinion of most law enforcement people that the harsh mandatory sentences in narcotics law have been a hindrance rather than an aid to enforcement," said Congressman William L. Springer (R-Ill.).[41] Congressman Edward Boland (D-Mass.) echoed these sentiments: "This section on simple possession violations reflects the judgment of most authorities that harsh penalties imposed on the user have little deterrent value."[42] Senator Jacob K. Javits (R-NY) observed that the Boggs Act "had a most severe penalty – life imprisonment. That did not seem to dam up the flow of narcotics nor the fast-spreading abuse of drugs."[43]

Finally, members argued that targeting all offenders with broad, unvarying sanctions was simply unfair, whereas the changes made in the repeal would reserve mandatory penalties only for the most serious drug offenders: those involved in a "continuing criminal enterprise."[44] Senator Roman Hruska (R-Neb.) argued that under the new law, "persons established as professional traffickers are exposed to appropriately severe penalties with mandatory minimums – the only place in the penalty scheme where these minimums are to be found."[45]

Congress sent the 1970 Act to President Nixon on October 14, and he signed the bill on October 27, mere days before hotly contested midterm congressional elections. President Nixon and Vice President Spiro Agnew campaigned aggressively in key states and districts, and frequent calls for "law and order" were a common feature of many races.[46] To the Administration, repealing nearly all existing mandatory minimum drug sentences was not in conflict with its pro-law enforcement campaign rhetoric.[47] Perhaps the most noteworthy fact about the 1970 election was that every senator that voted for the 1970

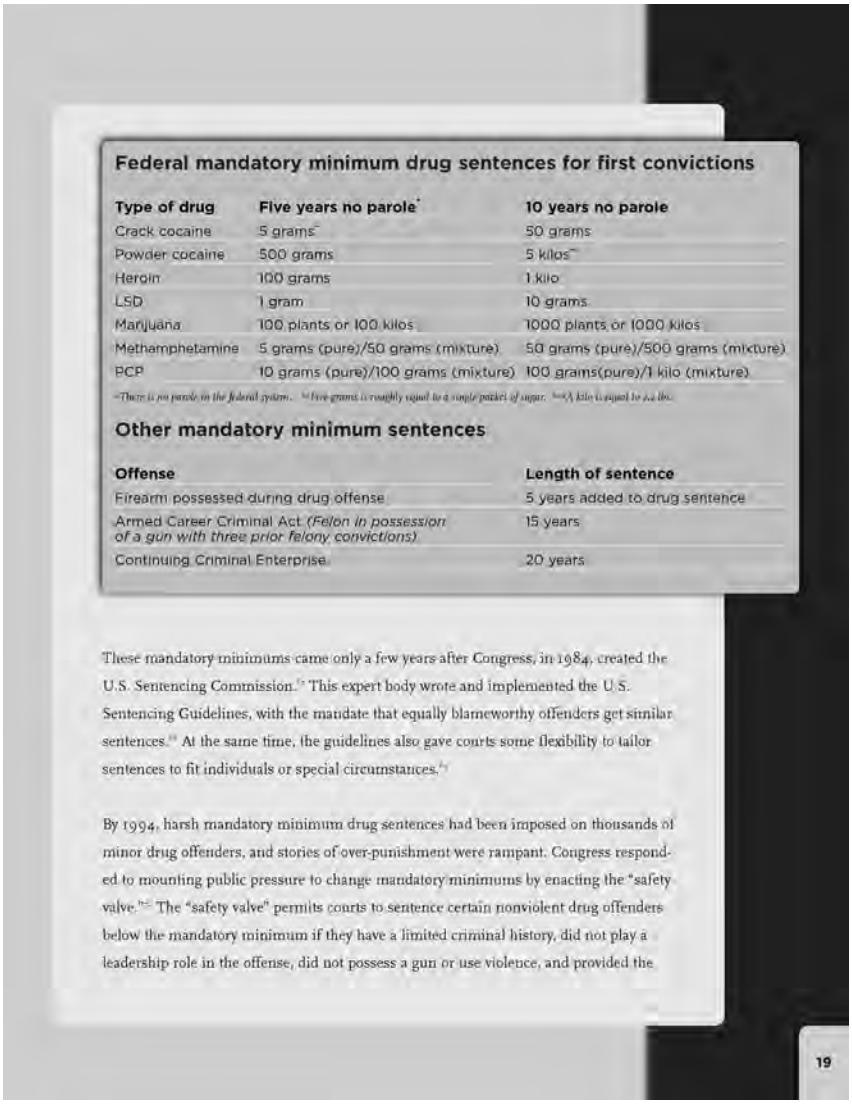

Act and to repeal mandatory sentences was reelected, save one who lost for completely unrelated reasons.[1]
Likewise, all but only a handful of House members who voted for the legislation were reelected, and none of the losers appear to have been targeted over mandatory minimums.[2]
Every senator that voted for the 1970 Act and to repeal mandatory sentences was reelected, save one who lost for completely unrelated reasons.
17

Drug Mandatory Minimums are Tried – And Fail – Again

The popularity of recreational drug use continued to grow in the 1970s. Marijuana and heroin use rose and cocaine emerged as a fashionable drug among the professional class. A handful of drug-related deaths suffered by young rock-n-roll musicians, including Janis Joplin, Jimi Hendrix, and Jim Morrison, stripped the veneer off the view that drug use carried no danger, but it was not until the 1980s that public attitudes began to turn sharply against drugs.

In the early 1980s a new drug, crack cocaine, emerged. The drug was cheap and easy to transport,[7] and the level of its use was viewed as "epidemic" in major cities around the country.[8] The crack epidemic brought with it fears of increased drug-related violent crime,[9] along with a number of misperceptions about the addictiveness of the drug and its effects on users.[10] As Congress was debating how to respond to mounting public fears and a media frenzy surrounding crack,[11] Americans awoke on June 20, 1986 to the news that basketball star and NBA first-round draft pick Len Bias had died the night before from an overdose from powder cocaine.[12] The tipping point was reached.

Congress wasted no time in responding to Bias's high-profile death with a display of political opportunism and "tough on crime" stances that included no meaningful reflection on the previous failure of mandatory minimums.[13] The House Judiciary Committee drafted and passed new antidrug penalties[14] in less than one week.[15] The legislative history of this period reveals no hearings, debate, or study preceding the adoption of these provisions.[16] The lack of legislative history makes discerning Congress's intent difficult, but one goal is clear: the mandatory penalties were intended to apply to "serious" and "major" traffickers.[17] In 1988, passage of mandatory minimums for simple possession of crack showed Congress's desire to fight use of the drug as well as drug trafficking.



Federal mandatory minimum drug sentences for first convictions

Type of drug	Five years no parole*	10 years no parole
Crack cocaine	5 grams**	50 grams
Powder cocaine	500 grams	5 kilos**
Heroin	100 grams	1 kilo
LSD	1 gram	10 grams
Marijuana	100 plants or 100 kilos	1000 plants or 1000 kilos
Methamphetamine	5 grams (pure)/50 grams (mixture)	50 grams (pure)/500 grams (mixture)
PCP	10 grams (pure)/100 grams (mixture)	100 grams(pure)/1 kilo (mixture)

*There is no parole in the federal system. **Five grams is roughly equal to a couple packs of sugar. ***A kilo is equal to 2.2 lbs.

Other mandatory minimum sentences

Offense	Length of sentence
Firearm possessed during drug offense	5 years added to drug sentence
Armed Career Criminal Act *(Felon in possession of a gun with three prior felony convictions)*	15 years
Continuing Criminal Enterprise	20 years

These mandatory minimums came only a few years after Congress, in 1984, created the U.S. Sentencing Commission.[7] This expert body wrote and implemented the U.S. Sentencing Guidelines, with the mandate that equally blameworthy offenders get similar sentences.[8] At the same time, the guidelines also gave courts some flexibility to tailor sentences to fit individuals or special circumstances.[9]

By 1994, harsh mandatory minimum drug sentences had been imposed on thousands of minor drug offenders, and stories of over-punishment were rampant. Congress responded to mounting public pressure to change mandatory minimums by enacting the "safety valve."[10] The "safety valve" permits courts to sentence certain nonviolent drug offenders below the mandatory minimum if they have a limited criminal history, did not play a leadership role in the offense, did not possess a gun or use violence, and provided the

prosecution with all of the useful information they had about the crime.[7] While the safety valve provides relief for about one quarter of federal drug offenders annually, its terms are stringent, and a person can easily fail to qualify for relief. For example, having even one too many prior offenses on one's record – even if the offense is nonviolent or occurred when the person was a juvenile – can be enough to fall outside the scope of the safety valve's protection.[8]

The cocaine overdose of basketball star Len Bias sparked the reintroduction of mandatory minimums in 1986.

In light of Congress's lack of deliberation when it created the current mandatory minimums, it is not surprising that the laws have failed just like their predecessors. Current federal mandatory minimum penalties have not curbed drug use or trafficking and have created a myriad of other harmful side effects and costs. It is time once again for Congress to end another costly, failed experiment with mandatory minimums. The case for doing so is much stronger now than it was in 1970, when Congress first repudiated mandatory sentences, because the bill of evidence has grown into a mountain. The evidence supporting reform includes the following:

Mandatory minimums have not discouraged drug use.

While current mandatory minimums were targeted at drug traffickers, Congress was also undeniably concerned with reducing drug use.[9] In theory, mandatory minimums would lock up drug traffickers, making drugs less available and more expensive, thus resulting in reduced drug use.[10] The theory has not worked. Price is "the most widely used measure of supply reduction effectiveness," and since 1981, the prices of both crack and powder cocaine have dropped or remained consistently lower than they were at the time mandatory minimums were passed.[11]

Some of this price decline may be due to the fact that the demand for drugs had already started to decline several years *before* mandatory minimums were enacted.[69] Drug use dropped among all ages from its high of 14.1 percent in 1979 to 7.7 percent in 1988 – a reduction of nearly 50 percent.[70] At a minimum, since mandatory minimum sentences were attached not only to drug trafficking offenses but also to simple possession of crack cocaine, the new stiff penalties' deterrent effect, if any, should manifest itself in falling usage of that drug. Mandatory minimums, however, did not decrease usage rates for crack and powder cocaine; rather, use decreased when negative media coverage increased the perception that using the drugs was dangerous and socially unacceptable.[71] When this perception decreased, usage of the drugs increased.[72]

Mandatory minimums have failed to reduce drug trafficking offenses.[73]

Proponents of mandatory minimums point to reduced national crime rates as evidence that the tough sentences work. Despite more than 50 years of experimenting with mandatory minimums, however, backers can point to no conclusive studies that demonstrate any positive impact of federal mandatory minimum sentences on the rate at which drugs are being manufactured, imported, and trafficked throughout the country.[74] National crime rate statistics do not include these types of drug trafficking offenses, so they cannot show whether mandatory sentences are reducing drug trafficking activity.[75] In fact, data from both the Federal Bureau of Investigation[76] and the Bureau of Justice Statistics[77] show a steady increase in the number of drug offenders arrested at both the state and federal levels over the last decades, as well as increases in the amount of drugs seized by law enforcement each year.[78] This data could be proof of more drug activity, better enforcement of drug laws, or both, but there is no definitive connection between mandatory minimums and reductions in drug trafficking offenses.

Large numbers of drug addicts support their habits by committing drug trafficking offenses. In 2004, almost 60 percent of federal drug traffickers reported using drugs in the month before the offense, a third were using drugs at the time of the offense.[46] A full quarter of all those convicted of a federal drug offense committed their crimes to get money to buy drugs.[47] Over half of all federal drug offenders in 2004 met the official criteria for having a drug abuse or dependence problem.[48] Mandatory minimums give drug addicts and drug traffickers lengthy prison sentences, but have failed to solve the drug abuse problems that lead to possession and trafficking offenses.

Mandatory minimums' failure comes with billions of dollars in direct costs.

Mandatory minimums apply to almost all federal drug offenses, and the majority of people in federal prisons are drug offenders. From 1990 to 2000, drug offenders accounted for 59 percent of the growth in the federal prison population.[49] In 2000, 57 percent of federal prisoners were serving sentences for a drug offense.[50] The large number of drug convictions contributes to the growth in the federal prison population. Between 2000 and the end of 2006, the federal prison population grew by an average of nearly five percent annually.[51] The trend continues: in 2008, the federal prison population passed the 200,000 mark, and more than half of these prisoners are serving time for a drug crime.[52] Drug offenses continue to be the largest category of federal convictions (almost 35 percent of all 2007 convictions),[53] and more than 65 percent of these offenders received mandatory minimums.[54] Because the U.S. Sentencing Commission has used mandatory minimums as the starting point for calculating other drug sentences under the guidelines, almost all drug sentences have gotten longer.[55]

Greater use of prison sentences for drug crimes and longer sentences required by mandatory minimums have driven a dramatic increase in federal corrections costs. In the five-year period from 1987 to 1992, during which the 1986 and 1988 mandatory

Mandatory minimums: Locking up more drug offenders, longer

Drug offenses are the largest single category of federal convictions:

- **34 percent** of all federal offenders in 2007 were sentenced for a drug offense.
- **67 percent** of all federal drug offenders received a mandatory minimum:
  - **28 percent** received a five-year mandatory minimum
  - **39 percent** received a minimum sentence of 10 years or more

Percentage of drug offenders receiving mandatory minimums:

- **82 percent** of crack cocaine offenders
- **81 percent** of methamphetamine offenders
- **79 percent** of powder cocaine offenders

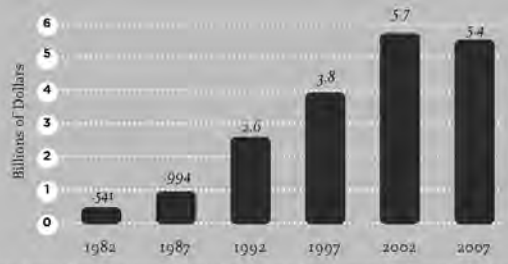
Some benefit from the "safety valve":

- **25 percent** of federal drug offenders who would have been subject to a mandatory minimum received a shorter sentence under the 1994 "safety valve" provision available to non-violent, low-level, first-time drug offenders.

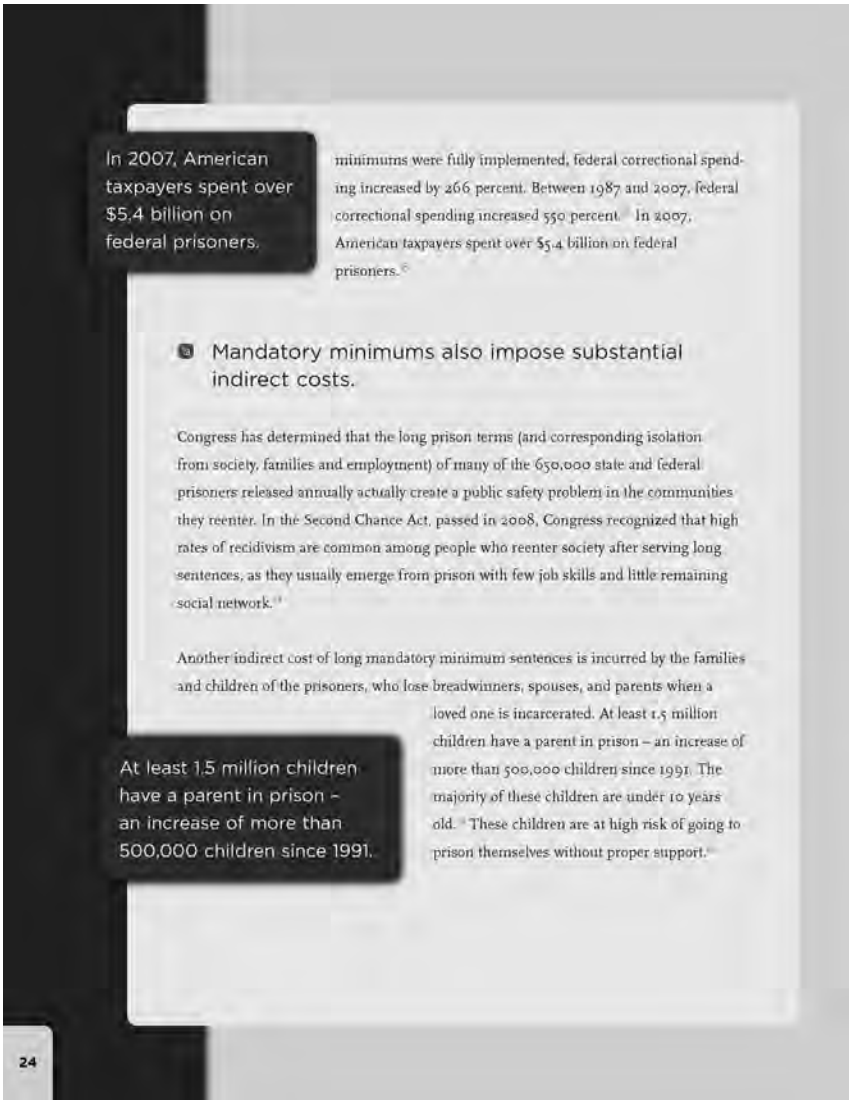
Source: United States Sentencing Commission, 2007 Annual Report 31-33 (2007), available at http://www.ussc.gov/ANNRPT/2007/ar07toc.htm (last visited June 20, 2008).

Federal corrections costs soared in last 25 years

Federal correctional costs increased 925 percent from 1982 to 2007, to over $5.4 billion.



Sources: Bureau of Justice Statistics, U.S. Dep't of Justice, Justice Expenditure and Employment in the United States, 2004 (Apr. 2006), at 3, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/jeus04.pdf (last visited June 18, 2008); Office of Management and Budget, Dep't of Justice Budget Information, available at http://www.whitehouse.gov/omb/budget/fy2009/justice.html (last visited July 31, 2008).



In 2007, American taxpayers spent over $5.4 billion on federal prisoners.

minimums were fully implemented, federal correctional spending increased by 266 percent. Between 1987 and 2007, federal correctional spending increased 550 percent. In 2007, American taxpayers spent over $5.4 billion on federal prisoners.[10]

Mandatory minimums also impose substantial indirect costs.

Congress has determined that the long prison terms (and corresponding isolation from society, families and employment) of many of the 650,000 state and federal prisoners released annually actually create a public safety problem in the communities they reenter. In the Second Chance Act, passed in 2008, Congress recognized that high rates of recidivism are common among people who reenter society after serving long sentences, as they usually emerge from prison with few job skills and little remaining social network.[11]

Another indirect cost of long mandatory minimum sentences is incurred by the families and children of the prisoners, who lose breadwinners, spouses, and parents when a loved one is incarcerated. At least 1.5 million children have a parent in prison – an increase of more than 500,000 children since 1991. The majority of these children are under 10 years old.[12] These children are at high risk of going to prison themselves without proper support.[13]

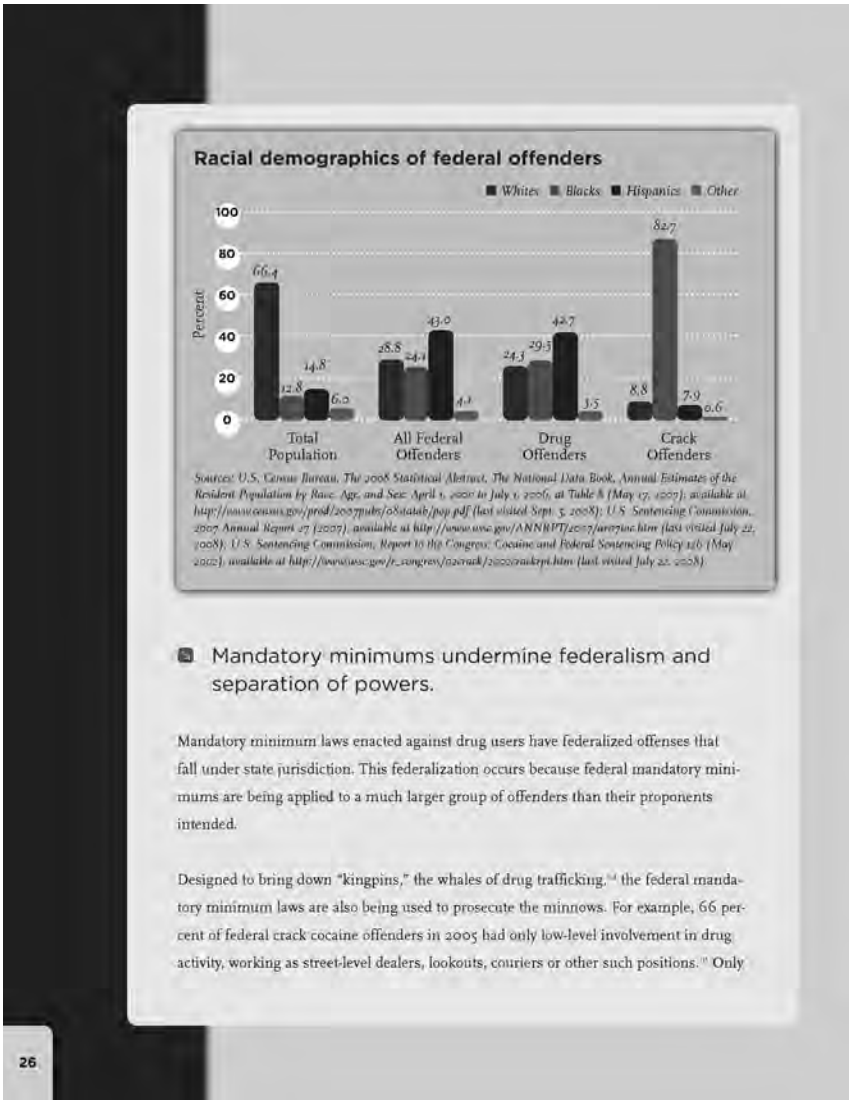
At least 1.5 million children have a parent in prison – an increase of more than 500,000 children since 1991.

24

Mandatory minimums create unwarranted disparities.

In 2007, Blacks and Hispanics made up approximately 67 percent of all federal offenders sentenced[103] and 72 percent of all federal drug offenders,[104] but comprised only about 28 percent of the United States' population.[105] This racial disparity is partly driven by mandatory minimum sentences,[106] particularly the far harsher mandatory sentences imposed on crack cocaine offenses than powder cocaine offenses.[107] In 2007, over 80 percent of federal crack cocaine offenders were Black,[108] even though two thirds of crack cocaine users were Whites or Hispanics[109] and Blacks comprised less than 18 percent of the nation's crack cocaine users.[110] The five and ten-year mandatory minimum sentences for crack cocaine were used as a starting point for calculating the rest of the guideline ranges for other crack offenses in the U.S. Sentencing Guidelines.[111] As a result, sentences for crack offenses are uniformly harsher than those for powder cocaine offenses. In 2006, crack cocaine sentences (both mandatory terms and those calculated under the guidelines) were 44 percent longer than powder cocaine sentences.[112]

The way mandatory minimums are applied can also undermine the principle that two equally culpable defendants who committed the same crime should generally get the same sentence. Two equally blameworthy defendants facing the same mandatory minimum can, in fact, receive very different sentences, depending on what they know or which prosecutor they get. More culpable defendants can get shorter sentences than their less culpable cohorts, too. One of the only ways to be sentenced below the mandatory minimum is to provide "substantial assistance" to the prosecution by sharing information about the crime and other offenders.[113] Offering assistance to the prosecution is encouraged and necessary to expedite cases through the system, but can result in inequity when offenders are sentenced more harshly than their equally culpable codefendants solely because they have little or no valuable information to offer.[114] Prosecutors decide what information is considered valuable, which influences whether a person gets a reduction.[115]



Mandatory minimums undermine federalism and separation of powers.

Mandatory minimum laws enacted against drug users have federalized offenses that fall under state jurisdiction. This federalization occurs because federal mandatory minimums are being applied to a much larger group of offenders than their proponents intended.

Designed to bring down "kingpins," the whales of drug trafficking,[14] the federal mandatory minimum laws are also being used to prosecute the minnows. For example, 66 percent of federal crack cocaine offenders in 2005 had only low-level involvement in drug activity, working as street-level dealers, lookouts, couriers or other such positions.[15] Only

two percent performed trafficking functions at a managerial or supervisory level, and less than a third (31 percent) were importers, high-level suppliers, organizers, leaders, or wholesalers, the functions most consistent with those Congress believed warranted high mandatory minimum penalties.[107] These figures, according to the U.S. Sentencing Commission, indicate a "failure to focus scarce federal law enforcement resources on serious and major traffickers," and "exaggerate the culpability" of the majority of crack cocaine offenders in terms of their trafficking function.[108] Similar effects are found across other mandatory minimum drug sentencing regimes.[109]

State law enforcement is well equipped to handle the local and community-level drug offenses perpetrated by many offenders currently receiving federal mandatory minimums. Federal resources should be limited to targeting the people the states lack the resources and jurisdiction to fight: large-quantity international drug importers, producers, and suppliers.[110]

The Constitution's separation of powers is also violated. Rather than allowing judges to use their intrinsic judicial power of discretion to impose criminal sentences, mandatory minimums have been a power grab by both the legislative and executive branches. First, the legislative branch dictated one-size-fits-all sentences that courts must follow. Second, the executive, in the person of the prosecutor, influences the sentence because prosecutors have discretion to choose certain charges on the basis of the penalties they carry.

"[M]andatory minimums... frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish."[111]
— Chief Justice William H. Rehnquist

For all of these reasons, there has been steadily growing criticism of mandatory minimums by former prosecutors,[112] federal judges,[113] and other commentators and organizations.[114] In 1991, the U.S. Sentencing Commission (USSC) studied the impact of mandatory minimum sentences.[115] In its report, the USSC criticized mandatory minimums, finding that they

"...I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."[1]

— Justice Anthony M. Kennedy, speaking at the 2003 annual meeting of the American Bar Association.

too often result in sentences out of proportion with an individual offender's culpability, that they discourage plea bargaining, and that they have the greatest impact (in terms of length of sentence) on the least serious drug crimes." The 1994 report by the Federal Judicial Center, the education and research agency for the federal courts, summed up the judicial consensus on mandatory minimums well: "federal mandatory minimum sentencing statutes have not been effective for achieving the goals of the criminal justice system."[2]

Time to Correct Course

It is time for Congress to correct course and bring its failed experiment with mandatory minimum sentences to an end, just as the 91st Congress did in 1970. Congressional action is now overdue, because other American legislative bodies have led the way in reforms.

There is a strong, bipartisan mandatory minimum reform and repeal movement at the state level. At the height of their popularity in the mid-to-late 1970s to 1980s, mandatory minimum drug sentences existed in 49 states.[28] State correctional spending increased from an aggregate $6 billion in 1982 to over $39 billion in 2003, an increase of over 550 percent.[29] In part because of the pressure this put on state budgets, as well as an evolving understanding of effective sentencing and punishment, many states have revisited these policies.[30] States are reforming or eliminating their mandatory minimums, especially those covering low-level, nonviolent drug offenses, or creating alternatives to incarceration for these offenders.[31]

Michigan, for example, under Republican Governor John Engler, repealed nearly all of its mandatory minimum drug sentences in 2003, replacing them with a more flexible sentencing guidelines system.[32] In 2001, Louisiana repealed mandatory sentences for simple possession of drugs and cut its minimum drug trafficking terms by half.[33] The same year, North Dakota repealed its mandatory minimum for first-time drug offenders, and Connecticut allowed courts more freedom to disregard mandatory penalties for drug possession or dealing when "good cause" to do so exists, even if the offense occurred in a "drug-free school zone."[34]

In addition to repealing mandatory minimums, states are also finding smarter, more cost-effective ways to deal with drug offenders. In 2007, Texas legislators replaced prison sentences in low-level, first-time felony drug possession cases with mandatory drug treatment. Since 2006, Kansas has revised automatic penalty enhancements for second, third, and subsequent possession offenses.[17] Jurisdictions in all 50 states and the District of Columbia now operate drug court programs, which are alternative sentencing systems typically combining intensive drug and mental health treatment with community supervision arrangements.[18] Studies continue to show that drug courts are cost-effective, reduce recidivism, and lower crime rates, and the number of these courts has increased as states have gotten the message.[19] Texas Governor Rick Perry described these programs as "help[ing] break the cycle of addiction and crime by using the authority of the court to promote accountability and enhance motivation for treatment."[20] Interestingly, as in the 1970s, there has been no evidence of electoral backlash against the politicians who have backed these state-level reforms.

Governors like Rick Perry of Texas are relying increasingly on drug courts and other alternatives to mandatory minimum prison sentences for nonviolent offenders.

Unlike in 1970, reform of federal mandatory minimums today would not initiate an ad hoc approach to sentencing, thanks to the sentencing guidelines.[21] The guidelines give judges the ability to protect public safety by sentencing harshly when it is deserved. An offender with numerous prior convictions, a gun, or a role as a manager or leader can often receive a guideline sentence that is longer (and sometimes much longer) than the currently applicable mandatory minimum.[22]

Recommendations for Reform

The last 20 years, like the 20 years preceding the repeal of the Boggs Act, have shown mandatory minimums to be ineffective, expensive, and increasingly abandoned by states that enacted them. Now is the time for Congress to do as the 1970 Congress did and reform mandatory minimum drug sentences. Reform could be accomplished in several ways:

Excise mandatory minimums from the criminal code.

Congress could excise all mandatory minimums for drug offenses found in Title 21 of the U.S. Code, while retaining the existing statutory maximums and sentencing guidelines for those offenses. The guidelines, while indexed to the mandatory minimums, are nuanced and capable of accounting for important differences among offenders. Allowing the guidelines to stand alone would give the courts flexibility to impose appropriate sentences in all cases.

Expand the existing statutory safety valve.

Congress could maintain the current mandatory minimum sentences, but provide courts an opportunity to opt out of them in certain cases by expanding the existing statutory safety valve.[10] Currently, the safety valve allows suspension of the mandatory minimum sentences in drug cases when a judge finds the case meets certain criteria.[11] When those strict criteria are met the court may impose a guideline sentence in lieu of the mandatory minimum sentence.

Congress could expand the safety valve by permitting courts to invoke it when, after looking at all the relevant facts and circumstances of the case and considering the purposes of punishment, imposing the mandatory minimum sentence would violate the parsimony mandate found in 18 U.S.C. § 3553(a). This provision directs judges to impose a sentence that is "sufficient but not greater than necessary to comply with the purposes" of sentencing.[12] This mandate is a long-standing, highly esteemed, and uncontroversial feature of American sentencing law.[13]

Conclusion

Twice in the past half century, Congress has enacted mandatory minimum sentencing laws to combat public fears about drug abuse and drug trafficking. Both times, the mandatory sentencing laws have failed to alleviate these problems. Worse, the laws caused other serious problems, including skyrocketing spending on corrections at the state and federal level. In 1970, Congress and a new Administration committed to reducing crime and drug abuse wisely repealed the failed mandatory minimum laws enacted in the Boggs Act of 1951 and the Narcotics Control Act of 1956.

The current mandatory minimum laws, enacted during the crack cocaine epidemic of the mid-1980s, have imposed too many burdens with no corresponding benefit. It is time once again for Congress to correct course and eliminate mandatory minimum sentences for drug offenders.

Endnotes

1 Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms*, Federal Judicial Center (1994), at 42 (quoting Michael Tonry, ed., *Mandatory Penalties*, in 16 Crime & Justice: A Review of Research 243-44 (1992)).

2 Sophocles, Antigone 233 (Dudley Fitz & Robert Fitzgerald trans., Harcourt Brace (1939)).

3 U.S. Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 5, fig. App. A (Aug. 1991), available at http://www.ussc.gov/r_congress/MANMIN.PDF (last visited July 21, 2008) [hereinafter 1991 USSC Report].

4 Act of Nov. 2, 1951, ch. 666, 65 Stat. 767 (repealed 1970).

5 S. Rep. No. 82-725, at 3 (1951).

6 97 Cong. Rec. 8195 (1951).

7 Act of Nov. 2, 1951, ch. 666, 65 Stat. 767 (repealed 1970).

8 Rufus King, The Drug Hang-Up: America's Fifty-Year Folly 114 (1972).

9 *Investigation of Organized Crime in Interstate Commerce: Hearings Before the Senate Special Comm. to Investigate Organized Crime in Interstate Commerce*, 82d Cong., pt. 12, 665, 666-67 (1951) [hereinafter *Organized Crime Hearings*] (testimony of Harry J. Anslinger).

10 *Id.* at 665.

11 *Id.* at 665; King, *supra* note 8, at 118, 146. The committee ultimately expressed its disagreement with Anslinger: "[L]ike any disease [drug addiction] can be attacked with greater vigor if brought out in the open and discussed in a forthright manner. If by education the young people of the Nation can be made aware of the true character of narcotic drugs and the dangers of addiction, they will become strong fighters in the campaign against the evil." S. Rep. No. 82-725, at 29.

12 *Organized Crime Hearings*, at 664.

13 King, *supra* note 8, at 113.

14 *Illicit Narcotics Traffic: Hearings Before the Senate Comm. on the Judiciary, Subcomm. on Improvements in the Federal Criminal Code*, 84th Cong. (1955).

15 *Id.*, pt. 4, at 18 ("Is it or is it not a fact that the marihuana user has been responsible for many of our most sadistic, terrible crimes in this Nation, such as sex slayings, sadistic slayings, and matters of that kind?").

16 S. Rep. No. 84-1850, at 2, 20 (1956).

17 S. Rep. No. 84-1440, at 2 (1956).

18 *Id.* at 3-4.

19 Section 104, 70 Stat. 568 (codified at 26 U.S.C. §7237 (1954) (repealed 1970)).

20 *See* Martin A. Lee & Bruce Shlain, Acid Dreams 179-182 (1985).

21 Richard Nixon, *Special Message to the Congress on Control of Narcotics and Dangerous Drugs*, The American Presidency Project (July 14, 1969), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=2126&st=&st1= (last visited June 17, 2008).

22 Richard Nixon, Remarks at the Opening Session of the Governors' Conference at the Department of State, The American Presidency Project (December 4, 1969), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=2353&st=&st1= (last visited June 17, 2008).

23 *Hearings Before a Special Subcomm. of the Senate Judiciary Comm. on S. 2213, S.2114, S. 2152 and LSD and Marihuana Use on College Campuses*, 89th Cong., Exhibit 8, at 613 (1966) (statement of Dean F. Markham) (from testimony given by Markham at the 1962 White House Conference on Narcotics); *Dodd Blasts Parole for Drug Terms*, Wash. Post (Sept. 29, 1963), at C5.

24 The President's Advisory Commission on Narcotic and Drug Abuse, Final Report 4 (Nov. 1963).

25 *Id.* at 3.

26 *Id.*

27 Charles Shanor & Mary Miller, *Pardon Us: Systematic Presidential Pardons*, 14 F. Sent. Rep. 159, 142 (2002).

28 *Id.* (quoting Annual Report of the Attorney General, 1964, at 62-63).

29 *Id.* at n. 24.

30 *See* Shanor & Miller, *supra* note 27, at 159, 142-43 (describing how clemency can be used systematically to create and span policy changes); *see also* Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 Fed. Sent. Rep. 5, 6 (2007) ("In a more recent 'systematic' use of the power evidently intended to send a message to Congress, Presidents Kennedy and Johnson commuted the sentences of more than 200 drug offenders serving mandatory minimum sentences under the Narcotics Control Act of 1956.").

31 The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice 423 (Feb. 1967).

32 *Supra* note 22.

33 *Supra* note 22.

34 *Narcotics Legislation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Judiciary Comm.*, 91st Cong. 216 (Sept. 15, 1969) (statement of Attorney General John Mitchell); Jack Rosenthal, *Nixon Aides Ease Marijuana Stand*, N.Y. Times (Oct. 14, 1969), at A1, A19.

35 *Crime in America: Views on Marihuana: Hearings Before the House Select Comm. on Crime*, 91st Cong., 1st (Oct. 14, 1969) (statement of Roger O. Egeberg); Rosenthal, *supra* note 34, at A19.

36 H.R. Rep. No. 91-1444, pt. 1, at 4 (1970).

37 *Id.* at 1.

38 *Id.*

39 *Id.* at 4-5 (engaging in a "continuing criminal enterprise" was punishable by a mandatory minimum sentence of 20 years to life in prison. *Id.* at 5. Second offenses under this provision required a mandatory minimum sentence of 25 years to life. *Id.* at 10.

40 *See* Pub. L. No. 91-513, 84 Stat. 1265 (codified as amended at 21 U.S.C. § 848 (2007)).

41 H.R. Rep. No. 91-1444, pt. 1, at 1.

42 *Id.* at 2.

43 116 Cong. Rec. 33,184 (1970).

44 *Id.* at 33,313-314.

45 *Id.* at 33,313.

46 *Id.* at 33,300; H. Rep. No. 91-1444, pt. 1, at 11 (noting how mandatory minimums made prosecutors reluctant to charge and juries reluctant to convict).

47 116 Cong. Rec. 33,416 (1970).

48 *Id.* at 35,077.

49 *See supra* note 40 and accompanying text (explaining "continuing criminal enterprise").

50 116 Cong. Rec. 35,052 (1970).

51 1970 CQ Almanac, at 1071.

52 In fact, the alternative penalty provisions in the 1970 Act were based on an Administration proposal submitted to Congress. According to Representative Clark MacGregor (R-Minn.), "Title II of H.R. 18583 grew out of the Nixon administration's proposal, which came up last year, for a reorganization of all existing narcotic and dangerous drug control laws.... Among changes common to both proposals would be.... a complete revision of the existing penalty structure, including making any first-time simply [sic] possession offense a misdemeanor, regardless of the drug involved, and easing penalties for second-time possession offenses. Also, mandatory minimum penalties would be eliminated, except for a special class of professional offenders." 116 Cong. Rec. 33,415 (1970).

53 *Supra* note 51, at 1074. Senator Thomas Dodd of Connecticut lost his seat running as an independent against moderate Republican House member Lowell P. Weicker Jr. *Id.* at 1076. The Senate had censured Dodd in 1967 for diverting funds for his personal use, thus making it unlikely that he could win a Senate nomination in a Democratic primary. Running as an Independent, he ultimately split the Democratic vote, helping the Republican win. *Id.* at 1074.

54 *Id.* at 1785. Local factors such as redistricting played a key role in some of the elections in which party shifts occurred. *Id.* at 1777. Unemployment, recession, and farmer dissatisfaction with Nixon's agricultural policies were significant factors that led to losses of seats in other districts, particularly in the Midwest. *Id.* at 1577, 1581.

55 *See, e.g.*, 132 Cong. Rec. 22,593 (1986) ("While a gram of cocaine sells for at least $100, two small pieces of crack, or enough to get three people high can be purchased in almost any American city for about $10.") (statement of Rep. LaFalce); *id.* at 26,447 ("[Crack] can be bought for the price of a cassette tape, and make people into slaves.") (statement of Sen. Chiles).

56 *See, e.g.*, *id.* at 22,667 ("A new form of freebase cocaine called crack is now becoming a major problem in many cities.") (statement of Rep. Traficant); *id.* at 26,447 ("We do have an epidemic in this country with regard to all kinds of controlled substances.") (Statement of Sen. Biden).

57 *See, e.g.*, *id.* at 22,667 (1986) ("The widespread use of crack in New York City is said by many law enforcement officials in that city to have caused a rise in violent crimes last year.") (statement of Rep. Traficant); *id.* at 31,329-30 (describing robberies and other crimes committed in connection with drug use or sales) (statement of Sen. Chiles).

58 *See, e.g.*, 132 Cong. Rec. S8092 (daily ed. June 6, 1986) (statement of Sen. D'Amato regarding S. 2878) (calling crack "more addictive" than powder cocaine); 132 Cong. Rec. 31,326 (1986) ("[I]f you try it once, chances are that you will be hooked. If you use it up to three times, we know that you will become hooked, and it is the strongest addictive that we have found.") (statement of Sen. Chiles).

59 *See, e.g.*, 132 Cong. Rec. 22,607 (1986) (describing how drug-related deaths of several famous athletes "precipitated a media blitz on the problem of drugs in America.") (statement of Rep. Traficant); *id.* at 26,447 ("The politicians are hearing the same things Time magazine and Newsweek have heard. It is the same thing Nightline, NBC, and CBS have heard. ... [P]eople are fed up with drugs.") (statement of Sen. Chiles).

60 *See, e.g.*, Edward Walsh, *Bias' Death Fueled Antidrug Fervor: Public Concern, Election-Year Sensitivity United Congress on Issue*, WASH. POST (Sept. 14, 1986), at A1; *see also* 132 Cong. Rec. 26,453 (1986) (statement of Sen. Mattingly describing how a "national outcry" arose from Len Bias's death and the resulting media coverage).

61 132 Cong. Rec. 22,690 (1986) ("[B]ecause of the publicity surrounding the recent tragedy stemming from drug abuse, this issue has become fertile ground for political and Federal hype.") (statement of Rep. Weiss); *id.* at 26,440 ("We talk about a 'war on drugs.' I love to use that term, because it sounds tough; it makes good talk, good speeches.") (statement of Sen. DeConcini); *id.* at 26,460 ("Some say the Senate is acting in response to a public outcry, and that we may be acting with undue haste.") (statement of Sen. Specter); *id.* at 26,463 ("Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process, tempered by the heat of debate.") (statement of Sen. Mathias).

62 H.R. 5394, 99th Cong. (1986); H. Rep. No. 99-845 pt. 1 (1986).

63 Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 Vill. L. Rev. 383, 408 (1995) (describing how no committee hearings were held). "The careful, deliberate procedures of Congress were set aside to expedite passage of the bill." *Id.*

64 *See id.* at 408; *see also* U.S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 117 (Feb. 1995), *available at* http://www.ussc.gov/crack/chap8.pdf (last visited August 27, 2008) (describing lack of legislative history in passage of 1986 law).

65 H.R. Rep. No. 99-845, pt. 1, at 16-17 (1986) (defining major traffickers as "the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities" and serious traffickers as "the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials ... and doing so in substantial street quantities.").

66 *See* Pub. L. No. 100-690, 102 Stat. 4181 (1988); 134 Cong. Rec. H7204 (daily ed. Sept. 16, 1988) (statement of Rep. Hunter) (stating that crack cocaine "causes greater physical, emotional, and psychological damage than any other commonly abused drug.").

67 Pub. L. No. 98-473, 98 Stat. 2017 (codified as amended at 28 U.S.C. § 991 (2007)).

68 *See* 28 U.S.C. § 994(h)(1)(B) (2007); *see also* Pub. L. No. 98-473, 98 Stat. 2019 (codified as amended at 28 U.S.C. § 994 (2007)) (describing the Commission's duties and powers).

69 *See, e.g.*, U.S.S.G. § 5K2.0 (2008) (describing when a sentence may be increased or decreased based on factors "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines").

70 *See Federal Mandatory Minimum Sentencing: Hearing on H.R. 2199 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong., 1st sess. 30 (1993).

71 Pub. L. No. 104-322, 108 Stat. 1985, as amended by Pub. L. No. 104-294, 110 Stat. 3499 (codified as amended at 18 U.S.C. § 3553(f) (2007)).

72 *See id.*; U.S. Sentencing Commission, 2007 Sourcebook of Federal Sentencing Statistics Table 44 (2007), *available at* http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm (last visited July 22, 2008) [hereinafter USSC 2007 Sourcebook].

73 *See, e.g.*, 132 Cong. Rec. 7344 (1986) ("What is most frightening about crack is that it has made cocaine widely available and affordable for abuse among our youth.") (statement of Rep. Rangel); *id.* at 26,431 ("The bill seeks to solve the drug crisis by attacking both the supply and the demand end.") (statement of Sen. Mattingly).

74 *See, e.g.*, *id.* at 22,688 (arguing that use would decrease if "drug pushers [were arrested] before they have the chance to peddle their poison.") (statement of Rep. Fields); id. at 22,706 (describing how the threat of mandatory minimums would deter drug traffickers, reducing drug use by "taking the profit out of dealing.") (statement of Rep. Jones); *id.* at 22,993 ("Those that traffic in drugs do so for profit. It is big business and if we are to have any success at all we must alter the balance between the rewards, which are often vast, and the punishment, which is often too slight to dilute the attraction of the millions that can be made in the drug trade.") (statement of Rep. LaFalce); *see also* U.S. Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy 64 (May 2002) (hereinafter 2002 USSC Cocaine Report) ("In theory, sentencing policies might reduce the *supply* of cocaine through the deterrence of potential traffickers or through the incapacitation of traffickers who are integral to the cocaine market.") (emphasis in original).

75 2002 USSC Cocaine Report, *supra* note 74, at 65-67.

76 *Id.* at 72.

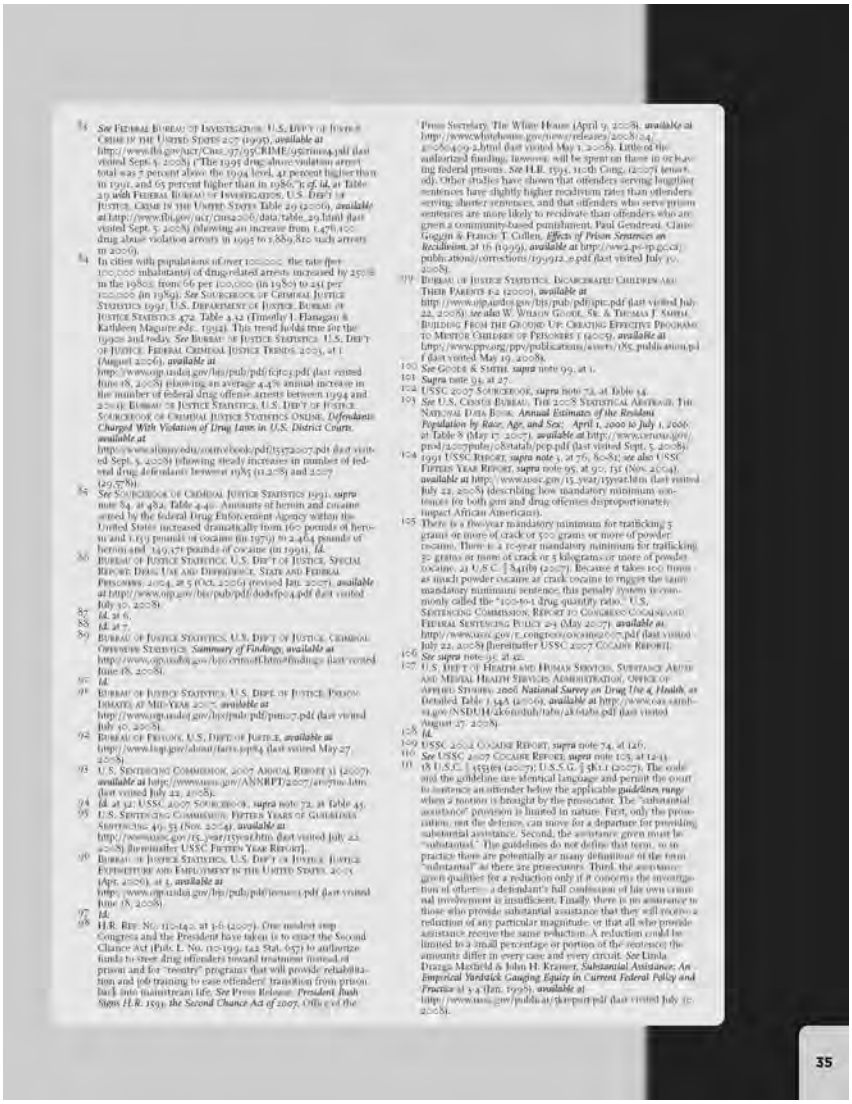
77 National Household Survey on Drug Abuse, Substance Abuse and Mental Health Servs. Admin., Dep't of Health and Human Servs., *available at* http://oas.samhsa.gov/nhsda/2khtml/2khtml.pdf (last visited June 10, 2008). The percentages used here refer to those who reported having used drugs during the past 30 days; this 30-day usage window is the most commonly used measure for charting drug use.

78 National Institute on Drug Abuse, National Institute of Health, U.S. Dep't of Health & Human Services, Monitoring the Future: National Survey Results on Drug Use: 1975-2003, Vol. II 12-14, *available at* http://monitoringthefuture.org/pubs/monographs/vol2_2003.pdf (last visited July 30, 2008).

79 *Id.*

80 "Drug trafficking offenses," as used in this report, includes only growing, manufacturing, buying, selling, supplying, importing, exporting, and otherwise transporting or distributing illegal drugs. This term does not include other crimes committed while under the influence of drugs (i.e., murder, assault) or crimes that do not involve drugs but are committed to obtain money for drugs (i.e., burglary, robbery, petty theft). All sides in the debate agree that proving causality between longer mandatory sentences and crime rates is difficult. Yet the burden falls on the proponents of mandatory minimums to provide evidence that they are working. The proponents have shown none.

81 *See, e.g.*, Federal Bureau of Investigation, U.S. Dep't of Justice, Preliminary Annual Uniform Crime Report (June 9, 2008), *available at* http://www.fbi.gov/ucr/2007prelim (last visited June 17, 2008) (describing nation-wide statistics only for *violent* crimes such as murder, robbery, rape, and arson, but not for *federal* drug trafficking offenses). The only data the FBI collects regarding drug trafficking offenses is the annual number of arrests for *state and local* "drug abuse violations."



94 *See* Federal Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States 207 (1995), *available at* http://www.fbi.gov/ucr/Cius_97/95CRIME/95crime4.pdf (last visited Sept. 5, 2008) ("The 1995 drug abuse violation arrest total was 7 percent above the 1994 level, 41 percent higher than in 1991, and 65 percent higher than in 1986."); *cf. id.*, at Table 29 *with* Federal Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States Table 29 (2006), *available at* http://www.fbi.gov/ucr/cius2006/data/table_29.html (last visited Sept. 5, 2008) (showing an increase from 1,476,100 drug abuse violation arrests in 1995 to 1,889,810 such arrests in 2006).

95 In cities with populations of over 100,000, the rate (per 100,000 inhabitants) of drug-related arrests increased by 250% in the 1980s, from 656 per 100,000 (in 1980) to 2,315 per 100,000 (in 1989). *See* Sourcebook of Criminal Justice Statistics 1991, U.S. Department of Justice, Bureau of Justice Statistics 472, Table 4.12 (Timothy J. Flanagan & Kathleen Maguire eds., 1992). This trend holds true for the 1990s and today. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Federal Criminal Justice Trends 2003, at 1 (August 2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fcjt03.pdf (last visited June 18, 2008) (showing an average 4.4% annual increase in the number of federal drug offense arrests between 1994 and 2003); Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics Online, *Defendants Charged With Violation of Drug Laws in U.S. District Courts*, *available at* http://www.albany.edu/sourcebook/pdf/t5372007.pdf (last visited Sept. 5, 2008) (showing steady increases in number of federal drug defendants between 1985 (12,208) and 2007 (29,578)).

96 *See* Sourcebook of Criminal Justice Statistics 1991, *supra* note 84, at 482, Table 4.46. Amounts of heroin and cocaine seized by the federal Drug Enforcement Agency within the United States increased dramatically from 160 pounds of heroin and 1,633 pounds of cocaine (in 1979) to 2,464 pounds of heroin and 149,471 pounds of cocaine (in 1991). *Id.*

97 Bureau of Justice Statistics, U.S. Dep't of Justice, Special Report: Drug Use and Dependence, State and Federal Prisoners, 2004, at 5 (Oct. 2006) (revised Jan. 2007), *available at* http://www.ojp.gov/bjs/pub/pdf/dudsfp04.pdf (last visited July 30, 2008).

98 *Id.* at 6.

99 *Id.* at 7.

100 Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Offender Statistics: *Summary of Findings*, *available at* http://www.ojp.usdoj.gov/bjs/crimoff.htm#findings (last visited June 18, 2008).

101 *Id.*

102 Bureau of Justice Statistics, U.S. Dept. of Justice, Prison Inmates at Mid-Year 2007, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf (last visited July 30, 2008).

103 Bureau of Prisons, U.S. Dept. of Justice, *available at* http://www.bop.gov/about/facts.jsp#4 (last visited May 27, 2008).

104 U.S. Sentencing Commission, 2007 Annual Report 31 (2007), *available at* http://www.ussc.gov/ANNRPT/2007/ar07toc.htm (last visited July 22, 2008).

105 *Id.* at 32; USSC 2007 Sourcebook, *supra* note 72, at Table 45.

106 U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing 40, 53 (Nov. 2004), *available at* http://www.ussc.gov/15_year/15year.htm (last visited July 22, 2008) [hereinafter USSC Fifteen Year Report].

107 Bureau of Justice Statistics, U.S. Dep't of Justice, Justice Expenditure and Employment in the United States, 2001 (Apr. 2006), at 3, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/jeus01.pdf (last visited June 18, 2008).

108 *Id.*

109 H.R. Rep. No. 110-142, at 3-6 (2007). One modest step Congress and the President have taken is to enact the Second Chance Act (Pub. L. No. 110-199, 122 Stat. 657) to authorize funds to steer drug offenders toward treatment instead of prison and for "reentry" programs that will provide rehabilitation and job training to ease offenders' transition from prison back into mainstream life. *See* Press Release, *President Bush Signs H.R. 1593, the Second Chance Act of 2007*, Office of the Press Secretary, The White House (April 9, 2008), *available at* http://www.whitehouse.gov/news/releases/2008/04/20080409-2.html (last visited May 1, 2008). Little of the authorized funding, however, will be spent on those in or heading federal prisons. *See* H.R. 1593, 110th Cong. (2007) (enacted). Other studies have shown that offenders serving lengthier sentences have slightly higher recidivism rates than offenders serving shorter sentences, and that offenders who serve prison sentences are more likely to recidivate than offenders who are given a community-based punishment. Paul Gendreau, Claire Goggin & Francis T. Cullen, *Effects of Prison Sentences on Recidivism*, at 16 (1999), *available at* http://www2.psepbc.gc.ca/publications/corrections/199912_e.pdf (last visited July 30, 2008).

110 Bureau of Justice Statistics, Incarcerated Children and Their Parents 1-2 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/icp.pdf (last visited July 22, 2008); *see also* W. Wilson Goode, Sr. & Thomas J. Smith, Building From the Ground Up: Creating Effective Programs to Mentor Children of Prisoners 1 (2005), *available at* http://www.ppv.org/ppv/publications/assets/185_publication.pdf (last visited May 19, 2008).

111 *See* Goode & Smith, *supra* note 99, at 1.

112 *Supra* note 94, at 27.

113 USSC 2007 Sourcebook, *supra* note 72, at Table 14.

114 *See* U.S. Census Bureau, The 2008 Statistical Abstract: The National Data Book: *Annual Estimates of the Resident Population by Race, Age, and Sex: April 1, 2000 to July 1, 2006*, at Table 8 (May 17, 2007), *available at* http://www.census.gov/prod/2007pubs/08statab/pop.pdf (last visited Sept. 5, 2008).

115 1991 USSC Report, *supra* note 3, at 76, 80-81; *see also* USSC Fifteen Year Report, *supra* note 95, at 90, 131 (Nov. 2004), *available at* http://www.ussc.gov/15_year/15year.htm (last visited July 22, 2008) (describing how mandatory minimum sentences for both gun and drug offenses disproportionately impact African Americans).

116 There is a five-year mandatory minimum for trafficking 5 grams or more of crack or 500 grams or more of powder cocaine. There is a 10-year mandatory minimum for trafficking 50 grams or more of crack or 5 kilograms or more of powder cocaine. 21 U.S.C. § 841(b) (2007). Because it takes 100 times as much powder cocaine as crack cocaine to trigger the same mandatory minimum sentence, this penalty system is commonly called the "100-to-1 drug quantity ratio." U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 2-4 (May 2007), *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf (last visited July 22, 2008) [hereinafter USSC 2007 Cocaine Report].

117 *See supra* note 95, at 42.

118 U.S. Dep't of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies, 2006 *National Survey on Drug Use & Health*, as Detailed Table 1.34A (2006), *available at* http://www.oas.samhsa.gov/NSDUH/2k6nsduh/tabs/2k6tabs.pdf (last visited August 27, 2008).

119 *Id.*

120 USSC 2002 Cocaine Report, *supra* note 74, at 126.

121 *See* USSC 2007 Cocaine Report, *supra* note 103, at 12-13.

122 18 U.S.C. § 3553(e) (2007); U.S.S.G. § 5K1.1 (2007). The code and the guideline use identical language and permit the court to sentence an offender below the applicable guidelines range when a motion is brought by the prosecutor. The "substantial assistance" provision is limited in nature. First, only the prosecution, not the defense, can move for a departure for providing substantial assistance. Second, the assistance given must be "substantial." The guidelines do not define that term, so in practice there are potentially as many definitions of the term "substantial" as there are prosecutors. Third, the assistance given qualifies for a reduction only if it concerns the investigation of others—a defendant's full confession of his own criminal involvement is insufficient. Finally, there is no assurance to those who provide substantial assistance that they will receive a reduction of any particular magnitude, or that all who provide assistance receive the same reduction. A reduction could be limited to a small percentage or portion of the sentence; the amounts differ in every case and every circuit. *See* Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* at 3-4 (Jan. 1998), *available at* http://www.ussc.gov/publicat/skreport.pdf (last visited July 30, 2008).

[104] Vincent & Hofer, *supra* note 1, at 21. Similarly, the substantial assistance provision allows drug defendants with a more involved role (and thus more information to trade) to receive lower sentences than their less culpable counterparts. *Id.*

[105] 18 U.S.C. § 3553(e) (2007). To receive a sentence reduction below both the guidelines range (which can be higher than the mandatory minimum) and the mandatory minimum, the prosecutor typically must bring both a motion under § 5K1.1 and a motion under 18 U.S.C. § 3553(e). *See Melendez v. United States*, 518 U.S. 120 (1996). When deciding whether to grant a reduction, courts must give substantial weight to the government's opinion of the value and truthfulness of the offender's assistance. U.S.S.G. § 5K1.1 App. Note 3 (2008).

[106] *See* USSC 2002 Cocaine Report, *supra* note 74, at 6.

[107] USSC 2007 Cocaine Report, *supra* note 105, at 21.

[108] *Id.*

[109] USSC 2002 Cocaine Report, *supra* note 74, at vii.

[110] Vincent & Hofer, *supra* note 1, at 11 ("Only 5% of the offenders convicted under the mandatory minimum statutes in fiscal year 1992 were organizers or leaders of an extensive drug operation. Over 80% did not manage or supervise trafficking activity."). *See also* 1991 USSC Report, *supra* note 3, at 47-49 (describing how mandatory minimums are triggered based only on drug type and weight and are not tailored based on the offender's role or function).

[111] H. Rep. No. 99-845, pt. 1 (1986) ("The Committee strongly believes that the Federal government's most intense focus ought to be on major traffickers: the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities of drugs.").

[112] David M. Zlotnick, *The War Within the War on Crime*, 7 SMU L. Rev. 211 (2004).

[113] *Id. See also* Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 Notre Dame L. Rev. 439, 458 (1999); Michael Edelman, *A Case for Discretion: Are Mandatory Minimums Usurping Our Sense of Justice and Compassion?*, Newsweek (Nov. 13, 1995).

[114] *See, e.g.*, Families Against Mandatory Minimums, *Voices for Reform*, *available at* http://www.famm.org/ExploreSentencing/TheIssue/Voicesforreform.aspx (last visited June 18, 2008); Justice Fellowship, *Issues in Criminal Justice Reform: Mandatory Minimums*, *available at* http://www.justicefellowship.org/contentIndex.asp?ID=321 (last visited July 22, 2008).

[115] 1991 USSC Report, *supra* note 3 (the 1991 report was prepared pursuant to Pub. Law No. 101-647, § 1703, 104 Stat. 4789 (1991)).

[116] *Id.* at 25.

[117] Vincent & Hofer, *supra* note 1, at 1.

[118] William H. Rehnquist, *Luncheon Address* (June 18, 1991), United States Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286 (1991).

[119] Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting* (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (last visited Sept. 5, 2008).

[120] 1991 USSC Report, *supra* note 3, at 6.

[121] Bureau of Justice Statistics, U.S. Dep't of Justice, Justice Expenditure and Employment in the United States, 2003 (Apr. 2006), at 1, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus03.pdf (last visited June 18, 2008).

[122] Jan Wood & Don Stemen, *Issues in Brief: Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2005*, Vera Institute of Justice 4 (May 2006), *available at* http://www.vera.org/publication_pdf/226_431.pdf (last visited June 18, 2008).

[123] Judith A. Greene, *Positive Trends in State-Level Sentencing and Corrections Policy*, Families Against Mandatory Minimums 13-15 (2-03), *available at* http://www.famm.org/Repository/Files/82731_Positive%20Trends.pdf (last visited June 18, 2008).

[124] *Id.* at 11-12.

[125] *Id.* at 13.

[126] *Id.* at 14-15.

[127] *Id.* at 13-14. *See also* The Pew Center on the States, One in 100: Behind Bars in America 2008 17-20 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8213PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (last visited July 23, 2008) (describing how Texas and Kansas have created alternatives to incarceration in an effort to cope with rapidly growing prison costs).

[128] *See generally* C. West Huddleston, III et al., *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States*, National Drug Court Institute (May 2005), *available at* http://www.ndci.org/publications/10697_PaintPict_final.pdf (last visited July 23, 2008) (describing current status of drug courts and drug sentencing alternatives around the country).

[129] *See* C. West Huddleston, III et al., *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States*, National Drug Court Institute 6-8 (May 2008), *available at* http://www.ndci.org/publications/PCPIII_web.pdf (last visited July 30, 2008).

[130] Press Release, *Ferry Awards $3.4 Million in Grants to Support Substance Abuse Treatment and Accountability through Drug Courts* (Dec. 29, 2006), *available at* http://www.governor.state.tx.us/division/press/pressreleases/PressRelease.2006-12-29.1041 (last visited June 18, 2008).

[131] Vincent & Hofer, *supra* note 1, at 2. While imposition of the guideline sentence is no longer mandatory after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Court did mandate that lower courts consider the guidelines when sentencing and "tailor the sentence in light of other statutory concerns." *Id.* at 248-46. While the experience under the now-advisory guidelines has been short, courts have largely continued to follow them. Since *Booker*, sixty-one percent of federal cases were sentenced within the applicable guideline range. *See* U.S. Sentencing Commission, Preliminary Post-*Kimbrough*/*Gall* Data Report (July 2008) Table 1, *available at* http://www.ussc.gov/USSC_Kimbrough_Gall_Report_July_08_Final.pdf (last visited July 30, 2008). Twenty-five percent were sentenced below the guideline range upon motion of the government, usually in exchange for substantial assistance to law enforcement. *Id.* The 1984 Act establishing the sentencing guidelines provided for judicial review of a sentencing decision through an appeal filed by either the defendant or the government, including "plainly unreasonable" sentences and sentences where the guidelines were applied incorrectly. 18 U.S.C. § 3742(a)-(b). In *Gall v. United States*, decided the same day as *Kimbrough*, the Supreme Court held that a district judge's sentencing decision, whether inside or outside of the guidelines range, is reviewed under an "abuse of discretion" standard. *Gall v. United States*, 552 U.S. —, 128 S. Ct. 586 (2007) (No. 06-7949). Since *Gall*, the proportion of cases where a judge departed from the guidelines has remained essentially the same as the post-*Booker* rate. Preliminary Post-*Kimbrough*/*Gall* Data Report, Table 1.

[132] *See, e.g.*, Families Against Mandatory Minimums, *Profile of Marcus Boyd*, at http://www.famm.org/ExploreSentencing/TheIssue/FacesofFAMM/MarcusBoyd.aspx (last visited May 19, 2008) (describing how Boyd received a sentence of over 14 years under the federal guidelines, despite the fact that the applicable mandatory minimum sentence was only five years). Boyd's sentence was so lengthy because his testimony in his own defense was deemed to be obstruction of justice and because his ten prior convictions for driving with a suspended license produced a criminal history category of III under the guidelines, placing Boyd in a much higher guideline sentencing range.

[133] *See* 18 U.S.C. § 3553(f) (2007).

[134] *See supra* note 71 and accompanying text.

[135] *See* 18 U.S.C. § 3553(a) (2007).

[136] *See generally* Brief of Amicus Curiae Families Against Mandatory Minimums at 8-12, *Gall v. United States*, — S.Ct. —, 128 S.Ct. 586 (2007) (No. 06-7949) (describing how the so-called "parsimony principle" developed by Montesquieu, Cesare Beccaria, and Jeremy Bentham influenced the Founding Fathers and continues to this day, to be a widely-accepted and uncontroversial guideline for criminal sentencing), available at http://www.famm.org/Repository/Files/Gall_Amicus_Brief_(FINAL_FOR_FILING_-_July_26_2007).pdf (last visited Sept. 5, 2008). "[P]arsimony is not an eighteenth century relic . . . To the contrary, it is now a Congressional command" set forth in 18 U.S.C. § 3553(a). *Id.* at 11-12.

Our Mission

Families Against Mandatory Minimums (FAMM) was established in 1991 to roll back the onslaught of mandatory minimum sentencing laws and promote fair and proportionate sentencing policies.

Through lobbying, advocacy, litigation, and media outreach, FAMM educates legislators and the public about the harm caused by mandatory minimum sentences. FAMM's national membership includes prisoners and their families, attorneys, judges, criminal justice experts and concerned citizens.

Our Vision

FAMM's vision is a nation in which sentencing is individualized, humane, and sufficient but not greater than necessary to impose just punishment, secure public safety, and support successful rehabilitation and reentry.

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111TH CONGRESS
1ST SESSION

H. R. 1459

To amend the Controlled Substances Act and the Controlled Substances Import and Export Act regarding penalties for cocaine offenses, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 12, 2009

Mr. SCOTT of Virginia (for himself, Mr. CONYERS, Ms. JACKSON-LEE of Texas, Mr. NADLER of New York, Ms. WATERS, Mr. LEWIS of Georgia, Mr. DAVIS of Illinois, Mr. ELLISON, Mr. JOHNSON of Georgia, Mr. GRIJALVA, Mr. PAYNE, Mr. COHEN, Ms. NORTON, and Mr. RANGEL) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend the Controlled Substances Act and the Controlled Substances Import and Export Act regarding penalties for cocaine offenses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fairness in Cocaine Sentencing Act of 2009".

SEC. 2. ELIMINATION OF INCREASED PENALTIES FOR COCAINE OFFENSES WHERE THE COCAINE INVOLVED IS COCAINE BASE.

(a) CONTROLLED SUBSTANCES ACT.—The following provisions of the Controlled Substances Act (21 U.S.C. 801 et seq.) are repealed:

(1) Clause (iii) of section 401(b)(1)(A).

(2) Clause (iii) of section 401(b)(1)(B).

(3) The sentence beginning ''Notwithstanding the preceding sentence'' in section 404(a).

(b) CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT.—The following provisions of the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) are repealed:

(1) Subparagraph (C) of section 1010(b)(1).

(2) Subparagraph (C) of section 1010(b)(2).

SEC. 3. REESTABLISHMENT OF POSSIBILITY OF PROBATIONARY SENTENCE.

(a) CONTROLLED SUBSTANCES ACT.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in each of subparagraphs (A) and (B), by striking the last two sentences; and

(2) by striking the final sentence of subparagraph (C).

(b) CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended in each of paragraphs (1) and (2), by striking the last two sentences.

SEC. 4. ELIMINATION OF MINIMUM MANDATORY IMPRISONMENT PENALTIES FOR COCAINE OFFENSES.

(a) CONTROLLED SUBSTANCES ACT.—

(1) Section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A)) is amended by adding at the end the following: "However, any minimum term of imprisonment otherwise required under this subparagraph shall not apply to an offense under clause (ii).".

(2) Section 401(b)(1)(B) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(B)) is amended by adding at the end the following: "However, any minimum term of imprisonment otherwise required under this subparagraph shall not apply to an offense under clause (ii).".

(b) CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT.—

(1) Section 1010(b)(1) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)) is amended by adding at the end the fol-

lowing: "However, any minimum term of imprisonment otherwise required under this paragraph shall not apply to an offense under subparagraph (B).".

(2) Section 1010(b)(2) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(2)) is amended by adding at the end the following: "However, any minimum term of imprisonment otherwise required under this paragraph shall not apply to an offense under subparagraph (B).".

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111TH CONGRESS
1ST SESSION

H. R. 1466

To concentrate Federal resources aimed at the prosecution of drug offenses on those offenses that are major.

IN THE HOUSE OF REPRESENTATIVES

MARCH 12, 2009

Ms. WATERS (for herself, Mr. SCOTT of Virginia, Ms. CORRINE BROWN of Florida, Mr. MEEKS of New York, Ms. KILPATRICK of Michigan, Ms. NORTON, Mr. JOHNSON of Georgia, Ms. CLARKE, Mr. COHEN, Mr. HASTINGS of Florida, Mr. ELLISON, Mr. PASTOR of Arizona, Mr. STARK, Ms. FUDGE, Mr. FATTAH, and Mr. DAVIS of Illinois) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To concentrate Federal resources aimed at the prosecution of drug offenses on those offenses that are major.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Major Drug Trafficking Prosecution Act of 2009".

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) Since the enactment of mandatory minimum sentencing for drug users, the Federal Bureau of Prisons budget increased from $220 million in 1986 to $5.4 billion in 2008.

(2) Mandatory minimum sentences are statutorily prescribed terms of imprisonment that automatically attach upon conviction of certain criminal conduct, usually pertaining to drug or firearm offenses. Absent very narrow criteria for relief, a sentencing judge is powerless to mandate a term of imprisonment below the mandatory minimum. Mandatory minimum sentences for drug offenses rely solely upon the weight of the substance as a proxy for the degree of involvement of a defendant's role.

(3) Mandatory minimum sentences have consistently been shown to have a disproportionate impact on African Americans. The United States Sentencing Commission, in a 15-year overview of the Federal sentencing system, concluded that "mandatory penalty statutes are used inconsistently" and disproportionately affect African American defendants. As a result, African American drug defendants are 20 percent more likely to be sentenced to prison than white drug defendants.

(4) In the Anti-Drug Abuse Act of 1986, Congress structured antidrug penalties to encourage the Department of Justice to concentrate its enforcement effort against high-level and major-level drug traffickers, and provided new, long mandatory minimum sentences for such offenders, correctly recognizing the Federal role in the combined Federal-State drug enforcement effort.

(5) Between 1994 and 2003, the average time served by African Americans for a drug offense increased by 62 percent, compared with a 17 percent increase among white drug defendants. Much of this disparity is attributable to the severe penalties associated with crack cocaine.

(6) African Americans, on average, now serve almost as much time in Federal prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months).

(7) Linking drug quantity with punishment severity has had a particularly profound impact on women, who are more likely to play peripheral roles in a drug enterprise than men. However, because prosecutors can attach drug quantities to an individual regardless of the level of culpability of a defendant's participation in the charged offense,

women have been exposed to increasingly punitive sentences to incarceration.

(8) In 2003, the States sentenced more than 340,000 drug offenders to felony convictions, compared to 25,000 Federal felony drug convictions.

(9) Low-level and mid-level drug offenders can be adequately prosecuted by the States and punished or supervised in treatment as appropriate.

(10) Federal drug enforcement resources are not being properly focused, as only 12.8 percent of powder cocaine prosecutions and 8.4 percent of crack cocaine prosecutions were brought against high-level traffickers, according to the Report to Congress: Cocaine and Federal Sentencing Policy, issued May, 2007 by the United States Sentencing Commission.

(11) According to the Report to Congress, "The majority of federal cocaine offenders generally perform low-level functions . . .".

(12) The Departments of Justice, Treasury, and Homeland Security are the agencies with the greatest capacity to investigate, prosecute and dismantle the highest level of drug trafficking organizations, and investigations and prosecutions of low-level offenders divert Federal personnel and re-

sources from the prosecution of the highest-level traffickers, for which such agencies are best suited.

(13) Congress must have the most current information on the number of prosecutions of high-level and low-level drug offenders in order to properly reauthorize Federal drug enforcement programs.

(14) One consequence of the improper focus of Federal cocaine prosecutions has been that the overwhelming majority of low-level offenders subject to the heightened crack cocaine penalties are black and according to the Report to Congress only 8.8 percent of Federal crack cocaine convictions were imposed on whites, while 81.8 percent and 8.4 percent were imposed on blacks and Hispanics, respectively

(15) According to the 2002 Report to Congress: Cocaine and Federal Sentencing Policy, issued May, 2002 by the United States Sentencing Commission, there is "a widely-held perception that the current penalty structure for federal cocaine offenses promotes unwarranted disparity based on race".

(16) African Americans comprise 12 percent of the US population and 14 percent of drug users, but 30 percent of all Federal drug convictions.

(17) Drug offenders released from prison in 1986 who had been sentenced before the adoption of

mandatory sentences and sentencing guidelines had served an average of 22 months in prison. Offenders sentenced in 2004, after the adoption of mandatory sentences, were expected to serve almost three times that length, or 62 months in prison.

(18) According to the Justice Department, the time spent in prison does not affect recidivism rates.

(19) Government surveys document that drug use is fairly consistent across racial and ethnic groups. While there is less data available regarding drug sellers, research finds that drug users generally buy drugs from someone of their own racial or ethnic background. But almost three-quarters of all Federal narcotics cases are filed against blacks and Hispanics, many of whom are low-level offenders.

SEC. 3. APPROVAL OF CERTAIN PROSECUTIONS BY ATTORNEY GENERAL.

A Federal prosecution for an offense under the Controlled Substances Act, the Controlled Substances Import and Export Act, or for any conspiracy to commit such an offense, where the offense involves the illegal distribution or possession of a controlled substance in an amount less than that amount specified as a minimum for an offense under section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A)) or, in the case of any sub-

stance containing cocaine or cocaine base, in an amount less than 500 grams, shall not be commenced without the prior written approval of the Attorney General.

SEC. 4. MODIFICATION OF CERTAIN SENTENCING PROVISIONS.

(a) SECTION 404.—Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended—

(1) by striking "not less than 15 days but";

(2) by striking "not less than 90 days but";

(3) by striking "not less than 5 years and"; and

(4) by striking the sentence beginning "The imposition or execution of a minimum sentence".

(b) SECTION 401.—Section 401(b) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended—

(1) in paragraph (1)(A)—

(A) by striking "which may not be less than 10 years and or more than" and inserting "for any term of years or for";

(B) by striking "and if death" the first place it appears and all that follows through "20 years or more than life" the first place it appears;

(C) by striking "which may not be less than 20 years and not more than life imprison-

ment" and inserting "for any term of years or for life";

(D) by inserting "imprisonment for any term of years or" after "if death or serious bodily injury results from the use of such substance shall be sentenced to";

(E) by striking the sentence beginning "If any person commits a violation of this subparagraph";

(F) by striking the sentence beginning "Notwithstanding any other provision of law" and the sentence beginning "No person sentenced"; and

(2) in paragraph (1)(B)—

(A) by striking "which may not be less than 5 years and" and inserting "for";

(B) by striking "not less than 20 years or more than" and inserting "for any term of years or to";

(C) by striking "which may not be less than 10 years and more than" and inserting "for any term of years or for";

(D) by inserting "imprisonment for any term of years or to" after "if death or serious

bodily injury results from the use of such substance shall be sentenced to";

(E) by striking the sentence beginning "Notwithstanding any other provision of law".

(c) SECTION 1010.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1)—

(A) by striking "of not less than 10 years and not more than" and inserting "for any term of years or for";

(B) by striking "and if death" the first place it appears and all that follows through "20 years and not more than life" the first place it appears;

(C) by striking "of not less than 20 years and not more than life imprisonment" and inserting "for any term of years or for life";

(D) by inserting "imprisonment for any term of years or to" after "if death or serious bodily injury results from the use of such substance shall be sentenced to";

(E) by striking the sentence beginning "Notwithstanding any other provision of law"; and

(2) in paragraph (2)—

(A) by striking "not less than 5 years and";

(B) by striking "of not less than twenty years and not more than" and inserting "for any term of years or for";

(C) by striking "of not less than 10 years and not more than" and inserting "for any term of years or to";

(D) by inserting "imprisonment for any term of years or to" after "if death or serious bodily injury results from the use of such substance shall be sentenced to";

(E) by striking the sentence beginning "Notwithstanding any other provision of law".

(d) SECTION 418.—Section 418 of the Controlled Substances Act (21 U.S.C. 859) is amended by striking the sentence beginning "Except to the extent" each place it appears and by striking the sentence beginning "The mandatory minimum".

(e) SECTION 419.—Section 419 of the Controlled Substances Act (21 U.S.C. 860) is amended by striking the sentence beginning "Except to the extent" each place it appears and by striking the sentence beginning "The mandatory minimum".

(f) SECTION 420.—Section 420 of the Controlled Substances Act (21 U.S.C. 861) is amended—

(1) in each of subsections (b) and (c), by striking the sentence beginning "Except to the extent";

(2) by striking subsection (e); and

(3) in subsection (f), by striking ", (c), and (e)" and inserting "and (c)".

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111TH CONGRESS
1ST SESSION

H. R. 265

To target cocaine kingpins and address sentencing disparity between crack and powder cocaine.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 7, 2009

Ms. JACKSON-LEE of Texas introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To target cocaine kingpins and address sentencing disparity between crack and powder cocaine.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009".

SEC. 2. FINDINGS.

Congress finds the following:

(1) Cocaine base (commonly known as "crack cocaine") is made by dissolving cocaine hydro-

chloride (commonly known as "powder cocaine") in a solution of sodium bicarbonate (or a similar agent) and water. Therefore, crack and powder cocaine are simply different forms of the same substance and all crack cocaine originates as powder cocaine.

(2) The physiological and psychotropic effects of cocaine are similar regardless of whether it is in the form of cocaine base (crack) or cocaine hydrochloride (powder).

(3) One of the principal objectives of the Anti-Drug Abuse Act of 1986, which established different mandatory minimum penalties for different drugs, was to target Federal law enforcement and prosecutorial resources on serious and major drug traffickers.

(4) In 1986, Congress linked mandatory minimum penalties to different drug quantities, which were intended to serve as proxies for identifying offenders who were "serious" traffickers (managers of retail drug trafficking) and "major" traffickers (manufacturers or the kingpins who headed drug organizations).

(5) Although drug purity and individual tolerance vary, making it difficult to state with specificity the individual dose of each form of cocaine, 5 grams

of powder cocaine generally equals 25 to 50 individual doses and 500 grams of powder cocaine generally equals 2,500 to 5,000 individual doses, while 5 grams of crack cocaine generally equals 10 to 50 individual doses (or enough for a heavy user to consume in one weekend) and 500 grams of crack cocaine generally equals 100 to 500 individual doses.

(6) In part because Congress believed that crack cocaine had unique properties that made it instantly addictive, the Anti-Drug Abuse Act of 1986 established an enormous disparity (a 100 to 1 powder-to-crack ratio) in the quantities of powder and crack cocaine that trigger 5- and 10-year mandatory minimum sentences. This disparity permeates the Sentencing Guidelines.

(7) Congress also based its decision to establish the 100 to 1 quantity ratio on the beliefs that—

(A) crack cocaine distribution and use was associated with violent crime to a much greater extent than was powder cocaine;

(B) prenatal exposure to crack cocaine was particularly devastating for children of crack users;

(C) crack cocaine use was particularly prevalent among young people; and

(D) crack cocaine's potency, low cost, and ease of distribution and use were fueling its widespread use.

(8) As a result, it takes 100 times more powder cocaine than crack cocaine to trigger the 5- and 10-year mandatory minimum sentences. While it takes 500 grams of powder cocaine to trigger the 5-year mandatory minimum sentence, it takes just 5 grams of crack cocaine to trigger that sentence. Similarly, while it takes 5 kilograms of powder cocaine to trigger the 10-year mandatory minimum sentence, 50 grams of crack cocaine will trigger the same sentence.

(9) Most of the assumptions on which the current penalty structure was based have turned out to be unfounded.

(10) Studies comparing usage of powder and crack cocaine have shown that there is little difference between the two forms of the drug and fundamentally undermine the current quantity-based sentencing disparity. More specifically, the studies have shown the following:

(A) Both forms of cocaine cause identical effects, although crack is smoked, while powder cocaine is typically snorted. Epidemiological

data show that smoking a drug delivers it to the brain more rapidly, which increases likelihood of addiction. Therefore, differences in the typical method of administration of the two forms of the drug, and not differences in the inherent properties of the two forms of the drug, make crack cocaine potentially more addictive to typical users than powder cocaine. Both forms of the drug are addictive, however, and the treatment protocol for the drug is the same regardless of the form of the drug the patient has used.

(B) Violence committed by crack users is relatively rare, and overall violence has decreased for both powder and crack cocaine offenses. Almost all crack-related violence is systemic violence that occurs within the drug distribution process. Sentencing enhancements are better suited to punish associated violence, which are separate, pre-existing crimes in and of themselves.

(C) The negative effects of prenatal exposure to crack cocaine were vastly overstated. They are identical to the effects of prenatal exposure to powder cocaine and do not serve as

a justification for the sentencing disparity between crack and powder.

(D) Although Congress in the mid-1980s was understandably concerned that the low-cost and potency of crack cocaine would fuel an epidemic of use by minors, the epidemic of crack cocaine use by young people never materialized to the extent feared. In fact, in 2005, the rate of powder cocaine use among young adults was almost 7 times as high as the rate of crack cocaine use. Furthermore, sentencing data suggest that young people do not play a major role in crack cocaine trafficking at the Federal level.

(E) The current 100 to 1 penalty structure undermines various congressional objectives set forth in the Anti-Drug Abuse Act of 1986. Data collected by the United States Sentencing Commission show that Federal resources have been targeted at offenders who are subject to the mandatory minimum sentences, which sweep in low-level crack cocaine users and dealers.

(11) In 1988, Congress set a mandatory minimum sentence for mere possession of crack cocaine, the only controlled substance for which there is a

mandatory minimum sentence for simple possession for a first-time offender.

(12) Major drug traffickers and kingpins traffic in powder, not crack.

(13) Contrary to Congress's objective of focusing Federal resources on drug kingpins, the majority of Federal powder and crack cocaine offenders are those who perform low level functions in the supply chain.

(14) As a result of the low-level drug quantities that trigger lengthy mandatory minimum penalties for crack cocaine, the concentration of lower level Federal offenders is particularly pronounced among crack cocaine offenders, more than half of whom were street level dealers in 2005.

(15) The Departments of Justice, Treasury, and Homeland Security are the agencies with the greatest capacity to investigate, prosecute, and dismantle the highest level of drug trafficking organizations, but investigations and prosecutions of low-level offenders divert Federal personnel and resources from the prosecution of the highest-level traffickers, for which such agencies are best suited.

(16) The unwarranted sentencing disparity not only overstates the relative harmfulness of the two

forms of the drug and diverts Federal resources from high-level drug traffickers, but it also disproportionately affects the African-American community. According to the United States Sentencing Commission's May 2007 Report, 82 percent of Federal crack cocaine offenders sentenced in 2006 were African-American, while 8 percent were Hispanic and 8 percent were White.

(17) Only 13 States have sentencing laws that distinguish between powder and crack cocaine.

SEC. 3. COCAINE SENTENCING DISPARITY ELIMINATION.

(a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in subparagraph (A)(iii), by striking "50 grams" and inserting "5 kilograms"; and

(2) in subparagraph (B)(iii), by striking "5 grams" and inserting "500 grams."

(b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1)(C), by striking "50 grams" and inserting "5 kilograms"; and

(2) in paragraph (2)(C), by striking "5 grams" and inserting "500 grams".

SEC. 4. ELIMINATION OF MANDATORY MINIMUM FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence,".

SEC. 5. INCREASED EMPHASIS ON CERTAIN AGGRAVATING AND MITIGATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and, if appropriate, amend the sentencing guidelines to ensure that the penalties for an offense involving trafficking of a controlled substance—

(1) provide tiered enhancements for the involvement of a dangerous weapon or violence, including, if appropriate—

(A) an enhancement for the use or brandishment of a dangerous weapon;

(B) an enhancement for the use, or threatened use, of violence; and

(C) any other enhancement the Commission considers necessary;

(2) adequately take into account the culpability of the defendant and the role of the defendant in the offense, including consideration of whether enhancements should be added, either to the existing enhancements for aggravating role or otherwise, that

take into account aggravating factors associated with the offense, including—

(A) whether the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood;

(B) whether the defendant is an organizer or leader of drug trafficking activities involving five or more persons;

(C) whether the defendant maintained an establishment for the manufacture or distribution of the controlled substance;

(D) whether the defendant distributed a controlled substance to an individual under the age of 21 years of age or to a pregnant woman;

(E) whether the defendant involved an individual under the age of 18 years or a pregnant woman in the offense;

(F) whether the defendant manufactured or distributed the controlled substance in a location described in section 409(a) or section 419(a) of the Controlled Substances Act (21 U.S.C. 849(a) or 860(a));

(G) whether the defendant bribed, or attempted to bribe, a Federal, State, or local law

enforcement officer in connection with the offense;

(H) whether the defendant was involved in importation into the United States of a controlled substance;

(I) whether bodily injury or death occurred in connection with the offense;

(J) whether the defendant committed the offense after previously being convicted of a felony controlled substances offense; and

(K) any other factor the Commission considers necessary; and

(3) adequately take into account mitigating factors associated with the offense, including—

(A) whether the defendant had minimum knowledge of the illegal enterprise;

(B) whether the defendant received little or no compensation in connection with the offense;

(C) whether the defendant acted on impulse, fear, friendship, or affection when the defendant was otherwise unlikely to commit such an offense; and

(D) whether any maximum base offense level should be established for a defendant who qualifies for a mitigating role adjustment.

SEC. 6. OFFENDER DRUG TREATMENT INCENTIVE GRANTS.

(a) GRANT PROGRAM AUTHORIZED.—The Attorney General shall carry out a grant program under which the Attorney General may make grants to States, units of local government, territories, and Indian tribes in an amount described in subsection (c) to improve the provision of drug treatment to offenders in prisons, jails, and juvenile facilities.

(b) REQUIREMENTS FOR APPLICATION.—

(1) IN GENERAL.—To be eligible to receive a grant under subsection (a) for a fiscal year, an entity described in such subsection shall, in addition to any other requirements specified by the Attorney General, submit to the Attorney General an application that demonstrates that, with respect to offenders in prisons, jails, and juvenile facilities who require drug treatment and who are in the custody of the jurisdiction involved, during the previous fiscal year that entity provided drug treatment meeting the standards established by the Single State Authority for Substance Abuse (as that term is defined in section 7(e)) for the relevant State to a number of such offenders that is two times the number of such offenders to whom that entity provided drug treatment during the fiscal year that is 2 years be-

fore the fiscal year for which that entity seeks a grant.

(2) OTHER REQUIREMENTS.—An application under this section shall be submitted in such form and manner and at such time as specified by the Attorney General.

(c) ALLOCATION OF GRANT AMOUNTS BASED ON DRUG TREATMENT PERCENT DEMONSTRATED.—The Attorney General shall allocate amounts under this section for a fiscal year based on the percent of offenders described in subsection (b)(1) to whom an entity provided drug treatment in the previous fiscal year, as demonstrated by that entity in its application under that subsection.

(d) USES OF GRANTS.—A grant awarded to an entity under subsection (a) shall be used—

(1) for continuing and improving drug treatment programs provided at prisons, jails, and juvenile facilities of that entity; and

(2) to strengthen rehabilitation efforts for offenders by providing addiction recovery support services, such as job training and placement, education, peer support, mentoring, and other similar services.

(e) REPORTS.—An entity that receives a grant under subsection (a) during a fiscal year shall, not later than

the last day of the following fiscal year, submit to the Attorney General a report that describes and assesses the uses of such grant.

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $10,000,000 to carry out this section for each of fiscal years 2009 and 2010.

SEC. 7. GRANTS FOR DEMONSTRATION PROGRAMS TO REDUCE DRUG USE SUBSTANCE ABUSERS.

(a) AWARDS REQUIRED.—The Attorney General may make competitive grants to eligible partnerships, in accordance with this section, for the purpose of establishing demonstration programs to reduce the use of alcohol and other drugs by supervised substance abusers during the period in which each such substance abuser is in prison, jail, or a juvenile facility, and until the completion of parole or court supervision of such abuser.

(b) USE OF GRANT FUNDS.—A grant made under subsection (a) to an eligible partnership for a demonstration program, shall be used—

(1) to support the efforts of the agencies, organizations, and researchers included in the eligible partnership, with respect to the program for which a grant is awarded under this section;

(2) to develop and implement a program for supervised substance abusers during the period described in subsection (a), which shall include—

(A) alcohol and drug abuse assessments that—

(i) are provided by a State-approved program; and

(ii) provide adequate incentives for completion of a comprehensive alcohol or drug abuse treatment program, including through the use of graduated sanctions; and

(B) coordinated and continuous delivery of drug treatment and case management services during such period; and

(3) to provide addiction recovery support services (such as job training and placement, peer support, mentoring, education, and other related services) to strengthen rehabilitation efforts for substance abusers.

(c) APPLICATION.—To be eligible for a grant under subsection (a) for a demonstration program, an eligible partnership shall submit to the Attorney General an application that—

(1) identifies the role, and certifies the involvement, of each agency, organization, or researcher involved in such partnership, with respect to the program;

(2) includes a plan for using judicial or other criminal or juvenile justice authority to supervise the substance abusers who would participate in a demonstration program under this section, including for—

(A) administering drug tests for such abusers on a regular basis; and

(B) swiftly and certainly imposing an established set of graduated sanctions for noncompliance with conditions for reentry into the community relating to drug abstinence (whether imposed as a pre-trial, probation, or parole condition, or otherwise);

(3) includes a plan to provide supervised substance abusers with coordinated and continuous services that are based on evidence-based strategies and that assist such abusers by providing such abusers with—

(A) drug treatment while in prison, jail, or a juvenile facility;

(B) continued treatment during the period in which each such substance abuser is in prison, jail, or a juvenile facility, and until the completion of parole or court supervision of such abuser;

(C) addiction recovery support services;

(D) employment training and placement;

(E) family-based therapies;

(F) structured post-release housing and transitional housing, including housing for recovering substance abusers; and

(G) other services coordinated by appropriate case management services;

(4) includes a plan for coordinating the data infrastructures among the entities included in the eligible partnership and between such entities and the providers of services under the demonstration program involved (including providers of technical assistance) to assist in monitoring and measuring the effectiveness of demonstration programs under this section; and

(5) includes a plan to monitor and measure the number of substance abusers—

(A) located in each community involved; and

(B) who improve the status of their employment, housing, health, and family life.

(d) REPORTS TO CONGRESS.—

(1) INTERIM REPORT.—Not later than September 30, 2009, the Attorney General shall submit to Congress a report that identifies the best practices relating to the comprehensive and coordinated treatment of substance abusers, including the best practices identified through the activities funded under this section.

(2) FINAL REPORT.—Not later than September 30, 2010, the Attorney General shall submit to Congress a report on the demonstration programs funded under this section, including on the matters specified in paragraph (1).

(e) DEFINITIONS.—In this section:

(1) ELIGIBLE PARTNERSHIP.—The term ''eligible partnership'' means a partnership that includes—

(A) the applicable Single State Authority for Substance Abuse;

(B) the State, local, territorial, or tribal criminal or juvenile justice authority involved;

(C) a researcher who has experience in evidence-based studies that measure the effective-

ness of treating long-term substance abusers during the period in which such abusers are under the supervision of the criminal or juvenile justice system involved;

(D) community-based organizations that provide drug treatment, related recovery services, job training and placement, educational services, housing assistance, mentoring, or medical services; and

(E) Federal agencies (such as the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the office of a United States attorney).

(2) SUBSTANCE ABUSER.—The term ''substance abuser'' means an individual who—

(A) is in a prison, jail, or juvenile facility;

(B) has abused illegal drugs or alcohol for a number of years; and

(C) is scheduled to be released from prison, jail, or a juvenile facility during the 24-month period beginning on the date the relevant application is submitted under subsection (c).

(3) SINGLE STATE AUTHORITY FOR SUBSTANCE ABUSE.—The term ''Single State Authority for Sub-

stance Abuse'' means an entity designated by the Governor or chief executive officer of a State as the single State administrative authority responsible for the planning, development, implementation, monitoring, regulation, and evaluation of substance abuse services in that State.

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $5,000,000 for each of fiscal years 2009 and 2010.

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

(a) IN GENERAL.—The United States Sentencing Commission, in its discretion, may—

(1) promulgate amendments pursuant to the directives in this Act in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (Public Law 100–182), as though the authority under that Act had not expired; and

(2) pursuant to the emergency authority provided in paragraph (1), make such conforming amendments to the Sentencing Guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

(b) PROMULGATION.—The Commission shall promulgate any amendments under subsection (a) promptly so that the amendments take effect on the same date as the amendments made by this Act.

SEC. 9. INCREASED PENALTIES FOR MAJOR DRUG TRAFFICKERS.

(a) INCREASED PENALTIES FOR MANUFACTURE, DISTRIBUTION, DISPENSATION, OR POSSESSION WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DISPENSE.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended—

(1) in subparagraph (A), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting "$10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively; and

(2) in subparagraph (B), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

(b) INCREASED PENALTIES FOR IMPORTATION AND EXPORTATION.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting "$10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively, and

(2) in paragraph (2), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

SEC. 10. AUTHORIZATION OF APPROPRIATIONS AND REQUIRED REPORT.

(a) AUTHORIZATION OF APPROPRIATIONS FOR DEPARTMENT OF JUSTICE.—There is authorized to be appropriated to the Department of Justice not more than $36,000,000 for each of the fiscal years 2009 and 2010 for the prosecution of high-level drug offenses, of which—

(1) $15,000,000 is for salaries and expenses of the Drug Enforcement Administration;

(2) $15,000,000 is for salaries and expenses for the Offices of United States Attorneys;

(3) $4,000,000 each year is for salaries and expenses for the Criminal Division; and

(4) $2,000,000 is for salaries and expenses for the Office of the Attorney General for the management of such prosecutions.

(b) AUTHORIZATION OF APPROPRIATIONS FOR DEPARTMENT OF TREASURY.—There is authorized to be appropriated to the Department of the Treasury for salaries and expenses of the Financial Crime Enforcement Network (FINCEN) not more than $10,000,000 for each of fiscal years 2009 and 2010 in support of the prosecution of high-level drug offenses.

(c) AUTHORIZATION OF APPROPRIATIONS FOR DEPARTMENT OF HOMELAND SECURITY.—There is authorized to be appropriated for the Department of Homeland Security not more than $10,000,000 for each of fiscal years 2009 and 2010 for salaries and expenses in support of the prosecution of high-level drug offenses.

(d) ADDITIONAL FUNDS.—Amounts authorized to be appropriated under this section shall be in addition to amounts otherwise available for, or in support of, the prosecution of high-level drug offenses.

(e) REPORT OF COMPTROLLER GENERAL.—Not later than 180 days after the end of each of fiscal years 2009 and 2010, the Comptroller General shall submit to the Committees on the Judiciary and the Committees on Appropriations of the Senate and House of Representatives a report containing information on the actual uses made of the funds appropriated pursuant to the authorization of this section.

SEC. 11. EFFECTIVE DATE.

The amendments made by this Act shall apply to any offense committed on or after 180 days after the date of enactment of this Act. There shall be no retroactive application of any portion of this Act.

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111TH CONGRESS
1ST SESSION

H. R. 2178

To amend the Controlled Substances Act and the Controlled Substances Import and Export Act to eliminate certain mandatory minimum penalties relating to crack cocaine offenses.

IN THE HOUSE OF REPRESENTATIVES

APRIL 29, 2009

Mr. RANGEL introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend the Controlled Substances Act and the Controlled Substances Import and Export Act to eliminate certain mandatory minimum penalties relating to crack cocaine offenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Crack-Cocaine Equitable Sentencing Act of 2009".

SEC. 2. TREATING CRACK AND OTHER FORMS OF COCAINE THE SAME FOR TRAFFICKING PENALTIES.

(a) TREATING 50 GRAMS OF CRACK THE SAME AS 50 GRAMS OF OTHER FORMS OF COCAINE.—Section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A)) is amended by striking clause (iii).

(b) TREATING 5 GRAMS OF CRACK THE SAME AS 5 GRAMS OF OTHER FORMS OF COCAINE.—Section 401(b)(1)(B) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(B)) is amended by striking clause (iii).

SEC. 3. TREATING THE POSSESSION OF CRACK THE SAME AS THE POSSESSION OF OTHER FORMS OF COCAINE.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence that begins "Notwithstanding the preceding sentence".

SEC. 4. TREATING THE IMPORTATION OF CRACK THE SAME AS THE IMPORTATION OF OTHER FORMS OF COCAINE.

(a) TREATING 50 GRAMS OF CRACK THE SAME AS 50 GRAMS OF OTHER FORMS OF COCAINE.—Section 1010(b)(1) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)) is amended by striking out subparagraph (C).

(b) TREATING 5 GRAMS OF CRACK THE SAME AS 5 GRAMS OF OTHER FORMS OF COCAINE.—Section

1010(b)(2) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(2)) is amended by striking out subparagraph (C).

SEC. 5. SENTENCING COMMISSION TO AMEND GUIDELINES.

As soon as practicable after the date of the enactment of this Act, the United States Sentencing Commission shall promulgate such amendments to the Sentencing Guidelines as are necessary to conform those Guidelines to the amendments made by this Act.

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111TH CONGRESS
1ST SESSION

H. R. 18

To amend the Controlled Substances Act and the Controlled Substances Import and Export Act with respect to penalties for powder cocaine and crack cocaine offenses.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 6, 2009

Mr. BARTLETT introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend the Controlled Substances Act and the Controlled Substances Import and Export Act with respect to penalties for powder cocaine and crack cocaine offenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Powder-Crack Cocaine Penalty Equalization Act of 2009".

SEC. 2. TRAFFICKING.

(a) 50-GRAM PENALTY.—Section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A)) is amended—

(1) in clause (ii), by striking "5 kilograms" and inserting "50 grams"; and

(2) by striking clause (iii).

(b) 5-GRAM PENALTY.—Section 401(b)(1)(B) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(B)) is amended—

(1) in clause (ii), by striking "500 grams" and inserting "5 grams"; and

(2) by striking clause (iii).

SEC. 3. POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking "cocaine base" and inserting "any controlled substance described in section 401(b)(1)(A)(ii)".

SEC. 4. IMPORT AND EXPORT.

(a) 50-GRAM PENALTY.—Section 1010(b)(1) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)) is amended—

(1) in subparagraph (B), by striking "5 kilograms" and inserting "50 grams"; and

(2) by striking subparagraph (C).

(b) 5-GRAM PENALTY.—Section 1010(b)(2) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(2)) is amended—

(1) in subparagraph (B), by striking "500 grams" and inserting "5 grams"; and

(2) by striking subparagraph (C).

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