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FEDERAL COCAINE SENTENCING POLICY

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME AND DRUGS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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FEDERAL COCAINE SENTENCING POLICY

WEDNESDAY, MAY 22, 2002

UNITED STATES SENATE,
SUBCOMMITTEE ON CRIME AND DRUGS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:35 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph Biden Jr., chairman of the subcommittee, presiding.

Present: Senators Biden, Leahy, Hatch, and Sessions.

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

Chairman BIDEN. The hearing will come to order, please.

This hearing, in one sense, has been a long time coming, and I am happy to be able to sit here and share this in the presence of my two distinguished colleagues, the ranking member, and former chairman and the chairman of the full committee, Senator Leahy.

I have a relatively brief opening statement, and then I will yield to Senator Hatch.

Quite frankly, with the permission of my colleagues, I would like them to yield to Senator Leahy and to Senator Sessions, both of whom have played major roles in dealing with this extremely controversial subject.

This morning, the subcommittee will be examining an issue that has been the subject of controversy in recent years, namely the difference in how Federal law treats drug offenses involving powder cocaine and crack cocaine.

Under the current law, as our witnesses clearly know—this is not meant to be instructive for the witnesses in any sense—offenses involving 5 grams of crack cocaine, the same weight as these two sugar cubes in this vial, are treated the same way as up to 500 grams of powder cocaine, the amount that I have of sugar—and this is sugar in this bag.

[Laughter.]

Both are subject to the same 5-year mandatory minimum penalty.

Now, many have argued that this 100 to 1 disparity is unnecessary and unjust. As a matter of fact, when President Bush was asked about the longer sentences for crack cocaine, he said, "The disparity ought to be addressed by making sure that powder cocaine and crack cocaine penalties are the same. I don't believe we ought to be discriminatory."

I agree that the current disparity in sentencing cannot be justified, although I must take responsibility for this disparity existing. We all, in this business, tend to tell you the good things we do and claim those good things and want you to remember them. But occasionally, we make mistakes. I'm the guy that wrote the law—literally. I'm the guy who drafted the legislation that resulted in this disparity. But I will get into that in a moment.

Today, Judge Murphy—and it is an honor to have you here, Judge—chair of the U.S. Sentencing Commission is with us. She will present the commission's unanimous recommendation that the disparity I referred to should be reduced by changing the amount of crack needed to trigger the Federal minimum mandatory penalties. I know that the commission, a bipartisan panel, comprised in large part of Federal judges who preside over cocaine cases, spent a great deal of time studying this issue. They heard from a wide range of experts before coming to their unanimous conclusion that the crack-powder sentencing disparity should be decreased to at least 20 to 1 from 100 to 1.

Let me share with you a few facts that led to their conclusion.

First, the average sentence for crack offenses was 44 months longer than the average powder cocaine offense. Second, two-thirds of all Federal crack convictions are of low-level street dealers—two-thirds.

Third, more than a quarter of all Federal crack offenses involve small quantities of cocaine, less than 25 grams.

In the Senate, there are those on both sides of the aisle who feel the current crack sentence disparity is unjust. Senator Sessions and Senator Hatch, both of whom have led in this area, have introduced legislation to reduce that disparity. I want to congratulate them on their hard work and dedication to this issue, which I understand is not the most popular thing we could be dealing with.

Back in 1986, as I said, I was of those people who was alarmed by the newest drug on the scene, and it was new then, and that was a smokeable form of crack cocaine that was ravaging our inner cities. I might add, Pat Moynihan, our former colleague, was the first one to call our attention to it and say that although it had been in the Bahamas, it was coming. We did not pay a whole lot of attention to it. It came, and it hit like a storm.

I remember the headline, which I think summed it up. It read, "New York City Being Swamped by Crack: Authorities Say They Are Almost Powerless to Halt Cocaine." It was called the Summer of Crack.

In Congress, there was a feeling of desperation that summer, a sense that we had to give law enforcement the power needed to save the neighborhoods being ravaged by this drug.

More than a dozen bills were introduced to increase the penalties for crack. But because we knew so little about it, the proposals were all over the map. We held extensive hearings. We had medical experts come in, telling us it was much more addictive. There was the phrase: "Once on crack, you never go back." There was a lot of testimony saying how particularly dangerous this was.

The proposals ranged from former President Reagan's proposal for a 20 to 1 disparity between crack and powder—which is what we are proposing going back to, or at least what the Sentencing

Commission is proposing going back to a 1,000 to 1 disparity proposed by our old friend, now deceased, former Governor and former Senator Lawton Chiles.

I joined Senators Byrd and Dole in an effort to enact an anti-drug abuse act in 1986, in which we established the current 100 to 1 disparity. Our intentions were good. But as the nuns who educated me used to do, after my having misbehaved in school by talking during class in grade school—they would make you walk to the board and not only clap the erasers and clean the board, but you would have to write 500 times on the board some saying. One of the ones I remember writing, and I committed it to memory out of necessity, was: "The road to hell is paved with good intentions."

Well, the fact of the matter was that our intentions were good. But in the rush to legislation, we may not have gotten it right.

Looking back after 16 years, it is clear that the harsh crack penalties have had a disproportionate impact on African-American communities. There are not a whole lot of folks convicted for breaking into suburban neighborhoods, with people snorting coke and doing a line at a time. But there are a whole lot of folks out on the street corners that are, as they should be, by the way, in my view. As they should be. But 85 percent of those convicted for crack offenses at the Federal level are African-American.

We have learned that crack and powder cocaine are virtually the same drug. According the Journal of the American Medical Association, "Cocaine, regardless of whether it is crack or cocaine hydrochloride, leads to the same physiological and behavioral effects."

We now know that the dire predictions of a generation of crack babies whose mothers used crack during pregnancy have not proven true, at least according to medical experts.

Now President Bush, Federal judges, Federal prosecutors, doctors, academics, social scientists, civil rights leaders, civic leaders, clergy, and others have begun to speak about the disparity between crack and powder cocaine sentences.

That is why, quite frankly, I was surprised at Deputy Attorney General Larry Thompson's testimony before the U.S. Commission on Civil Rights in March, and I am about to be surprised by Mr. Howard's testimony. I know what it is going to be, and it is a real switch.

Mr. Thompson said, "After thorough study and internal debate, we have concluded that the current Federal policy and guidelines for sentencing crack cocaine are appropriate." That has surprised us all, because we all thought we were working on the same page, but we have found out that you are reading a different book.

I hope that today we can explore the validity of the administration's position and its apparent shift from President Bush's position last year.

I would also like to state for the record that I have invited Deputy Attorney General Thompson and drug czar John Walters to testify today. Both declined to appear before the Congress to explain why the administration suddenly changed its position. A man who we have great respect for here, John Walters, said he would not have time to get up to speed on the issue.

The issue of the disparity between crack and powder cocaine laws is an important one, and I am glad that we are taking the

time to discuss it. I look forward to the hearing this morning. I have an open mind as to exactly what it should be; I have withheld introducing my own legislation.

I now will yield to Senator Hatch, who I think has a pretty sound piece of legislation that he and the Senator from Alabama have introduced. But I yield to Senator Hatch, and then to the chairman, and then to Senator Sessions.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman. I appreciate your leadership in all of these areas, and we have worked together very closely for many years.

I would like to welcome all of our witnesses here today, and a number of members of the U.S. Commission on Civil Rights in the audience that I notice—in particular, my former general counsel, Mike O'Neill. We are happy to welcome you back, Mike, and all the rest of you as well.

This is an important hearing on Federal cocaine sentencing policy. Mr. Chairman, you and I have worked together for over two decades to fight crime, including drug trafficking. I look forward to working with you on this issue.

Let me begin by saying that we have good panelists here today, whose diverse and expert testimony will undoubtedly help us devise rational, coherent, and fair sentencing policies.

I especially want to compliment Judge Murphy for her leadership on the Sentencing Commission, which has produced thoughtful recommendations and changes in the Sentencing Guidelines. I look forward, as always, to hearing her views today.

I also look forward to hearing today from the Honorable Roscoe Howard, U.S. attorney for the District of Columbia, who offers a unique, firsthand perspective of the impact our Federal drug sentencing laws have on people in communities every day.

Finding ways to reduce drug crime is not and should not be a partisan issue. All of us who are involved in this process are trying to craft the right solution to curb the spread of drug trafficking and drug abuse. An easy, straightforward blueprint unfortunately has proven to be elusive in this area.

Over 15 years ago, Congress passed the bipartisan Sentencing Reform Act. This was a revolutionary bill that categorically changed the objectives of sentencing policy. We replaced the then-existing model of haphazard and indeterminate sentencing with a sentencing policy that focused on certain and objective punishment. But it is fair to say that some of the bipartisan changes to Federal sentencing policy the Congress has made over the last 20 years have been more successful than others.

For over a decade, I have questioned, along with others, the overall utility of some severe minimum mandatory sentences. Indeed, in 1993, I published a Law Review article, suggesting that Congress should consider greater use of alternatives to mandatory minimum sentences, including the use of specific and general sentencing directives in pursuing uniform, certain, and effective sentencing. I still believe that today. That is why I agreed to cospon-

sor, with Senator Sessions, S. 1874, the Drug Sentencing Reform Act.

S. 1874 reduces the sentencing disparity between the mandatory minimum sentences imposed for offenses involving crack and powder cocaine. Over the past decade, public officials, interest groups, and criminal justice practitioners have questioned the fairness and practicality of Federal sentencing policy for cocaine offensives, specifically the 100 to 1 ratio between powder and crack cocaine. I have come to agree that while crack cocaine has a disproportionately greater detrimental effect than powder cocaine on society, particularly in minority families, children, and communities, the sentencing differential, which is based solely on drug quantity, does not further adequately the objectives of a fair and just sentencing policy.

The Sessions-Hatch bill reduces the 100 to 1 sentencing disparity between crack and powder cocaine to a 20 to 1 ratio by raising the threshold for crack from 50 to 20 grams and lowering the threshold for powder from 500 to 400 grams.

I want to be clear that this reduction does not give credence to the argument that crack and powder cocaine are coequal in their destructive effects. On the contrary, this fivefold reduction in the crack-powder ratio corrects the unjustifiable disparity while appropriately reflecting the greater harm to our citizens and communities posed by crack cocaine. Moreover, the increase in penalties for powder cocaine offensives simply reflects the existing reality that cocaine in whatever form has had very devastating effects on families and communities.

Our bill also includes specific directives to the Sentencing Commission to create sentencing enhancements for all drug offensives that involve violence or the use of fire arms and for organizers and supervisors who use young women and children to distribute drugs.

Finally, our bill contains another specific sentencing directive that will reduce the sentences of people who play a minimal role in drug offensives.

Ours, I believe, is a balanced bill that uses various sentencing methods to craft a more rational and effective sentencing policy. It does not go easy on drug dealers. Those who are determined to peddle dangerous drugs to our most vulnerable citizens will continue to pay gravely for those choices. Those who use firearms or violence while dealing drugs will be punished even more severely. Those who are less culpable, albeit far from innocent, will receive fair and just punishment.

The approach Senator Sessions and I take in our bill differs from that which is being recommended by the administration and the Sentencing Commission. Reasonable minds can and do differ often as to the appropriate response to this issue.

I understand that the administration is continuing to study the disparity issue and its consequential effects, and I commend them for what they are doing and encourage their continued involvement in this process. I personally believe that we can all work together on this issue and possibly reach common ground. I know that the Senators here today, all of whom I respect—in fact, I respect all Senators on this committee, and we are going to work closely together to do this, and I look forward to meeting this challenge.

Mr. Chairman, I ask that a copy of my complete statement be included in the record, along with my December 2001 letter to Judge Murphy and a copy of my 1993 Law Review article.

Chairman BIDEN. Without objective.

Senator HATCH. Thank you, Mr. Chairman.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Chairman BIDEN. Thank you very much.

Mr. Chairman.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Senator Hatch, Senator Biden and I have all served both as chairman and as ranking member of this committee. None of us have the seniority, though, of Senator Biden.

Chairman BIDEN. That is an honor that I just as soon forego.

[Laughter.]

Senator LEAHY. The only member of the Senate who is senior to me yet still younger than I am.

[Laughter.]

Judge Murphy, it is always a delight to see you, and I appreciate, I must say at the beginning, the amount of time you have spent with me in different meetings here. It means a great deal to me.

Mr. Howard, you understand, of course, as U.S. attorney for the District of Columbia, you really have the best job of anybody in Washington. You may not know it sometimes, when those calls come at 3 a.m., but you really do.

Mr. HOWARD. Thank you, Senator.

Senator HATCH. I see Judge Sessions here. Without leaving anybody else out, of course, Judge Sessions, from Vermont, an old and dear friend of mine and an extraordinarily well-respected judge and before that a trial attorney in Vermont.

Mr. Howard, when we speak of U.S. attorneys on the Sentencing Commission, you have our former U.S. attorney, Charles Tetzlaff, who is sitting back here. I know this will embarrass him, but we have had an awful lot of good U.S. attorneys in Vermont; everybody in Vermont agrees that he set the mark. He is the best U.S. attorney Vermont ever had. So I am glad he is there with you now.

I think in this cocaine sentencing, and Senator Biden and Senator Hatch have touched on this, and certainly Senator Sessions has said in his speeches, I don't think any of our criminal laws have really created more controversy over the past 15 years. The disparity between sentences for crack and powder cocaine has been a debate about racial bias in our justice system. It has also made it difficult for our law enforcement to work in a lot of minority communities.

Even as the crack epidemic of the 1980s has dropped, and the crime rate has dropped dramatically, we in Congress have been unwilling to revisit this issue in a serious way until now.

I hope today's hearing shows a change in the demagogic battles we fought during the 1990s.

I am grateful Senator Biden is holding this hearing. I know that Senator Sessions and Senator Hatch have been very active in this, and I think they have helped get the debate going.

The report is extremely good. I would note that the commission has made a unanimous recommendation. Considering the fact that these commission members go across the political spectrum and background, this should weigh heavily with us.

It is an important report. It shows that the principles that guided Congress in 1986 were often uninformed, and Senator Biden has pointed that out. I voted for some of these very same things that we are now revisiting. Some were not properly implemented.

All of us, Republican or Democrat, on this committee are opposed to crime. We are all opposed to crime. But now we have to think about the best to approach that.

I think Senator Biden pointed out, and I am going on the assumption that these are——

Chairman BIDEN. I am assured it is sugar.

[Laughter.]

Senator LEAHY. I am not going to hold them up again, but the 5 grams of crack cocaine, the 500 grams of powder—the commission reported in 2000 that the average sentence for a crack cocaine offense was nearly 4 years longer than for a powder cocaine offense. It has swelled our prisons. It has had a disproportionate impact on the African-American. They make up 85 percent defendants facing crack cocaine penalties.

Now, this disparity would be troubling enough if we believed our cocaine sentencing policy was working. But I think the penalties we created have proven poorly suited to the concerns we sought to address. We wanted to crack down on those who were bringing crack into our neighborhoods. We were concerned about the effect of the crack epidemic on our young people in our urban areas. We said that we will have these tough penalties because we are going to focus on the traffickers. Well, the Sentencing Commission reports that two-thirds of Federal crack cocaine offenders are street-level dealers. They are not the serious or major traffickers that we talked about in the 1986 drug abuse act. So it has not had its intended effect.

Then, there are a lot who talked about the crack babies, that we had to do something about that. Anybody who has been a parent or a grandparent who looks at what happened with these children had to be moved by it. So we thought we would go after crack to help out on prenatal matters. But now, according to the commission, we know the negative effects of prenatal crack exposure are identical to prenatal powder cocaine exposure, and they are less severe than the negative effects of prenatal alcohol exposures, something that goes across every racial category and, I might say, in my limited experience in this, across every economic and educational level.

I think the roadmap in the commission's recommendation is toward a fair and more proportionate system. The commission would increase the 5-year mandatory minimum threshold for crack cocaine offensives from 5 grams to at least 25 grams and the 10-year threshold from 50 grams to at least 250 grams, leaving powder cocaine untouched.

They talk about additional sentencing enhancements for those who are really the criminals, the drug importers, the drug offend-

ers who use weapons of violence, dealers who sell to children. I have to agree to that.

Senators Sessions and Hatch have introduced legislation that takes us part way toward solving this problem. In fact, Senator Hatch joined me, I think, this last December, when we asked the commission to look at this.

I think their bill is a good start, but I would change it. Instead of achieving a 20 to 1 ratio by lowering threshold quantities for powder cocaine, we need to leave powder cocaine thresholds alone and increase the threshold for 5-year mandatory minimum sentences for crack cocaine to 25 grams, not 20.

Now, Deputy Attorney General Thompson testified before the Sentencing Commission that he is not aware of any evidence that existing powder cocaine penalties are too low. Apparently, their only rationale for increasing penalties for powder cocaine is to reduce the disparity. That is not a good enough reason, and I commend Senators Hatch and Sessions for holding to their convictions.

Especially as, two days before taking office, President Bush said we should address this problem by making sure the powder cocaine and crack cocaine sentences are the same. He said he did not believe we ought to be discriminatory. He spoke of his concerns that we imprison too many people for too long for drug offensives.

It defies belief that the President's aim was to equalize penalties for crack and powder cocaine through a dramatic increase in powder penalties that would further overcrowd our prisons. His own Justice Department has decided that is the only acceptable way to equalize crack and powder penalties. The Justice Department is way off track here. I am glad that neither the Republicans nor the Democrats on the Sentencing Commission accepted this view.

So let's work together. I will certainly work with the commission. I would like to see these recommendations come into law.

Incidentally, you also talked about increasing maximum penalties in three statutes that protect our cultural heritage, and I will work to introduce legislation along that line.

Thank you, Mr. Chairman. I have to tell you, there is no member that I have served within 27 years who has spent more time worrying about this subject than you have.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman BIDEN. Thank you. I wish I had gotten it right the first time.

Senator Sessions.

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

Senator SESSIONS. Thank you, Senator Biden. I appreciate your summary of the circumstances leading to the passage of this legislation. I don't know, under the circumstances, that you were wrong at the time. But since the Congress has, in effect, taken over sentencing—and we have—we have mandated sentencing with very narrow margins for Federal judges—it is appropriate for us to review how it is going and see if we can update it, improve it, refine it, and make it better. I think that is what we are doing here, as far as I can see.

As a prosecutor, when you and Senators Hatch, Thurmond, Kennedy, and Leahy were drafting this legislation, I welcomed it with great delight. I believed that it would help us fight a war against drugs that I was committed to as a U.S. attorney. I believe it did.

In fact, from 1982 to 1990, drug use dropped 45 percent among high school students. There was more progress than most people ever believed in fighting drugs. It was a combination of creating an atmosphere of intolerance and unacceptability of drugs, tough prosecutions, aggressive prosecutions, and tough sentences. Those things ended up reducing addiction in America, reducing the use of drugs in America, and I believe helped play a role in reducing crime in America.

I am not coming at this from a point of view of being soft on crime. I believe a good, tough prosecution makes a difference. I respect the Department of Justice for having the gumption to come in and defend what they do. They are nervous about us sending a signal that we are going soft on drugs. They are nervous that anything that reduces some of the tools that prosecutors have to prosecute cases could undermine their effectiveness.

But I was a prosecutor too, 12 years as U.S. attorney, two and a half years as an assistant. I think we have to look at this objectively. We have to ask ourselves what is the best way to fight crime, and can we justify, can we defend in public, sentences that require 100 to 1 ratios for drug sentences? I do not think that we can defend that rationally. I do not believe the experience that we have seen would indicate that we should sustain and maintain sentences with that kind of disparity.

I think that is where we are coming from. I will offer my full remarks for the record; I want to go on to the panel.

I think that the trigger points that we had 16 years ago may have made sense at the time. But based on our experience, they do not make sense today, and they are not rational, such that we can defend them. If that is so, let's review it and change it. Let's listen to the Sentencing Commission. Senator Hatch's and my legislation is more consistent with the previous recommendations of the Sentencing Commission than this one, but it is still pretty close. Not much difference from what you say.

I would suggest that there is a basis for cracking down stronger on the "yuppie-drug," powder. We are going from 500 grams under our bill to 400 grams of powder, carrying a mandatory 5-year sentence. But that 400 grams is almost 1 pound of powder. A nickel weighs about 5 grams. So we are talking about still a rational sentencing policy for powder that I believe is justified. I think we have been too light on powder.

I think there is a combination of too much aggressiveness on crack and too little aggressiveness on powder that resulted in this extraordinary disparity that we are not able to defend.

It did seem to fall particularly on the African-American community, where crack was most prevalent. That was not the intent of it, I know, when you passed it. In fact, the intent was to try to stop this explosive growth of crack that was destroying whole neighborhoods. But we came in either too late or it just couldn't be done, because within just a matter of years, small towns in Alabama had crack cocaine all over. So it just spread throughout the country,

and the goal of being able to stop the spread of crack just has not been achieved.

I would suggest that Senator Hatch's and my bill is pretty close to what General McCaffrey proposed, the last drug czar. Attorney General Reno, I believe, supported that also.

It is a middle-level approach. It calls for a modest increase in powder and a modest decrease in crack, leaving us with a more balanced, logical, and defensible sentence.

Maybe we will ask Mr. Howard what the prices are today, but as I recall, a kilogram of powder cocaine would sell for about $25,000 or more 10 years ago. You are talking about 500 grams, 400 grams; we are talking about over $10,000 cash value on the street in wholesale bulk form. It would be even more if it were broken down. So this is not a smalltime offender who has 400 grams of cocaine.

Mr. Chairman, thank you for having this hearing. I look forward to the full discussion. That is the great thing about America. We put it all out on the table. That is your style as a leader, put it out on the table. Let's make some good decisions. I look forward to working with you.

Chairman BIDEN. Thank you. Your entire statement will be placed in the record.

[The prepared statement of Senator Sessions appears as a submission for the record.]

I do apologize to the witnesses for us taking the time we have taken. But as you know, Your Honor, this has been a matter of great discussion and great disparity. When you have Senator Leahy and Senator Sessions and Senator Hatch and Senator Biden agreeing on the parameters here, there has been some movement. That is important.

For the record, it is not just the African-American community concerned about disparity. It is leading conservatives in America: James Q. Wilson, the Ronald Reagan Professor of Public Policy at Pepperdine University; John DiLulio, who has been here a number of times, the former Bush administration official, who is referred to as a "crime control conservative"; the congressional testimony of the Bureau of Prisons director, Kathy Hawk Sawyer; Supreme Court Justice William Rehnquist; Supreme Court Justice Anthony Kennedy, one of the most conservative and brilliant jurists in the country; Richard Posner, a Reagan-appointed chief judge of the Chicago-based Seventh Circuit; Barry McCaffrey; Edwin Meese, former Attorney General; Tim Lynch, who directs the Criminal Justice Project for the libertarian Cato Institute; and William F. Buckley.

They have spoken to this issue, and they have spoken to these sentences. One of the underlying reasons why we feel so strongly about this is the one thing we do not want to do as leaders is we do not want to breed contempt for the law. When there is an obvious and overwhelming disparity, regardless of the intention, no matter how well-intentioned it was, if that disparity exists, it breeds in whole communities the notion that the law is deliberately directed at them, that the law is deliberately directed at discriminating against them. When we cannot sustain in a rational debate

with scientific evidence the discrepancy being justified, then, it seems to me, we have an obligation to do something about that.

I ask unanimous consent that the statements of the men I referred to be put in the record at this time.

Again, we are going to be all over the board, but we are all on the same field finally. We are all on the same field. Some are on the 20-yard line, some are on the 40-yard line, but we are all on the same field. We will get this right.

But, again, remember, Jerome Frank in his famous work, "Law and the Modern Mind," talked about the judicial myth and the need for there to be a belief that the system was fair. Mussolini's quote about the pope, "How many legions does the pope have?" Hitler's response was that all they have is their moral standing; they have no armies; they have nothing else.

Respect for the law is incredibly important. If we breed disrespect, even unintentionally, because it is viewed as not being fair, that is very damaging. That is my underlying concern about trying to get this right.

I will not interrupt any longer.

I am pleased to welcome back to the Judiciary Committee Judge Diane E. Murphy, Chair of the U.S. Sentencing Commission.

Judge thank you for taking on that responsibility. It is not an easy job.

Judge Murphy of Minneapolis, Minnesota, has served as a judge on the U.S. Court of Appeals in the Eighth Circuit since 1994. She has been a Federal judge on the bench since 1980, when she was appointed to the U.S. District Court for the District of Minnesota. From 1992 to 1994, she served as the court's chief judge. She also worked with the Federal Sentencing Guidelines since their introduction in 1987, first as a sentencing judge in the trial court and then as an appellate judge, reviewing the sentences imposed.

Judge Murphy was a State district court judge from 1976 to 1978, and an associate in a law firm from 1974 to 1976. Judge Murphy has served as a national president of the Federal Judges' Association, as Chair of the board of the American Adjudication Society, and as a member of the board of the Federal Judicial Center. She chairs the Judge Advisory Committee to the American Bar Association's Standing Committee on Ethics and Professional Responsibility.

I will not go through the rest of her background, but I do want to welcome her.

The second witness is Roscoe C. Howard, U.S. attorney for the District of Columbia. This is his first time testifying before the Congress, so we are particularly pleased to have you, notwithstanding the fact that your elders and seniors refused to be here.

That does not mean that you are not welcome. You are welcome. I am just angry at them. If I were chairman of the full committee, I would make sure they paid a serious price for not being here, and I mean that sincerely.

But we are happy to have you here and welcome you.

Mr. Howard received his undergraduate degree from Brown University, and his law degree from the University of Virginia. From 1984 to 1987, he served as assistant state attorney in the District of Columbia and then moved to assistant U.S. attorney for the

eastern District of Virginia, where among other responsibilities he serves as the Richmond division head of the Organized Crime and Drug Enforcement Task Force.

We welcome them both.

Judge we do have a copy of your report of the Sentencing Commission. I have distributed it to all members. I am aware, for the record, this is not the first time the Sentencing Commission has addressed this subject, and we are delighted you are willing to take it on again. The floor is yours.

Excuse me, Judge, Senator Grassley has a keen interest in the subject of drug policy. He is required to be on the floor of the Senate, but he wanted to be here. He asked me to express his apologies, and I would ask unanimous consent that the statement that he intended to deliver in person be inserted in the record at this point.

[The prepared statement of Senator Grassley appears as a submission for the record.]

STATEMENT OF HON. DIANA E. MURPHY, CHAIR, UNITED STATES SENTENCING COMMISSION, WASHINGTON, DC

Judge MURPHY. Thank you very much, Chairman and Senator Sessions and my seatmate, Mr. Howard.

I am happy to be here on behalf of my colleagues on the Sentencing Commission.

As I think you are well aware, this is the first opportunity this new commission has had to talk with the Senate about cocaine. We came into office on November 15, 1999. We have been very busy since then.

I remember testifying, and both of you were there, at the Senate Caucus on International Narcotics Trafficking last year on our increased penalties on ecstasy. In the time since we have been here, we have increased penalties on methamphetamine manufacturing; distribution of amphetamines; on precursor chemicals; on schedule B depressants, including the date drugs and GHB; also on the proprietors of rave and crack houses. I just mention that because this is not a soft on crime commission. Quite the contrary.

But we decided this year, for a variety of reasons, to take up this important topic. It was, in the first instance, many different groups talking to us about their concerns with this, including judges who are actually sentencing the human beings that are convicted of these crimes, and many different community groups. We had the legislation that Senator Sessions was contemplating and that he and Senator Hatch then introduced. We had the letter from Senators Leahy and Hatch, asking us for a report. We were aware of statements by people in the administration, from the very highest places to others involved in drug enforcement, that there seemed to be an interest in taking another look at this.

We have a very open process. When we decide that we are going to study something, we publish notice of that. We get input, written testimony, materials of all kinds. We had a series of public hearings this year, at which a variety of people testified on cocaine sentencing, including people who have studied it—academics, medical and scientific people, people from the various communities that are affected by it and concerned about it, also prosecutors and de-

fense counsel who were involved in this. We tried to get a lot of people from the government to come, and we did have, as you referred to, the deputy attorney general at our hearing in March.

We also had the benefit that our own staff analysis of the data we collect.

These are the actual cases that have been prosecuted and where people have been convicted of these drug crimes. I am going to refer to a few charts that show what the data are about the cocaine cases.

We believe that in the course of the year, from the variety of sources that I have indicated, we have discovered that there is new information available about these offenses. When the Anti Drug Abuse Act was passed 16 years ago, there may have been somewhat limited information available at that time, because of the newness of the crack situation. But we believe that there is significant information that merits Congress taking another hard look at this, and we welcome the fact that you all here are doing that.

We spent most of the year working toward our substantive position on this. We talked back and forth. The fact that we came out with a unanimous result is not because we just go along like lemmings. It is the opposite. It was a lot of hard work.

Chairman BIDEN. I can testify to that, Your Honor.

[Laughter.]

Judge MURPHY. As we got closer to the end of the year, all of a sudden, we were aware that we had a major procedural decision to make. This was whether to promulgate an amendment that would have effected the change in the guidelines controlling sentencing. The Commission would have had the power to promulgate an amendment to send to Congress. Congress, of course, would have had the power to do whatever it wanted, if it didn't like it. Or should we make a recommendation to Congress? That was a hard decision, particularly for some of our members who felt we only have these responsibilities for a limited time, and we believe that here are adjustments that could be made, and who knows when Congress might act on it.

But we, on the other hand, came to understand that there would be real problems in passing an amendment, because the guidelines, by the Commission itself, were tied to the mandatory minimum structure. If we would have changed the guidelines by themselves, it would have created a greater disparity between those people who were sentenced because of the trigger of the mandatory minimums and those who were sentenced under the guidelines.

We also talked with all of you, with your staffs, and other members who are not here today. We perceived that there was a concern. Obviously, this is something that Congress has to do. The Commission cannot do it by itself. That may be one of the reasons that the prior Commission, back in 1995, did not take the most effective procedure in that it took the approach of a separate amendment.

Any rate, we decided to come with a recommendation, and we are here now.

You have received my written testimony, as well as the report. I do have charts here.

The first one is just a visual description of what you have already referred to, which are the demographics of the offender population. Over 90 percent are minorities for crack. Of that, it is over 84 percent of the offenders who are black.

On the powder offenders, there again, a very large proportion, over 80 percent, are minorities. But here the largest segment is Hispanic.

Now, all of our data are national data. It is the whole universe of the cases that are actually prosecuted where there are convictions, so it is the total group. I imagine we may be hearing something about the District of Columbia that Mr. Howard is going to be very, very familiar with. But I just wanted to emphasize that our material is the national effect.

The second figure takes the Department's testimony about comparing the cocaine powder sentences and the crack sentences where the amount has been less than 25 grams. You see that there is a 4.8 times greater sentence. The 100 to 1 disparity, of course, is in the trigger amounts that trigger the mandatory minimums, but these are the actual sentences. You can see how much more severe the crack sentences are. We asked the question of whether that proportion is the appropriate proportion.

The next figure shows the offender functions in the actual cases. You see this very large bar, which is over 66 percent of the crack convicted defendants who are actual street-level dealers. We have other charts in our report that show the small amounts these people are dealing in.

You have referred already to your 1986 legislative history, where the intent of Congress was to capture the serious traffickers with the 5-year mandatory minimums. Actually, what is being captured are the street-level dealers, as you can see from this. The idea was that serious traffickers, and it was defined more fully, and the major traffickers, would get the 10 years. When we saw the chart with the functions, we were amazed. We didn't expect that to be—this was something we learned as we studied this this year.

Then when we looked at the offense characteristics of the offenders, we began to look at some of these concerns that society has about weapons, about violence, about protected locations. Sales to pregnant women, that almost is nonexistent for crack; there is more for powder cocaine, but not much. Bodily injury, it is not a great percentage of the offenses, but that is the serious offenders. These are the ones that society is most concerned about.

As we thought about this, we thought the rational system adjustment would be to target those cocaine offenders who are the more serious threat to society. For that reason, we developed our sentencing enhancements.

The next chart shows a shorthand version of our unanimous, bipartisan recommendation. I think really our recommendations are very close to those of Senator Sessions and Senator Hatch. There are some differences, but when Senator Hatch said that he thought we were on common ground and could work toward that, I was very happy to hear that.

We recommend that the 5 year mandatory minimum trigger be moved up to 25 grams and that the 10 year mandatory minimum be at least 250 grams. This would be a 20 to 1 ratio. We do believe

that crack offensives, for a variety of reasons, should be punished more severely than powder. But we believe that this 20 to 1 is appropriate.

We understand why Congress chose to use quantity. It is something that everybody understands as a measure. But we think that you can get a more closely targeted sentencing system if you add something to that, and that is looking at special aggravating conduct together with quantity. So we arrived at these specific enhancements. That is that there would be increases for the use of weapons, and it goes up, the number of points. There are levels that would go up, depending on whether a weapon was actually used, brandished or possessed in connection with it. Bodily injury, depending on how serious it was, would have different level enhancements.

Those people that import—these are higher up people, as Congress recognized back in 1986—would also have an enhancement, those who are repeating drug felons, drug trafficking felons.

Then protected persons and locations—schools, playgrounds, the pregnant, youth, and so forth.

Then we believe that we should maintain the current thresholds with powder cocaine. The more we looked at it, we did not see any persuasive evidence that these sentences were too low as is. We have the greatest respect for Senator Sessions because he is so knowledgeable about this whole area, but that was our conclusion.

Finally, and this is an important chart, this last chart, because it captures the sentencing scheme that Congress has set. It shows the relative comparison of drug sentences. On the left hand side, you see the current sentences, and then you see on the right hand side what it would be with our changed amounts and our aggravator enhancements.

You see that crack cocaine is by far most seriously sentenced. Methamphetamine is next. Powder cocaine is next. Heroin is lower. Then, of course, marijuana.

Some people knowledgeable about drugs are surprised when they see this relative pattern that has come into existence.

But then you see, with our recommendations put in here, that these are brought more closely together and, we believe, in a more proportionate sentencing scheme, which is one of the main goals of the Sentencing Reform Act.

We would be glad to furnish more information. We feel that this is punishment that fits the crime. I guess will shut up, like I am supposed to, with that buzzer.

[The prepared statement of Judge Murphy appears as a submission for the record:]

Chairman BIDEN. Judge, this is very important testimony, and I am the guy who wrote the Sentencing Reform Act. I am the guy who created your outfit.

Quite frankly, what was intended was the kind of work you just did. I mean, I think that our inclination here is to deal with quantities, as you said, because they are understandable. But if you look at that chart, it shows what the actual sentences would be, based on your recommendations, versus what the actual sentencing pattern is presently.

You factor in the things we intended. You factor in violence; you factor in drugs; you factor in weapons; you factor in previous behavior. You factor in what the real world is like out there, and you end up with something that has crack cocaine, heroin, methamphetamine, marijuana, and powder cocaine clearly in a more proportionate relationship to one another that what is over here.

Anyone who argues that crack cocaine, for example, warrants another 22 months in jail, almost 2 years more in jail than methamphetamine, has an awful hard case to make, in terms of impact on the community.

You ask a cop who he would rather go out and arrest, someone on meth or someone on crack cocaine, I promise you that it someone on crack cocaine. The guy on meth is very hard to handle.

I think you have done what I had hoped.

Judge MURPHY. Could I add one thing, Senator?

Chairman BIDEN. Please.

Judge MURPHY. I appreciate what you just said, and I had wanted to point out that we do have the effect of increasing powder sentences. I sounded like we didn't.

Chairman BIDEN. I can see that.

Judge MURPHY. It is because the enhancements for the more serious powder offenders, who have the aggravating conduct factors, would go up.

Chairman BIDEN. The impact is that the average sentence for crack cocaine would go from 74 months to 83 months, almost a year longer.

Judge MURPHY. Right.

Chairman BIDEN. My point is that this is not the soft on crime thing. It also goes up for methamphetamine, from 86 months to 91 months. It also goes up for heroin, from 62 months to 66 months. It goes up from marijuana, from 35 months to 36 months. It comes done from 118 months to 95 months for crack cocaine.

Again, I haven't read the whole report, but one of the reasons I wanted that accumulated expertise, when I drafted the law, was for you to do this kind of complicated, not simplistic, calculation as to what the effect on the actual real world is of the sentencing. That is why we needed your expertise.

Again, I have not decided, but I am impressed by the way you have gone about it. I compliment you.

Let me yield to Mr. Howard now, and have his opening statement, if you would.

STATEMENT OF ROSCOE C. HOWARD, U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA, WASHINGTON, DC; ACCOMPANIED BY JAMES H. DINAN, ASSISTANT U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA, WASHINGTON, DC

Mr. HOWARD. Thank you, chairman, members of the subcommittee. I do appreciate the opportunity to come here on behalf of the Department of Justice to discuss this very important issue.

First, I would like to certainly thank Judge Murphy and the Sentencing Commission for the work they have done on behalf of the Department of Justice, especially with their work with the USA PATRIOT Act.

Senator Leahy, despite this country's new focus on terrorism, we believe it is critical that we not allow our fight against illegal drug abuse to falter. These recommendations by the Sentencing Commission do exactly that, by lowering what we believe are the proper penalties for crack cocaine distributors.

I have laid out many of the reasons in my testimony, why I think that this decision is misguided and why the current Federal sentencing policy on crack cocaine offensives are proper.

It would be appropriate to address the existing differential between crack and powder cocaine not by raising the amount for crack cocaine but by lowering the amount for powder cocaine.

If enacted, the Justice Department believes that the commission's recommendations to lower crack cocaine penalties would signal a retreat in our Nation's fight in the drug war.

What the commission and these recommendations, we believe, fails to take into account are the victims, the families, the neighborhoods, the places where these people operate, where they live, what they affect.

The Justice Department would like today to give voice to those victims. We understand that the charts look at the defendants and who was arrested, but they operate in neighborhoods. I don't have a lot of neat charts, so I apologize. But what I do have are some people.

If I could, I would like to introduce Ms. Shandra Smith. She is sitting behind me on my left.

Chairman BIDEN. Ms. Smith.

Mr. HOWARD. Ms. Smith is the mother of two very bright—one in college—individuals who were gunned down in cold blood in the streets of the District of Columbia.

The picture before you is 20-year-old Rodney Smith. He was home from college, and while driving his sister—Volante, a 14-year-old—to a church party, they stopped at a light. Unfortunately, they stopped in front of a gentleman by the name of Tommy Edelin, a person that we have just prosecuted the District of Columbia's first-in-30-years capital case.

Tommy Edelin runs a crack gang. With him was a young enforcer, who was trying to make a name for himself. Unfortunately, the Smiths were driving a car that seemed to be a lot like a car that had just taken a shot at Edelin and his colleagues. So, as they pulled up behind the car that Ms. Smith's children were in, the enforcer gets out, runs up behind it, unloads a 9 mm in the back of both of their heads and kills them both.

That is who we are here to represent today. Yes, they're black. Yes, that's who these neighborhoods affect.

Edelin gave the nod, and just to prove a point, he had two very innocent people killed.

This city has been victimized by these crack dealers, just as the rest of the Nation has. They are the most violent gang you will ever see.

We start, as we look at the nightly news, and a lot of us who read the Post on a daily basis, you read the Metro section, and you become accustomed to the deaths that occur in this city.

In our office, we do not. They occur every day. Our prosecutors look at them every day.

Volante and Rodney Smith are simply an example of what happens, just innocent people in the wrong place at the wrong time. Unfortunately, in this city, the wrong place is becoming wider and wider and wider.

We are shocked when they take it out on law enforcement. This is very brave, bold group. You may or may not remember, but two FBI agents and a police officer were killed in police headquarters by a crack cocaine dealer. The officers were FBI agents Martha Dixon-Martinez and Michael Miller and MPD Sargent Henry M. Daily. They were killed by Bennie Lawson, who worked for the First and Kennedy Crew.

Uniform police officer Jason White was killed by Donzell McCauley, a street-level dealer in the Kentucky crew. McCauley was arrested later, and when he was arrested, not only did he have a weapon, but he had 13 Ziploc bags of crack cocaine, a total 1.5 grams.

Victims like these are why the President and why the Attorney General have asked me to be here today. We are happy and proud to represent these victims.

Lowering the penalties for crack dealers is simply inconsistent with our reinvigorated battle. The current penalties for crack offensives appropriately reflect the greater harm that crack simply causes. Smoking crack we know is psychologically more addictive. In essence, what you get from smoking crack is a bigger bang for your buck, if you will. Its greater addictive effects cause heavier and more frequent use, greater bingeing, more severe social and behavioral changes, clearly more money.

This is a cash enterprise. As the money flows, the guns come out to protect the money.

Further, crack can easily be broken down and packaged into very small, inexpensive quantities for distribution, thus making it particularly attractive to vulnerable members of our society and, obviously, our vulnerable communities.

Let me share with you another example of somebody who became addicted to crack cocaine. One mother, in order to support her addiction, became a cooker. This is, again, Tommy Edelin. She was hired by the 1-5 Mob, which was Tommy Edelin's group.

She permitted her children to be involved in crack cocaine, in trafficking cocaine. The young boy with the number 3 over his head is this young cooker's son. At the time this picture was taken—this is Tommy Edelin sitting beside the picture number 1. The three people around him are all 12 years old. They joined this gang when they were about 10.

The young man, by the time he was 14, was dead, killed as a street-level dealer. The other two boys are both in prison, one for murder, one for RICO conspiracy.

The neighborhood where they lived was ravaged by this group. They could not sleep. They could not walk outside. They could not go do their grocery shopping. They cannot go to church. They don't let their children play outside. If you walk through the community, their community is a wreck, with bullets, graffiti to mark the different gangs' territory.

These are crack cocaine traffickers. The area is already poor, and the gang just made it deteriorate further.

Once this mob was arrested, if you walked through the neighborhood, you could see the effects immediately. It became a more thriving, law-abiding community.

This 1-5 Mob is simply illustrative. We have many gangs like this in the city, some I cannot talk about now because we are in the process of prosecuting them as we sit here. They do involve minorities. All these gangs do. But they operate in minority communities. That is their neighborhood. Those are the people they know they can intimidate. Those are the people they know won't turn on them because they are scared. They are scared of these gangs.

We have made a lot of progress. When you hear the very figures that you are giving out to us as the numbers are dropping, the Justice Department believes that is a direct result of the legislation as it is now on the books. Our prosecutors do a wonderful job in enforcing those, and it does have its effects.

But the neighborhoods that are ravaged by crack cocaine are still here in the District. Our work is far, far from done.

The citizens, as I go out to community meetings, they still complain that they are unable to leave their homes. They still complain about the drug groups operating on their front steps, in front of their stores, in front of their churches, in front of their schools. The murder rate has been cut in half, and we do thank you, Senate, for you leadership on that. Certainly the prosecutors, the assistant U.S. attorney, throughout the country have done their share.

Nationwide, yes, the murder rate for African-Americans as a percentage is 50 percent. I will let you know that here in the District of Columbia it is exactly 90 percent. Ninety percent of those murder victims are African-American. Crack cocaine and the violence it spawns simply remains an extremely serious problem.

What you have done by giving us this mandatory minimum at the present level is given us a very, very important tool in a fight that we are presently winning. We think for you to change that will simply handcuff us and make our fight that much harder.

Now, my written testimony addresses many other reasons for keeping the penalties where they are. Probably one of the most important things is that these crack dealers are a lot like any business. They're very, very smart. They know what is going on. We think, the Justice Department, for you to change them now is simply sending them the wrong message.

I will guarantee you one thing: They will adjust. They will adjust, to all of our detriment.

Now, again, yes, African-Americans—we don't disagree with the charts that the Sentencing Commission and Judge Murphy have brought up here. We don't disagree with them at all. We know that this epidemic has a serious, serious effect on the African-American communities. We know that. Believe me, we appreciate it, and it is something that we all take a hard look at. But our prosecutors in our office, certainly in the District of Columbia, we are in those communities every day. The victims are the ones that we think that you need to address. They're the ones that you have to talk to. They're the ones who are listening. They are the ones who look for support. They are the ones who look to offices like mine for help, and I have promised to give them that.

Now, what I do not want to do is go back out there and tell them that our job is a little tougher. I believe that the changes that you are suggesting will do just that.

We are here because we do not want lives ruined. We do not want young men, like the one in the picture that we just showed to you, to have their lives ruined.

believe me, when you talk about—I know, Senator, you showed the two little sugar cubes. For crack cocaine, that is, take my word for it, it is a lot of drugs. You are talking about, with a group like the 1-5 Mob or some other groups we are looking at, being able to take that amount of crack cocaine and package it to serve between 50 and 100 people. Believe me, when you have the much crack, when you have it, you are very, very effective in getting this poison into the street. Where you find the crack, you are going to find the guns.

One other picture that I would like to show you, this is a picture on the return on a search warrant of the 1-5 Mob. If you look in the upper left-hand corner, you will see small Ziploc bags. Those small Ziploc bags contain a total of 4.6 grams of cocaine. I will represent to you that that amount is not accidental.

As you adjust, they are going to adjust. Instead of finding them putting 4.6 grams out on the street, if you raise it 20, they are going to start putting 19.6 grams out on the street. You are just simply inviting them, encouraging them, telling them, "Go ahead. Put the rest of the drugs out there."

The reason I wanted to show you this is that this is not uncommon for us. We pick up the drugs, we are going to pick up the guns. Violence goes with this territory. Violence simply goes with this territory.

We think that lowering these penalties simply provides, from Congress to the people out there—I know these are the people you are wanting to address—but we think it simply sends the wrong message at the wrong time. Right now, we are winning.

Now, I have written testimony, and with the chairman's permission, I would like to have that entered into the record.

Chairman BIDEN. Without objection, it will be placed in the record.

Mr. HOWARD. At this time, gentlemen, I would be glad to answer any questions.

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

Chairman BIDEN. Thank you very much.

We are going to have to leave in a moment and come back.

Let me just begin by addressing Mrs. Smith.

Mrs. Smith, in different circumstances, I lost a daughter and I lost a wife abruptly, like you lost your two children. All I can say to you is that there is not anything—we can do or say, or the prosecutor can do or say, that can ease your pain.

I think the worst thing that can happen to someone is have a child predecease a parent. My heart goes out to you.

Everyone can empathize, but unless it happens to you, you can't fully understand it.

I just tell you, my heart aches for you. That is almost insurmountable, what you have had to overcome.

But I can also tell you from experience that time—in time, when you remember your two children, they're going to bring a smile to your lips and not a tear to your eye. My prayer for you is that moment comes sooner than later. But it will come. It will come.

We appreciate you being here. I am sorry that you have to here, believe me, more than you can imagine, how sorry I am you have to be here.

I have a number of questions for you, Your Honor, if I may, but I am going to ask Mr. Howard, is your argument that there is not violence and guns associated with trafficking in meth?

Mr. HOWARD. I am certain there is. I think my representation is that it is not going to be as persistent and as common.

Chairman BIDEN. Now, what evidence do you have? That is not what I am told, by the way, just so you know. What I get in Philadelphia, Wilmington, Delaware, California—I mean you talk about the Bloods and the Crips in California, meth is their deal.

Let me just read a press release from you; I assume it is about this. It says: Violent drug-trafficking crew known as blah, blah, blah, all defendants were found guilty of participating in narcotics conspiracy and distributing over X number, Y period of time. This investigation focused on the narcotics trade and the attendant violence in the housing projects in Washington, DC This crew is responsible for distributing large quantities over the past 7 years. It lists two young people killed by these drug deals. The quote from your boss says that this crew was so vicious a group of dealers, whose decade-long reign of terror brought massive prosecution efforts by the chief gang prosecutor. It is credited with at least 17 murders, including systemic killings of potential witnesses.

I mean, that is pretty bad stuff.

Mr. HOWARD. That could be any of our crack press releases, so I apologize that I am not exactly——

Chairman BIDEN. It is a marijuana press release.

Mr. HOWARD. Marijuana is a problem. I will tell you——

Chairman BIDEN. A marijuana press release. It lists the names of the people: Srigate Sook and Leticia Henry, shot exactly like your children were shot. Good, decent people.

From your office, they talk about this K Street Crew, incredibly violent. They are dealing marijuana.

Mr. HOWARD. Senator, we have had marijuana problems in the city, too.

Chairman BIDEN. But my point is, you are saying here and your boss is saying that:

> The experience of D.C. shows that marijuana dealers are no less violent than cocaine and heroin traffickers. They have just as much money to lose, just as much turf to lose, and just as many reasons to kill any drug trafficker.

That is a press release put out on May 1 of this year by John P. Walters. So I guess he disagrees with you.

Mr. HOWARD. I do not think he does at all, sir.

Chairman BIDEN. Let's get clear here, OK? It says that marijuana dealers are no less violent than cocaine and heroin traffickers. Your testimony is that they are less violent than cocaine traffickers. Is it not? Isn't that your whole point? This is the single most violent group of people, cocaine traffickers; isn't that your rationale?

Mr. HOWARD. They have changed——

Chairman BIDEN. Answer my question, please.

Mr. HOWARD. I am trying to answer your question, Senator.

Chairman BIDEN. No, you can answer it yes or no.

Mr. HOWARD. No, I can't answer that question yes or no, Your Honor. I apologize, but I can't.

Chairman BIDEN. OK, you answer it then.

Mr. HOWARD. If you give me a chance, I will.

Chairman BIDEN. Sure.

Mr. HOWARD. What I am trying to say is, the crack dealers have certainly changed the landscape in this city——

Chairman BIDEN. No question.

Mr. HOWARD [continuing]. Certainly more so than marijuana.

Chairman BIDEN. OK, let's stipulate to that. Now, what is the point beyond that that you are trying to make?

Mr. HOWARD. The point I am trying to make is that, with the crack dealers right now, with our mandatory minimums, we are able to use that as a hammer, to try to figure out where they are getting their crack and move up.

What is going to happen is, if you move the mandatory minimums up to 20 grams or whatever, all you are doing is encouraging these dealers to bring more of this poison onto our streets.

Chairman BIDEN. OK, I've got that.

Mr. HOWARD. OK.

Chairman BIDEN. That makes sense to me.

If need be, I will be happy to swear you in as a witness. But you are not testifying here, then, that crack gangs are more violent than marijuana gangs or more violent than methamphetamine gangs; is that correct?

Mr. HOWARD. Excuse me for a minute?

Chairman BIDEN. Sure.

Mr. HOWARD. What I am saying is that, with the crack gangs, you are going to find that guns and violence are probably more associated with them.

Chairman BIDEN. What evidence do you have of that? Can you give us any evidence to sustain that? The judge comes in with data. Do you have any evidence?

I am not arguing that you may not be right. I haven't taken a position on this yet.

Mr. HOWARD. Your Honor, if you want evidence, go ahead and swear me in, and I will give it to you right now.

Chairman BIDEN. Well, I don't have to swear you in; I'll just ask you now.

What is the evidence?

Mr. HOWARD. Your Honor, my evidence are my prosecutors, and the cases that we have——

Chairman BIDEN. My son is a Federal prosecutor handling drug cases. That is not his experience in Philadelphia with methamphetamines——

Mr. HOWARD. Bring him down to Washington.

Chairman BIDEN [continuing]. Any more than cocaine.

Mr. HOWARD. Bring him down to Washington.

Chairman BIDEN. No, the point is that this is national. I am not the mayor of D.C., I am a United States Senator. I am chairman of a committee that is trying to come up with a rational policy.

Now, I have not made a decision, but you are not giving me relatively important data relating to your basic point, which is that, if Mr. Sessions and Mr. Hatch succeed and we raise the threshold to 20 grams, then it is going to make it harder for you to prosecute.

I thought that if I listened to your testimony, and I will reread it—if I listen to your testimony, I thought the point of having this wonderful woman here was that she was particularly victimized because crack dealers were more violent than all other dealers. I bet if I took a vote in here, I think the most folks out there probably thought that was the point you were trying to make.

Maybe I am just slow. Maybe I misunderstood the point of your graphic testimony, which is moving and compelling. But I am trying to figure out what the point is.

Mr. HOWARD. Well, I guess I don't understand the question.

Chairman BIDEN. Are crack gangs more violent than other street gangs dealing drugs other than crack? That is my question.

Mr. HOWARD. Senator, I don't know how many times somebody needs to be killed or shot to make somebody more or less violent.

Chairman BIDEN. Give me a break. Look, I am trial lawyer, too. Don't pull this stuff on me. Just answer the question: Is it in fact—I am literally trying to find information.

Is it the Justice Department's assertion that crack gangs are more violent than other drug trafficking organizations?

That is the question. Either you know yes, you know no, or you don't know.

Mr. HOWARD. I think if you look at the studies, Your Honor——

Chairman BIDEN. What is your opinion?

Mr. HOWARD. My opinion is yes, they are.

Chairman BIDEN. Yes, they are.

Now, I will leave the record open for a week——

Mr. HOWARD. OK.

Chairman BIDEN [continuing]. For the department to come and give us any information—you may be right——

Mr. HOWARD. OK.

Chairman BIDEN. But give us some information, other than theatrics, that this is in fact true. That's all. We are just trying to figure it out.

It is not what your boss says in the press release. It says prosecutor Volkov—you know him?

Mr. HOWARD. Volkov?

Chairman BIDEN. Yes. Do you know him or her?

Mr. HOWARD. I do. It's a him.

Chairman BIDEN. It says,

> The experience in D.C. shows that marijuana dealers are no less violent than cocaine and heroin traffickers. They have just as much money to lose, just as much turf to lose, just as many reasons to kill as any drug trafficker.

Now, if that statement is true, then it seems to me then, it doesn't go to the issue of whether we should keep the penalties up or down, relative to violence. It is the same with all dealers.

I always thought, having done this for a while—and as that old joke goes, probably have forgotten more than most people know

about drug trafficking—I have always thought that it related to the bucks, the dollars. The dollars were the thing that most impacted upon whether or not Rashid shoots Johnny on the corner, to claim his corner. I thought it was mostly related to dollars, but I may be wrong.

I will give you all the chance in the world to respond when I come back. I only have 2 minutes left to vote.

If Senator Sessions comes back, I will ask him to start his questioning, and we will proceed.

OK, thank you very much. We are going to recess.

[Recess from 11:57 a.m. to 12:11 p.m..]

Senator SESSIONS. I will just say how much I have appreciated the remarks both our witnesses have made and the discussion that has been started here. I am sorry that I missed the excitement.

[Laughter.]

But, Mr. Howard, you are a man of passion, and so is Senator Biden.

Mr. HOWARD. Next time I will go with you, Senator.

Senator SESSIONS. As you were talking, the juices started flowing. You are the kind of man I want to be my prosecutor.

Mr. HOWARD. Thank you.

Senator SESSIONS. I am glad President Bush has chosen you, because if you do not have a passion for the victims of crime, if you do not care about the neighborhoods that have been destroyed by drug dealers, you cannot be a very effective prosecutor, in my view.

I just would say that, and I thank you for being aggressive.

Mr. HOWARD. Thank you, Senator.

Senator SESSIONS. I know that if we have a not particularly significant reduction, in my view, in the actual sentences that will be imposed, prosecutors will feel—some will, at least—that there is some diminution in the tools that they have in their arsenal. I have talked to a lot of prosecutors; I think most of them feel comfortable with some modification.

I do not want juries to feel like, if they convict them, they might get a sentence that is disproportionate or unfair. I worry about that a lot.

Judge Murphy, I would like to commend you on your leadership on this committee, specifically on your decision to propose an amendment to Congress and not to try to manipulate the guidelines by the commission in a way that I think would be inconsistent with the logic of the guidelines. I am sure some may have preferred to do that, but I appreciate you doing it, and we will see what we can do about it.

I want to ask you a few things about the charts that you raised. I think the chart that you showed that is showing a 4.8 times greater sentence for crack than powder, when you are dealing with less than 25 grams, is a significant factor, and it is something that we should consider. I think that is an accurate chart that shows a reality that we should look at.

My and Senator Hatch's bill would increase powder a little bit and reduce crack some. I think you would have a better picture on there under any circumstances.

The next chart, on the offender function in crack cocaine cases, I would like to talk about that a little bit.

Mr. Howard, I tend to agree with you on this issue, that it is the street-level dealers that are disrupting the neighborhoods. They will kill you over a matter. They are addicting people and selling it and moving the drugs on the street.

Don't you think it is a mistake for us to minimize too much the street-level dealer's role in this whole process?

Mr. HOWARD. I think that's absolutely correct, Senator. Not only are they addicting people, but they are addicting people who are in neighborhoods who can't afford it.

This has a corollary effect, in that these people are going out to other neighborhoods, trying to find the money in order to feed their addiction.

As I said before, it is a cash commerce that they are going through. The crack, as you can see, is dealt with in small quantities. Ordinarily, when we catch somebody, it is not a true reflection of what they are actually doing. Just like any business, they do not keep all of their stash near them, because they know that there is a high potential to get robbed, thus the guns. They know that they have a lot of cash, because it is not only a quick high but it is a fleeting high, so people need to come back.

Those people are running out to neighboring communities. They are breaking into cars, breaking into our homes, taking things, selling those things, coming back, getting their cash. The dealers have the cash. They are going to keep the main part of their stash someplace else. They know the potential for robbery. They have the guns.

They operate in these neighborhoods because that is where they live, that is where they know the people. If somebody is going to testify against them, they will let folks know, "I will kill them."

Senator SESSIONS. I don't know what evidence or proof we have, but you have been at this awhile, and I have been at this awhile, when you have people who are addicted, they want that cocaine from the dealer.

Mr. HOWARD. Yes.

Senator SESSIONS. The dealer, if they have it stolen from them or if they put it out on credit and don't get paid, can't go down to the U.S. District Court and sue for a bad debt.

Mr. HOWARD. That's correct.

Senator SESSIONS. I mean, they collect their own money in their own ways.

Mr. HOWARD. They do.

Senator SESSIONS. It is a mean, vicious, dirty, rotten business, is it not?

Mr. HOWARD. It is, Senator.

In the pictures I gave you, I included two pictures of some street-level dealers gone awry. The first one is Maurice Doleman. I did not have a blowup of this. He goes awry of the group, and this is Maurice Doleman just a few months later.

Senator SESSIONS. Killed.

Mr. HOWARD. Killed.

The second picture in your group is Emanual Bennett, another street-level dealer. Again, gone awry of the 1-5 Mob. Here he is, killed, another ordered killing.

They enforce their rules, their laws, their business practices in much, much different ways. There is a lot of cash involved. There is a lot of violence. Violence becomes a way of life for these groups.

Senator SESSIONS. With regard to marijuana and crack cocaine, do you have any evidence that there is a distinction? We were just discussing the violence level.

Mr. HOWARD. The evidence I have actually comes from the Sentencing Commission, and their own figures show that, with crack cocaine, 21.3 percent of those involved with crack cocaine have a weapon involved, compared—I know marijuana was Senator Biden's topic just before the break—their figures show that only 5.9 percent are involved.

There is no doubt that when you have people dealing in an illicit trade, that there is some danger involved. Everybody knows that it's illegal. The problem that we have with crack is that it is just more prevalent. One of the reasons it is more prevalent, again, it is a small quantity. It is something you can stick in your pocket and hide.

Marijuana, for those who don't know, is bulky. It is just not a commodity that is easy to move around.

There is just simply a lot more cash involved. It really has changed the landscape of the District of Columbia.

Senator SESSIONS. The intensity of a habituation or an addiction of marijuana compared to crack is quite different too, isn't it?

Mr. HOWARD. I think that the reports bear that out, that it is a highly addictive drug. It is made from cocaine, and we understand that. But what we find is that the addiction rates are higher. The physiological addiction is higher. Again, the high, as we understand it, wears off quicker; therefore, they need it more. They are actually going through quite a bit of cocaine in a given week, probably as much as 2 to 3 grams in a given week. That is quite a bit of money in neighborhoods that don't have it.

Again, what our evidence has shown, what our experience has shown, as prosecutors in this city, is that people will do whatever they need to fix that. They will steal. Women become prostitutes. We found a sharp spike in prostitution. Gunpoint robberies.

Just a few weeks ago, one of my assistants was held up on Capitol Hill in a gunpoint robbery. They do not care who they are holding up. They just want your money, and they are going to go back and fix their addiction.

Senator SESSIONS. Well, that's important.

Just the night before last, a young lady I know was beaten pretty badly in a robbery. It just brings it home. She was going in her door and was knocked down, injured. She had some surgery on her knee, and it was injured.

This violence out there is important to deal with, and I think I may have quoted that one of the concerns with our proposal to modify the crack guidelines was that it was inconsistent with our reinvigorated battle, and I like to hear you say that.

My personal view is that I would rather have 10 people sent to jail for 5 years than 5 people for 10 years. I mean, I think you have to clean up those streets. We cannot allow professional street toughs pushing drugs in the neighborhoods, undermining the safety of that neighborhood. We have to keep the pressure on.

Mr. HOWARD. Senator, they are our windows into the large dealers. When we have the kind of tools that have been provided to us, we are able to get these street-level dealers, the people in the original bill Congress wanted to address, those who are keeping the street market going. When we can get to them and find out where they're coming, having a hammer of a mandatory sentence makes a difference. It makes a big difference. They will talk, and that's how we break a lot of these groups.

We have actually had the success in the District of Columbia of breaking a street-level dealer with just a few dime bags and actually being able to go across the country and find out who the suppliers were.

Those are the things I think that you would want us to do. As you take certain tools away from us, it simply makes that job harder. I mean, clearly, we will work at it. But right now, we have the tools that are effective. We have the tools that we think actually work.

Senator SESSIONS. Let's talk about the real situation here. You are different because you represent, in effect, the State and Federal Government in the District of Columbia. But throughout the Nation, these drug laws, I know Judge Murphy knows, are just for the Federal court cases. That's one reason, your next-to-the-last chart, showing these figures for crack and heroin and marijuana, I don't think can be as valuable as you think.

The reason I would say that is this: You've got 36 months for marijuana. In Federal court, they are selecting cases to bring into Federal court. So a marijuana case is not going to be brought into Federal court unless it is a pretty big dealer operation probably. The same, actually, is true with cocaine. We have very few, do we not, Mr. Howard, 5-gram cocaine cases in the district?

Mr. HOWARD. That is true. Usually, if you are going to bring something that small in the—if we bring in it the district, it is on the superior court side. But if we were to do it on the Federal court side, there would have to be far extenuating circumstances—violence, gangs, something like that.

Senator SESSIONS. When I was a U.S. attorney, we would sometimes try to take out an entire organization. We may only have a certain amount of drugs on some of the lower people, but we felt it was justified in prosecute the whole organization, so there wouldn't be anyone left to continue the activity in the neighborhood.

You made a good point about the African-American community. There was a minister who brought a group up to Washington a couple of years ago. He had been the pastor of a church in a neighborhood where we did a Weed and Seed group, and prosecuted a vicious crack gang. He introduced me to his church members as the man who put the crack dealers in jail for life. They all applauded. These were some very bad criminals.

We have to get our perspective correct about who we are representing and who we are concerned about.

But I don't know, looking at your chart, Judge Murphy, I do think it is probably correct, based on the cases that you've analyzed, that we are not seeing a major reduction in the sentences for crack cocaine. You are going from 95 to 188 months. Now, I am

not sure the deterrence of a crack case or a crack prosecution would be much less whether the guy got 95 months or 118.

Is that sort of what you are saying?

Judge MURPHY. That is definitely what we are saying. The statistics reflect that these are violent crimes. The data shows that these are serious offenses. But we believe that, with our recommendation, there will be serious sentences.

I did want to say one thing that our data also shows, and there wasn't time to talk about, and that is that the violence connected with drug crimes has gone down. Particularly measuring back to 1986, there is less incidence of violence connected. That is another reason we feel it is important to target those cocaine offenses that are associated with violence.

I am afraid that I am going to have to leave in just a minute, because I have to catch a plane back to Minneapolis, and it is the last seat available.

Senator Biden, I know that you said that you had a question.

Chairman BIDEN. I will submit them to you in writing, Judge, if I could.

Judge MURPHY. OK. We would be glad—I did want to say one thing. Our data is, as I said, reflecting the national universe of these offenses for the year 2000.

But, whenever we go anywhere in the country, we meet with the local Federal judges to ask what is on their mind. A lot of the time, they are attacking the mandatory minimums or attacking what we do on the Commission. But we feel it is important for us to listen to what their concerns are.

We had a meeting in the fall with the Federal judges in the District of Columbia, and it was very well-attended. It was attended by judges appointed by George W. Bush as well as by his father, and I believe there was somebody there that had been appointed by President Reagan also, and of course President Clinton. We didn't set the agenda; it was up to them to talk about what they might be concerned about.

What they talked about were their great concerns about what they perceived as unfair disparity in these cocaine and crack cases, and they are dealing with these cases all the time, from a neutral perspective. So I did want to put that in the record.

Senator SESSIONS. Thank you.

Mr. Chairman, one thing that you did and this Congress did that has reduced violence, I am absolutely certain of it, is when you made the mandatory 5 years without parole for carrying a firearm or using a firearm during a drug offense.

The word is out, don't you think, Mr. Howard, if you are dealing drugs, don't be carrying a gun, because you have another 5 without parole on top?

Mr. HOWARD. Senator, we have actually picked up that statement on intercepts. They know. They know, "Let's leave the gun." They know what goes on.

Judge MURPHY. That is one of the satisfying moments.

Mr. HOWARD. Right, it is. It makes us all smile.

Chairman BIDEN. It makes me smile too, since I wrote it.

Judge I know you have to go, so you are excused. I am presumptuous to excuse a judge, but you are excused, Your Honor.

Judge MURPHY. Again, Mr. Chairman, thank you so much for having this hearing. I think we would all agree, no matter what we have talked about, that it is very important for you all to be looking at this.

Chairman BIDEN. I have one question for Mr. Howard, if I may.

Mr. HOWARD. Yes, sir.

Chairman BIDEN. Of the crack cocaine cases that you have in the District that your office has prosecuted, can you give me a number of how many crack cocaine cases you have prosecuted in the District? Can you give me an estimate, the number of crack cocaine cases?

Mr. HOWARD. In a year?

Chairman BIDEN. In a year or any measure.

Mr. DINAN. It would probably range from 65 to 85 or 100.

Chairman BIDEN. OK. Would you be willing to submit that exact number for the record?

Mr. HOWARD. Your Honor, we can supplement the record with our own data from the office.

Chairman BIDEN. Secondly, can you estimate now—if you can't estimate, do it for the record—whether the discussion that the Senator from Alabama I had before, and my experience in Delaware and, I don't want to get my son in trouble, but my impression in the Philadelphia office, which is a gigantic office, is that there are very few prosecutions brought by the Feds for crack cocaine possession that are under 20 grams. Is that right or wrong?

That is my impression. I may be wrong.

If you have 65 to 80 prosecutions a year for crack cocaine, what is the average amount possessed by the individual you brought the case against? Is it 5 grams? Is it 15 grams? Is it 20 grams? Can you tell me? Do you have any idea?

Mr. HOWARD. In order to be accurate, I would have to look. I understand the point, and it is an excellent point.

One thing I would like to point out, one of the things that drug dealers do try to do, as we talked about avoiding guns, we pick people up on a regular basis, and they will say, "What do you think we have here? About 4.5 grams?" They know what the——

Chairman BIDEN. I am sure that is true, absolutely true for every crime. But my point is, what do you prosecute on average. In other words, I am trying to figure out what you bring into Federal court, in terms of a prosecution for crack cocaine.

Let me put it this way, have you prosecuted anybody for 5 grams this year? Just 5 grams, nothing else? My bet is that you haven't. I don't know, but I am curious.

Mr. DINAN. When I review them, I usually review them by the code section, so it would be a (b)(1)(A), (B), which would be 5 grams or more.

Chairman BIDEN. No, I got the "or more." There has to be 5 grams or more, or you are not in the game.

Mr. HOWARD. Senator, if you would forgive us, can we get that information——

Chairman BIDEN. Yes. I will bet you lunch that the average is well above 5.

Mr. HOWARD. You're on.

Chairman BIDEN. But at any rate, the point was the one raised by my friend earlier, unless I misunderstood him, that the number of Federal prosecutions for merely possessing 5 grams is de minimis, compared to the number of prosecutions.

What is the average possession for prosecutions relating to crack cocaine?

Mr. HOWARD. The actual number? Again, if you will forgive me.

Chairman BIDEN. Amount. Amount. I would like you to break out every case, even if it takes you awhile. Break out the actual number of cases you prosecuted for crack cocaine possession this past 12-month period.Secondly, next to each case, tell me how much the person you are prosecuting possessed. What was the nature of the indictment? For possession of 5 grams? What were the actual amounts possessed?

Before I make up my mind, it goes to the issue, if you were, for example, to raise this to 20 grams, and we would be eliminating 70 percent of the Federal prosecutions for crack cocaine, that has a certain impact. If it would only eliminate 3 percent of the number of prosecutions in Federal court, that would have a different impact.

Mr. HOWARD. Senator, if you wouldn't mind, one of the things that isn't always reflected in those statistics is the fact that we do catch people with 5 grams, sometimes less. Because we have mandatory minimums, we don't need to prosecute. They end up providing us information that allows us——

Chairman BIDEN. I got that. That is a different issue.

Look, one of the reasons my friends in the police organizations don't want this to be changed has nothing to do with violence, nothing to do with any of these things. You get someone with 5 grams, you can turn them. You can turn them. You say, "Hey, I've got 5 grams." They know they're not going to get prosecuted in Federal court for 5 grams, but guess what they don't know? What they don't know is you hold that and say, "Unless you're able to give me the following information, unless you're able to do the following things, I've got you on a minimum mandatory. You're dead." So now I find out where the chop shop is in the neighborhood.

I know a little about this stuff. He knows a lot of about this stuff. The audience doesn't know what we're talking about, but you all know and we know. Just so you know that we know. It's one those kinds of things where it would be helpful if we cut through a lot of the malarkey.

Mr. HOWARD. Senator, I know you know.

Chairman BIDEN. So my point is, I am not in any way doubting—for example, it would make police work easier if it were a half a gram, if the minimum mandatory was for half a gram. A cop gets you for half a gram, OK, turn in your mother.

[Laughter.]

But I understand that's a legitimate tool. But I want to know what the facts are. So to the extent——

Mr. HOWARD. I was just handled something that you have, and if you'll look on page 84, table 5, it sets out the number of cases for the different districts and the median weight.

Chairman BIDEN. Seventy-seven grams, crack cocaine. So you had 57 cases; they averaged 77 grams, which is three times what

the Senator from Alabama is suggesting. Powder cocaine, you had eight cases, and the average is 943.5 grams.

I think I won lunch, but I may be wrong.

[Laughter.]

Mr. HOWARD. Your Honor, I am glad to buy you lunch, but I think the point I was trying to make here earlier is still that where the mandatory minimum is now gives us a lot of tools in order to not only catch this individual, and these are the people who are on the street, the ones with the guns, but that also gives us—we're not looking at chop shops. We are trying to figure out where these drugs are coming from.

Chairman BIDEN. Got it.

Mr. HOWARD. We have had success with that. If you leave it where it is, we think we will continue to have success with that.

Chairman BIDEN. I got it. Look, I just want you to make the case, the point of what you find most valuable in this. It's not that if it were raised to 20 grams, you wouldn't be prosecuting as many cases. If it's raised to 20 grams, it impacts on what I would refer to as the ability to investigate other things, which is legitimate.

Mr. HOWARD. But for us, it is also——

Chairman BIDEN. You know, if the average weight is 77 grams——

Mr. HOWARD. It is not as simple as what we are prosecuting and not prosecuting. We have other ways to use our resources. When we have people who are on the street, and they are minimum amounts they deal with, when we have those people and are able to identify them, we know that with the minimum amount, we are able to bring them in and compromise them.

Chairman BIDEN. That's my point. That's a good argument. That's the one you should have made in the first place. Look, if you were——

Mr. HOWARD. I guess——

Chairman BIDEN. The argument you made—this is getting useless here, but the argument you made with your chart, you showed the chart with the guns on it, and you showed the fact that there were little bags, and you showed the fact of 5 grams, and you indicated that 70 people or whatever the number of people, and, "You know, Senator, if your law passes, you bad guy, if your law passes, guess what? You're going to have these guys going to 19.9 grams just like they did 4.6 here."

Well, let me tell you, if that is the thrust of what you are saying, then you are being relatively derelict as a prosecutor, because you're not prosecuting people at 5 grams.

Mr. HOWARD. Excuse me if I take offense at that.

Chairman BIDEN. No, I am making a point. You shouldn't take offense. You should just be straight. That's all. I am just looking for straight answers. Straight answers.

But you're a very good trial lawyer. I'd love to try a case against you, because I would like to see you before a jury.

You're really good at the props and the rest, but I want to know what the facts are.

Mr. HOWARD. These are the facts are.

Chairman BIDEN. I want to know what the facts are. The facts are that you prosecuted 57 cases, average weight 77 grams of crack cocaine——

Mr. HOWARD. What I am trying to say is that the prosecution isn't all we do in the office.

Chairman BIDEN. I got it. You should have said that in your statement.

Mr. HOWARD. I did say that in my statement.

Chairman BIDEN. OK.

Mr. HOWARD. It's only the tip of the iceberg of what an assistant U.S. attorney does on a day-to-day basis. A lot of it is trying to find these people, debrief them, figure out where they're getting their drugs, go after those individuals. A lot of those cases never end up——

Chairman BIDEN. You are saying, if it goes from 5 to 20 grams, you won't be able to do that as well.

Mr. HOWARD. That is exactly what I am saying.

Chairman BIDEN. Got it. OK.

Mr. HOWARD. OK.

Chairman BIDEN. I hope we don't have to have you back again. [Laughter.]

I mean, for your sake.

Mr. HOWARD. Thank you.

Chairman BIDEN. For our sake, I hope we actually are able to make some progress here.

I thank you very much.

Mr. HOWARD. Thank you.

Chairman BIDEN. All right, may we have order, please?

Our next panel, I understand they have a time restraint as well. I wish we had as much time with you all as the Sentencing Commission does.

But our first witness will be Charles J. Hynes, who has served as the district attorney for Kings County in Brooklyn, New York, since 1989. A lifelong resident of Brooklyn, he was raised—I'm not sure what this has to do with anything, but you were raised in Flatbush and received an undergraduate degree from St. Johns in Queens, began your legal career in 1963.

Before being elected to his current position, Mr. Hynes served for 2 years as a fire commissioner under Ed Koch and then the special State prosecutor for the New York City criminal justice system under Governor Mario Cuomo.

Our second witness is Dr. Charles Schuster, who is currently professor at the Department of Psychiatry and Behavioral Neuroscience at Wayne State University in Detroit, Michigan. He has more than 3 decades of experience working on these issues. Dr. Schuster received his undergraduate degree from Gettysburg College and master's from the University of New Mexico, and Ph.D. from Maryland, all in psychologically. From 1963 to 1969, he served in the Department of Pharmacology at the University of Michigan and worked at the University of Chicago from 1968 to 1990. He served as professor of psychiatry, pharmacology and psychological sciences and behavioral sciences for 18 years, and is director of the Drug Abuse Research Center for 14 years.

Our third witness is William Graham Otis. Mr. Otis has been adjunct professor of law at George Mason University since 1997.

I do that, too. It's fun isn't it, being an adjunct professor?

He currently serves as consultant for the Office of the Secretary of Energy. Mr. Otis is a graduate of the University of North Carolina. He has worked extensively on sentencing issues. He is a member of the Attorney General's Advisory Subcommittee on Sentencing Guidelines. From 1988 to 1999, he was a member of the American Bar Association National Convention on Sentencing Guidelines.

We welcome all of you here. I will put your entire bios in the record.

Dr. Schuster, I understand you have a time constraint. With the permission of the other two witnesses, why don't we let you testify first?

Then, Senator, if you would, you could proceed with questions for Dr. Schuster, if you have any.

The same time will elapse, but we will get the doctor to his plane.

Doctor, the floor is yours.

STATEMENT OF CHARLES SCHUSTER, PROFESSOR, WAYNE STATE UNIVERSITY, DETROIT, MICHIGAN

Mr. SCHUSTER. Thank you very much, Senator Biden.

I was interested in your statement at the beginning regarding your role in writing the legislation that we are reviewing here today. At that time, I was the director of the National Institute on Drug Abuse and appeared before you and various congressional committees when the crack epidemic hit the United States, to express my great alarm about the public health implications of this new form of cocaine use.

My concern about it was primarily because I had done research previously, while at the University of Chicago, studying the addictiveness of various routes of administration of cocaine—intravenous, for example, versus intranasal. I found that when cocaine is administered in a form that its actions are extremely prompt, rapid and intense, that it is much more euphoric, it is much more seductive, it is much more addicting.

We know on the basis of national statistics that this is true, that individuals who use drugs intravenously, experimenting with that that way, are much more likely to move on to addictive use with all the consequences of that.

There was a form of smoked cocaine prior to crack, but it involved an incredibly elaborate extraction procedure, which simply was not practical. When crack cocaine came along, we rapidly established that it had the same seductive properties as intravenous cocaine but without the necessity of putting a needle in your arm. The proportion of our population, particularly of our youth, who were willing a smoke a drug, because of their experience with marijuana, is obviously much greater than the proportion of our youth who would put a needle in their arm.

Since I felt very strongly that the seductive and addictive properties of crack cocaine and intravenous cocaine were comparable, I was alarmed that the public health impact would be much greater

because of the large proportion of the population that would be at risk for abusing crack.

Well, I think that it is absolutely true, and it remains true. However, I also must say that there are some reasons that I think that I oppose, on scientific grounds, the current disparity between the sentencing of individuals when we talk about the difference between 500 grams of powder cocaine and 500 grams of crack cocaine.

You showed us a bag of sugar. That bag of sugar can be used for somewhere between 10,416 and 15,000 intravenous doses of cocaine. The crack cocaine vial that you showed us could at the most result in 200 doses.

Now, I could stop here I think, because I think we would all agree that the public health implications, the social implications of the distribution of between 10,000 and 15,000 doses of intravenous cocaine or, for that matter, 5,000 to 7,000 of intranasal, snorted, cocaine, compared to the distribution and the use of 50 to 200 crack cocaine doses is astronomically different, both in terms of the damage to the individuals who use this drug, in terms of the frequency, the amount that they can get. Secondly, the fact that the total public health impact of this great difference in the number of doses that would be available on the streets, with all of the associated crime, criminal activities, et cetera, that would be associated with the far greater distribution spread of the powder cocaine.

I guess the other thing that bothers me is that I know from my friends who are chemists that that 500 grams of powder cocaine can be converted into crack cocaine in about 30 minutes, and you're going to get about 440 grams of crack. Well, I hate to say it, but if you arrest someone or if you stop someone and they have 499 grams of powder in their pocket, you don't know that within the next half hour they are not going to stop in anybody's kitchen who happens to have bicarbonate of soda, which is baking soda, and some hot water and some pans, and you can cook up crack in a very, very short period of time. So I do not know where it is going to go, whether it is going to be used as it is or whether it is going to be converted.

When the issue of violence is brought up, I run treatment programs and I live in the city of Detroit. I know about violence, and I know about crack cocaine use and the violence associated with it. I would also say, however, that I don't see any distinction, in the city of Detroit at least, between the violence associated with heroin distribution and crack cocaine distribution.

My friends who are into this from the criminological viewpoint tell me that, early on, the increased violence with crack was because of the failure of the maturation of the distribution system, so there were no monopolies, so there was competition. In the heroin business, it is more of a monopoly, and, therefore, there is less competition, and, therefore, less violence.

But that is not a statement that I want the crack cocaine distribution system to mature; please don't misunderstand that. But all I am saying is that I think that the bulk of the violence associated with crack cocaine use is because of distribution disputes.

Let me say one thing, however, and that is that there is evidence that cocaine, whether it is taken intranasally, whether it's take intravenously or whether it's smoked, can, if you take it often enough

and at high enough doses, produce a form of toxic psychosis like a paranoid schizophrenic.

I have patients who come in who have destroyed the walls in their homes and their apartments, looking for where the voices are coming from. These people are extremely paranoid. If pushed, they can become violent. But I see no evidence that this is more likely with smoked cocaine than it is with intravenous cocaine.

Chairman BIDEN. But it may be more likely with cocaine than heroin, for example?

Mr. SCHUSTER. Yes. Heroin, if anything, diminishes aggressiveness, as does marijuana.

Chairman BIDEN. I wanted to make sure that I understood the point.

Mr. SCHUSTER. Exactly.

The different routes of administration of cocaine do not differ in terms of their ability to produce this type of toxic psychosis.

I do not want it to appear that snorted cocaine is safe. It is not. People become addicted to it. But the fact is that it is less addictive because it is slow in its onset. It is less toxic because cocaine, in addition to getting to the brain and producing all kinds of changes in brain chemistry, also causes vasoconstriction. It shuts down the blood supply, so if you snort cocaine, it closes down the blood vessels that have to absorb the cocaine from your nasal mucosal. So the amount that you can get in is much less than if you smoke it or inject it. That is one of the reasons why it is less addicting and why it is less toxic in terms of its consequences.

But the bottom line here is that the evidence that we have from pharmacology and from science is that smoked cocaine produces, dose per dose, its potency, about two-thirds of the effect of intravenous cocaine. So if you take 32 milligrams of intravenous cocaine, it takes about 50 milligrams in crack powder to produce the same blood levels and the same effect. So it less efficient.

Nevertheless, as was pointed out, and this is something that is extremely important, powder cocaine, to distribute 32 milligrams would be very impractical. It's a tiny, little quantity. You shake it up with bicarbonate of soda, you make it into crack, and it then becomes easy to distribute it in unit doses.

In fact, crack cocaine, if you do the multiplication, is more costly per kilogram than powder cocaine. It's just that many people can't go out and buy the quantity that powder cocaine is sold in, whereas they can afford a crack cocaine rock for $3 to $5.

All of these differences that we see are primarily not pharmacological. They are related to distribution networks. They are related to the form in which it is sold.

But I remain convinced that the population at risk for becoming addicted to a smoked drug is simply much greater than that for using a drug intravenously. Therefore, I think that we need to retain some disparity in terms of the penalties associated with crack cocaine versus powder cocaine. But I think that the 100 to 1 ratio, when you talk about 10,000 to 15,000 doses intravenously with 500 grams of powder, and 50 to 200 at the most doses in 5 grams of crack cocaine, I just don't see how anyone can rationally say that those two are equal in terms of their impact on public health or, for that matter, the social consequences.

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

Chairman BIDEN. Doctor, I thank you very much. I thank you for your historical perspective. I think you did testify before my committee back then.

I want to reiterate the point that you made, because I think it is important in terms of whether or not we are being fair or unfair. The overwhelming consensus of the pharmacological community, the medical community, the psychiatric community, was the point that you made.

We are seeing, I would respectfully suggest, the same thing happen with heroin. As the purity of heroin has gone up, the use of heroin has increased significantly. But it is not because the purity has gone up and people inject it. It is because now you can smoke it. Now you can smoke it.

You have in my State teenage kids, who would no more in 9th grade think of putting a needle in their arm, as their first adventure are literally smoking heroin, because now the purity—it used to be called "chasing the dragon" back at the turn of the century.

I think the most devastating aspect, and the reason why some disparity should remain, I would argue that crack cocaine use is a gigantic contributor to AIDS.

Mr. SCHUSTER. That's right.

Chairman BIDEN. People say, "How does that contribute to AIDS?"

No one believed me on this, so about 12 years ago I took a group of Senators and some press up to a street in south Philadelphia. I stood on a corner across from a two-story building that was a walkup. I wanted to show them a very disturbing sight to make the point.

There was a young woman. You would see a man walk up the stairs. You would see her standing and the man standing. You would see her disappear; the man stand. You would see him leave. She was engaging in oral sex with him.

She would then get paid with a nickel hit of crack and binge on it. She would wait, and you would see another man come up the stairs 15 minutes later.

What is it, 1.7 seconds, 1.8 seconds, this euphoric high? I used to know this cold.

You also find a lot of these young women into prostitution, because that's how their pimps pay them. That is how they are paid.

It stuns people to realize that it is not just intravenous drug needles that are being shared that are spreading AIDS. It is this.

Mr. SCHUSTER. You are absolutely right. I would only say one thing, Senator, and that is that yes, heroin is smoked, but it is even more likely these days that it is snorted. The purity of it is such that snorting it——

Chairman BIDEN. Valid point.

Mr. SCHUSTER. Better than 50 percent of people coming into my methadone maintenance clinics now are not injecting it; they are snorting it.

Smoking heroin is more difficult than converting into a——

Chairman BIDEN. The point I guess I was really trying to make, and I thank you for the elaboration, is that you don't have to inject

it intravenously when it is 100 percent or 90 percent pure, like it is in the streets of Philadelphia.

Mr. SCHUSTER. That's correct.

Chairman BIDEN. My staff points out that crack takes 19 seconds to reach the brain. That wasn't the point I was making. I was making the point of how long the euphoria lasts after.

Mr. SCHUSTER. The crash, if I may say, it is almost like a square wave. You go up very quickly, and you come down very quickly, increasing the likelihood that you want to get back up again.

Chairman BIDEN. Are parachutes still a big deal, where they would lace it with heroin, to be able to make that down less dramatic?

Mr. SCHUSTER. Yes. Probably 60 percent of the people who come in for methadone maintenance treatment in the city of Detroit also use cocaine. So it's difficult to say which came first, but the fact is that it is very commonly——

Chairman BIDEN. Polyabuse is the norm rather than the exception.

Mr. SCHUSTER. Absolutely. Absolutely.

Chairman BIDEN. Well, I have a number of questions for you, but I know that your schedule it tight. I want to yield the remainder of the time to my friend from Alabama, who knows a great deal about this.

Senator SESSIONS. In your professional opinion, and you have treated a lot of addicts——

Mr. SCHUSTER. Yes.

Senator SESSIONS [continuing]. And seen them up close, there is a greater danger from crack, but it does not rise to the level that current laws have in terms of punishment?

Mr. SCHUSTER. What I would say, Senator, is that the individual's risk for intravenous cocaine use and for crack cocaine are very comparable. However, the proportion of our population, the total public health impact of crack use, is greater because more people are willing to smoke a drug than put a needle in their arm. Probably less than 10 percent of the people who use cocaine inject it, and this is for a variety reasons. AIDS is one of them.

But I am saying that, for the individual, if they start injecting it, the likelihood they are going to go on to addiction is comparable to if they start smoking it. It is just that far fewer people are willing to start injecting drugs.

Senator SESSIONS. Well, that is basically the difference, that it goes straight into the bloodstream from the lungs and straight to the brain.

Mr. SCHUSTER. Absolutely. All of those things happen so rapidly that it is very difficult for us to find a difference between intravenous and smoked, except people's reports that smoked may come on even faster than when you take the drug intravenously, because it goes to the lungs and the next heartbeat sends it up to the brain.

Senator SESSIONS. If someone snorts cocaine over a period of time and smokes crack, isn't it true that you get addicted quicker with the crack than with snorting cocaine——

Mr. SCHUSTER. Correct. That is correct.

Senator SESSIONS [continuing]. For the reasons you have described?

Mr. SCHUSTER. That is correct.

Senator SESSIONS. I think it is a more dangerous drug.

But looking at this chart that the Sentencing Commission had, under the Sessions-Hatch bill, we would have an increase in the powder a bit, and we would have a drop from 95 months to 118 months for crack. I don't think that is an extreme undermining of the crack penalties.

We have to remember, a lot of people don't, but I know you know, Mr. Chairman, under the new laws that you helped pass, and I was a member of this body, there is no parole in Federal court, so 118 months is 10 years without parole. If you get 120 months in most State courts, they will serve a third of that.

It is a very, very significant sentence. We are talking about 5 years without parole under the current law for the mere possession of 5 grams of crack, which I don't think there is a State in America that has as tough a sentence as that.

I just think that we are getting this thing back into the right balance, and we need to get it back into the right balance.

Thank you, Mr. Chairman.

Chairman BIDEN. I have one question. Is the reason why crack cocaine is more addictive than snorted cocaine because of the payoff for the user? That is, you get a higher, quicker high than you do the other way?

Mr. SCHUSTER. Correct. Correct.

Chairman BIDEN. It is not so much the property of the cocaine. It is how it gets to the brain.

Mr. SCHUSTER. It is how it gets there. Once it gets to the brain——

Chairman BIDEN. Same impact.

Mr. SCHUSTER. Cocaine is cocaine.

Chairman BIDEN. I know that sounds silly for me to ask the question, but that gets confusing in this debate.

I think the compelling point you made is that, if the dealer is arrested with this, the street person arrested with this bag, and the street person arrested with this vial, you don't know whether this is going to end up in 100 vials of this or 200 vials of this. You just don't know.

I guess what we have to ask the prosecutors is whether we have any sense how much this is sold on the street for purposes of conversion, as opposed to purposes of dividing this up, in effect, and selling lines to folks who are going to take it home, put it on a little mirror and snort it.

I am not asking you that, doctor. You may have anecdotal evidence based on your patient list, but I do not know.

Mr. SCHUSTER. I think I was referring more to the upper levels of distribution, where 500 grams of powder would more likely be brought into a community for conversion into crack in the form of powder because it is less bulky.

Chairman BIDEN. I am told by my staff, who was a Federal prosecutor himself, in D.C., about 80 percent of all powder gets cooked into crack. So if someone gets picked up on a D.C. street with this, there is an 80 percent chance it is going to be moved to crack anyway. Yet, if you get this bag and this vial, you end up having the same exposure.

At any rate, I truly appreciate your time, doctor, and your willingness to continue to work with us.

I admire, and I mean this sincerely, your professional commitment to stay involved in trying to deal with the scourge of drug abuse that we have in the country. I thank you for always being available.

Mr. SCHUSTER. Thank you.

Chairman BIDEN. Now, how about if we go to you Mr. Hynes? Then we will go to you, Mr. Otis.

STATEMENT OF CHARLES J. HYNES, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK

Mr. HYNES. Thank you, Mr. Chairman. It is good to be with you.

It is good to see you again, Senator Sessions. We met at the conference last year.

I want to thank you for the opportunity to talk about this very important criminal point. Mr. Chairman, I had the pleasure of talking to your excellent staff the last couple of days. I would like to introduce two of mine.

My counsel, Anne Swern, is the director of our Drug Treatment Alternative to Prison Program, and Hillel Hoffman is our legislative director.

Just by way of background, I represent 2.5 million people in Brooklyn, New York. We are the largest county in the State. We have 62 counties. We are the seventh largest county in the country.

There was a time when we became the fifth most violent municipality per capita in the United States, and I tell you about that because we had the toughest drug laws in the United States at the time, and they did not seem to be helping us.

But I am here for a couple of reasons that I would like to touch upon for a moment. As a State prosecutor, I prosecute under so-called Rockefeller drug laws.

Our history with drug enforcement parallels the sections that you dealt with today in the U.S. Code, 841, 844 and 961. I have no doubt, Mr. Chairman—I have great respect for you; I have followed your career—that you passed this amendment when you did because of the sheer horror you had of the crack epidemic, and we had the same problem in 1988.

The Rockefeller drug laws have multiple life sentences, and that is why they are reputed to be among the toughest drug laws in the country. For example, the 5 grams that you are discussing here today would not necessarily, the first time, lead to a jail sentence. You probably would get probation. If you got arrested again, though, regardless of what the weight was, as a second felony offender, it was bye-bye.

While the Rockefeller drug laws are less severe in cases of lower weights on the first offense, both the Federal statutes and Rockefeller laws have also caused me concern, because of the disturbing disparities as they apply to minority defendants.

The second point I would like to deal with is that I believe there is a place for mandatory sentences. It has to do with mandatory treatment alternatives.

The Rockefeller drug laws, for example, impose severe penalties for the possession of 4 ounces of crack cocaine or the sale of 2

ounces, up to 15 years in prison. It is this mandatory sentence that has caused a great deal of controversy in New York State, because it has resulted in drug mules and other middle-level people receiving very long prison sentences.

In a typical case in Brooklyn, a middle-level drug dealer is someone who sells in ounces, not kilos.

I was at a meeting with Governor Rockefeller and his counsel the day he announced the Rockefeller drug laws in 1973. I was in charge of the rackets bureau in Brooklyn. He was convinced that we were going to sweep off the streets the kilo sellers. That, frankly, didn't happen.

But after 17 years of the Rockefeller drug laws, by 1990, we had become the fifth most violent municipality in the country. One out of every 16 of our 2.5 million people—men, women and children—were victims of serious violent crime.

For example, we had 765 murders in 1990 in Brooklyn. The most disturbing figure, I guess, is in 1991, 151 of our children were killed in Brooklyn; 129 were shot to death.

I understand it, in 1995, when this Congress and President Clinton were reluctant to change the mandatory 5-year minimum out of concern for the devastating effect it was still having on communities.

But just as the passage of time has given us in New York State, a new perspective about the Rockefeller drug laws, in my judgment, effective prosecution of our drug laws must be accomplished with fundamental fairness to all defendants, and that is why I support the bills that you have before you today.

The statistic of 85 percent people of color serving time, or 85 percent of the crack offenders in Federal custody are African-American, nearly 10 percent Hispanic, that correlates with what we have in New York State. It may shock you as it does me that 94 percent of our 19,000 defendants who are there for low-level drug possession and drug sales are people of color. Three thousand and one-hundred women in New York State, mostly people of color, are in prison for low-level drug sales or possession.

Now, I respectfully suggest, Mr. Chairman, and this is not news to you, that this racial disparity cannot be ignored in the administration of either State or Federal justice systems.

I was speaking to another Howard the other day, Paul Howard. He is the district attorney of Fulton County, Georgia. He is the first African-American elected to that position. He said,

> "Will you tell that committee for me that I go around town saying, 'It ain't me that's putting your people in jail for the 5 grams. That's the Feds.'"

I said, "You know, Paul, that's what we have to say too."

When we pick juries, we probe with the voir dire on their attitudes toward the disparity of sentencing. That is another reason that I am pleased that you invited me to testify.

Chairman BIDEN. For the record, why do you do that? Why do you probe?

Mr. HYNES. Because it is fundamental that many people of color have had lousy experience not only in the execution of the drug laws but in dealing with some police officers, and you have to get them talking about their attitudes with respect to both issues in order to get a fair jury.

Let me be very clear, by supporting your proposal, it doesn't mean for a moment that I think that possession and sale of drugs is something that should be handled less than seriously. I would throw away the key on people who are drug sellers. There is no plea bargaining for drug sellers, drug traffickers. I don't care what the amount is, if they are not addicted. There is no plea bargaining for sociopaths as well.

But I believe that there is another important reason for mandatory sentences. It has allowed me in New York State to have a very, very successful program called the Drug Treatment Alternative to Prison. We started that program in 1990. We permit chronic drug offenders who sell drugs to support their habit a second chance to straighten out their life, if they go to residential drug treatment for 15 to 24 months.

I want to emphasize, this is a coercive prosecution-run program. We decide who gets into the program. We reject two-thirds of those people who apply. We have a guilty plea of typically 3 to 6 years in State prison. If they leave the reservation, we go out and grab them, and we are successful at 98 percent, getting them within 9 days. We execute the sentence and they go upstate.

We point with pride though that 900 offenders have gone through DTAP; 606 have graduated. They have been trained for jobs. They have jobs. They are paying taxes. Three hundred and eight are still in treatment.

Our graduates have saved New York State taxpayers $23 million in economic benefits by lowering health, welfare and recidivism costs and by becoming taxpayers themselves.The recidivism rate is one-half for our DTAP graduates, as compared to those who were eligible who turned us down and decided to go to prison instead.

Our 1-year retention rate is 80 percent. That is because it is coercive, and that is because there is job training and job placement.

A couple of weeks ago, Asa Hutchinson, the DEA Administrator, came down to Brooklyn and was our keynote speaker at out annual DTAP graduation. I have got to tell you, if you asked him his experience, he would explain that he was visibly moved by the graduates that we had, and one kid in particular who is 11 years old, thanking us for bringing her father back to life.

He, of course, was one of the cosponsors in Congress, with the companion to your S. 304. I know you, Mr. Chairman, and other members of this committee, have supported a drug treatment alternative to prison that allows State prosecutors all over this country to have the same success rate we have had.

Chairman BIDEN. By the way, it just takes your DTAP program. This is the guy, though, who has been pushing this Congress to make sure to try to get us in to have drug treatment in prisons. One of the things we found out is that, which surprised me, I must tell you, 15 years ago—I always thought, unless you wanted to be in treatment, it didn't work. There is no distinction between being coerced into treatment and having to stay there and voluntarily waking up one morning and say, "I want to go to treatment." That is an interesting phenomenon. The leader in that effort to try to get the States, conditioned upon Federal moneys, to have drug treatment programs in their prisons has been the Senator from Alabama.

Mr. HYNES. Yes, he is. I certainly acknowledge that.

I have always maintained, finally, it makes no sense to warehouse nonviolent drug abusers in prison for long periods of time only to have them come back to their neighborhood, and they go to jail on the installment plan for life.

It is my hope that this Congress will enact the DTAP legislation this year. But in any event, whatever legislative changes are made, I respectfully suggest to you that you tie it to mandated drug treatment.

Thank you for the opportunity.

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

Chairman BIDEN. Thank you very much.

Mr. Otis.

STATEMENT OF WILLIAM GRAHAM OTIS, ADJUNCT PROFESSOR OF LAW, GEORGE MASON UNIVERSITY LAW SCHOOL, ALEXANDRIA, VIRGINIA

Mr. OTIS. Thank you, Mr. Chairman.

As befits someone who is the last witness in a hearing of this kind, I will attempt to brief.

Chairman BIDEN. That's all right. You have been kind and patient with us; we will be patient with you.

Mr. OTIS. Thank you very much, Mr. Chairman and Senator Sessions.

I am happy that you have given me the opportunity to talk with you today about this quite important subject.

I agree with the Sentencing Commission that the present disparity between crack and powder sentencing should be addressed. But I do not believe that the answer lies in giving a break to crack dealers.

The answer, which the Senate correctly adopted a little more than 2 years ago in an amendment to the bankruptcy bill, is to raise powder sentences by a modest amount.

At the outset, I want to say that reasonable minds can differ on this question. The commission's proposal is sincere and conscientious. The same is true of the more balanced proposal sponsored by you, Senator Sessions, and Senator Hatch, whose work to safeguard our citizens I think is a benchmark of public service, both here in the Senate and in your tenure as U.S. attorney.

With all respect, I believe that in this instance the better view is to maintain in full effect the crack sentences we have now. This is so for several reasons. The first is that they are a major success story.

I think, Chairman Biden, you don't give yourself enough credit—and I am perfectly sincere in that—for the legislation that you helped to craft and that has given us these sentences.

Fifteen years ago, the crack wars were breeding endemic violence in our country. Once safe and stable neighborhoods had become free-fire zones. That has changed. We have not entirely won the war on crack, but our progress has been considerable.

As statutory minimum sentencing at the current levels began to kick in, dealers who in the past would have been back on the street instead have remained our official guests. As they stay put behind

bars, the rate of violent crime, so much of which was generated by crack gangs, has decreased every year since at least 1994.

There are people alive today, probably dozens and perhaps hundreds, who would have been casualties of the criminals we have kept locked up under these supposedly excessive sentences. At the minimum, it would be a precipitous gamble to change a sentencing regimen we know has helped keep us safer from drug dependency and overdose deaths, not to mention gunplay and murder—until we have a better idea than we do now of how much crime will result from bringing down these sentences.

Second, much of the impetus for change in this area is the idea that crack sentences are racially discriminatory. But I believe that is misconceived. It is true that about 85 percent of offenders sentenced in the Federal system are black. But it is also true that only 1 percent of blacks are among the thousands of defendants sentenced for methamphetamine offensives, which likewise carry a heavy mandatory minimum sentence. Indeed, distribution of a particular quantity of methamphetamine carries the same mandatory sentence as distribution of that same quantity of crack.

This tough meth sentencing is not explained by the system having decided to be particularly harsh with those dealers because the vast majority of them are not African-American, any more than the toughness of crack sentences is explained by the fact that the majority are.

The reason for the gravity of these sentences for both drugs is that in both instances Congress was properly concerned about the rapid spread of a dangerous and addictive substance whose distribution is so strongly associated with violence. That concern remains valid.

The large percentage of African-Americans sentenced for dealing crack does not change the fact that today, as at the time the mandatory penalties were enacted, crack is an exceedingly harmful drug that doesn't know or care who is dealing it or who is victimized by it.

Protecting all citizens from it continues to warrant the minimum sentences Congress has prescribed and that are working. It would be not justice but a burlesque of justice for society to chip away at sentences we know have served us well for reasons unrelated to the danger the drug poses.

This would be true in any event, but it is particularly true, for sliding back to the old days of relatively light crack sentences is most likely to damage the group of black citizens on whose behalf it is supposedly undertaken.

If we are to have a sentencing system engineered with one eye on race, which in my view we should not, at least we should keep that eye on the great majority of black people who want nothing more than their right to live in peace and safety, and who I am quite sure do not what crack-dealing criminals of any race to take that right away from them.

Finally, the commission's proposal sends exactly the wrong message. As one prominent citizen noted in opposing an earlier commission plan to lower crack sentences, and I am quoting now, "Trafficking in crack and the violence it fosters has a devastating impact on communities across America, especially inner-city com-

munities. Tough penalties for crack trafficking are required because of the effect on individuals and families, related gang activity, turf battles, and other violence. We cannot stop now. We have to send a constant message to our children that drugs are illegal and dangerous, and that penalties for drug dealing are severe. I am not going to let anyone who peddles drugs get the idea that the cost of doing business is going down."

These words of President Clinton were true when he spoke them a few years ago, and they are true today.

If we are to reduce the disparity in sentencing, let's do it without letting anyone who deals in crack get the idea that the cost of his business is going down.

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

Chairman BIDEN. Thank you very much.

I yield to the Senator.

Senator SESSIONS. Well, I thank both of you.

Mr. Otis, thank you for your words.

Mr. Hynes, good to see you again.

These are important issues. I think the number of drug cases prosecuted in Federal court would represent, Mr. Hynes, would you say less than 5 percent of all drug cases?

Mr. HYNES. I think that is accurate, Senator. We had 6,000 felonies last year—2,150 were felony. But the vast majority of the 4,000 were drug-related, meaning that the people were addicted. But you are right, it is very, very small.

Senator SESSIONS. Federal courts handle a small, pretty handpicked number of cases that they believe, for some reason or another, merit Federal prosecution rather than prosecution in State court.

Mr. HYNES. They're the Mercedes.

[Laughter.]

Senator SESSIONS. That is spoken like a true State prosecutor.

[Laughter.]

The point of all that, for me, is the cases that are getting prosecuted in Federal court I think are not normally the small cases, unless they are caught up in a web of——

Mr. HYNES. As you suggest, when you were a U.S. attorney, you would take down a whole gang. It didn't matter what the rates were.

Senator SESSIONS. Sometimes all you have is that.

Also, Mr. Otis, we were very successful. Apparently, some judges are not as favorable to using relevant conduct. You catch a person selling 5 grams of crack, and then you would prove that they were on that street corner and selling 5 grams every day for the last month, and the judge would give higher sentences based on that.

I guess all I am saying, Mr. Chairman, is that this thing is really complex. It is hard to get numbers that you can live with and understand, just having been there, having seen it, recognizing two countervailing issues. One is that it does diminish somewhat, but I don't think much, the power of the prosecutor to plea bargain. I think it does have the potential, but I hope does not, to send a signal that somehow we are less serious about drugs. I think that

would be a tragedy. I know you are concerned about that. I know that the Attorney General is concerned about that.

I talked to Larry Thompson, the deputy attorney general, and he wants to send the signal that we are getting tough on drugs and we are cracking down on drugs.

But I think that we cannot allow those fears to keep us from creating a tough, justifiable sentencing system. I believe that what we have offered is in that range, and I appreciate you having this hearing.

Chairman BIDEN. Thank you.

To reinforce Mr. Hynes' point, in the Federal district, the eastern district that takes in his county, which, I might add, is 2.5 times bigger than my State, there were 44 cases brought for crack cocaine and the average weight in grams was 362.4.

I was looking down this list of all 93 districts, and I am not confident what point it makes, but there are only a few jurisdictions where the gram weight was at 5-something or below. They were the Virgin Islands, New Hampshire, eastern Washington, and Alaska. It goes from 1.9 grams in the Virgin Islands to 5,000 grams in Northern Oklahoma, as the weights for which there was a Federal prosecution.

I acknowledge, as the Senator said, this is a complex issue. It doesn't mean there were plea bargains along the way. It doesn't mean there wasn't other information justifiably extracted or cooperation gleaned.

But I think the interesting thing that I would like to look at relative to the Senator's legislation is your suggestion, Mr. Hynes, of, in effect, diversion here to treatment. I don't know whether the Senator is interested in that. This is not a request. Maybe we could sit down and figure out whether that is appropriate, because I think you make a fairly compelling point.

I will make sure that the Office of the District Attorney report, the 11th Annual Report of 2001, is made part of the record.

[The information is being retained in committee files.]

Mr. HYNES. Thank you, Senator.

Chairman BIDEN. I think the point that Mr. Otis makes is worth making again. I guess the reason I am making it is, since I am the guy who drafted the law, I want to make it clear, which I hope that everyone understands in any community, that it was not meant to be discriminatory. For, as you point out, Mr. Otis, methamphetamine, which is the scourge of the Midwest and rural communities right now, is a circumstance where less than 5 percent, I think it is closer to less than 2 percent, of those who go to jail for relatively harsh penalties for methamphetamine possession are African-American. So it was not intended.

But the thing that I keep coming back to is some rationale for at least a marginally harsher penalty for crack is if 80 percent of the people on the streets of D.C.—and I expect it is the same in your district.

I would ask you, if they have this much powder cocaine, 80 percent of the time they are going to cook it into stuff that ends up a couple hundred times more than this vial. It takes this much in your possession to go to jail for this much, or to be able to be coerced or bargained or whatever. If you took half this amount, the

penalty for half this amount doesn't equal this amount. Your 500 grams cooks up 450 grams, and what is that? Well, if you cut this in half, we are talking about 225 grams, and this is 5 grams.

You go to jail for possessing this for a heck of a lot longer than you go to jail for possessing half of this. That is the part that I have difficulty with, not that this is not more addictive, because more pleasure is given.

I once asked, when I got started in this back in the 1970s—I am going to say something outrageous: I think I have spoken to every drug expert of renown in the last 20 years. We were talking to two leading scientists at Yale University. I asked them to explain to me what makes somebody become addicted and someone else not addicted to any drug, and particularly talking about cocaine, which is described as a lightening storm in the brain. There is no single receptor that is affected by cocaine, as we all know. That is why it is more difficult to treat, more difficult to deal with.

I asked the question and he gave me an example I will not give here, because it will be misunderstood by some. But he gave me an example, he said, if the first time you engage in an activity, and the result is one that does not make you feel really good in the first instance—whether it is premarital sex or whether it is cocaine or whether it is smoking a cigar—your likelihood of going back to doing that again, and desiring to want to do that again, is less likely. It is pretty much response-driven. There are a lot more complications as well, but that is the single best predictor.

The reason why this is so addictive, if you know how to smoke—and some of us don't. I have never smoked in my life. Not good or bad, I just wouldn't know how to put a cigarette to my mouth.

But if you know how to smoke and inhale, then you are going to get a good feeling. If you know how to snort and you don't get it right, and it gets in your eye instead of in your nostrils, you may not.

Mr. HYNES. Can I add just one point?

Chairman BIDEN. Yes.

Mr. HYNES. You get caught in Brooklyn with that thing in your left hand, I don't care if you are a stone-cold junkie, you'll go to prison for life. There is no DTAP for that stuff. You go to prison for life under the Rockefeller drug laws.

Senator SESSIONS. First offense?

Mr. HYNES. Yes, sir. You bet.

Chairman BIDEN. Well, Mr. Otis, maybe you should hang out with Mr. Hynes.

[Laughter.]

But I understand the point you are making.

But at any rate, that is my biggest problem, and I think the problem my friend has.

Unless we can logically explain and rationalize to the public—black, white, Hispanic, anyone—that there is a rationale, an implicit fairness to what we are doing, then it, I think, breeds a contempt for the system and for the law.

Again, I know this sounds this awful, sounds self-serving, I literally, not jokingly, by myself with my staff, I am the guy who drafted the Sentencing Commission law. I mean, it wasn't a joint

project. It wasn't with 50 other Senators. It was in my office. Then I went out and tried to sell it.

I am not a guy who thinks we shouldn't have tough sentences. I am the guy who insisted that we eliminate probation and parole in the system.

But I just have trouble rationalizing this, unrelated to race, unrelated to anything, just logic.

Mr. OTIS. Senator, may I respond to that?

Chairman BIDEN. Please.

Mr. OTIS. What you did, when you originally wrote this legislation and wrote these penalties into the law, has saved lives.

Chairman BIDEN. I don't doubt that.

Mr. OTIS. You are responsible and should take credit for the saving of those lives.

What is of most concern to me is that we don't know, we haven't had a study, the Sentencing Commission has not yet looked into this, of what is going to be the effect on these lifesaving sentences that you wrote. What is going to be the effect if we start bringing them down? At least, it seems to me, we ought to have a better idea than we do now, because we know that these sentences—that people who would have been out on the streets with this gunplay have been in prison. There hasn't been the gunplay, and people are alive today because of the sentences you wrote. I want to make sure that their lives continue to be protected, unless we know for sure that bringing down these sentences is not going to have the effect that I am afraid it will.

Chairman BIDEN. Let me conclude what I have to say, and since it is the Senator's bill, I will yield to him to close the hearing.

I think that's what they attempted to do by this chart. They attempted to indicate, as a practical matter as to how the laws are in fact enforced at the Federal level, what the impact would be if the Sentencing Commission change took place, which goes a little further than, in effect—it's slightly different than what my friend from Alabama is suggesting.

As my friend from Alabama suggested, the fact that someone would go to jail for 8 years versus 10 years, that is the reduction we are talking about, is not likely to be—188 months versus 95 months—that would be the effect on the average case.

The reason that I read these numbers, why they are compelling, if in fact there was evidence that Federal prosecutors were in fact plying the Federal law, and using the 5 gram minimum as the basis for the bulk of their prosecutions, that would lead me maybe to a different conclusion.

I don't know what the average is here, but I bet the average—and Samuel Clemens once said that all generalizations are false including this one. But if you took a look at the average, it is probably in the range of 100 grams. But my point is that it is way above 5 grams.

What my friend is suggesting here seems to me to have no not only material impact, but no even minor impact on the efficacy of the law as it is used now to look people up who are bad guys who are costing people their lives by selling it to them and/or being shot in the process.

Mr. HYNES. That is what Paul Howard and I talked about. You see, no one in my community or in the great county of Fulton would complain about people going to jail for what you have in your left hand. They wouldn't complain a bit. But they get very upset over disparate sentences given to yuppies as opposed to people in the inner city. They get very upset.

Chairman BIDEN. I have no further comments.

Senator SESSIONS. What we are trying to do, I think we want to be able to walk into any audience in America and say we considered this. Our Sentencing Guidelines, if they are going to be run from Congress, and they are being run from Congress, if the Congress is going to do it, we ought to listen and be able to defend them.

There may be a few small cases at the margin where these changes might affect the prosecutor. But for the routine case, I think there are plenty of tools there. If we get a little enhancement on powder, which as you note, Mr. Chairman, can be converted readily to crack, I think that would also help us on the fairness issue, which I believe is important.

When you stand before a jury, as I did many times—over half of the jury routinely in my district would be minority jurors. They want to do the right thing. They want to believe that the system they are supporting is correct.

If we aren't careful, that faith could be undermined and lost. I think this would be a step in the right direction. I don't believe it would undermine our legitimate ability to crack down on drugs, particularly crack.

I believe we are making some progress. I think it is time to get it done.

Mr. HYNES. Senator, if I can persuade you on mandated drug treatment, I would be happy to come and see you.

Senator SESSIONS. I will just say this: I talked to Mr. Schuster just before you came in during the break, and I certainly believe that intervention, treatment and/or close monitoring of people who have a drug problem works. It's not a cure-all. Everybody doesn't come out perfectly clean and never commit another crime, but you get less than you would otherwise. We ought to do more of it.

If we can't afford treatment for every person in America who wants it, we can afford these intensive monitoring programs that can help. I am open to that. I think that is probably a different issue. I know Senator Hatch is concerned about it and has some legislation on it. I would be willing to talk to you about it.

Chairman BIDEN. Let me close by asking unanimous consent here that several things be placed in the record.

Senator Grassley has two documents and a half-dozen letters to the committee from prominent individuals, who support reducing the 100 to 1 ratio.

Chairman BIDEN. Secondly, I would ask unanimous consent that we attach to the record support of the direction my friend from Alabama wishes to go from Joe Califano; from Jim McDonough, Governor Jeb Bush's drug czar; from Wayne Budd, a Ronald Reagan and Bush appointee; a supportive letter from Federal judges who were formerly U.S. attorneys; a supportive letter from Dr. Herb Kleger, who was the first guy to occupy the position with Bill Ben-

nett; and a supportive letter from the College on Problems of Drug Dependence.

Without objection, that will be placed in the record.

Mr. Otis, I thank you for your testimony.

Charlie, thank you for coming down. I know you are a busy man, so we appreciate it.

We are adjourned.

[Whereupon, at 1:39 p.m., the subcommittee was adjourned.]

[Submissions for the record follow.]

[Additional material is being retained in the committee files.]

Statement for the Record
Crime and Drugs Sub-Committee
"Federal Cocaine Sentencing"
May 22, 2002

For nearly a decade, the ACLU and other civil rights organizations have opposed the disparity in sentencing for equal amounts of crack and powder cocaine. We are urging Congress to take decisive action to address this disparity. The Crime and Drug Sub-Committee of the Senate Judiciary Committee is holding a hearing today on a report to be released by the United States Sentencing Commission (USSC). It is anticipated that the Commission will recommend that Congress begin to address the disparity in sentencing by raising the trigger amount for a mandatory sentence for crack cocaine from 5 grams to *at least* 25 grams. While we do not believe that this recommendation goes far enough, we urge Congress to begin addressing this disparity immediately.

In 1986, Congress enacted mandatory minimum sentencing laws for all drugs and determined that crack cocaine should be treated as a distinctly different drug than powder cocaine with uniquely harsh penalties. Congress set the penalty for the sale of five grams of crack cocaine (about the weight of two pennies) at a mandatory five years in prison. For powder cocaine, Congress set the triggering quantity for a five-year sentence at 500 grams (a little more than 1 pound). Thus, it takes 100 times more powder cocaine to trigger the mandatory sentence for powder cocaine than for crack.

In 1988, Congress chose to make mere "possession" of five grams of crack cocaine punishable by five years in prison.[1] It is the only drug that carries a mandatory

[1] Section 6371 of Public Law 100—690 amended 21 U.S.C. 844(a).

prison term for possession. Possession of any other drug triggers a maximum sentence of one year in prison.

The 100:1 disparity between crack and powder cocaine sentences is unjustifiable. Research has shown that cocaine is cocaine regardless of the form in which it is used. The United States Sentencing Commission (USSC) has long been sympathetic to this fact, which is why in 1995 it passed a sentencing guideline amendment to make crack penalties the same as powder. Unfortunately, Congress blocked the guideline amendment so it did not become law. However, Congress did note that the 100:1 disparity was unjustified and it asked the Commission to come back with another recommendation to resolve the disparity.

In 2002, the Commission re-opened the crack powder debate and once again heard testimony from experts who reiterated that there is no valid scientific or medical distinction between cocaine in its powder form or in its base form (crack).

Cocaine Sentencing Has Racially Discriminatory Consequences

Unfortunately, the difference in the cocaine weights that trigger mandatory sentences for crack and powder cocaine has racially discriminatory consequences. Nationwide statistics compiled by the Commission reveal that the race of those prosecuted for crack offenses has predominately been African American. In 2000, 84.7% of crack cases were brought against African-Americans, 9% against Hispanics and only 5.6% against Whites. Caucasians, however, comprised a much higher proportion of crack users: 2.4 million Caucasians (64.4%), 990,000 African Americans (26.6%), and 348,000 Hispanics (9.2%).[2] For powder cocaine, the

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[2] See United States Sentencing Commission, 1992 Data File, MONFY 92, Table 31, "Race of Defendant by Drug Type," October 1991 through September 30, 1992).

disparities are somewhat different. Of all powder cases brought, 30.5% were against African-Americans, 50.8% were against Hispanics and 17.8% were against whites.[3]

The Reasons for the Sentencing Differences are Unwarranted

Three reasons are often cited for the gross distinction in the penalties between powder and crack cocaine: addictiveness, violence, and accessibility due to low cost. All three reasons fail as a justification for the I00:1 ratio in punishment between two methods of ingesting the same drug. The Commission has been aware for many years that there are no scientific or medical reasons to justify the disparity.

Disparate treatment in sentencing between crack and powder cocaine users is not justified on the basis of the greater alleged addictiveness of crack. Research has proven that crack is not more addictive than powder cocaine. In her 10-year study of the developmental and behavioral outcomes of children exposed to powder and base cocaine in utero, Dr. Deborah Frank testified before the Commission that "the biologic thumbprints of exposure to these substances" are identical.[4] While there are differences in the manner in which the body absorbs base versus powder cocaine, since Cocaine hydrochloride (powder) can easily be transformed into crack by combining it with baking soda and heat, it is irrational to apply a stiffer penalty between cocaine which is directly sold as crack, and cocaine which is sold in powder form but which can be treated by the consumer and easily transformed into crack.

Furthermore, the myth of the "crack baby" has been debunked. Dr. Frank testified, "There are no long-term studies, which identify any specific effects of 'crack'

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[3] U.S.S.C. Sourcebook 2000, Figure 27.
[4] *See* Testimony of Dr. Deborah Frank before U.S.S.C., February 25, 2002.

compared to cocaine on children's development. Based on years of careful research, we conclude that the 'crack baby' is a grotesque media stereotype, not a scientific diagnosis."[5]

Current research indicates that there is no significant difference between the two substances in terms of causing violent behavior. Statistics from the Commission in 2000 show that in 91% of all powder cases and in 88.4% of all crack cases there is no bodily injury. Threats were present in 4.2 % of powder cases and 3.7% of crack cases. Bodily injury occurred in 1.4% of powder cases and 4.5% of crack cases and death occurred in 3.4% of both powder and crack cases.[6] Furthermore, according to Dr. Glen Hanson, there is "very little research on the role that drugs of abuse, such as stimulants like cocaine or amphetamine actually play in violence." Dr. Hanson concludes, that, "research has not been able to validate a casual link between drug use and violence."[7]

Neither are excessive penalties for crack cocaine justified by its low price and accessibility. To apply draconian penalties for first time possession of crack on the basis of its low cost discriminates on the basis of class, especially in light of the fact that powder cocaine, in spite of its greater cost, is abused by more people in this country.[8] Furthermore, higher penalties for crack cocaine guarantee that small time street-level users will be penalized more severely than larger distributors who possess powder cocaine before it is transformed into crack. This type of drug abuse policy, which disproportionately impacts lower income people, is neither logical nor effective.

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[5] *Id.*
[6] U.S.S.C., 2000 Drug Sample, Figure 25.
[7] Testimony of Dr. Glen Hanson before U.S.S.C. on February 25, 2002.
[8] With the exception of 1999, the number of powder cocaine offenders has exceeded use of crack in each year between 1992 and 2000. In 1999, the number of crack offenders was approximately 4,500, slightly higher than the use of powder offenders, also approximately 4,500. U.S.S.C Drug Briefing, Figure 1.

The New Sentencing Commission Recommendations

Like in 1995, the May 2002 report from the USSC will draw the conclusion that current disparities between the drugs are unwarranted and they recommend that Congress change the law. However, the Commission's recommendations this year are much more modest than in 1995. The Commission is recommending that Congress raise the trigger quantity for crack cocaine to *at least* 25 grams and that it not lower the trigger quantity for powder cocaine.

The ACLU's position remains that powder and crack cocaine should be treated equally and that crack cocaine trigger amounts should be raised to those of powder cocaine triggers. We oppose any attempt to lower the trigger level for powder cocaine for three reasons – (1) powder cocaine penalties are already very punitive and there is no sound reason to make them harsher; (2) powder cocaine penalties are in line with other controlled substance penalties and raising them will create the same level of inequity that currently exists with cocaine penalties; and (3) people of color, primarily Hispanics, are disproportionately targeted for federal powder cocaine prosecutions so increasing the penalties for powder cocaine will mean a disproportionate increase in prison sentences for Hispanics.

Representative Charles Rangel (D-NY), has introduced bills that would equalize crack cocaine levels at the same level as powder cocaine (in the 107th Congress the bill is 697). On the other end of the scale, Congressman Roscoe Bartlett (R-MD) has introduced a bill (H.R. 4026) to equalize crack and powder by lowering the trigger level of powder cocaine to that of crack. None of these proposals is likely to pass Congress this session.

A bill that has the potential of movement during the 107th Congress is sponsored by Senators Jeff Sessions (R-AL) and Orrin Hatch (R-UT). That bill, S. 1874, the Drug Sentencing Reform Act of 2001, would raise the five-year mandatory minimum trigger quantity of crack cocaine from 5 grams to 20 grams, and lower the trigger quantity for powder cocaine from 500 grams to 400 grams. This would leave a 20:1 disparity instead of the current 100:1 disparity. While we appreciate the willingness of Senators Sessions and Hatch to address this issue, we must oppose the bill because it does not go far enough toward addressing this problem. And we particularly oppose any efforts to lower the trigger quantities of powder cocaine.

Action Needed Now

We urge the Senate Judiciary Subcommittee on Crime and Drugs to support real reform legislation that makes crack penalties the same as current powder cocaine penalties. Most importantly, we urge the Committee not to make powder cocaine penalties more severe. Doing so will only mean more people of color serving unreasonably lengthy prison sentences.

For More Information, please contact: Rachel King, Legislative Counsel, American Civil Liberties Union at (202) 675-2314.

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Wayne A. Budd
Executive Vice President &
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May 20, 2002

VIA FAX AND FEDEX
The Honorable Joseph R. Biden, Jr.
U.S. Senator
221 Russell Senate Office Building
Washington, DC 20510

Re: Crack/Powder Cocaine: Disparities in Sentencing

Dear Senator Biden:

I would be grateful if you would make this letter a part of the record to be compiled at the hearing on the above subject which you will be holding on Wednesday, May 22, 2002.

By way of introduction, I know that we have met on at least two occasions, during that period of time when I was before the Senate Judiciary Committee for confirmation as U.S. Attorney for Massachusetts in 1989 and subsequently for the position of Associate Attorney General of the United States in 1992. I remain grateful for the courtesies which you as the Chair, in particular, and the Committee generally, extended to me.

Today, I write to you both as a former member of the Department of Justice, as well as a former member of the U.S. Sentencing Commission ("the Commission") from 1994 to 1997.

As you are no doubt aware, a majority of the Commission in 1995, voted to reduce the disparity in sentencing from 100 to 1 (crack to powder) to a one to one ratio in an effort to equalize the penalties assessed for violations of the cocaine distribution statutes. When that vote was rejected by the Congress, a second vote of the Commission (this time a unanimous one) was forwarded to the Congress in 1997 with a ratio range of 25 to 75gs of crack to 125 to 375gs of powder. It is my understanding that the second vote was rejected as well.

As a former member of law enforcement who has overseen numerous successful prosecutions of drug dealers of every type and description—including those involving

crack and powder cocaine, I am certainly no friend to or sympathizer with the illegal drug trade.

I do feel very strongly that the sentencing disparity ratio of 100 to 1 as set forth in the law at present (i.e., conviction for the distribution of 1g of crack cocaine is treated equally in terms of sentencing—78-97 months as a conviction for the distribution of 100gs of powder cocaine) is grossly unfair as a general matter and further that it has had a demonstrated adverse impact (by design or otherwise) on people of color. Most importantly, this disparity has no documented relation in any way to factors which ordinarily might be used to warrant or justify such a broad and sweeping result.

It is my firm belief and hence my recommendation that the ratio should be reduced at least, to the level proposed by the current legislation which your Committee is considering (if not lower) and correspondingly that given the current significant level of sentencing levels at present for powder cocaine, that the sentencing in that area should not be increased.

I am a person who believes very strongly in justice, fairness and parity for all persons regardless of their race, gender, nationality or ethnicity. In that light, I would say that the votes which I cast as a member of the U.S. Sentencing Commission to equalize or seek a greater degree of parity in the penalties for crack and powder cocaine distribution remains very high in importance on the list of actions which I have been privileged to participate in as a public servant; this includes service on the local, state and federal levels over a period in excess of thirty years.

Thank you for your consideration of this writing. I would be happy to respond to any questions which you might have of me on this subject.

Respectfully submitted,

Wayne A. Budd

WAB/cw

SUBMISSIONS FOR THE RECORD

COLLEGE ON PROBLEMS OF DRUG DEPENDENCE, INC.

May 20, 2002

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To the Honorable Joseph Biden
221 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

It is our understanding that the Senate Judiciary Committee is having a hearing on the disparity in sentencing guidelines between crack cocaine and powder cocaine. On behalf of the College on Problems of Drug Dependence (CPDD) and as President of this organization, I am writing a letter that is in support of reducing the sentencing disparity between crack cocaine and powdered cocaine. The CPDD, formerly the Committee on Problems of Drug Dependence, has been in existence since 1929 and is the longest standing group in the United States addressing problems of drug dependence and abuse. From 1929 until 1976, the CPDD was associated with the National Academy of Sciences, National Research Council. Now the CPDD functions as an independent organization representing a broad range of scientific disciplines and medical specialties concerned with researching and understanding the causes and consequences of drug abuse and based upon this understanding, the development of effective prevention and treatment interventions. It is the largest scientific organization in the United States and the world devoted to drug abuse research.

The College on Drug Dependence strongly believes that policies should be based on the best available science. The following provides the scientific data to date.

In the United States, cocaine is usually used by one or more of 3 routes: intranasal (snorted), smoked and intravenous. Crack cocaine is the smoked form of cocaine. Powder cocaine (cocaine hydrochloride) is either snorted or dissolved and water and injected

- Cocaine hydrochloride and crack cocaine are nearly identical compounds: Crack cocaine is cocaine hydrochloride with the hydrochloride part removed.

- Cocaine hydrochloride and crack cocaine have the same pathways of metabolism and metabolites and effects in the brain. Thereby, both these forms of cocaine produce similar physiological, subjective and behavioral responses.

- Once addicted to the drug, cocaine hydrochloride and crack cocaine result in similar negative legal, financial, interpersonal, vocational and physical consequences.

- Route of administration and speed of delivery are more important than the form of parent compound, since the speed of delivery is related to the euphoric effect of the drug. Thus, the rapidity of drug absorption to the brain impacts the potential for addiction and possibly physical dependence. The faster the speed of delivery, the more likely the drug will be abused. For example, crack cocaine and cocaine hydrochloride delivered intravenously are more likely to lead to addiction than intranasal cocaine. The data show that the use of crack cocaine results in a more rapid increase in frequency of use, greater amounts of cocaine use, more rapid onset of problems and entry into treatment. However, these effects are also observed for intravenously administered cocaine hydrochloride. One method to determine the addiction potential of a drug is to examine the percent of those exposed to the drug who become heavy users of the drug. Based on the National Household Survey on Drug Abuse, the percent of ever users of cocaine who then report using at least once a week in the past 12 months is 2.2-2.8% compared to 4.4% of crack users. The differential ratio is 1.6-1.9.

- Based on data collected in the late 1980s and early 1990s, the use of cocaine hydrochloride usually preceded the use of crack cocaine. Approximately 70-90% of crack users used intranasal cocaine hydrochloride prior to use of crack. Therefore, cocaine hydrochloride could be considered a gateway drug for crack cocaine. It is possible, however, that more recent data would show that a significant number of users began with the use of crack cocaine.

- Many non-drug factors play a significant role in determining cocaine use. These factors include drug availability, accessibility and cost. Crack cocaine is more available and accessible in poor neighborhoods and sold at a lower unit dose cost than cocaine hydrochloride.

- The distribution system is one of the major causes of violent crime associated with cocaine use. Although the use of high doses of cocaine can result in violent behavior, the occurrence of violence caused *solely* by the drug is low. Evidence shows that object and people crimes have greater associations with both crack cocaine and intravenous cocaine hydrochloride compared to intranasal cocaine hydrochloride. The rates of violent crimes associated with crack cocaine as opposed to cocaine hydrochloride, in general, are 2 to 3 times greater (see Table 1). The same rates are observed across the two forms of cocaine when examining the percent that carry weapons (see Table 2). When examining the number of emergency room visits (Drug Abuse Warning Network, 1997) or costs associated with effects on the fetus (see Table 3), a two-to-three fold increased rate is observed for crack cocaine as opposed to cocaine hydrochloride.

- Many individuals convicted of crime are addicted to cocaine (see Table 4). Studies show that drug courts can be effective in treating the addiction, reducing recidivism and are significantly more cost-effective than incarceration or other means of drug control (See Figure 1) and more likely to result in reduced cocaine consumption (see Figure 2).

Based on these data, CPDD believes that although there is justification for differences in sentencing between crack cocaine and cocaine hydrochloride, there is no scientific justification for the degree of the current disparity in sentencing. Although the criteria by which to determine this ratio is uncertain and the science to date is limited to make this determination, if negative consequences associated with each form of cocaine use are considered, then the ratio should be 1:3 or at most 1:5. On the other hand, if median quantity of crack cocaine involved in cocaine trafficking cases (68.7 grams, United States Sentencing Commission) is used as the criteria, then the ratio should be 1:10.

Unfortunately, differences in availability of the drug in different neighborhoods, combined with the sentencing disparity, resulted in penalizing poor, black communities and in significantly more convictions among blacks compared to whites. The higher rate of convictions is observed among blacks even though a higher proportion of whites report using crack cocaine compared to blacks. The data also supports the fact that treatment is effective for the nonviolent drug addicted user. Programs such as the Residential Substance Abuse Treatment Program and Drug Courts that are proposed in the National Drug Control Strategy issued by the Executive Office are excellent avenues of intervention. Studies have shown that one-year after discharge, non-incarcerated individuals who have attended drug abuse treatment experienced significant reductions in arrests (64%) and self-reported illegal activity (48%; Office of National Drug Control Policy, 2002). In 2000, the cost of incarcerating drug offenders exceeded $9 billion annually (Schiraldi, Holman, Beatty, 2000). It is our belief that sentencing should be related to the nature of the crime rather than solely on the form of cocaine.

If you have any questions, please feel free to contact us.

Sincerely yours,

Dorothy Hatsukami/KL

Dorothy K. Hatsukami, Ph.D
President, College on Problems of Drug Dependence

Cc: Martin Adler, Ph.D., Executive Officer of CPDD
Louis Harris, Ph.D., President-Elect of CPDD
Charles Schuster, Ph.D., Past President of CPDD
Stephen Holtzman, Ph.D., Secretary Treasurer of CPDD
Warren Bickel, Ph.D., Policy Officer of CPDD
William Dewey, Ph.D., co-Policy Officer of CPDD

Table 1. Percent of crimes committed among crack cocaine and cocaine hydrochloride (HCl) offenders

	Crack Cocaine	Cocaine HCl
Violent crimes[1]	40-50	20
Carry weapons[2]	28	15
Extensive criminal records[2]	18	7
Career offender status[2,3]	6	3
Offense within 2 years of release[2]	19	8

[1]Fagan and Chin, 1990
[2] U.S. Sentencing Commission, 1995
[3] At least 2 prior crimes of violence or drug trafficking

Table 2. Percent who carried weapon in last 30 days: 1992 Youth Risk Behavior Survey

	Black	White	Hispanic
Crack	48	31	36
Cocaine	40	25	30
No use	15	14	14

Table 3. Fetal Effects
Hospital Costs and Length of Stay

	Crack Cocaine	Other forms of Cocaine
Cost	$6735	$1226
Stay (days)	7.9	2.9

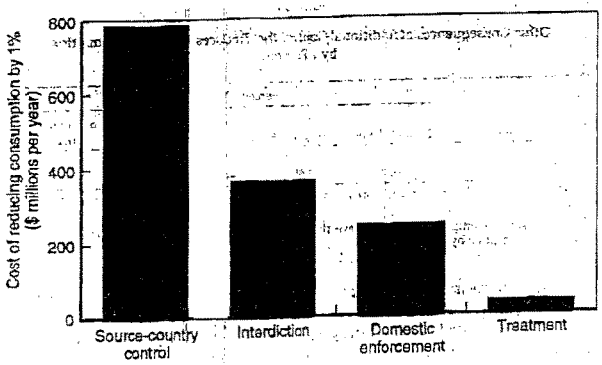
Phibbs, Bateman, Schwartz, 1991.

Table 4. Cocaine Addiction-Driven Crime

- Percent of all users that were heavy users[1]
  - Non-Institutionalized: 22%
  - Incarcerated: 51%
- 60% sold drug to fund personal use[2]
- 64% of federal offenders considered to be distributors identified as having substance abuse problem[3]

[1] Everingham & Rydell, 1994
[2] Mieczkowski, 1990
[3] US Sentencing Commission, 1995

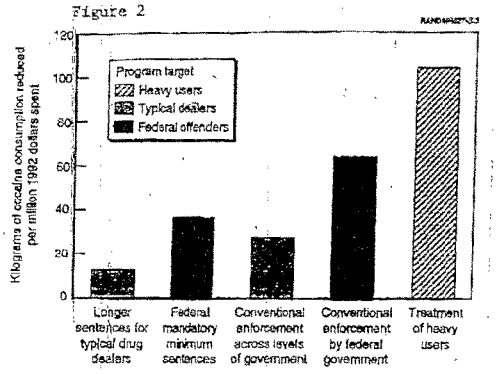
Figure 1



Cost of Reducing Cocaine Consumption by 1 Percent with Alternative Cocaine-Control Programs

From Rydell and Everingham, 1994
RAND report on Controlling Cocaine: Supply Versus Demand Programs

Figure 2



Benefits of Alternative Cocaine Control Strategies

From Caulkins, Rydell, Schwabe and Chiesa, 1997 Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money, RAND

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, N. Y. 11201

CHAMBERS OF
RAYMOND J. DEARIE
U. S. DISTRICT JUDGE

April 15, 2002

Honorable Diana E. Murphy, Chairperson
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

I am pleased to enclose a joint statement from a number of our colleagues addressing the important issue of the cocaine/crack sentencing ratio which we understand is under review by the Commission. We urge the Commission's consideration of the views expressed and stand ready to respond to any inquiries.

Thank you.

Very truly yours,

Raymond J. Dearie /RMZ
Raymond J. Dearie
United States District Judge

enclosure
bc: Judge Sterling Johnson, Jr.

STATEMENT TO THE UNITED STATES SENTENCING COMMISSION CONCERNING THE PENALTIES FOR POWDER AND CRACK COCAINE VIOLATIONS SUBMITTED BY CERTAIN UNITED STATES CIRCUIT COURT OF APPEALS AND DISTRICT COURT JUDGES WHO PREVIOUSLY SERVED AS UNITED STATES ATTORNEYS

The undersigned are Judges of the United States Circuit Courts of Appeals and District Courts -- Republicans and Democrats -- each of whom has previously served as United States Attorney. Having served as federal prosecutors, we believe we have a well-founded understanding of the factors that must be weighed in establishing the appropriate sentences for criminal conduct. We write to set forth our considered judgment concerning the penalties for the distribution of powder cocaine and crack cocaine.

It is our strongly held view that the current disparity between powder cocaine and crack cocaine, in both the mandatory minimum statutes and the guidelines, cannot be justified and results in sentences that are unjust and do not serve society's interest.

Having regularly reviewed presentence reports in cases involving powder and crack cocaine, we can attest to the fact that there is generally no consistent meaningful difference in the type of individual involved. At the lower levels, the steerers, lookouts and street-sellers are generally impoverished individuals with limited education whose involvement with crack rather than powder cocaine is more a result of the demand in their neighborhood than a conscious choice to sell one type of drug rather than another. Indeed, in some cases, a person who is selling crack on one day is selling powder cocaine the next. At the higher levels in the distribution chain, it is generally of no concern to the individuals involved whether the cocaine that they sell is ultimately distributed in the form of powder or is transformed through a relatively simple cooking

process into crack. At either end of the distribution chain, the substantially greater sentences for those who are involved with crack cocaine do not appear to have any greater deterrent impact than that achieved by the lower powder cocaine penalties.

Thus, the differences in the current mandatory minimums and guidelines for powder and crack cocaine result in the imposition of overly severe sentences on those who are involved with relatively small amounts of crack at the lowest level of the distribution chain, without providing any corresponding benefit to society.

We disagree with those who suggest that the disparity in treatment of powder and crack cocaine should be remedied by altering the penalties relating to powder cocaine. The penalties for powder cocaine, both mandatory minimum and guideline sentences, are severe and should not be increased.

In enacting the mandatory minimums, it was the view of Congress that "the Federal government's most intense focus ought to be on major traffickers, the manufacturers or heads of organizations, who are responsible for creating and delivering very large quantities of drugs. . . ." H.R. Rep. No. 99-845, at 11, 99th Cong. (1986). Thus, the quantities adopted to trigger the application of the mandatory minimum were "based on the minimum quantity that might be controlled or distributed by a trafficker in a high place in the processing and distribution chain." Id. at 12.

Experience since the adoption of these mandatory minimums indicates that, as a result of aggregating small quantities of drugs distributed over an extended period of time and conspiracy charges linking those who play a minor role in the distribution network with the major traffickers by whom they are employed, the mandatory minimum sentences are often applied to lower level

violators, which was not Congress' intent. Any lowering of the amount of powder cocaine that would trigger the application of the mandatory minimum would only exacerbate this problem.

Thus, there is no reason to increase the severity of the mandatory minimum provisions for powder cocaine by lowering the amount that would trigger the application of the mandatory minimum. The disparity should be remedied only by raising the amount of crack cocaine that would trigger the application of the mandatory minimum.

Finally, it is important to note that to the extent mandatory minimum or guideline sentences, for either powder or crack cocaine, result in the imposition of sentences that are greater than justice requires, it is not only the defendants and their families that suffer. Our prisons are overcrowded and it currently costs approximately $23,000 per year to maintain an individual in prison. Thus, the imposition of lengthy prison terms on those who play a minor role in a powder or crack cocaine distribution network places an unwarranted cost on the American taxpayer. This is particularly true in the case of the many alien defendants who will be deported upon completion of their prison sentence.

In sum, we do not believe there is any reason to increase the severity of the penalties for those who deal in powder cocaine and we strongly recommend that the disparity between the penalties for crack and powder cocaine be eliminated, or, at a minimum, significantly reduced.

Respectfully submitted,

Hon. Michael Daly Hawkins
Ninth Circuit Court of Appeals

Hon. Gilbert S. Merritt
Sixth Circuit Court of Appeals

Hon. Boyce F. Martin, Jr.
Sixth Circuit Court of Appeals

Hon. Jon O. Newman
Second Circuit Court of Appeals

Hon. Raymond L. Acosta
District of Puerto Rico

Hon. Sarah Evans Barker
Southern District of Indiana

Hon. Walter E. Black, Jr.
District of Maryland

Hon. Catherine C. Blake
District of Maryland

Hon. Clarence A. Brimmer
District of Wyoming

Hon. Robert J. Cindrich
Western District of
Pennsylvania

Hon. John T. Curtin
Western District of New York

Hon. Glen H. Davidson
Northern District of
Mississippi

Hon. Raymond J. Dearie
Eastern District of New York

Hon. Gustave Diamond
Western District of
Pennsylvania

Hon. Peter C. Dorsey
District of Connecticut

Hon. John Hannah, Jr.
Eastern District of Texas

Hon. William W. Justice
Eastern District of Texas

Hon. William C. Lee
Northern District of Indiana

Hon. William T. Moore
Southern District of Georgia

Hon. Frederick J. Motz
District of Maryland

Hon. Alan H. Nevas
District of Connecticut

Hon. Manuel L. Real
Central District of California

Hon. James M. Rosenbaum
District of Minnesota

Hon. Barefoot Sanders
Northern District of Texas

Hon. Fred J. Scullin, Jr.
Northern District of New York

Hon. Donald E. Walter
Western District of Louisiana

Hon. Rodney S. Webb
District of North Dakota

Hon. George E. Woods
Eastern District of Michigan

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STEVE YOUNG
PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

21 May 2002

The Honorable Charles E. Grassley
Ranking Member, Subcommittee on Crime and Drugs
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Grassley:

I am writing on behalf of the membership of the Fraternal Order of Police to submit the comments of our organization for the upcoming Subcommittee hearing on the recommendations of the United States Sentencing Commission as they relate to the current penalty structure for crack and powder cocaine offenses.

In a 5 April press release, the Commission noted its intention "to ask Congress to modify federal drug laws to address the disparity in treatment between crack and powder cocaine." The Fraternal Order of Police does not oppose addressing the disparate penalties associated with crack and powder cocaine offenses, or across drug type. We are, however, greatly concerned with the manner in which any such changes are put into effect. Despite the progress we have made, the problem of both powder and crack cocaine have not vanished from our streets. It is for this reason and many others that we recognize the urgent need to maintain the tough standards set forth in current law for the sentencing of those convicted of cocaine-related offenses.

The current penalty structure for crack and powder cocaine offenses is based primarily on the quantity of the drug in the possession of the defendant at the time of his arrest. This priority given to quantity in determining a defendant's role in the offense, and the final sentence of the offender, is as important today as it was in the 1980s. While other factors such as aggravating conduct are essential to the determination of a final sentence, these and other enhancements should continue to be in addition to a minimum sentence that is based first and foremost on the quantity of the controlled substance as provided for under current law.

With regard to the so-called "100-to-1" sentencing differential for crack cocaine and powder cocaine offenses, the Fraternal Order of Police supports *increasing* the penalties for offenses involving powder cocaine through a reduction in the quantity of powder necessary to trigger the 5- and 10-year mandatory minimum sentences. This would decrease the gap between the two similar offenses, address the concerns of those who

question the current ratio, and would provide law enforcement with the tools they need to further restrict the possession, use, and sale of powder cocaine.

Regardless of whether or not the concerns of those who question the current ratio are well founded, the appropriate response is not to *decrease* the penalties for engaging in one type of illicit behavior over another. Indeed this approach would seem to be at variance with common sense, and does not adequately take into consideration the impact that both crack and powder cocaine have on our communities. Meeting in the middle, or toughening the sentences for powder while weakening those for crack, is also not a feasible solution. While it would definitely affect a lower drug quantity ratio, any measure that decreases penalties for crack offenders would harm the overall effort to keep drugs off the street and violence out of our communities.

The dangers associated with both crack and powder cocaine have not completely disappeared since the current tough sentences for theses crimes were enacted; and although our nation has seen across the board reductions in crime rates in recent years, it is still true that illegal drugs have a devastating impact on society as a whole. That is why the Fraternal Order of Police supports tough penalties for all drug-related offenses. It is also evident that the Federal government, which has the available resources and policies in place to effectively investigate, apprehend, and punish drug offenders, must continue to take the lead in providing harsh penalties for drug-related offenses.

Attached to this letter, please find the testimony of National Legislative Committee Chairman Bill Nolan from the 26 February hearing on this issue before the U.S. Sentencing Commission. We respectfully request that the testimony, along with this letter, be included in the record for the 22 May hearing.

On behalf of the more than 300,000 members of the Fraternal Order of Police, thank you in advance for your assistance in this matter. Please do not hesitate to contact me, or Executive Director Jim Pasco, if we can provide you with any additional information or assistance.

Sincerely,

Steve Young
National President

Enclosure

MAY 21 2002 16:30 FR TO 2280544 P.04/09

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STEVE YOUNG
PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

TESTIMONY

Of

William J. Nolan
Chairman, National Legislative Committee
Grand Lodge, Fraternal Order of Police

On

The Issues for Comment Following Proposed Amendment No. 8 To the Sentencing Guidelines

Before the

United States Sentencing Commission
26 February 2002

Good morning Chair Murphy, Vice Chair Castillo, Vice Chair Sessions, Vice Chair Steer, and Members of the United States Sentencing Commission. My name is Bill Nolan and I am the Chairman of the National Legislative Committee of the Grand Lodge, Fraternal Order of Police. I am here today on behalf of National President Steve Young and the membership of our organization to offer the views of the F.O.P. on several issues related to the sentences for crack and powder cocaine offenses under the U.S. Sentencing Guidelines. Let me just say at the outset that I believe this is the first time that the Fraternal Order of Police has had the opportunity to appear before the Commission, and we greatly appreciate your invitation to do so here today.

In addition to serving the FOP on the National level, I am also the current president of local lodge #7 in Chicago, Illinois. Like many major metropolitan areas across the nation, our city has long been plagued by the scourge of drugs, and experienced a rising trend in the crime and violence that is all too often associated with these offenses. As I know you are already well aware, our larger cities and the nation as a whole witnessed an explosion in cocaine-related drug use and violence during the 1980s, especially due to the emergence of crack cocaine. The rapid ascension of this new drug caught many of us in the law enforcement community by surprise, due to the rapidity of it's spread into our major cities and the unmerciful psychological and physiological effects it caused on its victims. Thankfully, America's lawmakers moved quickly to stem the tide, enacting sweeping new laws and penalties for those who would bring their poison into our neighborhoods and communities. Measures such as the Anti-Drug Abuse Acts of 1986 and 1988 gave us in the law enforcement community the tools we needed to appropriately punish these often violent offenders. Despite the progress we have made, the problem of both powder and crack cocaine have not vanished from our streets, and we in Chicago are still coping with this as well as the use of other illicit drugs. In 1999, for example, the Arrestee Drug Abuse Monitoring Program reported that over forty-one percent of adult males in our city tested positive for cocaine at the time of their arrest, posing a dangerous situation for the brave men and women of my department. It is for this reason and many others that I recognize the urgent need to maintain the tough standards set forth in current law for the sentencing of those convicted of cocaine-related offenses.

The Commission has asked our organization to testify regarding the issues for comment following proposed amendment number eight to the Sentencing Guidelines; specifically, on several questions regarding the sentencing of defendants convicted of cocaine-related offenses. Let me begin by telling you that the Fraternal Order of Police does not oppose addressing the disparate penalties associated with crack and powder cocaine offenses, or across drug type. Even though various drugs or even two variations of the same drug may have different physiological effects on their users, their general

effect on society is the same. We are, however, greatly concerned with the manner in which any such changes are put into effect.

As I mentioned before, in the 1980s Congress recognized the need for tougher penalties to counter the rising trends in drug use and violent crime with passage of the Anti-Drug Abuse Acts, establishing mandatory minimum penalties for persons convicted of offenses involving a given amount of a variety of controlled substances. Mandatory sentences are an important tool for law enforcement in their fight against career criminals and as a deterrent for those who are considering a life of crime. Project Exile, which relies on the federal prosecution of illegal gun offenses, is one example of their effectiveness in action. Begun in Richmond, Virginia in 1997, Project Exile is an extremely successful model of Federal, State and local law enforcement participating in a cooperative effort to reduce crime through tough enforcement of the gun laws and the imposition of harsh sentences for convicted offenders. Through these tougher penalties, Project Exile has helped to reduce gun violence in Richmond by over 40 percent and has been expanded to cities across the country.

The current penalty structure for crack and powder cocaine offenses is based primarily on the quantity of the drug in the possession of the defendant at the time of his arrest. The quantities which trigger the law's mandatory minimum penalties differ for various drugs, and in some cases, for different forms of the same drug, including for powder and crack cocaine offenses. Under this law, a person convicted of distributing 500 grams of powder cocaine or 5 grams of crack cocaine receives a mandatory 5-year sentence, and a 10-year sentence for those convicted of distributing 5,000 grams of powder or 50 grams of crack. In the Anti-Drug Abuse Act of 1988, Congress further set enhanced penalties by establishing a 5-year mandatory minimum sentence for the possession of 5-grams of crack cocaine. This priority given to the quantity of illegal drugs in determining a defendant's role in the offense and the final sentence of the offender is as important today as it was in the 1980s.

That being said, is there also a need for penalties that are tougher for crack than for powder cocaine offenses, or for one type of drug over another? Several sources would support such a conclusion. In a report to Congress in 1997 required by Public Law 104 – 38, a prior Commission recognized that some drugs "have more attendant harms than others and that those who traffic in more dangerous drugs ought to be sentenced more severely than those who traffic in less dangerous drugs." There is also evidence to support the fact that crack cocaine does greater harm to both the user and to the well being of communities across the nation. The Commission's findings in the 1997 report also stated that crack cocaine is more often associated with systemic crime, is more widely available on the street, is particularly accessible to the most vulnerable members of our society, produces more intense physiological and psychotropic effects than snorting powder cocaine; and that Federal sentencing policy must reflect the greater dangers associated with crack. As a former police officer in one of America's largest cities, one who has witnessed first-hand the devastating impact that crack has had on my community, I agree completely with this assessment. And I believe that anyone who has ever seen a child or adult addicted to crack, or talked to the families who are forced to

live locked inside their own homes for fear of the crack dealers who rule their streets, would also agree with this statement.

There are, however, other factors which should go into the sentencing of those convicted of crack-powder cocaine offenses. The Commission notes that some have suggested that proportionality in drug sentences could be better served by providing enhancements that target offenders who engage in aggravating conduct, and by reducing the penalties based solely on the quantity of crack cocaine to the extent that the Drug Quantity Table already takes aggravating conduct into account. For example, possession of 5 grams of crack is currently assigned a base offense level of 26, which translates into a sentence of between 63 and 78 months for individuals with 0 to 1 Criminal History Points. The Commission's current proposed amendment addresses this issue by, among other things, making an appropriate differentiation regarding the use and possession of firearms in drug-related offenses, and providing sentencing enhancements for the distribution of drugs at a protected location or to underage or pregnant individuals. We applaud the Commission for working to include additional aggravating factors in the determination of a final sentence under the Guidelines, however, these and other enhancements should continue to be in addition to a minimum sentence that is based first and foremost on the quantity of the controlled substance as provided for under current law.

We also appreciate the Commission's concerns regarding the 100:1 drug quantity ratio for crack cocaine and powder cocaine offenses. As I mentioned before, current law requires a 5-year mandatory sentence for distributing 500 grams of powder cocaine or 5 grams of crack cocaine, a 10-year sentence for those convicted of distributing 5,000 grams of powder or 50 grams of crack, and a 5-year sentence for the possession of crack cocaine. We further understand that some are concerned with the disparate impact of this ratio, particularly those who have expressed concern about its impact on minority communities. Regardless of whether or not these concerns are well founded, the appropriate response is not to *decrease* the penalties for engaging in one type of illicit behavior over another. Indeed this approach would seem to be at variance with common sense, and does not adequately take into consideration the impact that both crack and powder cocaine have on our communities. And although we support sentencing guidelines which are fair and just, we strongly disagree with the assumption that 5- and 10-year mandatory sentences should be targeted only at the most serious drug offenders. The so-called "low level dealer", who traffics in small amounts of either powder or crack cocaine, is no less of a danger to the community than an individual at the manufacturing or wholesale level. Despite the fact that these individuals may represent the bottom of the drug distribution chain, that does not necessarily translate into a decrease in the risk of violence that all too often accompanies these offenses, or in the serious threat they pose to the safety of our children and the quality of life in America's communities. The Fraternal Order of Police supports *increasing* the penalties for offenses involving powder cocaine through a reduction in the quantity of powder necessary to trigger the 5- and 10-year mandatory minimum sentences. This would decrease the gap between the two similar offenses, address the concerns of those who question the current ratio, and would

provide law enforcement with the tools they need to further restrict the possession, use, and sale of powder cocaine.

There are other reasons to support an increase in the penalties associated with cocaine-related offenses. In its 1995 report on "Cocaine and Federal Sentencing Policy," the Commission wrote that the Drug Enforcement Administration noted that in prior years some wholesale distributors who initially handled crack cocaine were moving to distribute powder cocaine to avoid the "harsh Federal sentencing guidelines that apply to higher-volume crack sales." Meeting in the middle, or toughening the sentences for powder while weakening those for crack, is also not a feasible solution. While it would definitely affect a lower drug quantity ratio, any measure that decreases penalties for crack offenders would harm the overall effort to keep drugs off the street and violence out of our communities.

The dangers associated with both crack and powder cocaine have not completely disappeared since the current tough sentences for theses crimes were enacted. A Report published by the DEA in September 1999 highlighted this fact, noting that "the primary U.S. drug threat is cocaine, particularly in its smokeable form known as 'crack cocaine,'" and that "cocaine traffickers continue to attract most of the nation's drug law enforcement assets." There is also evidence that the use and relative ease of obtaining cocaine remains unacceptably high. A University of Michigan study entitled "Monitoring the Future" found that powder cocaine use by high school seniors doubled from 3.1 percent in 1992 to 6.2 percent in 1999. And although cocaine usage among 12th graders declined to 4.8 percent in 2001, this is still higher than the percentage of those who reported using crack. In addition, the percentage of those respondents who say that it is "fairly easy" or "very easy" to get cocaine remains at a level of over 40 percent. Finally, despite the fact that in 2000 there was a slight decrease in seizures of cocaine reported to the Federal Drug Seizure System (from 135 metric tons in 1999 to 103 metric tons in 2000), this does not signal a decline in cocaine production. Indeed, the DEA reported in its 2001 "Drug Trafficking in the United States" study that the decline in cocaine seizures "is primarily attributed to the decrease in the size of the average load transiting the Southwest border and an increase in the number of drug loads moving between ports of entry."

The Fraternal Order of Police supports tough penalties for all drug-related offenses. Each illegal drug carries with it different effects on their users, as well as different problems associated with their manufacture and distribution. One thing is clear, however: that although our nation has seen across the board reductions in crime rates in recent years, it is still true that illegal drugs have a devastating impact on individuals and society as a whole. In a September 2001 study entitled "The Economic Costs of Drug Abuse in the United States," the Office of National Drug Control Policy (ONDCP) reported that the overall cost of drug abuse to our nation was over $143 Billion in 1998, and represented an annual increase of nearly 6 percent from 1992 to that year. It is also clear that the Federal government, which has the available resources and policies in place to effectively investigate, apprehend, and punish drug offenders, must continue to take the lead in providing harsh penalties for drug-related offenses. The Administration,

Congress and the Commission must continue to send the message to drug dealers and traffickers that the Federal government will fiercely protect the most vulnerable members of our society and will severely punish those who seek to exploit them.

The question of appropriate sentences for crack and powder cocaine offenses has received a great deal of attention in recent years from a variety of sources. Unfortunately, there has been far too much demagoguery and too little rational deliberation on this issue. That is why we believe that today's hearing is an important step in the right direction. Our organization looks forward to the continuing discussion on the appropriate penalty levels for drug-related offenses, and welcomes the opportunity to participate in an ongoing dialogue with the Commission and others interested in this issue. On behalf of the membership of the Fraternal Order of Police, let me thank you again, Chair Murphy, for the opportunity to appear before you here today.

I would be pleased to answer any questions you may have at this time.

STATEMENT OF SENATOR CHUCK GRASSLEY
SUBCOMMITTEE ON CRIME & DRUGS HEARING
FEDERAL COCAINE SENTENCING POLICY
MAY 22, 2002

Mr. Chairman, thank you for holding this hearing on federal cocaine sentencing policy. I'm sorry that I'm unable to attend today's hearing, because this is an important subject. Unfortunately, my duties as Ranking Republican on the Finance Committee require that I be on the floor as the Senate considers the trade bill. However, I'll submit several questions in writing for the witnesses.

In the 1980s, the country faced a crisis of violence in the inner cities caused by the near epidemic spread of crack cocaine. To counter the rising trend in violent drug crime, we passed the Omnibus Anti-Drug Abuse Act of 1986. That bill put in place mandatory minimum penalties for persons convicted of drug crimes involving given quantities of certain specific drugs. These mandatory minimums play a crucial role in our war on drugs.

As a part of the mandatory minimum regimen, we established different penalties for powder and crack cocaine offenses based on the quantities of drug the offender possessed. Under this framework, a person convicted of distributing 500 grams of powder cocaine or 5 grams of crack cocaine receives a mandatory 5 year sentence, and a 10 year sentence for those convicted of distributing 5,000 grams of powder or 50 grams of crack. We also created a 5 year mandatory minimum penalty for possession of 5 grams of crack cocaine.

These sentencing guidelines, including the 100-to-1 ratio, serve an important purpose. In the 1997 U.S. Sentencing Commission Report, the Commission stated that some drugs, "have more attendant harms than others and that those who traffic in more dangerous drugs ought to be sentenced more severely than those who traffic in less dangerous drugs."

The 1997 Commission Report found that significant dangers are associated with both crack and powder cocaine, but that "many of these dangers are associated to a greater degree with crack cocaine than with powder." Some of these greater dangers include the fact that "crack cocaine is more often associated with systemic crime . . . particularly the type of violent street crime so often connected with gangs, guns, serious injury, and death." Crack is also more widely available on the street and at a lower cost than powder and, as such, it is particularly accessible to those who are most vulnerable. Further, the Commission found that because crack is smoked rather than snorted, it produces more intense physiological and psychotropic effects than snorting powder cocaine, rendering the user more vulnerable to addiction. For these reasons the Sentencing Commission concluded that "federal sentencing policy must reflect the greater

dangers associated with crack." I agreed with the Commission's findings and conclusion then, and I still do today.

For the last sixteen years since the passing of the 1986 Act, there has been a vigorous debate on how best to punish both powder and crack cocaine offenders. Today this Subcommittee picks up the debate and hears from some of the most experienced minds on this issue.

The U.S. Sentencing Commission and Senator Biden argue for equalizing crack and powder penalties by decreasing the penalty for crack offenders. They believe that the 100-to-1 differential exaggerates the relative harmfulness of crack cocaine; doesn't sufficiently target major dealers; fails to provide adequate proportionality; and has too great an impact on minorities, who make up about 85 % of the 2000 offenders.

The Department of Justice and the leading law

enforcement organizations, including the Fraternal Order of Police and the International Association of Chiefs of Police, make the argument that the disparity in punishment for crack and powder cocaine has been a major success in decreasing inner city violence and is a significant deterrent to those considering dealing in crack cocaine. They claim that one reason it has been successful is that it has kept recidivist criminals off the streets for longer periods of time. They also argue that these mandatory minimums reflect the seriousness with which we take crack cocaine offenses and they say that to lessen the penalty for crack would send the wrong message.

Senators Session and Hatch have introduced a bill, S.1874, the Drug Sentencing Reform Act, that would decrease the disparity in sentencing and establish certain enhancements to target sentencing to the most violent

offenders. This may be a reasonable compromise and I plan to review this bill carefully.

Whatever decision we ultimately make, we should not make a change to the sentencing guidelines without sufficient consideration. That is why it is especially important that we are holding this hearing today. I look forward to hearing today's testimony.

Statement of Orrin G. Hatch
Before the Senate Judiciary Subcommittee on
Crime and Drugs
May 22, 2002
Subcommittee Hearing on "Federal Cocaine Sentencing Policy"

Thank you Mr. Chairman for holding this very important hearing on federal cocaine sentencing policy. You and I have worked together for over two decades to fight crime, including drug trafficking, and I look forward to working with you on this issue.

The Constitution does not assign the responsibility for federal sentencing – the function of determining the scope and extent of punishment for federal offenses – solely to any one of the three branches of government. For this reason, it is appropriate that we have all three branches of government represented here today to deliberate this issue. I want to welcome our panelists whose diverse and expert testimony will undoubtedly provide us with additional, crucial information upon which we will rely as we continue to devise rational, coherent, and fair sentencing policies.

I want to commend Judge Murphy for her leadership on the Sentencing Commission which has led to fair-minded and cogent recommendations and changes to the sentencing guidelines. The Commission has been responsive to concerns and issues raised by Congress. Specifically, I want to recognize the swift action the Commission has taken to implement the criminal law and sentencing provisions included in the USA PATRIOT Act.

In December, Senator Leahy and I wrote to Judge Murphy requesting that the Commission update its 1997 report on federal cocaine sentencing policy for Congressional review to provide us with guidance as we continue to evaluate the appropriateness of the penalty differential between powder and crack cocaine. I was pleased that the Commission granted our request in providing guidance and did not act unilaterally by promulgating amendments that would have changed the cocaine sentencing structure before Congress had an opportunity to consider and act on their recommendations. I look forward to reviewing thoroughly this report, which was released by the Commission today.

I particularly look forward to hearing the testimony today from the Honorable Roscoe Howard, United States Attorney for the District of Columbia. Before becoming U.S. Attorney, Mr. Howard was a line prosecutor in both D.C. and Virginia, and he has also served as a law professor. The District of Columbia U.S. Attorney's office prosecutes ~~more~~ crack cocaine a high number offenses ~~than any other component in the Department of Justice~~, because that office is responsible for the enforcement of both the federal and the local drug laws in the District of Columbia.

Every day you are in a position to examine the real-life effects of our federal cocaine sentencing policy. Given your unique perspective, and the breadth of your prosecutorial experience, you are particularly well-situated to articulate the Department's position on these issues, and I believe that your input today is invaluable. I have confidence that this Administration's vigor to renew and recharge our nation's battle against drug trafficking and abuse will yield positive results. It is good to see you again, and I look forward to hearing your testimony.

Finding ways to reduce drug crime is *not* and *should not* be a partisan issue. All involved in this process are trying to design a blueprint to curb the spread of drug trafficking and abuse. An easy, straightforward blueprint, unfortunately, has proven to be elusive.

Since the 1970's, Congress has been working to improve federal sentencing policy and has routinely made necessary changes to make our sentencing structure more just and effective. Over fifteen years ago, Congress passed the bipartisan Sentencing Reform Act, a revolutionary bill that categorically changed the objectives of sentencing policy. The then-existing model of haphazard and indeterminate sentencing was replaced with a sentencing policy that focused on certain and objective punishment.

The new objectives of sentencing included the creation and imposition of sentences that reflect the seriousness of the offense, adequately deter criminal conduct, and protect the public. The Sentencing Reform Act also created the Sentencing Commission, which was charged with the duty of producing guidelines that would curtail unwarranted sentencing disparities, ensure certainty, and provide just punishment. To further the goal of uniform and certain punishment, Congress also began enacting mandatory minimum sentences specifically targeting drugs and violent crime. The purpose of these mandatory penalties was to deter – through the prospect of certain and lengthy prison terms – potential offenders from engaging in these offenses.

It is fair to say that some of the bipartisan changes to federal sentencing policy that Congress has made over the last 20 years have been more successful than others. For over a decade I have questioned, along with others, the overall utility of some severe mandatory minimum sentences. Indeed, in 1993, I published a law review article examining Congressional attempts at creating a certain and effective sentencing system. In that article, I wrote that Congress should seriously consider greater use of alternatives to mandatory minimum sentences, including the use of specific and general sentencing directives, in pursuing uniform, certain, and effective sentencing. I still believe that today, and it is why I agreed to cosponsor with Senator Sessions S. 1874, the "Drug Sentencing Reform Act."

S. 1874 reduces the sentencing disparity between the mandatory minimum sentences imposed for offenses involving crack and powder cocaine. Over the past decade, public officials, interest groups, and criminal justice practitioners have questioned the fairness and practicality of the federal sentencing policy for cocaine offenses, specifically, the 100-to-1 quantity ratio between powder and crack cocaine. I have come to agree that while crack cocaine has a

disproportionately greater detrimental effect than powder cocaine on society – particularly on minority families, children, and communities – the sentencing differential, which is based solely on drug quantity, does not further adequately the objectives a fair and just sentencing policy.

The Sessions-Hatch bill reduces the 100-to-1 sentencing disparity between crack and powder cocaine to a 20-to-1 ratio by raising the threshold for crack from 5 to 20 grams and lowering the threshold for powder from 500 to 400 grams. I want to be clear that this reduction does not give credence to the argument that crack and powder cocaine are coequal in their destructive effects. On the contrary, this five-fold reduction in the crack-powder ratio corrects the unjustifiable disparity, while appropriately reflecting the greater harm to our citizens and communities posed by crack cocaine. Moreover, the increase in penalties for powder cocaine offenses simply reflects the existing reality that cocaine, in whatever form, has had devastating effects on families and communities.

Our bill also includes specific directives to create sentencing enhancements for all drug offenses involving firearm use or violence and for organizers and supervisors who use young women and children to distribute drugs. Finally, our bill contains another specific sentencing directive that will result in a sentencing reduction for people who play minimal roles in drug offenses and caps the amount of the sentence attributable to quantity alone to 10 years.

It is a balanced bill that uses various sentencing methods to craft a more rational and effective sentencing policy. It does *not* go easy on drug dealers. Those who are determined to peddle dangerous drugs to our most vulnerable citizens will continue to pay gravely for their choices. Those who use firearms or violence while dealing drugs will be punished more severely. And those who are less culpable, albeit far from innocent, will receive fair and just punishment.

The approach Senator Sessions and I take in our bill differs from that which is being recommended by the Administration and the Sentencing Commission. While the Administration does not favor raising the threshold for crack, the Sentencing Commission opposes lowering the threshold for powder. Reasonable minds can and do differ as to the appropriate response to this issue. I understand that the Administration is continuing to study the disparity issue and its consequential affects. I commend them for what they are doing and encourage their continued involvement in this process. We all agree that there is no panacea for ending all drug crimes, and all sentencing options need to be considered. I believe that we can all work together on this issue and possibly reach common ground. I look forward to meeting this challenge.

Mr. Chairman, I ask that a copy of my December 2001 letter to Judge Murphy and a copy of my 1993 law review article be included in the record along with my statement.

A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature

*185 THE ROLE OF CONGRESS IN SENTENCING: THE UNITED STATES SENTENCING COMMISSION, MANDATORY MINIMUM SENTENCES, AND THE SEARCH FOR A CERTAIN AND EFFECTIVE SENTENCING SYSTEM

The Honorable Orrin G. Hatch [FNa1]

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This article discusses the role of Congress in the federal sentencing system, reviews the creation of the United States Sentencing Commission, and examines the effectiveness of the sentencing guidelines promulgated by the Commission in meeting Congress' sentencing goals. The author, a United States Senator, also reviews the effectiveness of mandatory minimum sentences and provides an overview of some alternatives to mandatory minimum sentencing, of which Congress has begun to make greater use.

Introduction

The Constitution of the United States does not exclusively assign the responsibility for federal sentencing--the function of determining the scope and extent of punishment for federal offenses--to any one of the three branches of government. [FN1] Still, the Constitution does assign to Congress the power to define crimes and to determine the degree and method of punishment. [FN2] Moreover, while the right to try offenses and impose punishment is conferred upon the judicial branch, [FN3] Congress has the power to limit the scope of judicial sentencing discretion. [FN4] If exercised appropriately, these powers provide Congress with a prominent and constructive role in federal sentencing.

*186 I. Background

Despite its power, Congress had historically exercised an only minor, indirect role in federal

sentencing. [FN5] For almost a century, Congress delegated near absolute discretion to the sentencing judge to determine the duration of a sentence within a customarily wide range. Within this wide range, sentencing decisions were virtually unreviewable on appeal. [FN6] The power of the sentencing judge grew stronger when judges were granted the power to suspend imprisonment sentences in favor of probation. In 1910, Congress delegated further sentencing power when it established the United States Parole Commission, which was charged with evaluating and setting the release date of federal prisoners. [FN7]

Despite such a broad assignment of sentencing power and discretion, a review of sentencing policy shows that the Congress, over the years, has employed a number of methods to maintain some influence over sentencing policy. These methods include: (1) the enactment of a limited number of mandatory minimum sentences; [FN8] (2) requirements that sentences for certain offenses be served consecutively; [FN9] (3) increases in statutory maximum penalties; [FN10] and (4) the enactment of specialized sentencing statutes applicable to narrow classes of offenders. [FN11] In addition, oversight hearings [FN12] and "sense of the Congress resolutions" [FN13] have allowed for important, ***187** though less formal, input into sentencing policy.

Congress' role has been limited largely because the federal system came to adopt "coercive rehabilitation" [FN14] as its foundation principle. According to this theory, rehabilitation of the offender represents the overwhelming consideration in sentencing. [FN15] Such as scheme necessarily involves a sharing of power between the sentencing judge, who is expected to sentence the defendant to a long term, [FN16] and the Parole Commission which is charged with setting release dates for those sufficiently rehabilitated. [FN17]

In 1984, after studying the rehabilitation model of punishment and its characteristic feature of indeterminate sentencing for nearly a decade, Congress concluded that the entire system was ooutmoded and in need of reform. [FN18] The system lacked the certainty necessary to inspire public confidence and operate as a meaningful deterrent to crime. These deficiencies were the product of unwarranted disparity and inconsistency in sentencing application. [FN19] The discretion that Congress had conferred for so long upon the judiciary and the parole authorities was at the heart of sentencing disparity. An unjustifiable variation existed in the sentences imposed by judges on similarly situated defendants. [FN20] The Parole Commission compounded the problem by releasing prisoners according to its own view of the appropriate term of imprisonment. [FN21] In response, judges began to ***188** factor into sentences the anticipated actions of the Parole Commission. [FN22] Despite this conflicting process and its harmful effects on the system, the judiciary, as an institution, did little to utilize its power to effect positive change. When Congress chose to act to correct a faltering sentencing system, the judiciary failed to take a leadership role in determining the course of reform legislation. [FN23]

II. Congress Establishes Sentencing System Goals

A. The Sentencing Reform Act of 1984

definitive study of their impact unfeasible. [FN39]

Currently, the guidelines are applied nationwide, with more than seventy-five percent of federal criminal defendants subject to the SRA as of December 1991. [FN40] While evidence exists that sentencing disparity has declined among certain selected groups of offenders, [FN41] it is also evident that unwarranted sentencing disparity has not been entirely eradicated by the guidelines. In addition, while many within the criminal justice system believe that the guidelines have been generally successful in meeting the goals of uniformity and just sentencing, [FN42] a majority of recently interviewed judges, defense attorneys, and probation officers cite significant problems with the guidelines. [FN43]

The Federal Courts Study Committee, [FN44] the General AccountingOffice, [FN45] and numerous commentators [FN46] have detailed problems with the guidelines, including the sentiment that the guidelines are excessively time consuming, rigid and technical in their application, and overly harsh in their effect. Indeed, the opinion that guidelines sentences are too severe may be the catalyst for other criticisms. Despite virtually unanimous support among the courts of appeals, certain sentencing practices-- such as the consideration of nonconvicted and acquitted conduct--remain controversial. As well, Chief Justice Rehnquist has cited a "dramatic increase" in criminal appeals since the guidelines were imposed. [FN47]

Perhaps the most serious criticism of the guidelines is that their compulsory nature has given prosecutors too much leverage over defendants, thereby elbowing judges out of the sentencing process. [FN48] Discretionary decisions by prosecutors, regarding both charges and factual allegations, can powerfully expand or limit a judge's sentencing boundaries. This increased leverage, in turn, promotes "hidden bargaining," wherein prosecutors and defense attorneys manipulate the guidelines in order to induce pleas necessary to keep the system working. [FN49] The extent to which the presentencing decisions and policies promulgated by the Department of Justice have affected the sentencing system must be examined by Congress. These policies include the use of discretion in the choice of charges filed and in the plea bargaining procedure. [FN50] As the Commission concluded in a 1991 report on the impact of the guidelines, prosecutorial charge reductions and other bargaining affect the sentencing process in seventeen percent of cases. [FN51] In light of this impact, Congress must determine the extent to which presentencing decisions produce unwarranted disparity and, subsequently, whether prosecutors exercise too much power under the present guidelines system, bearing in mind the broad latitude to charge and bargain cases which prosecutors have always been afforded under the Constitution and federal statutes.

Obviously, the binding nature of the guidelines is a significant aspect of this issue. To the extent that the power of the trial court has been constrained, greater discretion is now exercised by others in the criminal law enforcement process. While some shift in power away from the court is inherent in any compulsory guidelines system, such a result does not ***192** excuse Congress from the responsibility of ensuring that the guidelines protect against undue prosecutorial influence. Supporters maintain that the guidelines provide some protections against prosecutorial abuse and that those protections rest with the courts and with the Attorney General. [FN52] Congress should review the adequacy of these protections and, where lacking, encourage remedial action by the Commission. Congress should consider all options, including, if necessary, giving judges greater flexibility in deciding the

appropriate application of, and departure from, guidelines sentences.

Supporters and critics alike acknowledge that, while the guidelines have been in force for only a short time, the current system is more predictable and uniform, and thus, preferable to the pre-guidelines sentencing scheme. [FN53] At the same time, however, judges, scholars and bar associations call for an intensive analysis of the guidelines. Many of the problems and concerns they raise warrant examination by Congress.

B. Increased Enactment of Mandatory Minimum Sentences

Congress' pursuit of enhanced sentencing effectiveness through certain and objective punishment did not end with the enactment of the SRA. Congress took a second approach, as well, in the form of renewed support for mandatory minimum sentences. [FN54] From 1984 to 1990, Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime. [FN55] The purpose of these mandatory penalties was to deter--through the prospect of certain and lengthy prison terms--potential offenders from engaging in these offenses. More recently, however, Congress has begun to reconsider the merit of these statutes.

In 1990, Congress formally directed the Commission to study the effectiveness of mandatory minimum sentencing. The Commission determined that, while mandatory minimums were not new to the federal criminal justice system, the enactment of mandatory minimums had historically been an occasional phenomenon aimed at special classes of offenders. [FN56] Since 1984, however, a decided trend toward the use of mandatory minimum penalties was underway. Responding to the nation's legitimate concerns about violent crime and drug related problems, Congress, in 1986, significantly altered sentencing policy by focusing on drug trafficking and distribution offenses and by tying the minimum penalty to ***193** the quantity of drugs involved in the offense. [FN57] Congress also provided substantial mandatory sentence enhancements for the use or carrying of a firearm during a crime of violence and established mandatory minimums for certain drug offenses. [FN58] Congress passed additional mandatory minimums for drug offenders who sold drugs to minors [FN59] or who possessed certain weapons during commission of the offense. [FN60] In 1988, Congress cast an even larger net over drug offenses at different levels of the drug distribution chain by applying mandatory minimum penalties to conspiracies to commit certain offenses [FN61] and by providing a mandatory minimum of five years imprisonment for simple possession of "crack" cocaine. [FN62] Today, over one hundred separate federal mandatory minimum penalty provisions are operative in sixty criminal statutes. [FN63]

On its face, mandatory minimum sentencing appears to satisfy the sentencing objectives established under the SRA. In fact, the rationales cited by supporters of mandatory minimums include many of the sentencing objectives set forth in the SRA itself--deterrence, certainty, incapacitation, and the reduction of unwarranted sentencing disparity. [FN64] Despite noting the potential inconsistencies between mandatory minimum sentences and sentencing guidelines, [FN65] Congress has continued to pursue this method of sentencing.

Recent findings of the Commission, the Federal Courts Study Committee, and the Judicial Conference, however, have prompted a growing number of legislators to question the merit and efficacy of mandatory minimum sentences. While mandatory minimum sentences may increase the potential for severe punishment, a current lack of uniform application [FN66] may be dramatically undermining sentencing certainty. As the ***194** Commission confirmed in its recent study of mandatory minimum sentencing, despite the expectation that mandatory minimums would be applied to all relevant cases, an inconsistent application was created substantial disparity in sentencing. [FN67] In addition, the Federal Courts Study Committee has determined that lengthy mandatory minimums may work to hamper federal criminal adjudication and frustrate the traditional pretrial settlement of criminal cases. [FN68] Of the sixty statutes containing such minimums, only four result in frequent convictions. [FN69]

The compatibility of the guidelines system and mandatory minimums is also in question. [FN70] While the Commission has consistently sought to incorporate mandatory minimums into the guidelines system in an effective and reasonable manner, [FN71] in certain fundamental respects, the general approaches of the two systems are inconsistent. [FN72] Whereas the guidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. Whereas the guidelines provide for graduated increases ***195** in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the guidelines incorporate a "real offense" approach to sentencing, mandatory minimums are basically a "charge-specific" approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts. In view of these distinctions, the Judicial Conference [FN73] and the Federal Courts Study Committee [FN74] concluded that mandatory minimum sentences were more rigid than the guidelines and, thus, were inconsistent with the sentencing goals adopted by Congress under the SRA. Moreover, as the Study Committee suggested, the impact of mandatory minimum sentences on the guidelines system and on individual cases has yet to be fully realized. [FN75]

III. New Avenues for Accomplishing Sentencing Goals

Congress, in its continuing pursuit of uniform, certain, and effective sentencing, has lately begun to reevaluate its use of mandatory minimum sentences as a means of shaping sentencing policy. A growing tendency exists among those members of Congress most familiar with the criminal justice system to seek alternatives that are more compatible with the sentencing guidelines and with the purposes of sentencing articulated in the SRA. [FN76]

The Commission, in its report on mandatory minimum sentences, noted several alternative sentencing methods, [FN77] methods that Congress has used to varying degrees in recent years. Consistent with the Commission's findings, I believe Congress should seriously consider greater use of these alternatives which include: specific statutory directives, general directives, and increased statutory maximums. In my view, Congress should also make greater use of its oversight powers to review legitimate proposals aimed at furthering the sentencing objectives established in the SRA.

*196 A. Speficic Statutory Directives

In recent years, Congress has made increased use of specific statutory directives to the Commission to set forth desired guidelines amendments. [FN78] In 1990, for example, Congress instructed the Commission to set the minimum guideline offense level for bank fraud convictions where the defendant derives more than $1 million in gross receipts at twenty-four. [FN79] That same year, rather than enact a mandatory minimum penalty previously passed by the Senate, Congress instructed the Commission through a specific directive to increase by two offense levels the offense level for drug offenses involving minors. [FN80]

Specific directives allow Congress to implement a desired penalty enhancement for targeted offenses and still achieve some measure of uniformity. As well, such directives enable the Commission to integrate the congressionally desired penalty into the guidelines structure. In effect, this approach permits meaningful distinctions to be made among defendants based on their role in the offense, their criminal history, their acceptance of responsibility, and other pertinent factors. Furthermore, the integration of congressional directives into the guidelines gives the courts a degree of flexibility, permitting departure from the guidelines on those rare occasions where certain, unusual mitigating factors are found to exist.

B. General Directives

In addition to specific directives, Congress has begun to make greater use of general directives to instruct the Commission to review current sentencing practices for specific offenses and provide more substantial penalties where warranted. [FN81] For example, Congress recently instructed the Commission to consider the appropriateness of the existing fraud guidelines and to enhance the guidelines where warranted. [FN82] As with specific directives, general directives permit formal congressional input into the guidelines structure, while still deferring to the independence and expertise of the Commission in addressing the finer points of sentencing policy formulation.

*197 C. Increased Maximum Sentences and Legislative History

A third recommended alternative involves congressional changes in statutory maximum sentences, accompanied by expressions of congressional intent for guidelines responses. [FN83] Again, such legislation allows congressional input in the sentencing system, while affording the Commission the necessary latitude to integrate the statutory penalty changes into the guidelines structure.

D. Diligent Oversight

Finally, Congress can continue to promote uniformity and certainty in punishment through proper

oversight of the Commission's activities. Continued study and review of proposed guidelines amendments promulgated by the Commission is critical if Congress wishes to ensure that the goals established in 1984 are met. As an example of such oversight, guidelines amendments promulgated in 1991 contained a proposal to lower the offense level for crimes related to the receipt of child pornography. Although the amendment took effect, Congress disapproved. The amendment was quickly superseded by a corrective amendment implementing a congressional directive.

Several key criminal justice issues will confront Congress and the Commission in the next several years, not the least important of which is the membership of the Commission itself. Other issues affecting sentencing and Commission activity will be closely scrutinized. Congress and the Commission must acknowledge their differing views on specific aspects of sentencing policy and must discuss these views candidly. As well, the Commission should renew and analyze serious proposals intended to improve the guidelines. Congress should closely review the Commission's actions and remain open to the Commission's consideration of alternative views.

In reaching informed decisions, Congress should make more active use of the growing volume of empirical data and related research that has been accumulated by the Commission pursuant to its statutory mission. Other bodies, such as the Judicial Conference, offer equally rich sources of data which Congress should utilize to educate itself, and in turn, to educate the public. In the past, some legislators have sought to develop sentencing policy based on anecdotal information; however, Congress cannot now ignore the available wealth of data describing the application of the guidelines to actual cases. As the ultimate architects of a sentencing policy that affects the liberty interests of defendants and the lives of all citizens, congressional policy makers must take advantage of the most current and complete information available when making legislative decisions. Whenever possible, Congress should call upon those with relevant empirical research information, encouraging those most knowledgeable of ***198** and most involved with the guidelines--judges, prosecutors, practitioners, and the Commission-- to express their views.

As a final recommendation, Congress should carefully study and monitor the effects of the guidelines' compulsory nature. While Congress has ordained that sentences be imposed according to the recommendations in the guidelines, it has not intended that the guidelines be imposed in an overly mechanistic fashion. [FN84] Many of the guidelines' problems, including their perceived rigidity and their facilitation of hidden bargaining and increased prosecutorial leverage, can be traced to their compulsory nature. Congress must review whether these problems can be appropriately remedied within a compulsory guidelines system. If not, Congress should consider whether uniform and predictable sentencing can alternatively be accomplished through a more general guidelines system that identifies presumptive sentences. In other words, Congress may need to examine whether the most effective way of addressing these problem is to return a greater degree of flexibility to the judiciary.

Conclusion

Over the last decade, Congress has assumed a more active role in the federal sentencing system and should continue to do so. Inherent in this role is the responsibility to analyze the effectiveness of

sentencing guidelines, to conduct a broad examination of their deficiencies, and to suggest necessary improvements. While mandatory minimum sentences yet remain within the legislature's power and prerogative, Congress should continue to assess the merit of these measures in advancing the objectives of sentencing established in the SRA. In its pursuit of a certain and effective sentencing system, Congress must continue to study these sentencing approaches, seeking a broad spectrum of input. Yet, Congress must not allow itself to lose sight of its principal constituency--the law abiding citizen whose confidence in our criminal justice system must be restored and maintained.

[FNa1]. United States Senator, Utah; Ranking Republican Member, Senate Judiciary Committee; B.S. 1959, Brigham Young University; J.D. 1962, University of Pittsburgh Law School; Honorary Doctorate 1981, University of Maryland.

[FN1]. See Mistretta v. United States, 488 U.S. 361, 364 (1989)(Constitution does not confer complete sentencing authority upon any one branch of government).

[FN2]. The Supreme Court addressed this issue in Ex parte United States, 242 U.S. 27, 42 (1916). See also U.S. Const. art. I, § 8, cl. 10 (specifically granting Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations").

[FN3]. See Ex parte United States, 242 U.S. at 41-42 (stating "under our Constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment povided by law is judicial").

[FN4]. Id.

[FN5]. For a historical overview of Congress' role in federal sentencing, see S.Rep. No. 225, 98th Cong., 1st Sess. 40 (1983)[hereinafter S. Rep. No. 225].

[FN6]. Review of sentences imposed was confined to two particular statutes unless the sentence was illegal. Those statutes were 18 U.S.C. § 3576, repealed by Act of Oct. 12, 1984, Pub.L. No.98-473, § 212(a)(1), 98 Stat. 1987 (relating to dangerous special offenders) and 21 U.S.C. § 849, repealed by Act of Oct. 12, 1984, Pub.L. No. 98-473, § 219, 98 Stat. 2027 (relating to dangerous special drug offenders).

[FN7]. For comments on the role of the United States Parole Commission, see 45 Cong. Rec. 6374 (1910)(remarks of Rep. Clayton).

[FN8]. For a discussion of research on mandatory minimum penalties conducted pursuant to Act of Nov. 29, 1990, Pub.L No. 101-647, § 1703, 104 Stat. 4926, see U.S. Sentencing Comm'n, Special Report to Congress: Mandatory Minimum Penalties in the Criminal Justice System (1991)[hereinafter

Mandatory Minimum Report]. This report provided a compilation of all mandatory minimum sentencing provisions. Minimum sentences requiring life imprisonment for certain acts of piracy were enacted by Congress as early as 1790. For the current version of these Statutes, see 18 U.S.C. § 1651 (1988)(regarding piracy under the Law of Nations) and § 1652 (regarding piracy by U.S. citizens).

[FN9]. See, e.g., 18 U.S.C. § 924(c)(1988)(requiring an additional five- year prison sentence for using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime and providing that such a five- year sentence would be in addition to the punishment already provided for such crime).

[FN10]. See, e.g., Act of Aug.9, 1989, Pub.L No. 101-73, § 961(b), 103 Stat. 499 (increasing the maximum term of imprisonment for bank embezzlement offenses under 18 U.S.C. § 656 from five years to 20 years).

[FN11]. See, e.g., 18 U.S.C. § 4216, repealed by Act of Nov. 10, 1986, Pub.L No. 99-646, § 3(a), 100 Stat. 9592 (regarding sentencing of young offenders); 18 U.S.C. § 3575, repealed by Act of Oct. 12, 1984, Pub.L No. 98-473, § 212(a)(2), 98 Stat. 1987 (regarding increased sentences for dangerous special offenders).

[FN12]. For a discussion of the operation of congressional oversight powers, see Walter A. Oleszek, Congressional Procedures and the Policy Process 263-82 (3d ed. 1989).

[FN13]. The phrase "sense of Congress resolutions" refers to concurrent resolutions of the Congress. These resolutions are passed by both houses, but are not referred to the President for his signature and do not have the force of law. These resolutions are used to express the feeling or position of Congress on a particular issue. Congressional Quarterly's Guide to Congress 420 (Mary Cohn ed., 4th ed. 1991).

[FN14]. See S.Rep. No. 225, supra note 5, at 40 (Senate Judiciary Committee discussion of coercive rehabilitation as a "theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons").

[FN15]. See Ilene H. Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J.Crim.L. & Criminology 883, 894 (1990).

[FN16]. Id.

[FN17]. For a discussion of the system of sentencing review established by Congress through the Parole Commission, see United States v. Addonizio, 442 U.S. 178, 188-89 (1979); see also Williams v. New York, 337 U.S. 241, 248 (1949) (noting that the execution of the parole system depends on

the Parole Commission being able to exercise discretion).

[FN18]. See S.Rep. No. 225, supra note 5, at 38.

[FN19]. Id. The Senate Judiciary Committee cited several published analyses of correctional rehabilitation programs. See, e.g., Robinson & Smith, The Effectiveness of Correctional Programs, 17 Crime & Delinq. 67 (1971); Douglas Lipton et al., Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies (1975).

[FN20]. The Senate Judiciary Committee cited several studies indicating disparate practices among federal judges. S.Rep. No. 225, supra note 5, at 41- 46. See, e.g., Anthony Partride & William B. Eldridge, The Second Circuit Sentencing Study, A Report to the Judges of the Second Circuit 1-3 (1973) (report of a sentencing experiment conducted to determine the extent of sentencing disparity wherein 50 district court judges of the Second Circuit rendered sentences on 30 presentence reports which produced significant variances in sentences).

[FN21]. S.Rep. No. 225, supra note 5, at 46. The Parole Commission had attempted to reduce unwarranted disparity in prison terms by utilizing parole guidelines that recommended appropriate periods of incaceration for different offenses and offender characteristics. It also presumptive release dates for prisoners in order to increase certainty in sentencing. See 28 C.F.R. § 2.20 (1992) (regarding parole guidelines) and § 2.12 (regarding release dates).

[FN22]. The Senate found that some sentencing judges, in anticipation of the Parole Commission's response, would impose a sentence on the basis of when the believed the Parole Commission would release the defendant. S.Rep. No. 225, supra note 5, at 46.

[FN23]. Former Chief Judge of the U.S. Court of Appeals for the Eighth Circuit, Donald Lay, has suggested that the SRA and the resulting guidelines are the "fault" of the federal judiciary. Donald P. Lay, Rethinking the Guidelines: A Call for Cooperation, 101 Yale L.J. 1755 (1992). As Lay observed:

The truth is that the federal judiciary, lacking both "the sword" and "the purse," was asleep at the switch. Because sentencing had traditionally been a judicial prerogative, judges thought that no one would ever have the audacity to deprive them of sentencing discretion. More importantly--and perhaps as a result--the federal judiciary essentially ignored the problem until congress enacted the Sentencing Reform Act, and it became too late to stop the train.

Id. at 1757.

[FN24]. Sentencing Reform Act of 1984, Pub.L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

[FN25]. 18 U.S.C. § 3553(a) (1988).

[FN26]. Id. § 3553(a)(2).

[FN27]. 28 U.S.C. § 991(a) (1988).

[FN28]. S.Rep. No. 225, supra note 5, at 67.

[FN29]. According to the Commissioners, the SRA was intended to reduce disparity in sentencing through a new system in which defendants with similar characteristics who committed similar crimes received similar sentences. See, e.g., William W. Wilkins, Jr. & John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L.Rev. 495 (1990); Helen G. Corrothers, Rights in Conflict: Fairness Issues in the Federal Sentencing Guidelines, 26 Crim.L.Bull. 38 (1990).

[FN30]. 18 U.S.C. § 3553(b) (1988).

[FN31]. Id. The Parole Commission argued that parole should be retained because the Parole Commission, a small collegial body, would be better able than federal judges, to achieve the goal of eliminating unwarranted disparity. The Senate Judiciary Committee rejected this proposal for several reasons: it was at odds with the rationale of the guidelines system; it was based on the same "discredited" assumptions as the then current system; and it would have continued a degree of unfairness and uncertainty. S.Rep. No. 225, supra note 5, at 53-58.

[FN32]. During Congress' debate regarding a certain minor and technical amendments package to the SRA (sentencing Reform Act of 1987, Pub.L. No. 100- 182, 101 Stat. 1266), the Senate rejected efforts on the part of the House to suggest that language be added to 18 U.S.C. § 3553(a) (1988). The additional language would have stated that the court "shall impose a sentence sufficient, but no greater than necessary, to comply with the purposes" of sentencing and would have broadened the departure standard for judges. 133 Cong.Rec. S16644- 48 (daily ed. Nov. 20, 1987).

[FN33]. 28 U.S.C. § 994(b)(2) (1988 & Supp.II 1990).

[FN34]. The Commission made several compromises regarding the creation of the guidelines. These compromises arouse out of the practical needs for creating an effective administration, providing for certain institutional considerations, and considering the competing goals of the criminal justice system. See Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L.Rev. 1 (1988).

[FN35]. William W. Wilkins, Jr., Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines, 23 Wake Forest L.Rev. 181 (1988) (discussing the effect of certain policy decisions in the guidelines).

[FN36]. See United States v. Mistretta, 488 U.S. 361 (1989). In Mistretta, the Supreme Court concluded that Congress had neither "delegated excessive power nor upset the constitutionally mandated balance of powers among the coordinated Branches" when it created the Commission. Id. at 412.

[FN37]. U.S. Sentencing Comm'n, Sentencing Guidelines and Policy Statements (Apr. 13, 1987).

[FN38]. This issue was ultimately settled by the U.S. Supreme Court in United States v. Mistretta, 488 U.S. 361 (1989).

[FN39]. See Gen.Acct.Off.Rep. to Cong. Committees, Sentencing Guidelines: Central Questions Remained Unanswered (Aug. 1992) [hereinafter GAO Report]; U.S. Sentencing Comm'n Rep., The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining (Dec. 1991) [hereinafter Commission Guidelines Report].

[FN40]. See GAO Report, supra note 39, at 11.

[FN41]. See Commission Guidelines Report, supra note 39, at 269.

[FN42]. See GAO Report, supra note 39, at 13.

[FN43]. See id. at 148.

[FN44]. See generally Fed. Courts Study Committee, Report of the Federal Courts Study Committee (Apr. 2, 1990) [hereinafter Study Committee Report].

[FN45]. See generally GAO Report, supra note 39.

[FN46]. See, e.g., Daniel J. Freed, Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681 (1992); Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 Am. Crim.L.Rev. 161 (1991); Donald P. Lay,

Rethinking the Guidelines: A Call for Cooperation, 101 Yale L.J. 1755 (1992); Judy Clarke, The Sentencing Guidelines: What a Mess, Fed. Probation, Dec. 1991, at 45; G. Thomas Eisele, The Sentencing Guidelines System? No. Sentencing Guidelines? Yes., Fed. Probation, Dec. 1991, at 16.

[FN47]. Address by Chief Justice William Rehnquist, American Bar Association Mid-Year Meeting (Feb. 4, 1992).

[FN48]. See, e.g., Freed, supra note 46, at 1723.

[FN49]. GAO Report, supra note 39, at 138.

[FN50]. See Commission Guidelines Report, supra note 39, at 166.

[FN51]. Id.

[FN52]. See, e.g., William W. Wilkins, Jr., Response to Judge Heaney, 29 Am.Crim.L.Rev. 795 (1992).

[FN53]. See Study Committee Report, supra note 44, at 136.

[FN54]. See Mandatory Minimum Report, supra note 8, at 9.

[FN55]. Id. at 5.

[FN56]. Throughout the first half of this century, Congress adopted mandatory minimum sentencing provisions in somewhat of a piecemeal fashion. During this period, short prison terms were mandatory for disobeying various orders while longer sentences of one to two years were applied to a number of economic crimes. Id. at 9.

[FN57]. Id. See, e.g., 21 U.S.C. § 841(b)(1)(A) (1988 & Supp. III 1991).

[FN58]. See generally Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, § 1005(a), 98 Stat. 2138 (1984) (codified as amended at 18 U.S.C. § 924(c) (1988)) (providing significant mandatory sentence increases for the use or carrying of a firearm during a crime of violence); id. § 503(a), 98 Stat. 2069 (codified as amended at 21 U.S.C. § 860 (1988)) (establishing mandatory minimum sentences for drug offenses committed near schools).

[FN59]. See, e.g., Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, § 1105(a), 100 Stat. 3207-11 (codified as amended at 21 U.S.C. § 859 (Supp. II 1990 & Supp. III 1991)).

[FN60]. See, e.g., id. § 1002, 100 Stat. 3207-167 (codified as amended at 15 U.S.C. § 1245 (1988)).

[FN61]. See, e.g., Anti-Drug Abuse Act of 1988, Pub.L. No. 100-690, § 6470(a), 102 Stat. 4377.

[FN62]. 21 U.S.C. § 844 (1988 & Supp. II 1990 & Supp. III 1991).

[FN63]. Mandatory Minimum Report, supra note 8, at 10.

[FN64]. The Sentencing Commission reviewed relevant legislative history, executive branch statements, and views expressed in academic literature which, in turn, identified six common rationales for mandatory minimum sentencing provisions: retribution, deterrence, inacapacitation (especially for serious offenders), disparity reduction, inducement of cooperation, and inducement of pleas. Id. at 13.

[FN65]. See, e.g., S.Rep. No. 225, supra note 5, at 37.

[FN66]. The Commission conducted an empirical research study of the effect of mandatory minimum sentencing provisions using a variety of sources which contain sentencing data. Such sources included Commission monitoring data for fiscal year 1990 and data from a 12.5% sample survey from the Commission's files containing defendants sentenced in fiscal year 1990. See Mandatory Minimum Report, supra note 8, at 36. The Commission found that defendants whose conduct and offender characteristics appeared to warrant application of mandatory minimum sentencing provisions failed to receive those sentences approximately 41% of the time. For example, in 35% of cases in which data strongly suggested that a defendant's behavior warranted a sentence under a mandatory minimum statute, defendants pled guilty to offenses carrying non- mandatory minimum orreduced mandatory minimum provisions. Id. at 35-89. The lack of uniform application of mandatory minimum sentences by prosecutors is a result of discretion given to prosecutors. Congress should examine mandatory minimums to determine whether such minimums vest too much discretion in prosecutors and to what extent they are misused.

[FN67]. An empirical study conducted by the Commission determined that an increase in disparity can be produced through the use of mandatory minimums in two ways. First, an increase in disparity can be realized if similar defendants are charged and convicted pursuant to mandatory minimum provisions depending on such factors as race, circuit, and prosecutorial practices. Second, if defendants who appear to be different with respect to distinguishing characteristics receive similar reductions in sentences below the mandatory minimum provisions disparity will increase. Id. at 89.

[FN68]. Study Committee Report, supra note 44, at 134.

[FN69]. Although there are over 60 federal mandatory minimum sentencing provisions, only four statutes (which involve drug and weapons offenses) are used with any regularity. Mandatory Minimum Report, supra note 8, at 89.

[FN70]. See, e.g., Crime Control Act of 1990, Pub.L. No. 101-647, § 1703(b), 104 Stat. 4789, 4845-46.

[FN71]. In developing the guidelines, the Commission determined that when sentencing drug offenders, mandatory minimum penalties would serve as starting points for determining the base offense level. This was decided despite the fact that this structure defeated the mitigation scheme of the guidelines for less serious cases. Mandatory Minimum Report, supra note 8, at 29.

[FN72]. While both sentencing guidelines mandatory minimums have common objectives, they are structurally and functionally at odds with each other and with the SRA's goals for three reasons: (1) mandatory minimums are wholly dependent on defendants being charged and convicted of the specified offense, while the guidelines adopt a modified real offense system; (2) mandatory minimums are not proportionate sentences, while the guidelines are; and (3) mandatory minimums employ a narrow approach to sentences, while the guidelines provide a degree of individualization. Id. at 26.

[FN73]. Report of the Proceedings of the Judicial Conference of the United States (September 23-24, 1991).

[FN74]. See Study Committee Report, supra note 44, at 133-34.

[FN75]. Id. at 134.

[FN76]. For example, in 1990, Congress passed the Crime Control Act of 1990, Pub.L. No. 101-647, 104 Stat. 4789. Earlier versions of that Act contained several new mandatory minimum sentencing proposals. However, the enacted bill contained only one new mandatory minimum sentence for continuing financial crimes enterprises. See 18 U.S.C. § 225 (Supp. III 1991) (establishing that a party convicted of committing a continuing financial crimes enterprise shall be fined not more than a fixed sum and be imprisoned not less than ten years and which may be life). In addition, 1991 saw each house of Congress pass their own omnibus crime bills. The Senate version of the bill contained nearly two dozen new mandatory minimum proposals. S. 1241, 102d Cong., 1st Sess. (1991). The conference report to the House and Senate bills, which failed to pass the Senate for reasons generally unrelated to sentencing policy, contained only three new mandatory minimum sentences. H.R. 3371,

102d Cong., 1st Sess. (1991).

[FN77]. Mandatory Minimum Report, supra note 8, at 118.

[FN78]. Since passage of the SRA, Congress has enacted ten additional instructions to the Commission regarding desired amendments to the guidelines, seven of which are specific in nature. Id. at 121.

[FN79]. Crime Control Act of 1990 Pub.L. No. 101-647, § 2507, 104 Stat. 4862. A level twenty-four offense carries a minimum prison term of fifty-one to sixty-three months for a first-time offender.

[FN80]. Id.

[FN81]. After the guidelines were promulgated and implementation had begun, Congress began providing more flexible guidelines instructions to the Commission. Congress directed the Commission to study and, in some cases, increase the penalties for guidelines regarding fraud, criminal conduct substantially jeopardizing the safety and soundness of federally insured financial institutions, and sexual crimes against children. Mandatory Minimum Report, supra note 8, at 121.

[FN82]. See Pub.L. No. 100-700, § 2(b), 102 Stat. 4632 (1988).

[FN83]. The Commission has issued guidelines amendments in response to a number of legislative enactments that increased the statutory maximum fine, term of imprisonment, or other penalties for different offenses. Mandatory Minimum Report, supra note 8, at 119.

[FN84]. S.Rep. No. 225, supra note 5, at 52.

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Review

Crack Cocaine and Cocaine Hydrochloride

Are the Differences Myth or Reality?

Dorothy K. Hatsukami, PhD; Marian W. Fischman, PhD

Objective.—To review and discuss the differences and similarities between the use of crack cocaine and cocaine hydrochloride; and to determine how these findings might affect policies on the imprisonment and treatment of cocaine users.

Data Sources.—English-language publications were identified through a computerized search (using MEDLINE) between 1976 and 1996 using the search terms "smoked cocaine," "crack cocaine," "freebase," and "cocaine-base." In addition, manual searches were conducted on references cited in original research articles, reviews, and an annotated bibliography, and on selected journals.

Study Selection.—Only those articles that compared various routes of cocaine administration or types of cocaine (cocaine base or crack cocaine vs cocaine hydrochloride) were examined.

Data Extraction.—Studies were reviewed to obtain information on the composition of the 2 forms of cocaine, and the prevalence, pharmacokinetics and pharmacodynamics, abuse liability, pattern of use, and consequences across the various routes of cocaine administration and forms of cocaine.

Conclusion.—Cocaine hydrochloride is readily converted to base prior to use. The physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride or crack cocaine (cocaine base). However, evidence exists showing a greater abuse liability, greater propensity for dependence, and more severe consequences when cocaine is smoked (cocaine-base) or injected intravenously (cocaine hydrochloride) compared with intranasal use (cocaine hydrochloride). The crucial variables appear to be the immediacy, duration, and magnitude of cocaine's effect, as well as the frequency and amount of cocaine used rather than the form of the cocaine. Furthermore, cocaine hydrochloride used intranasally may be a gateway drug or behavior to using crack cocaine. Based on these findings, the federal sentencing guidelines allowing possession of 100 times more cocaine hydrochloride than crack cocaine to trigger mandatory minimum penalties is deemed excessive. Although crack cocaine has been linked with crime to a greater extent than cocaine hydrochloride, many of these crimes are associated with the addiction to cocaine. Therefore, those addicted individuals who are incarcerated for the sale or possession of cocaine are better served by treatment than prison.

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FROM THE mid 1970s to the mid 1980s, the United States was in the midst of a cocaine epidemic of a very different nature than the current one. The users were primarily middle class, the drug was primarily powder cocaine hydrochloride taken by the intranasal route. A relative few dissolved the drug in water and injected it intravenously, and a relative few carried out a "gourmet" conversion to the base form in order to smoke the cocaine, using kits purchased in head shops. Results from the National Household Survey on Drug Abuse (NHSDA),[1,2] whose respondents include civilian noninstitutionalized individuals 12 years of age and older, indicated that, in 1974, 5 million people had tried cocaine, with less than 10% having used it in the past year. By 1982 more than 20 million people reported having tried cocaine, with approximately half of them using it in the past year. By 1985, the number of those ever using cocaine had increased to 25 million, and the peak of that epidemic was reached, with steadily diminishing numbers over the next 7 years. However, a new epidemic was beginning: crack cocaine, a readily smokable form of cocaine hydrochloride, was being sold in unit doses for $3 to $5 per rock. The availability of a relatively cheap smokable form led to a marked expansion of cocaine use among the poor and ethnic minorities,[2,3] and its use was accompanied by violent crime and devastation of both inner-city areas and families.

See also p 1615.

The distinction between cocaine hydrochloride and cocaine base (crack cocaine) has received a great deal of attention during the past few years, with primarily a judicial focus. In 1986, Congress passed a federal sentencing guideline that punishes a first-time offender with a minimum mandatory sentence of 5 years in prison for possessing 5 g of crack cocaine (resulting in 50-200 doses), while that same first-time offender would have to possess 500 g of cocaine hydrochloride (resulting in more than 10 000 doses) to obtain the same sentence. With unit dosing approximately the same for the 2 forms, the hydrochloride form represents approximately a 100-fold increase over the crack cocaine form in the number of cocaine doses available for use. Furthermore, in 1988 a law was passed stating that the possession of more than 5 g of crack cocaine triggers a minimum of 5 years in prison, whereas simple possession of cocaine hydrochloride or any other controlled substance by first-time offenders is punished by a maximum of 1 year in prison.

Three problems are perceived to have arisen from these discrepant sentencings. First, low-level retail crack dealers have received more severe sentences than wholesale suppliers of cocaine hydrochloride. Second, crack cocaine users who are

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addicted are more prone to be imprisoned than treated for their abuse. Third, this sentencing guideline has led to 22 times more convictions among African Americans than whites. For example, blacks accounted for 88%, Hispanics for 7%, and whites for 4% of the federal crack cocaine distribution convictions in 1993; in contrast, only 27% of cocaine hydrochloride charges were accounted for by blacks, with 32% white and 39% Hispanic.[4] Furthermore, in actual numbers, fewer blacks report using crack cocaine in the past year compared with whites,[2] although an increasing proportion of blacks and Hispanics were found to comprise the frequent crack as well as cocaine hydrochloride users.[3] As a result, the issue of racial discrimination has surfaced.

In the spring of 1995, the US Sentencing Commission,[4] which establishes guidelines for the federal courts, issued a report strongly opposed to the 100:1 quantity ratio for sentencing between crack cocaine and cocaine hydrochloride. The commission reported that while a greater penalty for crack cocaine is justifiable, the 100:1 sentencing ratio exceeds the differences between the 2 forms of cocaine. The commission stated that at this time there is no substantive evidence to support this differential ratio in sentencing. Furthermore, this sentencing guideline was considered to lead to a lack of sensitivity to differences in individual factors associated with possession of cocaine and to anomalies in sentencing between 2 easily convertible forms of the same drug. The commission therefore called for more flexible sentencing that would take into account the various factors associated with cocaine use. Attorney General Janet Reno recommended that Congress reject the proposal of the commission, although she agreed that the disparity in sentencing should be narrowed but not eliminated. In the fall of 1995, the House and Senate voted to reject the commission's proposals and President Clinton was supportive of Congress on this issue. Proponents for the discrepant sentencing point to the greater violence, gang activities, health problems, and family disruption associated with crack compared with cocaine hydrochoride as well as its greater accessibility to the young, poor, and disadvantaged. Furthermore, crack was considered to be more addictive than cocaine hydrochloride.

This article will examine the scientific evidence demonstrating the similarities and differences between crack cocaine and cocaine hydrochloride. The results from this review will show that the route of administration (eg, intranasal, intravenous, or smoked) is a more important determining factor for the abuse potential, pharmacokinetics, and biological and psychological effects of cocaine than the form of cocaine. Clearly, to some extent, form dictates route (ie, crack cocaine can only be smoked), but cocaine, regardless of whether it is crack cocaine or cocaine hydrochloride, leads to the same physiological and behavioral effects. The more appropriate comparison is between intravenous cocaine hydrochloride and smoked crack cocaine, since both are more likely to lead to abuse, dependence, and severe consequences than intranasal cocaine hydrochloride due primarily to the rate and amount of cocaine reaching the brain via these routes of administration. These results do not support the 100:1 sentencing ratio between crack cocaine and cocaine hydrochloride. Additionally, this article will conclude that it would be more cost-effective in the long term if greater effort were expended in treatment of appropriate cocaine abusers rather than imprisonment of all convicted cocaine abusers.

METHODS

Objective and Study Selection

The objective of this review is to determine similarities and differences between the use of crack cocaine and cocaine hydrochloride. Therefore, for a study to be included in the review, it had to compare the effects of crack cocaine with the effects of cocaine hydrochloride, administered either intravenously or intranasally.

Data Sources

A systematic search of MEDLINE (1976 to 1996) was conducted using the search terms "smoked cocaine," "crack cocaine," "freebase," and "cocaine-base." Names of selected authors who are known to have conducted research in this area were also searched.

Additional references were searched from the reference list of original research and review articles.

Selected publications were searched manually.

An annotated bibliography of articles on cocaine[6] was also reviewed to select any articles that pertained to comparing smoked or crack cocaine with cocaine hydrochloride.

Data Extraction

Because so few studies have been conducted comparing crack cocaine with cocaine hydrochloride, or cocaine administered across various routes, almost all studies were included in the review and consistency of the results across studies was examined. Relevant studies were those that addressed the prevalence of use, the composition of the various types of cocaine, the pharmacokinetics and pharmacodynamics, abuse liability, and pattern of use, including rapidity and probability of developing dependence, and the consequences across the various routes of administration and forms of cocaine. Each study was reviewed and extracted for results relevant to the aforementioned areas and for conclusions. The majority of these studies were conducted in the mid to late 1980s and early 1990s.

RESULTS

Prevalence of Cocaine Use

The 1993 NHSDA report indicated that among those who used cocaine at least once in the past year, 77% snorted, 36% smoked, and 7% injected cocaine intravenously. In this population of cocaine users, 69% were white, 15% were black, and 13% were Hispanic.[2] Among those reporting crack use at least once in the previous year, 46% were white, 36% were black, and 11% were Hispanic. Within racial categories, 2.0% (n=3 153 860) of whites, 2.9% (n=663 058) of blacks, and 3.1% (n=573 531) of Hispanics reported past-year cocaine use (cocaine hydrochloride and crack), whereas 0.3% (n=473 079) of whites, 1.6% (n=368 032) of blacks, and 0.6% (n=111 006) of Hispanics reported past-year crack use. Thus, crack use is more prevalent in the African-American population, although there are fewer absolute numbers of black users compared with white users. Furthermore, if drug availability and social conditions are held constant, then the probability of crack cocaine use within a specific population does not differ by race or ethnicity.[6] Nonetheless, in an analysis of the 1991 NHSDA, an increasing proportion of African Americans and Hispanics and those living in large metropolitan areas were found to comprise the frequent cocaine hydrochloride and crack users.[3] In addition, among frequent users compared with infrequent users, there is a greater rate of crack use (52.5% vs 17.5%, respectively) and intravenous cocaine use (24.3% vs 9.3%, respectively).

In summary, cocaine hydrochloride is the dominant form of cocaine used by the general population. Among cocaine users, a higher percentage of whites use cocaine than blacks or Hispanics, with the percentage of blacks increasing when examining crack cocaine use. On the other hand, within racial groups, a higher percentage of blacks and Hispanics use crack cocaine compared with whites. However, this higher prevalence may be a function of where they live rather than racial background.

Cocaine Hydrochloride and Cocaine Base: Are They the Same Drug?

Cocaine is an alkaloid extracted from coca leaves. The coca leaves are pro-

cessed with different chemicals (eg, alkali, organic solvents, hydrochloric acid, and ammonia) resulting in the intermediate product, coca paste, and the final product, cocaine hydrochloride, which is imported to the United States and other parts of the world from South America. Cocaine hydrochloride is typically used for nonmedical purposes either intranasally (snorting), or intravenously in an aqueous solution since the drug is hydrophilic. Cocaine hydrochloride cannot be smoked because it decomposes at temperatures required to vaporize it. Cocaine base, however, can easily be smoked at temperatures significantly lower than cocaine hydrochloride, and therefore is the form of cocaine used for smoking. It is made by mixing cocaine hydrochloride with an alkaline substance, such as sodium bicarbonate or ammonia to convert it to base, and then heating. The result is waxy chunks or rocks of cocaine often referred to as crack cocaine. One gram of cocaine hydrochloride is typically converted into 0.89 g of cocaine base or crack.[4] Crack cocaine is typically smoked in glass or other pipes, soda cans modified to accommodate the placement of crack cocaine and act as pipes, or tobacco or nontobacco cigarettes. Freebasing is another but less common method of smoking cocaine. Freebase cocaine involves dissolving cocaine hydrochloride in water and an alkaline substance, such as ammonia, and then extracting the cocaine base into ether or another organic substance. Evaporating the organic phase by heating yields a residue that is similar to crack cocaine and can be smoked. The extraction procedure increases the difficulty and hazard (eg, fire) of the conversion process so that crack is considerably more commonly used than freebase. In the following review, smoked cocaine always refers to the use of cocaine base or crack cocaine. Intravenous or intranasal cocaine refers to the use of cocaine hydrochloride.

The rate and extent of cocaine absorption vary considerably across routes of administration and are relevant in the context of abuse liability. Once cocaine is absorbed, however, the pharmacokinetics, regardless of the route of administration, are quite similar. In several studies in which subjects smoked cocaine base or received cocaine hydrochloride intravenously, there were no differences in the elimination half-lives of the 2 forms.[7,8] One study found a shorter half-life for crack (56 minutes) than intranasal cocaine hydrochloride (78 minutes), but the number of subjects was small.[7] A shorter half-life may be associated with more frequent use, although this difference in half-life will not likely have an impact on the issue of use frequency. Urinary excretion of cocaine and total metabolites was also similar for all 3 routes of administration (64%-69% of the dose) with very little excreted as cocaine (<1%) and most as benzoylecgonine and ecgonine methyl ester.[9] Some minor differences in amounts of metabolites generated may exist as a function of the route of administration, with a modestly lower percentage of benzoylecgonine and a higher percentage of ecgonine methyl ester in urine after smoking compared with administration of cocaine by the other 2 routes.[9] It is unlikely, however, that these differences in metabolism contribute to the effects of cocaine since both benzoylecgonine and ecgonine methyl ester appear to have little or no behavioral activity. One notable difference between smoked cocaine and other routes of administration is the production of pyrolysis products during smoking such as methylecgonidine,[10,11] benzoic acid,[12] and methyl-40 (3-pyridine) butyrate.[13] The higher the temperature at which the cocaine is volatilized, the greater the amount of pyrolysis products.[10,12,14] The activity of these products is unknown.

In summary, regardless of whether cocaine is administered as hydrochloride or base, both its rate of elimination and its metabolic profile are similar. It is unclear whether minor differences in metabolite patterns between routes of administration, or the presence of pyrolysis products in smoked cocaine, contribute to cocaine's behavioral effect.

Is Crack More Addictive Than Cocaine Hydrochloride?

Pharmacokinetics, Pharmacodynamics, and Psychotropic Effects.—Although both humans and nonhumans will take cocaine repeatedly, regardless of the route of delivery,[15] the immediacy and magnitude of cocaine's effect is an important factor in its reinforcing effects and thereby its abuse liability.[16] The magnitude of effect is related to dose as well as to the rapidity with which it reaches the brain. The dose, in turn, is determined by both the actual amount of the drug and its bioavailability. The bioavailability of smoked cocaine is between 60% and 70% when cocaine base is volatilized,[7,9,17] but much of this bioavailability is dependent on the temperature at which the cocaine is volatilized and the skill of the smoker in using the cocaine delivery device. As the temperature increases, less cocaine and more of the pyrolysis products are absorbed (as previously noted). The amount of intranasal cocaine absorbed can vary depending on the dose, with higher doses having greater absorption. For example, a 96-mg dose resulted in 58% of the amount absorbed compared with 30% with a 64-mg dose.[18] However, other studies have found bioavailability of intranasal cocaine as low as 25%[19] and as high as 80% to 94%[7,9] with doses as low as 32 mg.[7]

Since the behavioral activity of cocaine resides primarily in the parent compound, cocaine in any form produces the same physiological and subjective effects.[4] However, the route of administration plays a major role in the rate of onset as well as intensity and duration of a drug's effect. The more immediate and greater the magnitude of effect, the greater likelihood that the drug will be abused. Orally ingested cocaine achieves maximum concentration most slowly, followed by the intranasal route. Intravenous and smoked cocaine achieve maximal concentration and effect most rapidly. Peak venous plasma cocaine concentration is achieved at approximately 30 to 40 minutes after intranasal administration and at approximately 5 minutes after intravenous and smoked cocaine administration.[7,14,20] Similarly, for intranasal cocaine, the time of peak physiological (eg, heart rate) and subjective effects is later and the duration of effects is longer than with smoked or intravenous cocaine. The maximum physiological effects of intranasal cocaine occur within 15 to 40 minutes and the maximum subjective effects occur within 10 to 20 minutes.[7,14,20-22] Duration of effects is approximately 60 minutes or longer after peak effects.[20,23] The maximum physiological and subjective effects occur within minutes of intravenous or smoked cocaine use, and the duration of effect is approximately 30 to 45 minutes.[7,17,20-23]

One study that directly compared both arterial and venous blood concentrations for intravenous and smoked cocaine showed that for both routes of administration, the peak arterial cocaine concentrations were 10 times higher than venous concentrations, and that maximal arterial concentrations occurred within 15 seconds compared with 3 to 6 minutes with venous concentrations.[24] Since both routes of administration produce similar pharmacokinetic patterns, the investigators concluded that the abuse liability for these 2 routes of administration could not be differentiated. Thus, both the absorption kinetics and the time course of cocaine effects are strikingly similar for intravenous cocaine hydrochloride and smoked crack cocaine. This finding is surprising given the quickest onset and fastest penetration to the brain is likely to be from inhalation because of the more direct passage to the brain compared with cocaine delivered intravenously.

In the only research study comparing

Department of Justice

STATEMENT

OF

ROSCOE C. HOWARD, JR.
UNITED STATES ATTORNEY FOR THE
DISTRICT OF COLUMBIA

BEFORE THE
SUBCOMMITTEE ON CRIME AND DRUGS

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

FEDERAL COCAINE SENTENCING POLICY

PRESENTED ON

MAY 22, 2002

TESTIMONY OF ROSCOE C. HOWARD, JR.
UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA
BEFORE THE SUBCOMMITTEE ON CRIME AND DRUGS
COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

May 22, 2002

INTRODUCTION

Chairman Biden, Senator Grassley, Members of the Subcommittee:

I appreciate the opportunity to appear before this Subcommittee today on behalf of the Department of Justice to discuss the important issues of federal drug sentencing policy, generally, and federal cocaine sentencing policy, in particular.

Before turning to drug policy, though, I would like to take this opportunity on behalf of the Department of Justice to commend the Sentencing Commission for being responsive to many of the Department of Justice's concerns regarding federal sentencing policy during this past guideline amendment year. In particular, we want to make special note of amendments to the sentencing guidelines the Commission has forwarded to Congress in response to the passage of the USA-PATRIOT Act. The PATRIOT Act is an excellent example of how hard work and bipartisan cooperation can lead to significant legislation addressing a critical national problem. We thank the Judiciary Committee for all its efforts on the Act, and we deeply appreciate the Commission's work to implement the Act's important new substantive criminal law and sentencing provisions into the sentencing guidelines. The Act and the guideline amendments are both critical parts of the country's ongoing fight against terrorism.

Mr. Chairman, despite the country's new focus on terrorism, we believe it is critical that we not allow our fight against illegal drug abuse to falter. The Sentencing Commission has sent recommendations to Congress to lower penalties on crack cocaine traffickers. For reasons I will lay out in detail, we believe these recommendations are misguided and that the current federal sentencing policy and guidelines for crack cocaine offenses are proper. We believe it would be more appropriate to address the existing differential between crack and powder penalties by increasing penalties for powder cocaine.

THE PRESIDENT'S NATIONAL DRUG CONTROL STRATEGY

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

Unfortunately, drug abuse continues to plague this country at unacceptably high levels. According to estimates generated by the National Household Survey on Drug Abuse, 2.8 million Americans are dependent on illegal drugs, and an additional 1.5 million are non-dependent abusers. In 2000, Americans spent $62.9 billion dollars on drugs. Of that, $36.1 billion was spent on cocaine; approximately $12 billion was spent on heroin; and $11 billion on marijuana. Data provided by the Substance Abuse and Mental Health Services Administration indicate that there are roughly 175,000 emergency room incidents annually related just to cocaine, while heroin and marijuana are each implicated in about 97,000 incidents.

Even worse, drug use among high school students is simply unacceptably high. According to the Monitoring the Future study, drug use among our nation's 8th, 10th, and 12th

graders remains at levels that are close to record highs. More than 50 percent of our high school seniors experimented with illegal drugs at least once prior to graduation. And during the month prior to the last survey, 25 percent of seniors used illegal drugs.

The President's drug strategy lays out a number of initiatives to reduce drug use in this country. It includes initiatives on drug education and community action to stop drug use before it starts. It includes significant new steps to get treatment resources where they are needed most, recognizing the critical need to heal America's drug users. The strategy also recognizes the critical need to continually disrupt drug markets at international and wholesale levels.

But as the President and the National Drug Control Strategy recognize, meeting the challenge of reducing illegal drug use will require more that just a range of targeted initiatives focused on key elements of the drug problem. It will take more than a five-pronged strategy or a 15-point implementation plan. This is so because, in distinct contrast to the can-do attitude we have seen every day since September 11th in the fight against terrorism, the public's confidence that we can effectively fight illegal drug use has been undermined.

We believe, however, that we can again make real strides in reducing drug use in this country and restore confidence in this important effort. History has shown us that we can succeed. During the late 1980s and early 1990s, an engaged government and citizenry took on the drug issue and forced down drug use, with declines observed among 12th graders in every year between 1985 and 1992. The federal government supplied important leadership, and achieved progress together with parents and clergy, media and community groups, state and local leaders. We in the federal government must once again show the leadership necessary to reinvigorate this effort.

The Commission's recommendations to lower crack cocaine penalties would take the country in the wrong direction. They signal not a rejuvenated and confident effort to reduce drug use, but rather a retreat in our nation's fight against illegal drugs. Unfortunately, the Commission has not recognized the corrosive signal that would be sent by these recommendations, if enacted.

Nor has the Commission focused sufficiently on the victims of those who peddle drugs and on the violent crime that comes hand-in-hand with the drug trade – and especially with the crack trade. The lives of family members and friends are too often shattered by deadly drug violence and by a loved one's addiction to illegal drugs. It is also a fact that minorities are more likely to be victims of violent drug crime. African Americans constitute about 50 percent of this country's homicide victims. That statistic is horrifying. Today we want to give voice to the victims, a group that is all too often overlooked and unheard in the debate over drug penalties.

Sitting behind me today is Shandra Smith, the mother of two bright and beautiful young people who were gunned down in cold blood. Fourteen-year-old Volante Smith asked her 20-year-old brother Rodney, who was home from college, to drive her and two friends to a Christmas party at church. They piled into his tiny 280 ZX and the girls talked about the evening ahead. When they stopped at a light, a man got out of the car behind them, came up to the driver's window, raised a gun, and fired. Six shots ripped through Rodney's body, and three into Volante, killing them both.

Volante and Rodney were killed because they stopped at the light in front of a car driven by Tommy Edelin, the kingpin of the 1-5 Mob, recently convicted and sentenced to life without possibility of release for his role in 4 of the 20 murders committed by his gang. Riding with Edelin that night was an associate who mistakenly thought that the driver of the 280ZX was someone who had previously shot at him. The associate asked Edelin if he could kill the driver

of the car. Edelin, in part to find out if the associate had the heart to kill someone, told him to go ahead. In order to make sure that he killed his target, the associate unloaded his 40-caliber Glock into the car. A case of mistaken identity and a total disregard for the sanctity of life. Tommy Edelin, a drug kingpin; the associate, a low-level drug dealer turned hit man.

This city, indeed all of America has been victimized by nearly two decades of drug trafficking violence. We have become accustomed to nightly news stories about drive-by shootings and execution-style killings by ruthless drug gangs. We have been worried by reports of stray or intentional bullets killing children -- like Volante and Rodney -- who were simply in the wrong place at the wrong time.

And the criminal justice system has itself been threatened by violent intimidation and witness retaliation. When I started as a prosecutor in 1984, we could say with confidence to our witnesses who were fearful of retaliation, "We haven't lost anyone yet." Sadly, that day is long gone. The difference: crack cocaine. For example, Tommy Edelin told an acquaintance that if he ever got caught, he had no intention of letting justice take its course. Instead, he intended to "crush" everyone who might testify against him. So, after his arrest, he arranged for the murder of a potential witness against him.

In addition to lay witnesses, many law enforcement officers have sacrificed their lives to rescue communities from the ravages of violent drug trafficking. For example, here in Washington in November 1996, members of the cold case squad were working inside the Headquarters building when Bennie L. Lawson, a low-level drug dealer who had been targeted by their investigation of the First and Kennedy Crew, burst into their room and started firing wildly. FBI agents Martha Dixon-Martinez and Michael Miller, and Metropolitan Police Sargent Henry M. Daily were killed before Lawson turned the gun on himself. Eventually 24 people in

the crew were convicted, including eleven members of the crew who were held accountable for 9 homicides. In December 1993, Donzell McCauley, a member of Kentucky Courts Crew, brutally murdered a uniformed police officer, Jason White, who had stopped to ask McCauley a question. When he was arrested, McCauley had 13 ziplock packages of crack cocaine on him. 13 ziplocks would contain, as a general rule, between 1 ½ and 2 ½ grams.

Victims like Volante and Rodney Smith, Martha Dixon-Martinez, Michael Miller, and Henry M. Daily, and Jason White are why the President and the Attorney General have pledged to reinvigorate the battle against drug trafficking.

THE CURRENT SENTENCING GUIDELINES SCHEME FOR DRUG OFFENSES

In 1987, the Sentencing Commission tied the sentencing guidelines for drug trafficking offenses to the quantity of drug associated with the offense. These guidelines, found at §2D1.1 of the sentencing guidelines, call for base offense levels ranging from level 6 to level 38, moving in two-level increments determined by the quantity of drugs trafficked by the defendant.

The guidelines are tied – correctly we believe – to the applicable mandatory minimum drug trafficking statutes. Title 21 U.S.C. § 841 specifies the quantity thresholds that trigger mandatory minimum sentences. The amount of controlled substance that triggers a mandatory minimum in a given case corresponds to a particular base offense level. For example, 5 grams of crack cocaine triggers a mandatory minimum sentence of five years and is tied to a base offense level of 26 with a corresponding sentence of 63-78 months for a first offender. Some observers, have criticized the present sentencing guidelines scheme, arguing that this quantity-based scheme does not adequately address other relevant sentencing factors. We disagree with this criticism.

Current law – both in the federal statutes and the guidelines – allows for the consideration of aggravating factors, such as the use of a gun or a defendant's criminal history or bodily injury. Current law also allows for the consideration of mitigating factors, through the "safety valve" exception to mandatory minimums, the guidelines' mitigating role adjustment, and guideline departures when a defendant provides substantial assistance in the investigation or prosecution of another person.

FEDERAL COCAINE SENTENCING POLICY

This year, the Commission reexamined whether the guidelines should be amended with respect to the current quantity ratio between crack and powder cocaine. The Commission has now recommended lowering penalties for crack offenders. The Department of Justice has also reviewed cocaine sentencing policy. After thorough study and internal discussion, the Department has concluded that the current federal policy and guidelines for sentencing crack cocaine offenses are appropriate.

A. Crack Cocaine Is Associated With Much Greater Dangers Than Powder

Higher penalties for crack offenses appropriately reflect the greater harm posed by crack cocaine. We recognize that cocaine base – crack – and cocaine hydrochloride – cocaine powder – are chemically similar. Nonetheless, there are significant differences in the predominant manner the two substances are ingested and marketed. Based on these differences and the resulting harms to society, crack cocaine is an especially dangerous drug. Its traffickers should be subject to significantly higher penalties than traffickers of like amounts of cocaine powder.

Current research shows that crack is a more dangerous and harmful substance for many reasons. The most common routes of administration of the two drugs cause crack to be the more

psychologically addictive of the substances.[1] This makes crack cocaine more dangerous, resulting in far more emergency-room episodes and public-facility treatment admissions than powder cocaine,[2] despite the fact that powder cocaine is much more widely used. The quicker, more intense, and shorter-duration effects of crack contribute to its greater abuse and dependency potential as compared to snorted cocaine powder. Its greater addictive effects cause heavier and more frequent use and greater binging, causing more severe social and behavioral changes than use of cocaine powder.

Further, crack can easily be broken down and packaged into very small and inexpensive quantities for distribution – sometimes as little as single dose quantities, for just a few dollars – thus making it particularly attractive to some of the more vulnerable members of our society. As Professor Randall Kennedy has noted, "[b]ecause it is relatively inexpensive," crack has the "dubious 'achievement'" that it has "helped tremendously to democratize cocaine use."[3] Crack dealers have fulfilled its "promise" by marketing it to these vulnerable groups. Additionally, the open-air street markets and crack houses used for the distribution of crack cocaine contribute heavily to the deterioration of neighborhoods and communities. Both the scale of marketing and its open and notorious nature enable many, who would not previously have had access to cocaine

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[1]For example, one study showed that roughly 66% of crack users smoked on a daily basis, but only 18% of cocaine snorters used it on a daily basis. See Dorothy K. Hatsukami and Marian W. Fischman, "Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality," 276 J. of the Am. Med. Ass'n. 1580, 1583 (1996). Intravenous use of powder cocaine is comparable to smoking crack in addictiveness, but intravenous use is an unpopular method of administration.

[2]From 1992 and 1998, between 69.1% and 74.5% of public treatment admissions for cocaine emergencies involved smoked cocaine (the remainder was for all forms of nonsmoked cocaine). National Drug Intelligence Center, National Drug Threat Assessment 2002 at 80, table A10. While there are some limitations on this data that may cause it to over-represent crack users, it is nonetheless very telling. According to one study, of persons making emergency-room visits because of crack, 38% had smoked crack, 11% had snorted it. See also Hatsukami and Fischman, 276 J. of the Am. Med. Ass'n. at 1584; United States Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 42-43 (1995).

[3]Randall Kennedy, Race, Crime and the Law 383-84 (1997).

powder, to purchase, use, and become addicted to crack cocaine. Moreover, the present crack market is associated with violent crime to a greater extent than that of cocaine powder.

Let me share with you one example of a mother who became addicted to crack cocaine. In order to support her addiction, she became a cooker and later worked for the 1-5 Mob. She also permitted her children to be involved in crack cocaine trafficking. One of the children was about ten when he joined the 1-5 Mob -- and fourteen when he was murdered. When he was killed, the mother was serving a prison sentence for her involvement in crack cocaine trafficking. She credits her prison experience as the catalyst for completely changing her life. She still grieves the loss of her son -- for which she blames herself.

The neighborhood where this family lived was riddled with crack cocaine and violence. People could not sleep peacefully in their beds at night because of the gunfire and the fear that a stray bullet would come in through the window and kill one of their children; gangs of gun-toting crack cocaine dealers on the street kept elderly citizens from going to the grocery store or to church; parents did not let their children play outside; buildings were marred by bullet holes and graffiti; the area, already poor, was deteriorating further.

According to a news account at the time, after the members of the 1-5 mob were arrested and detained pending trial, the neighborhood was transformed. Drug dealers were no longer running up and down the street shooting their guns, overall crime decreased, graffiti faded, children were permitted to go outside to play again, and the neighborhood returned to normal.

The 1-5 Mob is illustrative of the severe, negative impact that crack cocaine has had on families and communities, and in particular, on minority communities. The seller of crack is well aware of its addictive qualities and the familial and community devastation it causes. While

much good has been done since the worst days of the crack epidemic in the 1980s, it would be premature to declare victory and relax our efforts. In spite of a number of successful prosecutions of major drug trafficking rings, citizens in other neighborhoods here in the District still complain that they are unable to leave their homes because of rampant drug violence in the streets. Although we have cut in half the all time high of 482 homicides in 1991, the murder of 241 people in 2001 is still unacceptably high. Crack cocaine trafficking remains a major problem here.

Federal cocaine sentencing policy should specifically reflect the greater violence associated with crack as compared to cocaine powder. Although the reasons for the link are not well defined, crack cocaine is clearly more closely associated than powder cocaine with systemic violence. Crack offenders are more frequently associated with weapons use than powder cocaine offenders. For example, in FY 2000, weapons were involved in 10.6% of federal powder convictions, and 21.3% of federal crack convictions (making it the drug offense most likely to involve a weapon[4]). Federal crack offenses are also more frequently associated with violence and bodily injury than powder cocaine offenses.

Some have argued that the violence can be addressed separately as a sentencing enhancement. That is not enough. It will not be able to account for all of the differences, both because of the systemic nature of some of the harms and the problems of proof in individual cases. Enhancements for violence by individual traffickers would only address a portion of the systemic violence and crime of the crack trade. We cannot know in each individual defendant's case exactly how many of his customers' lives have been destroyed by resorting to prostitution to finance their habit, nor can we know precisely how many innocent neighbors were robbed to buy

[4]By comparison, 18.7% of methamphetamine convictions, 6.6% of heroin convictions, and 5.9% of marijuana convictions involved weapons.

his wares. But we are certain that is precisely what is happening. The evidence is clear: Crack is associated with an increase in robbery, theft, and prostitution to finance crack use. Let me cite just a few examples:

- One 1998 study concluded from its research that crack is the drug most closely linked to homicide trends. Crack users appear more likely than powder cocaine users to engage in drug transactions in a manner that elevates personal and aggregate risk, including possessing larger dealer networks and being more likely to use sex to finance drug-taking behavior. Also, because of the short high, buyer and seller will still be in the same area when the high wears off. Users coming off a crack high often feel an intense need for more crack, and frequently suffer from dysphoria and extreme agitation. "Combined, these situational factors elevate the potential for violence during crack transactions."[5] Again, punishing individual dealers only when they possess a weapon or when they use it does not account for much of the violence they spawn. Moreover, it does not take into account the realities of drug trafficking where the drugs and the guns are often possessed by different people and one member of a gang or crew or mob may retaliate for a real or perceived harm done to another.

- The National Institute of Justice's Arrestee Drug Abuse Monitoring (ADAM) program preliminary 2000 findings reported that urinalysis revealed that high percentages of ADAM arrestees had recently used cocaine – on average, 30 percent of arrestees tested positive for cocaine. NIJ sponsored a study in 1999 to examine whether arrestees testing positive for cocaine had used crack or powder

[5]K. Jack Riley, "Homicide and Drugs: A Tale of Six Cities," 2 Homicide Studies 176, 197-98 (1998).

cocaine. That study looked at six ADAM sites and found that the overwhelming majority of cocaine-positive arrestees – 65 percent – were using crack cocaine.

- In another study, 86.7% of women surveyed were not involved in prostitution in the year before starting crack use; fully one-third became involved in prostitution in the year after they began use. Women who were already involved in prostitution dramatically increased their involvement, with rates nearly four times higher than before beginning crack use.[6] Because of the incidence of prostitution among crack users to finance their habit, crack cocaine smokers have been found to have rates of HIV infection as high as those among IV drug users.[7]

- A 2001 study found that women who used crack cocaine had "much higher than average rates of victimization" than women who did not, and were more likely to be attacked and more likely to be raped. Although the study did not compare the victimization rates with other drug-using groups, it nevertheless starkly reflects the tremendous human toll this drug takes. Among an Ohio sample of 171 non-drug injecting adult female crack users, 62% had been physically attacked since the onset of crack use. Rape was reported by 32% of the women since they began using crack, and among these, 83% reported being high on crack when the rape occurred, as were an estimated 57% of the perpetrators.[8]

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[6]Ko-Lin Chin & Jeffrey Fagan, "The Impact of Crack on Drug and Crime Involvement" 15 (1991) (unpublished monograph).

[7]Hatsukami and Fischman, 276 J. of the Am. Med. Ass'n. at 1585 (citing R.E. Booth et al., "HIV risk-related sex behaviors among injection drug users, crack smokers, and injection drug users who smoke crack," Am. J. Pub. Health, 1993; 83:1144-48).

[8]Russel S. Falck et al., "The Epidemiology of Physical Attack and Rape Among Crack-Using Women," 16 Violence & Victims 79 (2001).

B. Lowering Crack Penalties Will Signal A Retreat From The Battle Against Drug Abuse

But despite all of this data, perhaps the most important factor for us is the signal that lowering crack penalties will send to crack traffickers and to the victims of crack traffickers. Yes, African Americans constitute a disproportionate share of those sentenced for federal crack offenses. But as Professor Kate Stith commented, "it is distressing that [some] recognize only half" of the equation – "the denial of liberty to lawbreakers."[9] There is a disparity in the race of the victims of crack offenses. Let me just cite a few illustrative studies:

- A report published by the Substance Abuse and Mental Health Services Administration in July 2001 on women in substance abuse treatment indicated that in 1998, adult women entering public treatment facilities for crack cocaine abuse were disproportionately black – 61 percent compared to 26 percent of all women entering treatment. The 1998 SAMHSA Treatment Episode Data Set indicated that smoked cocaine was the primary substance most frequently reported by black treatment admissions – 28% of black treatment admissions.

- The June 2000 Community Epidemiology Work Group (CEWG) report on trends in drug abuse reported that crack is the predominant form of cocaine in many inner city areas, including in Atlanta, Boston, and Washington D.C.

- In 1999, SAMHSA reported that:
  •Blacks admitted to treatment in 1999 for cocaine abuse reported smoking as their method of use in higher proportion than in the total treatment population.

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[9]Kate Stith, "The Government Interest in Criminal Law: Whose Interest Is it, Anyway" in Public Values in Constitutional Law 137, 158 (Stephen E. Gottlieb, ed. 1993).

•In 1999, smoked cocaine was the method of use for 81 percent of black male cocaine admissions and 86 percent of black female cocaine admissions.

- The 2000 CEWG report indicated that African Americans predominate among cocaine emergency department mentions – including both powder and crack – in 12 of the 20 CEWG cities in the Drug Abuse Warning Network – ranging from 10% in Phoenix to 72 percent in Washington, D.C.

These and many other statistics and studies tell the story of the devastation that cocaine, and crack cocaine specifically, bring to the nation and particularly its minority communities. Lowering crack penalties now would simply send the wrong message – that we care less about the people and the communities victimized by crack. It is something that we simply cannot support. Further, lowering crack penalties is inconsistent with a rejuvenated national fight against illegal drug use. As we indicate in the National Drug Control Strategy, effective drug control policy, reduced to its barest essentials, has just two elements: modifying individual behavior to discourage and reduce drug use and addiction, and disrupting the market for illegal drugs. Lowering crack penalties fails on both counts.

We recognize that this Commission and many others have been concerned that current federal cocaine sentencing policy tacitly directs federal enforcement resources towards lower-level drug traffickers. We ourselves have been increasingly concerned about ensuring that we invest scarce federal drug enforcement resources wisely. With this in mind, the Attorney General recently announced a new federal drug enforcement strategy that seeks to identify and target the most significant drug and money laundering organizations operating across the country for federal investigation and prosecution. As part of this strategy, the Deputy Attorney General will personally be coordinating all of the Department's drug enforcement efforts which will placed

increased emphasis on intelligence based targeting to reach the most significant drug organizations. The new strategy will also redeploy resources towards the most significant nation drug "hot spots," including such locations as the Southwest border, South Florida, Los Angeles, Puerto Rico, and New York. We think this new strategy – together with existing sentencing mechanisms such as the safety valve and substantial assistance departures – will go a long way towards addressing the concerns over less culpable offenders and federal drug sentencing policy.

We believe it would be more appropriate to address the differential between crack and powder penalties by recommending that penalties for powder cocaine be increased. As you know, under current law, a defendant who traffics in 500 grams of powder cocaine faces a five-year mandatory minimum sentences while someone who traffics in 5 grams of crack cocaine faces the same penalty. Five hundred grams of powder cocaine represents between 1,000 and 5,000 doses while 5 grams of crack cocaine represents approximately 50 doses. Comparison of dosage units - as well as price - for the current mandatory minimum levels for powder cocaine with those of other similarly dangerous drugs suggests that increasing powder cocaine penalties is justified to reduce the current sentencing differential.

C. The Realities Of Drug Trafficking Counsel Against Reducing The Penalties For Crack Cocaine

In a city like ours, crack cocaine is distributed at the street level by gangs, not by individual entrepreneurs. It is simply not safe to be out there alone. Crack cocaine networks are very territorial and independent salesmen would not -- do not -- last long. Several people work together, sometimes sharing a common stash, taking turns waiting on customers, or dividing up the territory into smaller units. They may return to a house where they process the crack cocaine to resupply when they run out or run low, but they generally do not keep quantities in excess of that which would qualify for the mandatory minimum on them. As a consequence, street-level

dealers, like Donzell McCauley, are generally caught with relatively low quantities of crack cocaine. This does not tell the whole story of how much they sold on given day or given week, or how much their associates have sold, or how much is in a stash house. Raising the quantity for which a mandatory minimum sentence could be imposed from 5 grams to 25 grams would only put more crack cocaine on the street and would make it more readily available in those neighborhoods that have already suffered the most because of the crack cocaine trade.

It would also make prosecution of gangs and gang violence more difficult. Let me be clear, a 5-year mandatory minimum for someone who has 5 grams (about 50 doses) of crack cocaine for sale is warranted by that conduct alone, a 10-year mandatory minimum for someone who has 50 grams (about 500 doses) of crack cocaine is warranted by that conduct alone.

But beyond that, successful prosecutions of violent crack cocaine distribution networks are built one drug dealer at a time. Without significant punishment available, there is little incentive to provide information to the authorities. If they are not going to prison or not going for any significant amount of time, it does not make sense to risk life and limb to cooperate. [10]

In sum, the overall impact of reducing penalties for crack cocaine would be to permit crack cocaine distribution networks to flourish, to reduce the quality of life in those neighborhoods where we have successfully combatted crack cocaine gangs, and to increase the homicide rate and the violence that we have been fighting so hard to reduce. Instead, Congress

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[10] The examples I have given you throughout this testimony are of murders that occurred in the early to mid-1990's. This is attributable to two factors. First, it takes a long time to build a solid case against major crack cocaine traffickers; with fewer cooperators, it will take longer and there will be fewer successful prosecutions. Second, cases involving more recent acts of violence are either under investigation or pending trial and cannot be discussed publicly.

can reduce the disparity between the penalties for crack and powder cocaine by lowering the threshold quantities for powder cocaine.[11]

D. Our Position Is Supported By Other Law Enforcement

It significant that our position on federal cocaine sentencing policy is supported by other major law enforcement organizations. At a hearing held by the Sentencing Commission earlier this year, William Nolan, the Chair of the National Legislation Committee of the Fraternal Order of Police, urged the Commission not to reduce federal crack cocaine penalties. Mr. Nolan stressed the need for Federal leadership in the fight against illegal drugs.

> "Although our nation has seen an across-the-board reduction in crime rates in recent years, it is still true that illegal drugs have a devastating impact on society as a whole. It is also clear that the Federal Government, which has available resources and policies in place to effectively investigate, apprehend, and punish drug offenders, must continue to take the lead in providing harsh penalties for drug-related offenses. The Administration, Congress, and the Commission must continue to send the message to drug dealers and traffickers that the Federal Government will fiercely protect the most vulnerable members of our society and will severely punish those who seek to exploit them."

The key point of Mr. Nolan's testimony was that the federal government is the leader in the fight against illegal drug abuse, and the reduction in federal crack cocaine penalties would indicate a failure of leadership.

William Berger, the President of the International Association of Chiefs of Police, also commented to the Commission his belief – and that of the IACP – that crack penalties should not be reduced. Mr. Berger, a law enforcement officer, executive, and police chief in the

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[11]In this regard, it should be noted that research conducted by the Department's Office of Legal Policy and released in March 2002 indicates that the actual disparities in sentencing for crack and powder offenses are considerably less than may be commonly perceived. For example, the research shows that the disparity between actual average sentences for crack and powder offenses ranges from 2.1-to-1 to 4.8-to-1.

metropolitan Miami area for over 30 years, stressed the devastation and horror suffered by families and communities as a result of the sale and use of crack and powdered cocaine. While recognizing the concerns that have been identified over the difference in the penalty levels for crack and powder cocaine, Mr. Berger concluded,

> "I do not believe that the Sentencing Commission should take any steps that would weaken the existing penalties for possession and sale of crack cocaine. Rather, it is my belief that the current threshold limits for powdered cocaine should be reduced so that they more closely track those for crack cocaine. In this fashion, the Commission would achieve the goal of reducing or eliminating any disparity between crack and powdered cocaine, while at the same time ensuring that those who participate in the sale and use of these illegal narcotics are penalized in a manner appropriate to the crime they commit."

The views of Mr. Nolan, Mr. Berger, and the thousands of police officers and chiefs of police they represent – the people on the front lines of the fight against illegal drugs – should carry great weight in this debate over federal cocaine sentencing policy.

CONCLUSION

We appreciate the chance to share our views on this important subject. We think the Congress should be guided by the words of President Bush: "We must reduce drug use for one great moral reason: Over time, drugs rob men, women, and children of their dignity and of their character. Illegal drugs are the enemies of ambition and hope. When we fight against drugs, we fight for the souls of our fellow Americans." We think all Americans, should continue to fight as hard as we can to reduce illegal drug use. We think the Sentencing Commission's recommendations are misguided and are inconsistent with a vigorous fight to reduce illegal drug use.

Thank you again for inviting me to be here, I would appreciate it you would make my written testimony a part of the record in this case. I'd be happy to answer any questions you may have.

TESTIMONY OF DISTRICT ATTORNEY CHARLES J. HYNES
HEARING ON CRACK COCAINE SENTENCING
SENATE JUDICIARY SUBCOMMITTEE ON CRIME AND DRUGS
WASHINGTON, D.C.
WEDNESDAY, MAY 22, 2002

Mr. Chairman and members of the Committee good morning and thank you for the invitation to testify about this very important criminal justice issue.

For the record, my name is Charles J. Hynes, and I have served as the elected District Attorney of Kings County, in Brooklyn, New York since 1990. By way of brief background my county has a population of 2 and ½ million people. It is the most populous county of New York State's 62 counties, and the seventh largest county in the United States. Last year my office prosecuted over 6,000 felony cases, and although approximately 2,150 were for the possession or sale of drugs, a large percentage of the nearly 4000 other felony cases were drug related

With me is my Counsel Anne Swern, who is the Director of our Drug Treatment Alternative to Prison Program, and Hillel Hoffman, my Legislative Director.

My mandate as a State Prosecutor in narcotics enforcement is to prosecute crimes under New York's Rockefeller Drug Laws.

Our history with drug enforcement parallels that of Sections 841, 844 and 961 of 21 U.S. Code. Mr. Chairman, I have no doubt that when Congress amended these sections to impose lengthy sentences for crack cocaine, it was reacting to the sheer horror of the crack epidemic, which had devastated so many inner city communities. Our Legislature also amended the Penal Law in 1988 to include crack cocaine in our Rockefeller Drug Laws.

The Rockefeller Drug Laws, created in 1973, with several sentences of life imprisonment for possession or sale tied to the weight of a narcotic substance, are reputed to be among the toughest drug laws in the nation. But the Rockefeller Drug Laws do not treat first time crack offenders with the same severity as federal law.

Under the Rockefeller Drug Laws the possession of 500 milligrams of crack cocaine is a class D felony, punishable by up to seven years in state prison. However, for a first offense the court the court has several options - it can place the defendant on probation or it can impose a definite sentence of one year in a local jail.

A New York defendant who is convicted of possessing five grams of crack would be guilty of a C felony, with a maximum penalty of five to fifteen years. But unlike an offender convicted under Section 844, a first

time offender would also be eligible for a sentence of probation, and most first offenders receive this sentence.

In order for a first time offender in New York to receive a mandatory prison sentence for simple possession of cocaine, the aggregate weight of the substance containing cocaine must be at least one-half of an ounce, enough to produce 220 ten dollar vials or ziplocks of crack for a street sale value of $2200. And this amount is almost three times greater than the five grams required under the federal statute for a mandatory minimum sentence of five years. Or, the defendant can be convicted of possessing a lesser weight with intent to sell it. But the minimum penalty for these drug crimes, a B felony under our law, is a sentence of one to three years, or if the defendant is cooperating with the prosecution, a lifetime sentence of probation.

It is only when a first time New York defendant possesses much larger quantities of drugs that the longer sentences kick in.

For example, a New York defendant who is convicted of possessing two ounces of a substance containing cocaine will be subject to a minimum sentence of at least three years to life imprisonment, although no one serves a life sentence for that amount.

A defendant who is convicted of possessing four ounces of a substance containing cocaine (or for selling two ounces) will be subject to a

minimum sentence of at least fifteen years to life imprisonment. It is this last category that has caused much of the controversy about the Rockefeller Drug Laws because it has resulted in drug mules and other middle level people receiving very long prison sentences. In a typical case in Brooklyn, a middle level dealer is someone who sells a few ounces, not kilos. Of course, even 4 ounces of cocaine can produce 1,600 ten-dollar vials or ziplocks of crack – for a street value of sixteen thousand dollars.

The New York picture changes significantly when a drug defendant is convicted of a second felony because our second felony offender law requires mandatory sentences of imprisonment for lower level weights.

So, for example, a New York defendant who is convicted of possessing 500 milligrams of crack cocaine, and who has a prior felony conviction for any crime, must receive a prison sentence of at least two to four years. A New York defendant whose second felony conviction is for possessing one-eighth of an ounce of a substance containing cocaine faces a mandatory prison sentence of at least three to six years. And a defendant whose second felony conviction is for possessing one-half of an ounce of a substance containing cocaine faces a mandatory sentence of at least 4 1/2 to 9 years in prison.

But despite these sentences which were in effect since 1973, by 1990 the crack epidemic had led Brooklyn to become the fifth most violent municipality, per capita, in the United States. One out of every 16 of our residents was the victim of a felony crime. In 1989, 686 people were murdered in Brooklyn, and in 1990 the number increased to 765. In one year alone, 1991, 151 children were murdered in Brooklyn, 129 of them by gunfire.

I can understand that as late as 1995 the Congress and President Clinton were reluctant to change the mandatory 5 year minimum prison sentence out of a concern that crack still had, and still does have, a devastating effect on communities.

But just as the passage of time has given us in New York State a new perspective about the Rockefeller Drug Laws, I would agree that a new perspective is needed about the federal drug laws.

Raising the threshold level for crack cocaine in the federal statutes to a higher amount for a minimum five year sentence, and keeping a one year sentence for lesser amounts, would place the federal statutes roughly on a par with the most serious drug offenses in New York State. Raising the threshold would also alleviate the same criticism of the federal statutes that has been leveled at the Rockefeller Drug Laws: that stiff sentences for small

quantities of drugs have had a disproportionate impact on poor people in general and people of color in particular.

As you are aware, Mr. Chairman, the Bureau of Justice Statistics Study of Federal Drug Offenders found that in 1997 about 86 percent of crack offenders in federal prisons were African-American and eight percent were Hispanic.

The United States Sentencing Commission figures for 2000 show that 84.7% of crack cocaine offenders were African American and nine percent were Hispanic. These figures also show that 66.5% of the crack offenders were street level dealers, and only ten percent were leaders, growers, manufacturers, financiers or money launderers.

These percentages roughly correlate to the percentages in New York State where it is estimated that 94 percent of the 19,000 drug offenders in our prisons – most of whom sold or possessed small quantities of drugs - are African American or Hispanic. Among the 3,100 women in the New York State prison system, the vast majority are also women of color who have been convicted of drug offenses.

This racial disparity cannot be ignored in administering our state and federal criminal justice systems. And whether it is the 100 to 1 ratio based on the weight of powdered cocaine versus crack cocaine (500 grams of

powered vs. 5 grams of crack – with the same sentence), or (the 5.4 to 1 ratio the Justice Department maintains on the basis of sentences for similar amounts of crack or powdered cocaine), the simple fact is that minority drug defendants are serving substantially longer prison sentences than non-minority defendants, although both populations have similar rates of drug abuse. The Sentencing Commission figures for 2000 show that an average sentence for crack cocaine is ten years, while the average sentence for powdered cocaine is six years five months.

And I do not believe that this problem will be solved by reducing the weight of powdered cocaine from 500 grams to a lessor amount for a five year sentence. This will not alleviate the unnecessarily long sentences served by low level street dealers, who comprise two-thirds of all crack offenders in the federal system.

By supporting the proposal to raise the weight for the five year minimum for crack cocaine I do not wish to suggest for one moment that possession of drugs should not continue to have serious criminal consequences. Drug dealing is an unacceptable outrage and I have no sympathy for drug dealers whose only motive is to make money out of other people's misery. In my County I do not plea-bargain with drug traffickers. I

prosecute them to the fullest extent available under the Rockefeller Drug Laws.

I also believe that there can be a justification for mandatory sentences for drug offenses, if not used unfairly or harshly. In New York State the existence of mandatory prison sentences for second offenders has enabled me to establish a highly successful Drug Treatment Alternative to Prison Program called DTAP.

We started our program in 1990 with one of the toughest criminal populations to rehabilitate: chronic drug offenders who sold drugs to support their habit. We took this revolving door population and gave them a second chance to straighten out their lives if they were willing to undergo 15 to 24 months of rigorous, intensive residential drug treatment. I want to emphasize that this program is totally controlled by us. We carefully screen – accepting only about a 1/3rd of the applicants– we require a guilty plea, typically 3 to 6 years, and if a defendant fails the program, we have the sentence imposed.

Today, we can point with pride to the success of our program. More than 900 drug offenders have been helped by DTAP. Six hundred six have graduated and 308 are still in treatment. Our graduates have generated $23 million of economic benefits to the taxpayers of New York State by

lowering health, welfare and recidivism costs and by becoming taxpayers themselves.

At our annual graduation ceremony three weeks ago our guest speaker, Asa Hutchinson, the Director of the federal Drug Enforcement Agency, was visibly moved by the eloquence of our DTAP graduates. When Director Hutchinson was a member of Congress, he co-sponsored a DTAP bill that is similar to the DTAP section of your S. 304, the omnibus drug education, treatment and prevention bill which you, Mr. Chairman, Mr. Leahy, Mr. Hatch and other members of the Judiciary Committee have sponsored.

Our DTAP experience has proven that a tough, prosecution run treatment alternative can be operated with no threat to public safety. We have an enforcement team which apprehends 95% of our absconders within a median time of 14 days. We have a one year retention rate that is now as high as 80%, far above the national average. And the recidivism rate of our graduates is one-half the rate for eligible defendants who did not participate in the program and were sentenced to state prison.

I have always maintained that it makes no sense to warehouse nonviolent drug abusers in prison for long periods of time, only to have them return to a life of crime and drugs when they are released to the community.

It is my hope that the Congress will enact our DTAP proposals this year and use them as a model for federal alternative programs as well as state alternative programs.

I think that any legislative changes which are contemplated in the federal statutes for a drug population that consists primarily of addicts who possess or sell drugs to support their habit should be accompanied by the enactment of mandated treatment alternatives to help rehabilitate this population.

Again, thank you for this invitation. I would be happy to respond to any questions.

COLUMBIA UNIVERSITY
COLLEGE OF PHYSICIANS & SURGEONS

DEPARTMENT OF PSYCHIATRY

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MEMORANDUM

TO: Senator Joseph R. Biden, Jr.
FROM: Herbert D. Kleber, M.D.
DATE: May 21, 2002
RE: Response

Dear Senator Biden:

This is in reference to the hearing you are holding regarding the sentencing for powder vs. crack cocaine. There is major controversy as to whether the current sentencing guidelines or laws, by having roughly a 100 to 1 ratio between the amount of drug related to sentencing severity between powder and crack cocaine, has unfairly targeted the minority community. This has led to sharply increased numbers of especially blacks in our prisons.

My key points on this controversy are as follows:

1. The likelihood of becoming addicted to cocaine is related to the degree of euphoria, which, in turn, is related to the speed with which the drug hits the brain.

   The fastest routes are smoking (crack) or I.V. (powder cocaine dissolved in water). Both are faster than intranasal (snorting) which involves powder cocaine.

2. Crack is the base form of the powder, cocaine hydrochloride, and is made from the powder. Because of its poor solubility in water, it is not used by the snorting or injection route.

3. I do not believe the intent of the original legislation was to target minority communities. Rather it emerged out of the concern over the crack epidemic, the havoc it was causing, and the way it was typically sold - in small quantities rather than large as the powder was. Unfortunately, probably because crack was sold in

minority communities in open-air markets as opposed to behind closed doors as the powder usually was; it was easier to arrest these individuals and accounts for the disparity in prison populations. It should be remembered that community members were often very vocal about the need to arrest these dealers and close down the open-air drug markets.

4. In spite of these original good intentions, the disparity in our prison populations demands some remedial actions out of fairness. Further, since our ability to successfully treat cocaine addiction has improved over the decade, since treatment can be a cost-effective alternative to imprisonment, especially using sanctions such as employed by Drug Courts, and since many convicted of cocaine selling are themselves addicts, coerced treatment can help keep our communities safer while reducing the high recidivism rate encountered among those leaving prison.

5. However, given the increased addictiveness of crack over powder cocaine, I would recommend that some disparity remain. I believe that a 5 to 1 ratio is both fair and more in keeping with our knowledge of the drugs and how they are sold than the 100 to 1.

6. I base the above points on my over 35 years in doing research, treatment, and policy work in the field of addiction. As you know, I had the honor of being the Deputy Director for Demand Reduction at ONDCP from 1989 through 1991, serving under Bill Bennett and the 1st President Bush.

7. Finally, I would like to include for the record the article by Dr. Dorothy Hatsukami and my late wife and colleague, Dr. Marian Fischman. It is a scholarly description of the state of our knowledge about the similarities and differences between powder and crack cocaine.

Thank you for your kind attention

Yours sincerely,

Herbert D. Kleber, M.D.
Professor of Psychiatry
Director, Division on Substance Abuse

Attachment

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy,
Chairman, Senate Judiciary Committee
Hearing on "Federal Cocaine Sentencing Policy"
May 22, 2002

Few of our criminal laws have created more controversy over the last 15 years than the laws governing cocaine sentencing. The wide disparity between sentences for crack and powder cocaine has fed a debate about racial bias in our justice system, and harmed the ability of law enforcement officers to do their jobs in minority communities. Even as the crack epidemic of the 1980s has receded, and as the crime rate has dropped dramatically, we in Congress have been unwilling to revisit this issue in a serious way. I hope that today's hearing indicates a change in focus for this Committee from the demagogic battles we fought over cocaine sentencing during the 1990s. I am grateful that Senator Biden is holding this hearing, and I know that Senators Sessions and Hatch have been very involved in this issue during this Congress. I know that we are all eager to hear from the Sentencing Commission and our other witnesses.

The Sentencing Commission has released a report to Congress this morning that provides a comprehensive review of our cocaine sentencing policies, and the Commission's unanimous recommendations about how those policies can be improved. This is an important report and it deserves the attention of all the members of this Committee, and of the Congress as a whole. It shows that the principles that guided Congress in 1986 were often uninformed or improperly implemented, and offers a better approach.

Under current law, someone who is apprehended with 5 grams of crack cocaine faces the same five-year mandatory minimum sentence as someone with 500 grams of powder cocaine. This 100:1 disparity in threshold quantity creates a gulf between sentences for powder and crack cocaine offenses. For example, the Commission reports that in 2000 the average sentence for a crack cocaine offense was nearly four years longer than the average sentence for a powder cocaine offense, 118 months to 74 months. This has swelled our prisons, and has had a disproportionate impact on African-Americans, who make up 85 percent of the defendants facing crack cocaine penalties.

This disparate impact on African-Americans would be troubling enough if we believed our cocaine sentencing policy was working. But it is particularly disturbing when one considers that the penalties Congress created in 1986 have proven poorly suited to the concerns Congress sought to address.

In 1986, Congress wanted to crack down on those who were bringing crack into our neighborhoods, in response to overwhelming public concern about the effect of the crack epidemic on our urban areas and our young people. The supporters of severe crack penalties said they wanted to focus on major traffickers, but the results have not reflected that intention. The Sentencing Commission reports that *two-thirds* of Federal crack cocaine offenders are street-level dealers, not the "serious" or "major" traffickers the 1986 Anti-Drug Abuse Act was targeting. In other words, the policy has not had its intended effect.

During the 1986 debate, there was a substantial focus on crack babies. Congress believed that our nation was in the midst of, or at least on the verge of, an epidemic, and that prenatal exposure to crack was far more devastating than exposure to other harmful substances. This belief was a powerful prod toward increasing penalties for crack far beyond those for cocaine and other drugs. According to the Commission, we now know that the negative effects of prenatal crack cocaine exposure are identical to the effects of prenatal powder cocaine exposure, and less severe than the negative effects of prenatal alcohol exposure.

The Commission's recommendations provide a roadmap for the 107th Congress toward a fairer, more proportionate drug sentencing system. The Commission would increase the five-year mandatory minimum threshold quantity for crack cocaine offenses from 5 grams to at least 25 grams, and the ten-year threshold from 50 grams to at least 250 grams, while leaving the threshold quantities for powder cocaine untouched. This would reduce the 100:1 disparity to 20:1, a substantial change that should greatly reduce perceptions of racial bias in our criminal justice system.

At the same time, the Commission recommends additional sentencing enhancements that would ensure that we provide longer sentences to the criminals who should be our most important targets, including drug importers, drug offenders who use weapons or violence, and dealers who sell to kids. These enhancements would apply to all drugs, including powder cocaine, so that the worst offenders are punished *more* severely than they sometimes are today.

Senators Sessions and Hatch have introduced legislation that takes us part of the way toward solving this problem, and I appreciate their interest. Indeed, Senator Hatch joined me last December in asking the Commission to take another look at the powder/crack issue. The Sessions/Hatch bill is a good start, but I believe it needs to be changed in at least two ways: instead of achieving a 20:1 ratio by lowering threshold quantities for powder cocaine, we need to (1) leave powder cocaine thresholds alone and (2) increase the threshold for a 5-year mandatory minimum sentence for crack cocaine to 25 grams instead of 20 grams.

Indeed, I have not heard anyone make the argument that powder cocaine sentences under current law are insufficient. Although the Justice Department has suggested lowering powder cocaine thresholds, Deputy Attorney General Thompson testified before the Sentencing Commission that he was *not aware of any evidence* that existing powder cocaine penalties are too low. In other words, the Administration's only rationale for increasing penalties for powder cocaine is to

reduce the disparity between powder and crack without decreasing crack penalties. I am pleased that Senators Sessions and Hatch have held to their conviction that current crack penalties should be decreased, even as the Justice Department has argued strongly for the status quo.

The Administration's failure to support even the slightest modification of crack penalties has been a surprise and a deep disappointment. Two days before taking office, President Bush said that we should address this problem "by making sure the powder cocaine and the crack cocaine sentences are the same." He also said, "I don't believe we ought to be discriminatory." Given the context in which he made the remarks – he was speaking about his concerns that we imprison too many people for too long for drug offenses – it defies belief that the President's aim was to equalize penalties for crack and powder cocaine through a dramatic *increase* in powder penalties that would further overcrowd our prisons. Yet his Justice Department has decided that that is the only acceptable way to equalize crack and powder penalties. Thankfully, neither the Republicans nor the Democrats on the Sentencing Commission accepted the Administration's view, and instead were unanimous in their recommendation to us today.

I urge my colleagues to embrace that recommendation and make it law. It is long past time for us to do something about this issue.

On another note, I am also preparing to introduce legislation to increase maximum penalties in three statutes that protect our cultural heritage. The Sentencing Commission has recommended the changes that would be included in the legislation, and I thank them for their input. Under current law, penalties for people who would steal historical artifacts or Native American relics are too low. This is something we can and should change, and we can do so on a bipartisan basis. I hope Senator Hatch and all the members of this Committee will join together on this issue.

Statement of Diana E. Murphy

Chair of the United States Sentencing Commission

Before the Senate Subcommittee on Crime and Drugs

May 22, 2002

Chairman Biden, members of the Subcommittee, I am Diana Murphy, Chair of the United States Sentencing Commission (the "Commission") and a judge on the Eighth Circuit Court of Appeals. I appreciate the opportunity to testify today about federal cocaine sentencing policy, and **the Subcommittee should be commended for holding this important hearing**. Although Congress and the Commission have been considering cocaine sentencing issues for a number of years, federal sentencing policy for cocaine traffickers has remained essentially unchanged since the current penalty structure was established by the Anti-Drug Abuse Act of 1986 (the "1986 Act").[1]

This year the Commission placed this difficult issue on our agenda, in part because federal cocaine sentencing policy continues to be criticized by many, and in part because we sensed a renewed interest by members of Congress in exploring possible changes to the penalty structure. We received a letter from Senator Leahy and Senator Hatch specifically requesting the Commission to study the issues presented and to report back on its findings and recommendations. The Commission is also familiar with legislation introduced by Senator Sessions and Senator Hatch, Senate Bill 1847, the Drug Sentencing Reform Act of 2001, which would change the penalties for both powder cocaine and crack cocaine offenses.

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[1] *See* Pub. L. 99–570, 100 Stat. 3207 (1986).

In the course of our work this year, the Commission (i) reviewed findings from **recent literature** on specific issues such as the addictiveness of cocaine and the consequences of prenatal cocaine exposure; (ii) conducted an **extensive empirical study** of federal cocaine offenders sentenced in fiscal year 2000 and compared those results with the findings in the Commission's 1995 special report to Congress on federal cocaine sentencing policy;[2] (iii) surveyed **state sentencing policies**; (iv) considered **public comment** on the appropriateness of current federal cocaine sentencing policy; and (v) heard testimony at **three separate public hearings** from the medical and scientific communities, federal and local law enforcement officials, including the Department of Justice, criminal justice practitioners, academics, and civil rights organizations.

After carefully considering all of the information available, the Commission **unanimously concluded that the cocaine penalty structure can be improved significantly to achieve more effectively the various congressional objectives outlined in the Sentencing Reform Act of 1984, the 1986 Act, and the 1995 legislation**[3] disapproving the prior Commission's guideline amendment addressing cocaine sentencing.[4]

Having reached that substantive conclusion, we faced the difficult threshold decision of determining how best to proceed. We considered promulgating an amendment to the guidelines

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[2] USSC, 1995 Special Report to Congress: Cocaine and Federal Sentencing Policy (as directed by section 2800006 of Public Law 103–322) (February 1995).

[3] *See* Pub. L. 104–38, 109 Stat. 334 (Oct. 30, 1995).

[4] That amendment, among other things, would have equalized the quantity-based sentencing guideline penalties for crack cocaine offenses with the sentencing guideline penalties for powder cocaine offenses.

and submitting it to Congress with the other guideline amendments we sent for congressional review on May 1, 2002. After consulting with a number of sources, including several members of the Subcommittee, the Commission unanimously agreed that at this time we can best facilitate congressional consideration of the proposed statutory and guideline changes by submitting recommendations to Congress first, and then working with Congress to implement appropriate modifications to the penalty structure. We believe Congress and the Commission now have the tools to effect even more appropriate and proportionate penalties for cocaine offenses. These resources include a well settled sentencing guideline system that can account in a calibrated manner for variations in offender culpability and offense seriousness and updated comprehensive data about crack cocaine and crack cocaine offenders.

In that spirit we submit today a comprehensive report on federal cocaine sentencing policy and a number of concrete recommendations for congressional consideration regarding statutory and guideline modifications. The Commission recommends that Congress adopt the following three-pronged approach to revise federal cocaine sentencing policy:

(1) **Increase the five year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams, and the ten year threshold quantity to at least 250 grams (and repeal the mandatory minimum for simple possession of crack cocaine).**

(2) **Direct the Commission to provide appropriate sentencing enhancements in the primary drug trafficking guideline, USSG §2D1.1, to account for certain aggravating conduct.**

(3) **Maintain the mandatory minimum penalties for powder cocaine offenses at their current levels, with the understanding that the proposed guideline sentencing enhancements would apply to powder cocaine offenses.**

With that background, I will highlight the Commission's most important findings, outline our recommendations and the estimated impact, and describe the amendment to the drug trafficking guideline submitted to Congress on May 1, 2002.

Background

Currently, 21 U.S.C. § 841(b)(1) requires a five year mandatory minimum sentence for trafficking five grams or more of crack cocaine or 500 grams of powder cocaine, and a ten year mandatory minimum sentence for trafficking 50 grams or more of crack cocaine or 5,000 grams of powder cocaine. In other words, it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalties. It is this 100-to-1 drug quantity ratio that lies at the heart of the debate surrounding cocaine sentencing.

When the mandatory minimum penalties were first established, the Commission was still in the process of developing and promulgating a guideline system. **The Commission responded to the 1986 Act by assigning sentencing guideline base offense levels which corresponded to the mandatory minimum penalties** with adjustments upward or downward to account for all drug quantities.[5] This approach caused the Commission to use the statutory 100-to-1 drug quantity ratio to set base offense penalties in the guidelines for all quantities of powder cocaine and crack cocaine.

Findings

The Commission concludes that the 100-to-1 drug quantity ratio is problematic for a number of reasons. The legislative history of the 1986 Act indicates that Congress generally intended that five year penalties would apply to "serious" traffickers, and ten year penalties

[5] *See* the Drug Quantity Table in USSG §2D1.1(c).

would apply to "major" traffickers.[6] Congress recognized that all drug trafficking offenses cannot be prosecuted at the federal level, and it established the mandatory minimum structure in part to create incentives to federal law enforcement to direct its "most intense focus" on major and serious traffickers.[7]

Contrary to the intent of Congress, the five and ten year mandatory minimum penalties most often apply to low level crack cocaine traffickers, rather than to serious or major traffickers. Commission sentencing data indicate that in 2000 the majority of federal crack cocaine offenders – *two-thirds* – were *street-level dealers*. (*See* Figure 1.) In contrast, only 5.9% of federal crack cocaine offenders performed trafficking functions (manager, supervisor) most consistent with those described in the legislative history of the 1986 Act as warranting a five year penalty. Only 15.2% performed trafficking functions (importer, high-level supplier, organizer, leader, wholesaler) most consistent with the functions described as warranting a ten year penalty.

The relatively small quantity of crack cocaine required to trigger the mandatory minimum penalties appears to draw away prosecution of low level crack cocaine offenders from the states to the federal authorities. For both crack cocaine and powder cocaine, few cases involve drug quantities below the five year mandatory minimum threshold quantities. Cases tend to cluster around quantities that receive five and ten year penalties, but crack cocaine

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

[7] Id.

cases cluster at the ten year quantities to a significantly greater degree than powder cocaine cases. Of the 4,195 crack cocaine cases sentenced in 2000, 735 cases involved five to twenty grams, the quantities that receive a guideline base offense level that corresponds to the five year mandatory minimum penalty, and 1,148 cases involved 50 to 150 grams, the quantity that receives a guideline base offense level that corresponds to the ten year mandatory minimum penalty.

In 2000, 1,083 federal crack cocaine offenses – representing *over one-quarter (28.5%)* of federal crack cocaine offenses – involved less than 25 grams of the drug. The importance of the five year trigger quantity in prosecutorial decisions is underscored by the fact that 72.7% (747) of those crack cocaine cases involving less than 25 grams involved between five and twenty grams, the quantities that receive the sentencing guideline range that corresponds to the five year mandatory minimum penalty. In contrast, only 2.7% of federal powder cocaine offenses involved less than 25 grams of the drug, no doubt influenced by the fact that the mandatory minimum penalties do not apply to offenses involving such small quantities of powder cocaine.

Particularly problematic is the fact that crack cocaine offenders who traffick relatively small drug quantities receive especially disparate penalties in comparison to similar powder cocaine offenders. The Department of Justice recently reported that "crack defendants received higher average sentences than powder defendants, and that *the ratio of crack to powder sentences was greater for lower amounts of cocaine than for higher amounts of the drug.*"[8] Specifically, the Department reports that defendants convicted of trafficking less than 25

[8] *See Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties*, U.S. Department of Justice (March 17, 2002), at 23 (emphasis added).

grams of crack cocaine received an average sentence 4.8 times longer than the sentence received by an equivalent powder cocaine defendant.[9]

Discussion of a "penalty ratio" masks the real and significant impact that the 100-to-1 drug quantity ratio has on sentences for those traffickers of relatively small quantities. **Defendants convicted of trafficking less than 25 grams of powder cocaine received an average sentence of 14 months, just over one year. (*See* Figure 2.) In contrast, defendants convicted of trafficking an equivalent amount of crack cocaine received an average sentence of *65 months, over five years*.**

Moreover, **what is termed the "penalty ratio" widens even further to 8.3 to 1 for crack cocaine and powder cocaine offenders with the *lowest drug quantities and the least criminal history*** (Criminal History Category I).[10] For those offenders, the 100-to-1 drug quantity ratio results in average sentences of 33 months for crack cocaine offenders compared to four months for powder cocaine offenders with equivalent drug quantities. **The Department reports that this heightened differential affected 1,637 crack cocaine defendants sentenced between 1996 and 2000. The Commission strongly believes that sentencing differentials of this magnitude are inappropriate for the category of least culpable offenders and result in an ineffective use of limited federal prison space.**

The legislative history of the 1986 Act also indicates that Congress established the 100-to-1 drug quantity ratio in part to account for certain more harmful conduct believed to be widespread in crack cocaine offenses, particularly systemic violence associated with its

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[9] Id.

[10] Id. at 25.

trafficking. **Commission sentencing data indicate, however, that certain aggravating conduct occurs in only a small minority of crack cocaine offenses.** In fact, as Figure 3 demonstrates, the prevalence of many aggravating factors in crack cocaine offenses is infrequent and does not differ substantially from the prevalence in powder cocaine offenses.

For example, an important basis for the establishment of the 100-to-1 drug quantity ratio was the understanding that crack cocaine trafficking was highly associated with violence. More recent data indicate that **significantly less systemic violence, as measured by weapon use and bodily injury, is associated with crack cocaine trafficking than was reported earlier**. In 2000, Commission sentencing data indicate that approximately *two-thirds of crack cocaine offenders had no personal weapon involvement.* (*See* Figure 3.) Even when crack cocaine offenders possessed weapons, they were rarely actively used (2.3%). Bodily injury of any type occurred in 7.9% of crack cocaine offenses in 2000. (*See* Figure 3.)

Recent Commission sentencing data on protected classes of individuals and locations also do not support previous concerns about the high prevalence of other aggravating conduct in crack cocaine offenses. In 2000, **only 4.2% of crack cocaine cases involved minors in the offense, and very few – 0.5% – involved the sale of the drug to a minor. Only 4.5% of crack cocaine offenses occurred in protected locations** such as near schools and playgrounds, and sales of crack cocaine to pregnant women were never documented. (*See* Figure 3.)

This data raises two principal concerns. **First, to the extent that the 100-to-1 drug quantity ratio was designed to account for the type of harmful conduct described above, it sweeps much too broadly by treating *all* crack cocaine offenders *as if* they commit such**

harmful acts, even though Commission sentencing data indicate most crack cocaine offenders in fact do not.

A second related problem is that because the current penalty structure focuses on drug quantity to account for culpability, the primary drug trafficking guideline lacks specific sentencing enhancements to target those offenders with aggravated conduct for especially severe penalties (with the exception of an existing 2-level sentencing enhancement for possession of a dangerous weapon). As a result, **the penalty structure does not provide adequate sentencing proportionality. Put another way, the most serious crack cocaine offenders may not be getting the proportionate sentences that they deserve.**

The Commission also believes that the **100-to-1 drug quantity ratio exaggerates the relative harmfulness of the two forms of cocaine**. Cocaine is a powerful stimulant and in any form produces the same physiological and psychotropic effects. The two forms of the drug pose different typical risks of addiction, however. Smoking or injecting any drug, including cocaine, produces the greatest risk of addiction. Because powder cocaine usually is snorted, it tends to pose a lesser risk of addiction to the *typical* user than crack cocaine, which is smoked. However, injecting cocaine produces the same risk of addiction as smoking crack cocaine.[11] **Differences in the addictive potential of the two forms of cocaine do not by themselves appear to warrant the 100-to-1 drug quantity ratio.**

Congress also provided heightened penalties for crack cocaine offenses because of widespread concerns regarding "crack baby syndrome." **Recent research shows that the**

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[11] *See* Written statement of Glen R. Hanson, PhD, DDS, Acting Director of the National Institute on Drug Abuse (NIDA), to the U.S. Sentencing Commission (February 25, 2002).

negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure and significantly less devastating than previously believed.[12] The negative effects associated with prenatal cocaine exposure are in fact similar to those associated with prenatal exposure to other illegal and legal substances, such as tobacco and alcohol. Since recent research reports no difference between the negative effects from prenatal crack cocaine and powder cocaine exposure, no differential based on this particular heightened harm appears to be warranted. In any event, **sentencing proportionality would be better achieved by imposing enhanced sentences directly on the small minority of offenders who knowingly distribute drugs to pregnant women.**

Congress also set heightened penalties for crack cocaine offenses because it feared that the drug's potency, low cost per dose, and ease with which it is manufactured and administered were leading to its widespread use, particularly by youth. **Recent data indicate that the feared epidemic of crack cocaine use by youth never materialized.** Crack cocaine use among 18 to 25 year old adults has historically been low. Between 1994 and 1998, on average less than 0.4% of those young adults reported using crack cocaine in the prior 30 days.[13] Similar findings are reported for crack cocaine use by high school seniors. Between 1987 and 2000, on average less than 1.0% of high school seniors reported crack cocaine use within the prior 30 days.[14] The

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[12] *See, e.g.*, Written statement by Deborah A. Frank, M.D., to the U.S. Sentencing Commission (February 25, 2002); Written statement of Glen R. Hanson, supra note .

[13] Department of Heath and Human Services, Substance Abuse and Mental Health Services Administration, *Summary of Findings from the 1999 NHSDA.*

[14] *See* http://www.monitoringthefuture.org/pubs/monographs/vol1_2000.pdf. Monitoring the Future is a nationwide annual survey of a representative sample of eighth, tenth, and twelfth grade students.

Commission believes that persons selling any dangerous drug to our youth should receive appropriately severe penalties. But the small number of crack cocaine offenders identified as distributing to youth indicates that **sentencing proportionality would be improved by imposing enhanced guideline sentences on the small minority of offenders who sell any type of drug to juveniles or distribute in areas likely to be frequented by juveniles (*e.g.*, near schools and playgrounds).**

Another key issue surrounding the debate concerning the different penalty structures for crack cocaine offenses and powder cocaine offenses relates to the racial composition of federal crack cocaine offenders. The overwhelming majority of offenders subject to the heightened crack cocaine penalties are African American, 84.2% in 2000. (*See* Figure 4.) This has contributed to a perception widely held in some communities that the current penalty structure for federal cocaine offenses promotes unwarranted disparity based on race.

The Commission is unable to evaluate this assertion scientifically. Nevertheless, **the Commission finds even the perception of racial disparity to be problematic because it fosters disrespect for and lack of confidence in the criminal justice system** among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine offenses. One of the primary concerns of Congress was to protect poor and minority neighborhoods that were heavily afflicted by crack cocaine trafficking and its associated secondary harms. To the extent that many of those communities and their representatives now seek change in the federal penalty structure, that suggests a critical reexamination of the penalty structure is warranted.

Recommendations

(1) Increase the five year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams, and the ten year threshold quantity to at least 250 grams (and repeal the mandatory minimum penalty for simple possession).

The Commission has unanimously concluded that the five year mandatory threshold quantity for crack cocaine offenses should be increased to at least 25 grams, and the ten year threshold quantity to at least 250 grams. The Commission believes that the penalty structure for crack cocaine offenses should more closely reflect the overall penalty structure established by the 1986 Act. Increasing the five year threshold quantity to at least 25 grams would provide a penalty structure significantly more consistent with the penalty structure of other major drugs which are abused.

If Congress were to increase the five year trigger quantity to 25 grams of crack cocaine, the sentencing guidelines would then assign a base offense level of 26 to offenses involving 25 to 100 grams of crack cocaine. Offense level 26 provides a guideline sentencing range of 63 to 78 months for defendants with minimal or no criminal history, and this would correspond to the five year mandatory minimum penalty. Federal law enforcement representatives have reported that mid-level crack cocaine traffickers deal in ounce or multi-ounce quantities and one ounce equals 28.5 grams.[15] The Commission therefore believes that the trigger quantity of 25 grams and a base offense level of 26 would more closely fit serious traffickers as described in the legislative history of the 1986 Act.

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[15] Memorandum from Toni P. Teresi, Chief, Office of Congressional Affairs, Drug Enforcement Administration, to Stacy Shrader, Office of Rep. Asa Hutchinson (March 8, 2001).

Such a change could result in a more desirable distribution of federal cases by drug quantity, with a significant proportion of cases then involving more substantial quantities. The Commission also recommends that (1) Congress repeal the mandatory minimum penalty for drug possession that is unique to simple possession of crack cocaine, and (2) conform the statutory definition of cocaine base to the sentencing guideline definition.

(2) Direct the commission to provide appropriate sentencing enhancements to target offenders who actually engage in certain more harmful conduct, and to make those enhancements applicable to offenses across all drug types.

Sentencing guidelines provide Congress a more finely calibrated mechanism to account for variations in offender culpability and offense seriousness than was available at the time the 100-to-1 drug quantity ratio was established in 1986. Commission sentencing data indicate that many of the heightened harms that in part formed the basis for the 100-to-1 drug quantity ratio are committed by a small minority of crack cocaine offenders. These harms warrant additional punishment and the sentencing guideline system could target those individuals who engage in this aggravated conduct and substantially increase their prison sentences. The Commission believes that adding sentencing enhancements to the drug trafficking guideline to address those harms will better achieve sentencing proportionality than accounting for them in quantity-based penalties. Specifically, we recommend that Congress direct the Commission to provide appropriate sentencing enhancements for:

(1) Involvement of a dangerous weapon (including a firearm);

(2) Bodily injury resulting from violence;

(3) An offense under 21 U.S.C. §§ 849 (Transportation Safety Offenses); 859 (Distribution to Persons Under Age Twenty-One), 860 (Distribution or Manufacturing in or Near Schools and Colleges), and 861 (Employment or Use of Persons Under 18 Years of Age);

(4) Repeat felony drug trafficking offenders; and

(5) Importation of drugs by offenders who do not perform mitigating roles.

The Commission also proposes that these sentencing enhancements apply across all drug types, including powder cocaine, and not just to crack cocaine offenses.

(3) Maintain the mandatory minimum penalties for powder cocaine offenses at their current levels, with the understanding that the proposed enhancements would apply to powder cocaine offenses.

The Commission also unanimously concludes that a restructuring of federal cocaine sentencing policy should *not* include an increase in the mandatory minimum penalties for powder cocaine offenses. Some have proposed increasing the powder cocaine mandatory minimum penalties as a way to address the differential treatment of the two forms of cocaine, and others have suggested doing so to reflect more adequately the harmfulness of the drug and its status as the necessary precursor to crack cocaine.

After considering all of the information available, however, the Commission finds there is **no persuasive evidence that the current quantity-based penalties for powder cocaine offenses are inadequate**. At the Commission's public hearing on cocaine sentencing on March 19, 2002, Deputy Attorney General Larry Thompson agreed that he was not aware of any specific information indicating that existing powder cocaine penalties are too low.[16]

[16] Testimony of Larry Thompson, Deputy Attorney General, U.S. Department of Justice, to the U.S. Sentencing Commission, March 19, 2002, at Tr. 71.

If powder cocaine penalties for some offenders should be raised, the Commission believes that the **proposed enhancements would both increase penalties and promote sentencing proportionality**. Those enhancements, if adopted, would increase the average sentences for those most culpable powder cocaine offenders who engage in such aggravating conduct by 29 months, from 79 months to 108 months.

Finally, the Commission is also mindful of the impact an increase in the mandatory minimum penalties for powder cocaine would have on minority populations, particularly Hispanics. One-half of federal powder cocaine offenders in 2000 were Hispanic, and 30.3% were African American. (*See* Figure 4.) The Commission does not want to create perceptions that could undermine confidence in a restructured federal cocaine sentencing policy.

Impact

The Commission believes that its suggestions are **a modest proposal** that would significantly improve the effectiveness of federal cocaine sentencing policy. The guideline sentencing ranges based solely on drug quantity for crack cocaine offenses still would be significantly longer (approximately two to four times longer) than for powder cocaine offenses involving equivalent drug quantities, depending on the precise quantity involved. The Commission finds that this differential is appropriate to account for certain systemic crime more often linked to crack cocaine than powder cocaine, such as prostitution.

The Commission estimates that the difference in average sentences for crack cocaine and powder cocaine offenses would narrow because of the effect of the decrease in average crack cocaine penalties and a corresponding increase in powder cocaine penalties. Specifically, the Commission estimates that the average sentence for crack cocaine would decrease from 118

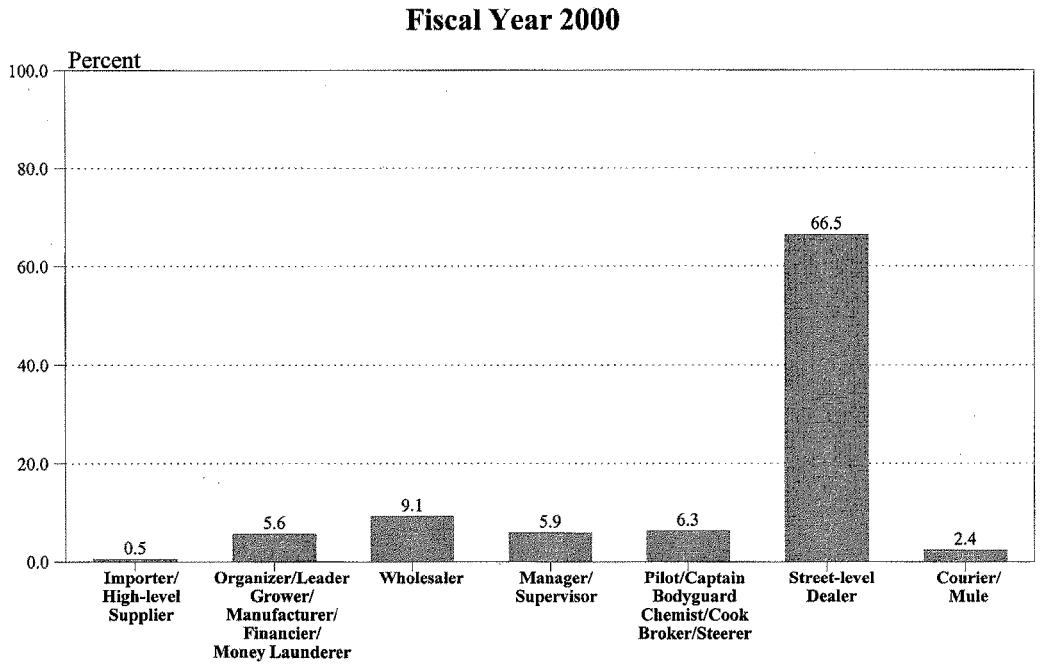
months to 95 months, and the average sentence for powder cocaine offenses would increase from 74 months to 83 months.

Sentences for crack cocaine offenses would still remain the longest of the major drugs of abuse. (*See* Figure 5). Furthermore, the recommendations would not alter the current hierarchy of average sentences by drug type. Average sentences currently are the longest for crack cocaine offenses, followed by methamphetamine, powder cocaine, heroin, and marijuana offenses, respectively. The recommendation would preserve this order.

Conclusion

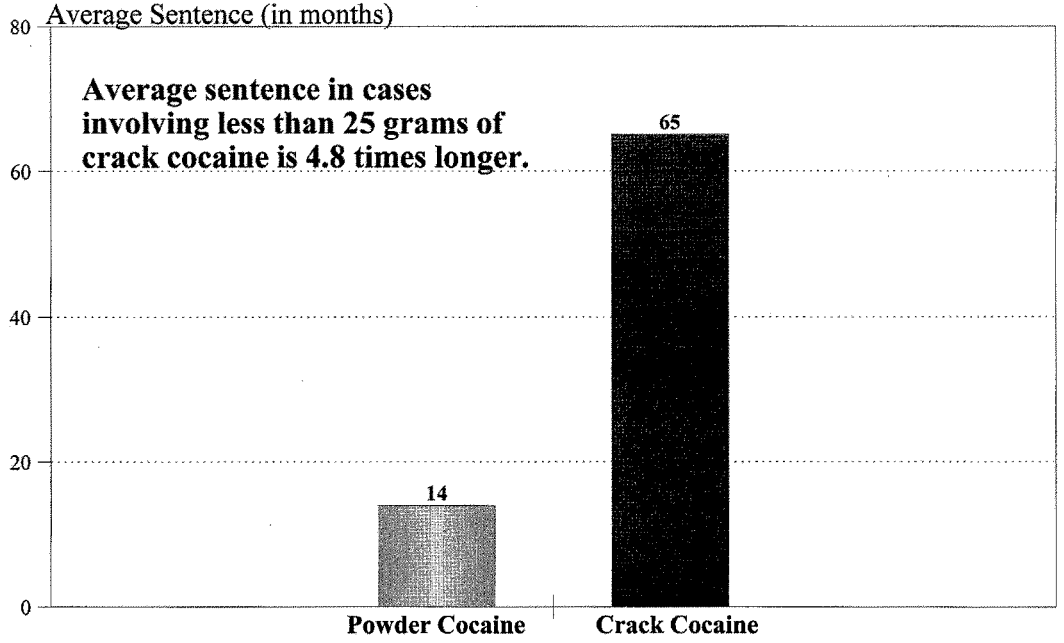
The Commission intends by the report it submits today to contribute in a meaningful way to the ongoing assessment of cocaine sentencing policy by Congress. The Commission is eager to continue its work with you to develop the most appropriate and effective federal cocaine sentencing policy possible. We hope you will agree that our report and recommendations are significant steps toward that end.

Figure 1
Offender Function in Crack Cocaine Cases



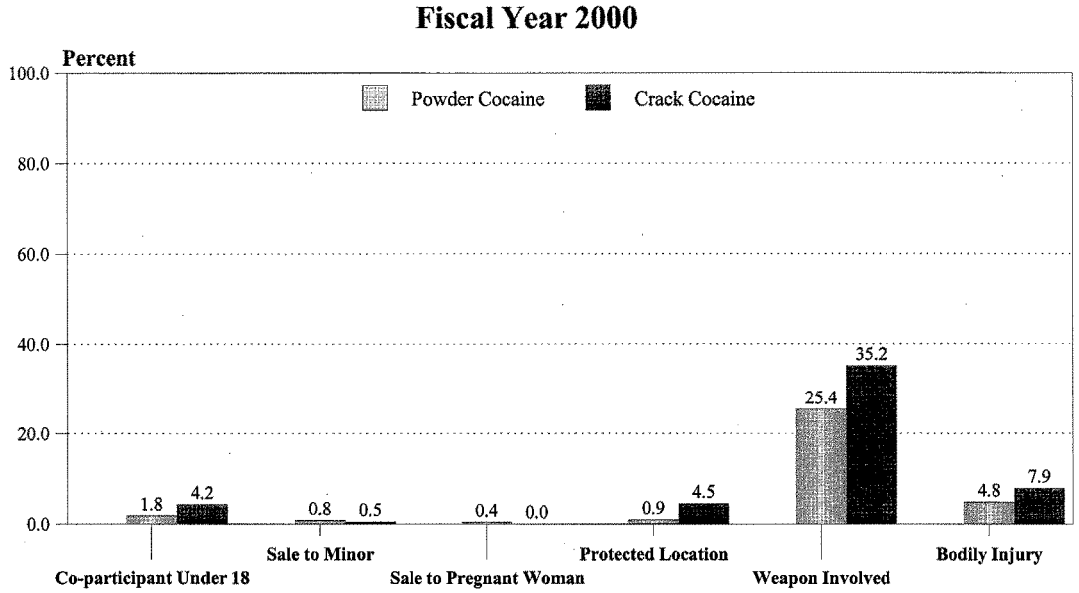
Not represented in the figure is a residual category which includes loaders, lookouts, and users involving 3.8% of crack cocaine cases.
SOURCE: U.S. Sentencing Commission, 2000 Drug Sample.

Figure 2
Cocaine Sentences for Quantities Less Than 25 Grams



SOURCE: U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties*, March 17, 2002.

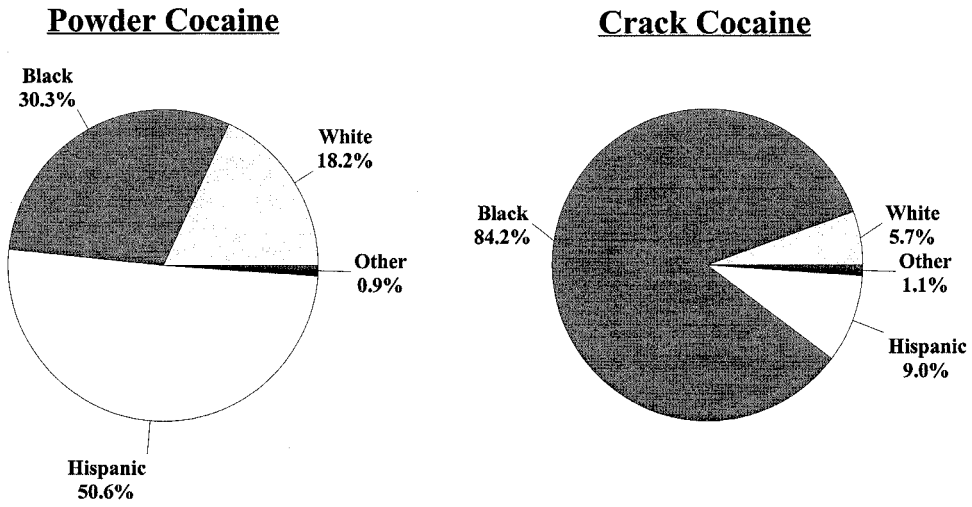
Figure 3
Offense Characteristics of Cocaine Offenders



SOURCE: U.S. Sentencing Commission, 2000 Drug Sample.

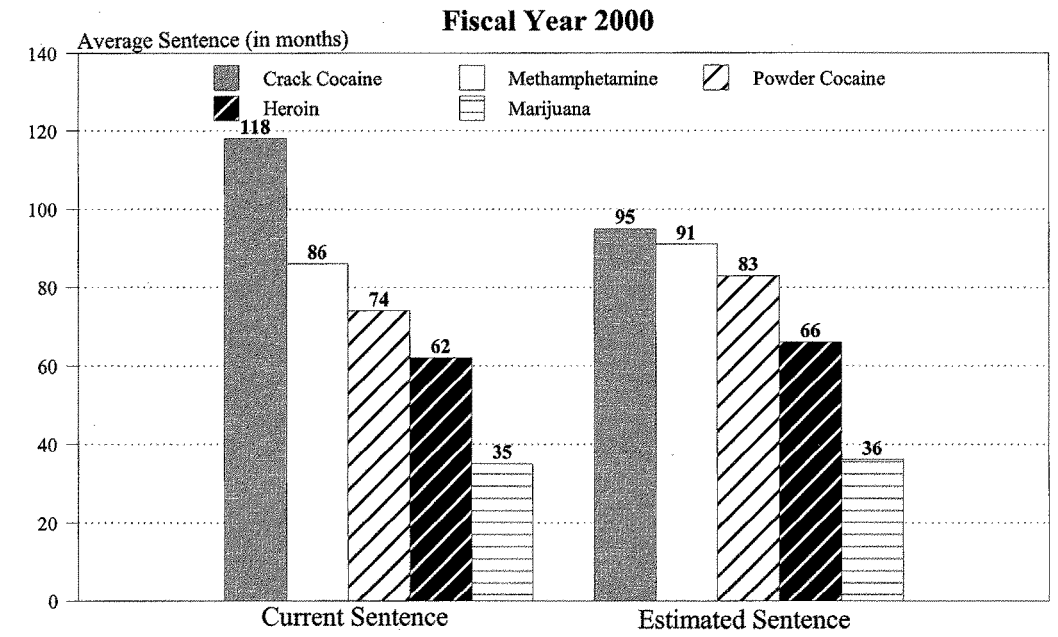
Figure 4
Race/Ethnicity of Cocaine Offenders

Fiscal Year 2000



SOURCE: U.S. Sentencing Commission, 2000 Sourcebook of Federal Sentencing Statistics.

Figure 5
Current and Estimated Sentences
Of All Major Drug Trafficking Offenders



Assumes crack cocaine mandatory minimum of 25 grams and enhancements for weapons, bodily injury, prior drug felony, and importation (for powder cocaine and crack cocaine only).
SOURCE: U.S. Sentencing Commission, 2000 Datafile, USSCFY00 and the Commission's Prison Impact Model.

The National Center on
Addiction and Substance Abuse
at Columbia University

May 20, 2002

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The Honorable Joseph R. Biden, Jr.
United States Senate
221 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I was heartened to hear that you will be holding a hearing this week to examine the disparity between the treatment of crack cocaine and powder cocaine offenses under federal law. What we have now is an unjust system in which individuals convicted with two virtually identical drugs are treated in a dramatically different fashion with little or no justification in science or criminal justice. The African American community has been savaged by this disparity for the past sixteen years. The time has come to amend the law.

When Congress passed the Anti-Drug Abuse Act of 1986, its intentions were good. There was enormous fear that crack was going to destroy inner cities and that something drastic was required. In the intervening years, we have learned that many of the assumptions made about crack--it is more addictive than powder cocaine, crack users are more violent than powder cocaine users, prenatal crack use would result in a generation of "crack babies"--are not true. In fact, what the scientific community now knows about crack simply does not support the current 100-to-1 sentencing disparity.

Individuals convicted with five grams of crack cocaine should be prosecuted at the state and local level; they do not belong in the federal criminal justice system and federal prisons. Those who need drug treatment should be diverted to a drug court or a Drug Treatment Alternative to Prison (DTAP) program like the one in New York operated by Kings County District Attorney Charles J. Hynes.

Your hearing will shed light on this important issue, and I urge Congress to reduce the sentencing disparity by decreasing crack penalties without increasing powder cocaine penalties.

Sincerely,

Joseph A. Califano, Jr.

STATEMENT OF WILLIAM G. OTIS
ADJUNCT PROFESSOR OF LAW
GEORGE MASON UNIVERSITY

FORMER WHITE HOUSE SPECIAL COUNSEL

FORMER ASSISTANT UNITED STATES ATTORNEY
EASTERN DISTRICT OF VIRGINIA

BEFORE THE

SUBCOMMITTEE ON CRIME & DRUGS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING, "FEDERAL COCAINE SENTENCING POLICY"

Thank you, Mr. Chairman and Senator Grassley, for the opportunity to speak with your Sub-Committee about a subject long debated in federal law, the differences between crack and powder sentencing. I agree with the Sentencing Commission that the present disparity should be addressed, but I do not believe the answer lies in giving a break to crack dealers. The answer, which the Senate correctly adopted a little more than two years ago, is to raise powder sentences by a modest amount.

At the outset, I want to say that reasonable minds may differ on this question. The Commission's view is sincere and conscientious. The same is true of the more balanced proposal sponsored by Senator Hatch and Senator Sessions, whose work to safeguard our citizens is a benchmark of public service. With all respect, I believe that in this instance, the better view is to maintain in full effect the crack sentences we have now.

This is so for several reasons. First, they are a major success story. Fifteen years ago, the crack wars were breeding rampant violence. Once safe and stable neighborhoods had become free-fire zones. That has changed. We have not entirely won the war on crack, but our progress has been considerable. As statutory minimum sentencing at the current levels began to kick in, dealers who in the past would have been back on the street after a few years instead remain our official guests. As they stay put behind bars, the rate of violent crime, so much of which was generated by crack gangs, has decreased every year since at least 1994. There are people alive today, probably by the dozens, who would have been casualties of the criminals we have kept locked up under these supposedly "excessive" sentences. At the minimum, it would be a precipitous gamble to change a sentencing regimen we know has helped keep us safer -- safer from drug

dependency and overdose deaths, not to mention gun-play and murder – until we have a better idea of how much additional crime will result form ratcheting down these sentences.

Second, much of the impetus for change, the idea that crack sentences are racially discriminatory, is misconceived. It is true that about 85% of crack offenders sentenced in the federal system are black. But it is also true that there are only 1% of blacks among the thousands of defendants sentenced for methamphetamine offenses, which likewise carry heavy mandatory minimum sentences: indeed, distribution of a particular quantity of actual methamphetamine carries the same mandatory sentence as distribution of that same quantity of crack. This tough meth sentencing is not explained by the system's having decided to be particularly harsh with those dealers because the vast majority of them are NOT African-American, any more than the toughness of the crack sentences is explained by the fact that the majority of those dealers ARE. The reason for the gravity of the sentences for both drugs is that, in both instances, Congress was properly concerned about the rapid spread of a dangerous and addictive substance whose distribution is strongly associated with violence.

That concern remains valid. The large percentage of African-Americans sentenced for dealing crack does not change the fact that today, as at the time the mandatory penalties were enacted, crack is an exceedingly harmful drug that doesn't know or care about the race of either those who deal in it or those who are victimized by it. Protecting ALL citizens from it continues to warrant the minimum sentences that Congress has prescribed and that are working. It would not be justice, but a burlesque of justice, for society to chip away at drug sentences we know have served us well, for reasons unrelated to the danger the drug poses. This would be true in all

events, but it is particularly true where sliding back to the old days of lighter crack sentences is most likely to damage the group – black citizens – in whose behalf it is supposedly undertaken. If we are to have a sentencing system engineered with one eye on race, which in my view we should not, at least we should keep that eye on the great majority of black people who want nothing more than their right to live in peace and safety, and who, I am quite sure, do not want crack-dealing criminals of any race to take that right away from them.

Finally, the Commission's proposal sends exactly the wrong message. As one prominent citizen noted in opposing an earlier Commission plan to lower crack sentences, "Trafficking in crack, and the violence it fosters, has a devastating impact on communities across America, especially inner city communities. Tough penalties for crack trafficking are required because of the effect on individuals and families, related gang activity, turf battles, and other violence....[W]e cannot stop now. We have to send a constant message to our children that drugs are illegal [and] dangerous....and the penalties for dealing drugs are severe. I am not going to let anyone who peddles drugs get the idea that the cost of doing business is going down."

These words of President Clinton were true when he spoke them a few years ago, and they are true today. If we are to reduce the disparity in sentencing, let's do it without letting anyone who deals in crack get the idea that the cost of doing business is going down.

Testimony for the May 22, 2002 hearing of the Subcommittee on Crime and Drugs of the Senate Judiciary Committee on "Federal Cocaine Sentencing Policy."

By: Charles R. Schuster, PhD.
Professor of Psychiatry and Behavioral Neurosciences
Director of the Addiction Research Institute
Wayne State University School of Medicine
Former Director of the National Institute on Drug Abuse

Thank you for giving me the opportunity to express my views as a scientist and substance abuse treatment provider about current federal cocaine sentencing policy.

In my role as the Director of the National Institute on Drug Abuse I appeared before congressional committees when the crack cocaine epidemic exploded in the 1980's to express my alarm and concern about the public health and social consequences of this form of cocaine use. My concern was based upon the following facts:

1. Cocaine is self-administered in the United States by one of the three routes: intranasal (snorting), intravenously or by smoking. Cocaine HCL (powder) is most commonly snorted and less often by dissolving it in water and injecting it intravenously. Cocaine HCL cannot be smoked, but when converted to the free base it can be smoked, but not snorted or injected. Crack is a form of free base cocaine.
2. Research has shown that drugs, or routes of administration that result in a rapid "high" are more likely to be abused, more likely to lead to addiction and self-administered at doses that produce adverse legal, financial, social and physical consequences.
3. The intravenous route is the most efficient route of administration, which produces an almost instantaneous "rush" followed by 20-40 minute period of euphoria and stimulation.
4. Snorting cocaine is less efficient route of administration necessitating the use of larger quantities of drug. Further, by this route of administration the onset of cocaine's euphoric high effects are of lesser magnitude and slower in onset requiring 15-20 minutes to reach their peak.
5. The quantity of cocaine that can be self-administered per unit time intravenously is much larger than that which can be self-administered intranasally. Cocaine taken intranasally limits its own absorption due to the fact that it causes vasoconstriction of the blood vessels in the mucosal lining of the nasal cavity. Thus the potential for toxic overdose problems is more likely when the individual uses the drug intravenously.

6. Cocaine powder cannot be smoked because it does not volatilize at temperatures below which the cocaine is destroyed.
7. Cocaine in the form of free base *can* be smoked because it volatizes at a low enough temperature.
8. Crack is a form of free base cocaine that is easily made from cocaine powder not requiring any equipment or knowledge that is not readily available.
9. Because of the ease with which it can be made and the fact that it can be more readily distributed in a smaller unit size than powder cocaine, it is sold in single dose units at prices which are easily affordable by the young and poor.
10. Smoked cocaine has all of the seductive pharmacological attributes of intravenous cocaine – a rapid, intense high – but without the necessity of putting a needle in your body. Cocaine's speed of onset is as fast if not faster when smoked than when injected. Like intravenous cocaine its seductive high leads to taking the drug repeatedly at short intervals often leading to toxic physiological and psychological consequences.

The research that crack had all of the addictiveness and dangers of intravenous cocaine led me to conclude that this form of cocaine could have a larger adverse public health and social impact since the proportion of our youth who would smoke a drug is larger than those willing to put a needle into their arm. I expressed this concern in my testimony before Congress when I served as the Director of NIDA.

In 1995 I gave testimony to the United States Sentencing Commission in which I restated my concerns about crack, but as well stated that there was no credible scientific evidence for equating the sentencing of individuals convicted of possession of 500 grams of cocaine powder with 5 grams of crack cocaine. I will summarize the facts that led me to this conclusion.

1. 500 grams of Cocaine HCL can be converted into 450 grams of crack using supplies and tools available in most every kitchen,
2. The physiological and psychoactive effects of cocaine are similar whether one is using crack cocaine or cocaine powder.
3. Research has shown that it is the route of administration which determines the speed of onset of a drug's effects, rather than the form of the drug that is of importance in determining the addictiveness and dangers of cocaine. The relevant comparison here is between smoked crack and intravenous cocaine powder since at equivalent doses these two routes lead to comparable speed of onset and intensity of effects.
4. It is essential to remember that once cocaine is absorbed into the blood stream and reaches the brain its effects on brain chemistry are identical whether it was smoked or injected. It is the speed of onset, the intensity

of the high that leads to its destructive use and powder injected is comparable to smoked crack in both of these dimensions.

5. Violence associated with cocaine is primarily attributable to competition between rival distribution networks. It is true however, that prolonged use of high doses of cocaine can produce a form of paranoid toxic psychosis in which aggressive acts are more likely. I know of no evidence, however, that this is more likely to occur after the use of crack as opposed to powder cocaine.

I remain concerned that the adverse public health and social consequences of crack cocaine use are potentially greater for crack than for powder cocaine. The ease with which crack can be smoked repeatedly makes it appealing to many who would not put a needle into their body. Thus, although individual risk may not vary between smoked and injected powder cocaine the numbers of people who are at risk of becoming addicted to crack, may be significantly greater. I therefore believe that we should retain some differential penalties for possession and distribution of crack as opposed to powdered cocaine. The 100 to 1 ratio which is currently in force is in my opinion not defensible. Based upon the analysis of Hatsukami and Fischman (JAMA, 1996) I believe that this ratio should be in the range of 3 to 1. To retain the current ration of 100 to 1 is simply not justified by any pharmacological or social science analysis.

For the Record

STATEMENT OF SENATOR JEFF SESSIONS BEFORE THE SUBCOMMITTEE ON CRIME AND DRUGS ON THE "FEDERAL COCAINE SENTENCING POLICY"

May 22, 2002

Mr. Chairman, thank you for holding this hearing on the very important subject of federal cocaine sentencing policy. I come to this subject with a background as a federal prosecutor who has prosecuted thousands of drug traffickers before

and after the mandatory minimums for crack and powder were established in 1986 and before and after the Sentencing Guidelines became effective in 1987.

As someone who has been on the front lines of the War on Drugs, I can positively state that we made progress. From 1982 (49.4%) to 1992 (27.1%), drug use among high school seniors fell by 45%.

[Johnston, L.D., O'Malley, P.M., & Bachman, J.G. (2001). *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2000.*]

I believe that drug use fell during that period because of a combination of things.

First, national and local leadership sent an unambiguous message that drug use was morally, legally, medically and physiologically bad. There was no ambiguity.

Second, Congress passed drug sentencing statutes that provided tough mandatory minimum sentences for drug traffickers.

Third, the Department of Justice worked with local law enforcement to prosecute substantially more drug traffickers and send them away for long mandatory minimum sentences. This combination of a clear message, aggressive prosecution, and tough

sentences for drug dealers helped drive drug use down. Our country benefitted from this. The War on Drugs was not lost.

A decrease in drug use meant fewer of our young people died of drug overdoses, young people like the late basketball star, Len Bias, fewer teenage boys committed murder to feed a crack habit, and fewer teenage

girls turned to prostitution to feed a powder cocaine habit.

Then for a few years, the message from our leader became unclear. From statements on MTV to defunding the drug czar's office, the message that drug use was not acceptable became blurred. And, not surprisingly, drug use among high school seniors from 1992 to 2000 rose 52%, from 27.1% in 1992 to 40.9% in 2000.

[Johnston, L.D., O'Malley, P.M., & Bachman, J.G. (2001). *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2000.*]

We in leadership positions today must decide what action we are going to take on the War on Drugs.

First, I believe that Senator Biden, myself, President Bush, the Sentencing Commission, and the Department of Justice stand united on the message that drug use is morally,

legally, and physiologically bad. It wastes lives, results in people going to prison, and can kill you. It is not cool. It is not funny. It is deadly. Drug use and addiction drives young girls into prostitution, it funds organized crime rings that murder witnesses and judges, and funds terrorists who viciously massacre innocent civilians.[*See* Statement of President George W. Bush, February 12, 2002.] For every drug dealer, pimp, gangster and terrorist

who is listening, hear this: Because we love our children, we will fight you and your drug trade, we will be relentless, and we will win.

Second, I applaud Attorney General John Ashcroft on the initiative he announced last year to increase prosecution of drug dealers. [*See* United States Department of Justice, FY2001-2006 Strategic Plan.] The more drug dealers who are off the streets, the more drug dealers who know that the risk of arrest and

prosecution is high, the less drug sales there will be. I have seen this during my tenure as a federal prosecutor. The number of drug dealers prosecuted does make a difference. Sending 10 drug dealers away for 5 years each does more to fight crime and drug abuse than sending 5 drug dealers away for 10 years each.

Third, Congress and the Sentencing Commission should address the statutory and guideline sentencing schemes, respectively, for drug crimes in a manner that is both tough minded and fair. As a federal prosecutor, I whole heartedly supported the tough mandatory minimum sentences for drug criminals that Congress enacted in the 1980s. I still support mandatory minimum sentences. These tough sentences

have taken thousands of violent, recidivist criminals off the street.

With respect to crack and powder cocaine, I, as a prosecutor, agreed with many in the law enforcement community in 1986 to support a 5-year mandatory minimum sentence for 5 grams of crack and for 500 grams of powder. The purpose of supporting the same 5-year sentence for such different amounts of essentially the

same drug was based in large part on an effort to stop the rapid spread of crack into African-American neighborhoods. It was also based on the fear that pregnant women on crack would make their babies addicts – this was the "crack baby" phenomenon. Further, the difference in the 5 gram and 500 gram trigger points for the same 5-year sentence was based on the greater degree of violence and weapons use associated with crack.

In 2002, we can reflect on whether the 1986 trigger points are still supported by the rationales that we used 16 years ago. I have concluded that they are not. The 5-gram trigger point for crack failed to keep crack out of African American neighborhoods. Further, the scientific evidence now suggests that pregnant women on powder cocaine have the same chance of making their babies addicts as pregnant women on crack.

Moreover, the Sentencing Commission reports that 84% of defendants sentenced for trafficking crack are African Americans, while only 30.5% of the defendants sentenced for powder are African American. [*2002 Report to the Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 22, 2002.]

Thus, the 5-gram trigger point for crack that was intended to protect African Americans has resulted in heavy penalties for African Americans, penalties that lack a rational basis.

As a former federal prosecutor who sent numerous drug dealers to prison for long sentences, it is my considered opinion that the 100-to-1 differential between crack and powder in the

trigger points for the 5-year mandatory minimum sentence is no long justified. We should change it.

Many proposals for changing the mandatory minimum have been made in the last several years. On the one hand, the current Sentencing Commission and some of my colleagues on the left have recommended that we close the gap between crack and powder solely by

raising the trigger point on crack from 5 grams to 25 grams.

On the other hand, the current Department of Justice and some of my colleagues on the right support narrowing the gap solely by lowering the trigger point on powder from 500 grams to as low as 50 grams.

In 1997, the Sentencing Commission, Attorney General Reno,

and President Clinton's Drug Czar McCaffrey took the middle approach by recommending an increase in the trigger point for crack from 5 grams to around 25 grams and a decrease in the trigger point for powder from 500 grams to around 250 grams — a significant increase for powder cocaine.

After talking with a number of career federal prosecutors who have

prosecuted a number of crack and powder cases, I introduced legislation in 2002, along with Senator Hatch — legislation that my experience led me to conclude was sound. It is a middle ground approach. It would adjust the trigger points for both crack and powder, and it would be consistent with the Reno-McCaffrey approach. My bill would raise the trigger point for the 5-year mandatory minimum sentence for crack from 5 grams to 20

grams and would lower the trigger point for powder from 500 grams to 400 grams. Remember, 400 grams is almost one pound of what may be pure cocaine. I believe this is a fair approach to reducing the disparity between the intent of the 1986 Act and the reality of its result.

And, we must remember that keeping a dealer with 400 grams of powder of the street is important. 400 grams of cocaine will sell for $10,000 - $20,000 on the streets. This is not a small time user/dealer.

I look forward to hearing from Judge Murphy of the Sentencing Commission, Roscoe Howard of the Department of Justice and our other distinguished witnesses. I would hope

that the politics of the left or the right does not keep us from a fair evaluation of this issue and adjusting the sentencing statutes if the facts show that such change is justified.

The plain fact is that in enacting the sentencing guidelines, Congress took control of sentencing. Since we control sentencing, we cannot escape the responsibility of reviewing the impact of our handiwork. On the

whole, the guidelines have worked extremely well, being rational and consistent. As for the crack and powder sentencing, it cannot be justified. Let's fix it.

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