

Testimony of

The Honorable Patrick Leahy

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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.