

Testimony of Asa Hutchinson

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Before the Senate Judiciary Committee

Chairman Durbin, Ranking Member Graham and Members of the Committee, it is my privilege to return to this Committee and to testify in support of Congressional action to reduce the sentencing disparity between crack and powder cocaine.

As a young federal prosecutor in Arkansas in the early 1980s, I aggressively prosecuted cocaine offenses. High quality powder cocaine was coming straight from Columbia to New York and then to rural areas of the country such as Arkansas. It seemed that no community or family was exempt from the threat of cocaine abuse and addiction. Shortly thereafter, in 1986, Congress passed the Anti-Drug Abuse Act of 1986, which toughened the criminal penalties for cocaine but also created the crack-powder disparity in sentencing.

The law established mandatory penalties for crack cocaine offenses and codified a 100-to-1 different penalty structure for crack as compared to powder cocaine. The result is that defendants convicted with just 5 grams of crack cocaine, the weight of less than 2 sugar packets, which yields about 10 to 50 doses, are subject to a five-year mandatory minimum sentence. For powder cocaine, the same 5 year mandatory minimum is not triggered unless the offense involves 500 grams, which equals between 2,500 and 5,000 doses. In addition, the 10 year mandatory minimum is triggered at differing levels resulting in the same 100-to-1 disparity.

Legislative history indicates that Congress created this distinction in sentencing structures because of its belief that crack cocaine was particularly addictive and associated with greater levels of violence than was powder cocaine. More than two decades of experience has given us a different perspective. The facts and the passage of time have built a growing consensus that the

sentencing disparity is fundamentally unfair; has a disparate racial impact and undermines the perception of fairness and the integrity of our criminal justice system.

I am not a new convert on this issue. Ten years ago, as a member of Congress and a member of the House Judiciary Committee, I joined with Congressman Bobby Scott and others to express concern about the unfairness of the crack powder disparity. In 2001, I was appointed by President George W. Bush as Administrator of the U.S. Drug Enforcement Administration, and I continued my efforts to reduce this distinction.

While at the DEA, I looked closely at the sentencing disparity and particularly the arguments supporting the enhanced penalties for crack cocaine. Contrary to the legislative concerns of over 20 years ago, research clearly shows that the addictive properties of crack have more to do with the fact that crack is typically smoked than with its chemical structure.¹ There remains a justified concern about the level of violence associated with crack, but recent studies show that the violence is stable or even declining.²

As the lead drug enforcement official in the nation, I also did not want to do anything that would undermine the progress we were making in reducing the availability of illegal drugs in this country. As I talked to front line agents and drug task force officers, there was recognition that the current disparity was undermining confidence in the fairness of the criminal justice system. This makes it harder for the street agent to receive cooperation from informants and cooperating individuals. It also erodes the credibility of law enforcement and diminishes the ability to get jury convictions. The strength of our system of justice is totally dependent on the perception of fairness and the acceptance of penalties by the general public as being largely just. When significant numbers of African Americans question the fairness of our criminal justice

¹ See e.g. U.S. Sentencing Commission, 2007, Report to the Congress, at 63, note 1 (linking risk of addiction to mode of administration).

² See id. at 86-87 (reporting research showing declines in level of violence).

system, then it becomes more difficult for the officer on the street to do his or her duty under the law. Under the current disparity, the credibility of our entire drug enforcement system is weakened.

Perhaps the easier part of this debate is to convince policy makers that the current disparity is unfair and needs to be changed. The more difficult aspect is to answer the tougher questions of how to address the issue of retroactivity for any change and whether to completely eliminate the disparity or to reach some compromise.

Let me just offer my views:

1. On the issue of retroactivity, I applaud the Congress for not reversing the retroactive application of the changes made by the Sentencing Commission last fall. As Judge Reggie Walton has said, "I just don't see how it's fair that someone sentenced on October 30th gets a certain sentence when someone sentenced on November 1 gets another." The most strenuous objection to the retroactive application comes from my former colleagues at Justice Department who are concerned about the attorney and court resources that are required when a change is made. First, the individualized review of each case by the Court is important and necessary to assure that violent or dangerous criminals are not released. In terms of resources, this legitimate concern should not be minimized but it should be answered by additional attorney resources in the jurisdictions with the greatest caseload.

2. In terms of adjusting the mandatory minimum sentences, I would suggest that the mandatory minimum sentences required of cocaine traffickers be directed more clearly to those that are engaged in the business of drug trafficking. Presently, the primary determining factor is the quantity of drugs. The quantity trigger has proven to be an unreliable ally in focusing federal resources on the most serious offenders. Research has shown that the 5 grams

of crack set by Congress as the trigger for a 5 year mandatory sentence is not a quantity associated with anything but a small time street peddler. Quantity should be one factor but other factors should be considered to more particularly target federal resources toward mid and high level drug dealers. Congress should require additional factors indicating higher levels of culpability in order to trigger the mandatory minimum sentences. I would encourage Congress to listen carefully to the expertise of the DEA in determining the additional factors.

3. Finally, whatever Congress does in terms of changes to the sentencing structure should be given time to work, and then the Sentencing Commission should be directed to report to Congress assessing the impact of the changes and recommending any necessary adjustments to continue down the path of fundamental fairness.

I appreciate the opportunity to appear before the Committee and I am happy to answer any questions.