

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE REGGIE B. WALTON

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA



BEFORE

THE SUBCOMMITTEE ON CRIME AND DRUGS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

**“RESTORING FAIRNESS TO FEDERAL SENTENCING: ADDRESSING THE
CRACK-POWDER DISPARITY”**

April 29, 2009

Thank you for affording me the opportunity to appear before you today on behalf of the Judicial Conference of the United States. In recent years, the disparity between crack and powder cocaine sentences has been a subject of great interest to the Criminal Law Committee (upon which I serve as a member) and the Judicial Conference. Of course, it is not surprising that this should be an issue of concern for the judiciary. Crack has long been a contentious subject, a specter that has haunted the federal criminal justice system for more than twenty years.

In June 2006, the Criminal Law Committee discussed the fact that 100 times as much powder cocaine as crack is required to trigger the same five-year and ten-year mandatory minimum penalties, resulting in crack sentences that are 1.3 to 8.3 times longer than their powder equivalents.¹ Noting that most informed commentators agree that the ratio between crack and powder is unwarranted,² the Committee concluded that this disparity between sentences was unsupportable, and undermined public confidence in the criminal justice system. Upon the Committee's recommendation, in September 2006, the Judicial Conference voted to "oppose the

¹See U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 19 (Mar. 17, 2002), available at http://www.usdoj.gov/olp/cocaine.pdf/crack_powder2002.pdf.

²See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007) [hereafter, U.S. SENTENCING COMM'N, 2007 REPORT]. The Sentencing Commission noted that:

Federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission.

Id. at 2.

existing differences between crack and powder cocaine sentences and support the reduction of that difference.”³

I conveyed that view on behalf of the Criminal Law Committee at a Sentencing Commission hearing on cocaine sentencing policy in November 2006.⁴ In 2007, the Sentencing Commission, implementing the policy conclusions that follow from its series of special congressional reports on cocaine and sentencing policy,⁵ amended downward the guideline for crack cocaine.⁶ Congress, with virtually no debate or opposition, permitted the amendment to become effective on November 1, 2007.

Soon thereafter, I testified before the Commission on the issue of retroactive application of the guideline amendment for crack.⁷ I told the commissioners that the Criminal Law Committee wrestled with the question. On one side of the matter, there were considerations of fundamental fairness and an opportunity to undo a little of the harm that had been wrought by

³JCUS-SEP 06, p. 18.

⁴*Public Hearing on Cocaine Sentencing Before the U.S. Sentencing Comm’n* 103-111 (Nov. 14, 2006) (testimony of Judge Reggie B. Walton), available at <http://www.ussc.gov>.

⁵The Commission has repeatedly condemned the crack-powder disparity in its reports to Congress. See, e.g., U.S. SENTENCING COMM’N, 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Feb. 1995); U.S. SENTENCING COMM’N, 1997 SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Apr. 1997); U.S. SENTENCING COMM’N, 2002 REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002) [hereafter, U.S. SENTENCING COMM’N, 2002 REPORT]; U.S. SENTENCING COMM’N, 2007 REPORT, *supra* note 2.

⁶Notice of Submission to Congress of Amendments to Sentencing Guidelines Effective November 1, 2007, 72 Fed. Reg. 28558 (May 21, 2007).

⁷*Public Hearing on Retroactivity Before U.S. Sentencing Comm’n* 14-20 (Nov. 13, 2007) (testimony of Judge Reggie B. Walton), available at <http://www.ussc.gov>.

two decades of too-severe crack guidelines; but on the other, there were serious concerns about community safety and practical implications for the workload of the federal judiciary. The representation of the Probation and Pretrial Services Chief's Advisory Group that probation offices can handle the anticipated increased workload was a key consideration in the Criminal Law Committee's decision. Eventually, however, we concluded that fundamental fairness compelled the retroactive application of the guideline amendment.⁸

The words "equal justice under law" – words etched into the rock of the west pediment of the Supreme Court of the United States – are not mere rhetoric; they are the expression of a principle that lies at the heart of the rule of law. In a nation of laws, similarly situated offenders should receive the same treatment under the law. Indeed, parity in punishment was the paramount objective of the Sentencing Reform Act of 1984.⁹ Therefore, if, as the Commission explained in justifying its amendment, "the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act,"¹⁰ then the same logic applies to those who were sentenced last year, or five years ago, as to those who will be sentenced for crack tomorrow. It is not often that courts are afforded the opportunity to ameliorate the wrongs of the past; however, by unanimously voting to apply the guideline

⁸Letter from Judge Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the U.S., to Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n (Nov. 2, 2007), *available at* <http://www.ussc.gov>.

⁹*See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 79 (2004) ("Eliminating unwarranted sentencing disparity was the primary goal of the Sentencing Reform Act.").

¹⁰U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 2, at 8.

amendment retroactively, effective March 3, 2009¹¹ the Commission was able to undo some of the injustices associated with crack sentencing.

This was a courageous and promising first step in ameliorating the disparity that exists between crack and powder sentences. But as the Commission itself acknowledged, the promulgation of the guideline amendment was only a partial solution to a much-larger problem, and the ultimate solution lies with Congress.¹² Congress, as well as the courts and the Sentencing Commission, has been interested in the sentencing disparity between crack and powder cocaine. In the 110th Congress, there were three different crack-powder sentencing bills introduced in the Senate¹³ and five in the House of Representatives.¹⁴ I testified before the Senate Judiciary

¹¹ See Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Comm'n Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), available at <http://www.ussc.gov>; See also Memorandum from Judge Julie E. Carnes, Chair, Committee on Criminal Law of the Judicial Conference of the U.S. and Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n to members of the federal judiciary (Feb. 20, 2009), available at <http://www.ussc.gov/TRAINING/DIR8-025.pdf>.

¹² *Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity* 1 (Feb. 12, 2008)(testimony of Ricardo H. Hinojosa, Chair, United States Sentencing Commission), available at http://www.ussc.gov/testimony/Hinososa_Testimony_021208.pdf. ("Although the Commission took action this past year to address some of the disparity existing in the federal sentencing guideline penalties for crack cocaine offenses, the Commission is of the opinion that any comprehensive solution to the problem of federal cocaine sentencing policy requires revision of the current statutory penalties and therefore must be legislated by Congress"). *Id.* at 1.

¹³ See Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, S. 1711; Drug Sentencing Reform Act of 2007, S. 1383; Fairness in Drug Sentencing Act of 2007, S. 1685.

¹⁴ See Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, H.R. 4545; Crack-Cocaine Equitable Sentencing Act of 2007, H.R. 460; Powder-Crack Cocaine Penalty Equalization Act of 2007, H.R. 79; Fairness in Cocaine Sentencing Act of 2008, H.R. 5035; H.R. 4842.

Committee's Subcommittee on Crime and Drugs on the issue of cocaine sentencing on February 12, 2008,¹⁵ and before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security about the issue on February 26, 2008.¹⁶

Congress established the crack-powder disparity with the passage of the Anti-Drug Abuse Act of 1986.¹⁷ It did so not to frustrate the goal of eliminating unwarranted sentencing disparity in the federal courts,¹⁸ but because it held a particular set of beliefs about crack cocaine. For example, the record reflects Congress's concern that crack cocaine was uniquely addictive,¹⁹ was associated with greater levels of violence than was powder cocaine,²⁰ and was especially damaging to the unborn children of users.²¹

¹⁵*Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity* (Feb. 12, 2008)(testimony of Judge Reggie B. Walton), *available at* http://www.uscourts.gov/Press_Releases/walton_testimony_001.pdf.

¹⁶*Cracked Justice—Addressing the Unfairness in Cocaine Sentencing* (Feb. 26, 2008) (testimony of Judge Reggie B. Walton), *available at* http://www.uscourts.gov/newsroom/walton_hjc_feb_26_001.pdf.

¹⁷Pub. L. 99-570, 100 Stat. 3207 (1986).

¹⁸*See, e.g.*, 18 U.S.C. § 3553(a)(6)(2007) (“The Court, in determining the particular sentence to be imposed, shall consider...the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”).

¹⁹*See, e.g.*, U.S. SENTENCING COMM’N, 2002 REPORT 93 (“Crack cocaine can only be readily smoked, which means that crack cocaine is always in a form and administered in a manner that puts the user at the greatest potential risk of addiction.”).

²⁰*See id.* at 100 (“An important basis for the establishment of the 100-to-1 drug quantity ratio was the belief that crack cocaine trafficking was highly associated with violence generally.”).

²¹*See id.* at 94 (“During the congressional debates surrounding the 1986 Act, many members voiced concern about the increasing number of babies prenatally exposed to crack cocaine and the devastating effects such exposure causes.”).

I understand the circumstances under which Congress passed the 1986 Act because many of those same beliefs about crack cocaine were in force during the late 1980s, when I served as the White House's Associate Director of the Office of National Drug Control Policy. But twenty years of experience has taught us all that many of the beliefs used to justify the 1986 Act were wrong. Research indicates that the addictive properties of crack have more to do with its typical mode of administration than with its chemical structure.²² The national epidemic of crack use that many of us feared never actually materialized,²³ and recent studies suggest that levels of violence associated with crack are stable or even declining.²⁴

Because experience has shown that many of the foundations of the 1986 Act were flawed, and because the existing disparity may actually frustrate (instead of advance) the goals of the Sentencing Reform Act,²⁵ there is now almost universal support in the United States to reduce the existing sentencing disparity between crack and powder cocaine.²⁶

The Judicial Conference is to be counted among those entities calling for a reduction or elimination of the disparity.²⁷ After all, the federal courts must be fundamentally fair, but they

²²See, e.g., U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 2, at 63 (linking risk of addiction to mode of administration).

²³See *id.* at 72-76 (noting that use of crack has been stable in recent years).

²⁴See *id.* at 86-87 (reporting research showing declining levels of actual violence).

²⁵See *id.* at 8 (“[T]he Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.”).

²⁶See *supra* note 2 and accompanying text.

²⁷JCUS-SEP 06, p. 18.

must also be *perceived as fair* by the public. And today, that is not always the case. Today, some citizens believe that federal statutes (and the courts that interpret those statutes) have racial underpinnings.

I do not believe that the 1986 Act was intended to have a disparate impact on minorities, but while African-Americans comprise approximately only 12.3 percent of the United States population in general,²⁸ they comprise approximately 81.8 percent of federal crack cocaine offenders, but only 27 percent of federal cocaine powder offenses.²⁹ (Hispanics, though, account for a growing proportion of powder cocaine offenders. The U.S. Sentencing Commission noted in its 2007 report to Congress that “[i]n 1992, Hispanics accounted for 39.8 percent of powder cocaine offenders. This proportion increased to over half (50.8%) by 2000 and continued increasing to 57.5 percent in 2006.”³⁰) Furthermore, because crack offenses carry longer sentences than equivalent powder cocaine offenses,³¹ African-American defendants sentenced for cocaine offenses wind up serving prison terms that are greater than those served by other cocaine defendants.³² I have a concern that disparate impact of crack sentencing on African-American

²⁸www.census.gov/main/www/cen2000.html (follow American Fact Finder; then follow Fact Sheet link).

²⁹U.S. SENTENCING COMM’N, 2007 REPORT, *supra* note 2, at 15 (“Historically the majority of crack cocaine offenders are black, but the proportion steadily has declined since 1992: 91.4 percent in 1992, 84.7 percent in 2000, and 81.8 percent in 2006.”).

³⁰*Id.*

³¹*See supra* note 1 (noting crack sentences that are 1.3 to 8.3 times longer than their powder equivalents).

³²*See, e.g.,* U.S. SENTENCING COMM’N, 2007 REPORT, *supra* note 2, at B-18 (“In 1986, before the enactment of the federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11 percent higher than for

communities shapes social attitudes. When large segments of the African-American population believe that our criminal justice system is in any way influenced by racial considerations, our course are presented with serious practical problems. People come to doubt the legitimacy of the law – not just the law associated with crack – but *all* laws. People come to view the courts with suspicion, as institutions that mete out unequal justice, and the moral authority of not only the federal courts, but all courts, is diminished. I have experienced citizens refusing to serve on juries, and there are reports of juries refusing to convict defendants.³³

For these practical reasons, the Judicial Conference strongly supports legislation to reduce the sentencing disparity between crack and powder cocaine. The Criminal Law Committee and the Judicial Conference have no established view on whether the disparity should be reduced by raising penalties for powder, reducing penalties for crack, or through some combination of both approaches,³⁴ but Congress may find it prudent to reconsider whether existing minimum penalties

whites. Four years later, the average federal drug sentence for African Americans was 49 percent higher than for whites.”).

³³See William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1282 (1996) (“Moreover, the 100:1 ratio is causing juries to nullify verdicts. Anecdotal evidence from districts with predominantly African-American juries indicates that some of them acquit African-American crack defendants whether or not they believe them to be guilty if they conclude that the law is unfair.”) (citing Jeffrey Abramson, *Making the Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at A15); Symposium, *The Role of Race-Based Jury Nullification in American Criminal Justice*, 30 J. MARSHALL L. REV. 911 (1997).

³⁴For a discussion of specific legislative recommendations, see, e.g., U.S. SENTENCING COMM’N, 2007 REPORT, *supra* note 2, at 8-9.

are necessary to achieve the goals of sentencing. Eliminating statutory minimum penalties would be consistent with the parsimony provision of the Sentencing Reform Act.³⁵

Doing so would also address the Judicial Conference's longstanding opposition to mandatory minimum penalties.³⁶ For more than thirty years, it has been the view of the Judicial Conference that mandatory sentences unnecessarily prolong the sentencing process, increase the number of criminal trials, engender additional appellate review, and increase the expenditure of public funds without a corresponding increase in benefits.³⁷ Accordingly, as a general matter, the Conference favors legislation that leaves sentencing decisions to judges. Any legislation that increases the drug weights required to trigger mandatory minimum penalties would be consistent with Judicial Conference policy inasmuch as it narrows the pool of defendants subjected to mandatory minimum provisions.

Although at the time of preparing my written testimony I am not aware of any cocaine sentencing legislation heretofore introduced in the 111th Congress, I believe there are reasons to be optimistic about meaningful change in this area. The new administration counts the crack-powder disparity among the civil rights issues in need of reform, writing that "the disparity

³⁵See 18 U.S.C. § 3553(a) (2007).

³⁶See, e.g., JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93; JCUS-MAR 90, p. 16; JCUS-SEP 91, p. 56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 94, p. 42; JCUS-SEP 95, p. 47 (all opposing mandatory minimum sentences).

³⁷JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93.

between sentencing crack and powder-based cocaine is wrong and should be completely eliminated.”³⁸

Because the Sentencing Commission has already taken a preliminary step in that direction, we know that the reform of federal cocaine sentencing is possible, and that it can be implemented in a coordinated manner. When the Commission voted to apply the crack guideline reduction retroactively, two national “crack summits” were quickly convened, providing judges, probation officers, prosecutors, and defense counsel with information and a forum to plan for the smooth processing of retroactivity motions.³⁹ In the year that has passed, the courts have already reviewed more than 19,000 motions for sentencing modification pursuant to Amendment 706.⁴⁰

Despite the Criminal Law Committee’s concerns about workload, the courts have managed ably and the majority of the eligible cases have already been reviewed. Similarly, despite the Committee’s concerns about public safety, the available data suggest that recidivism rates among those whose sentences were reduced are no higher than relevant comparison

³⁸White House Agenda, Civil Rights, *available at* http://www.whitehouse.gov/agenda/civil_rights/.

³⁹*See National Summits Help Federal Courts Prepare for Sentence Reduction Requests, THE THIRD BRANCH* (Feb. 2008), *available at* http://www.uscourts.gov/ttb/2008-02/national_summit.cfm.

⁴⁰*See* U.S. SENTENCING COMM’N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT (March 2009), *available at* http://www.ussc.gov/USSC_Crack_Cocaine_Retroactivity_Report_Mar2009.pdf.

groups.⁴¹ These facts suggest that the reform of federal cocaine sentencing can be done in a safe and efficient manner.

I would like to thank you for the opportunity to testify before you today. The disparity in crack and powder sentences is an important issue with practical consequences for the federal courts. I believe that existing cocaine policy in general, and the 100-to-1 ratio in particular, has a corrosive effect upon the public's confidence in the federal courts. As a representative of the Judicial Conference and as a sentencing judge who is regularly called upon to impose sentences on crack defendants, I urge Congress to pass legislation that would reduce the disparity between crack and powder cocaine sentences.

I thank you for your attention and would be happy to answer any questions that you might have.

⁴¹ Analysis conducted by the Administrative Office of the United States Courts of the Probation/Pretrial Services Automated Case Tracking System (PACTS) on April 17, 2009 revealed that of the inmates who have received reductions in their sentences, 6,968 have already commenced their terms of supervised release. Of these, 1,193 (17.1%) have had violations reported and 44 (0.6%) have had their supervision revoked as a result of a new arrest. The average revocation rate for federal offenders on terms of supervised release for new arrest is approximately 12.5%. *See* Table E-7A, Federal Probation System, Post Conviction Cases with and without Revocation, by Type, available at: http://jnet.ao.dcn/img/assets/6312/E7A_Ending12312008.pdf.