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, TERRORISM, AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED

"CRACKED JUSTICE - ADDRESSING THE UNFAIRNESS IN COCAINE SENTENCING"

February 26, 2008

Thank you for affording me the opportunity to appear before you today on behalf of the Judicial Conference of the United States and to convey my own experience and perspectives on this very important matter. The disparity between sentences imposed for powder-form cocaine and cocaine base ("crack") is one of the most serious challenges facing the federal criminal justice system today, and I am grateful for the chance to share the views of the courts.

Most informed commentators now agree that the infamous 100-to-1 ratio between crack and powder is unwarranted,[1] but legislative remedies have proved elusive. Some believe that the answer lies in reducing the penalties associated with crack; others believe that the answer lies in increasing the penalties associated with powder; others believe that the penalties associated with powder should be increased *and* that crack penalties should be reduced. Any of these approaches, if adopted by Congress, will have reverberating consequences for the criminal justice system: while the Sentencing Commission estimates that there are 19,500 inmates eligible for sentence reduction, there are more than 26,383 inmates in the custody of the Bureau of Prisons whose offenses involved crack[2] (approximately 13 percent of the total prison population).[3]

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[1]*See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007) [hereafter, U.S. SENTENCING COMM'N, 2007 REPORT].

> 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.

[2]*See* U.S. SENTENCING COMM'N, *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive* (Oct. 3, 2007), *available at* http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf.

[3]Federal Bureau of Prisons, Inmate Population as of December 29, 2007, was 199,616 http://www.bop.gov/news/quick.jsp. In 2006, there were 5,397 individuals sentenced in federal

In recent years, the disparity between crack and powder cocaine sentences is a subject that has captured the attention of the Criminal Law Committee (of which I am a member) and the Judicial Conference. 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.[4] The Committee concluded that the disparity between sentences was unsupportable, and that it undermined public confidence in the courts. Upon the Committee's recommendation, in September 2006, the Judicial Conference voted to "oppose the existing differences between crack and powder cocaine sentences and support the reduction of that difference."[5] I conveyed that view on behalf of the Criminal Law Committee at a Sentencing Commission hearing on cocaine sentencing policy in November 2006.[6] In 2007, the Sentencing Commission, implementing the policy conclusions that follow from its series of special congressional reports on cocaine and sentencing policy,[7] amended downward the guideline for

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courts for crack, compared to 5,744 sentenced for powder cocaine. Between 1996 and 2006, the number of sentenced crack offenders ranged from 4,350 to 5,397. U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at 12 (Figure 2-1).

[4]*See* 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

[5]JCUS-SEP 06, p. 18.

[6]*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.

[7]The 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

crack cocaine.[8] And Congress, with virtually no debate or opposition, permitted the amendment to move forward and become effective on November 1, 2007.

Soon thereafter, I testified before the Commission on the issue of retroactive application of its guideline amendment for crack.[9] The Criminal Law Committee of the Judicial Conference recommended that the amendment should be made retroactive,[10] and on December 11, 2007, the Commission voted unanimously to apply the guideline retroactively.[11] This was a courageous and promising first step in ameliorating the disparity that exists between crack and powder sentences. But as the Commission itself acknowledges, the promulgation of the guideline amendment was only a partial solution to a much-larger problem, and the ultimate solution lies with Congress. I testified before the Senate Judiciary Committee's Subcommittee on Crime and Drugs on the issue of cocaine sentencing on February 12, 2008,[12] and am pleased to see the

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REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002); U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1.

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

[9]*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.

[10]Letter 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.

[11]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.

[12]*Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity Before the Subcomm. on Crime and Drugs of the Senate Comm. on Judiciary,* 110th Cong. (Feb. 12, 2008)(testimony of Judge Reggie B. Walton), *available at* http://judiciary.senate.gov/pdf/08-02-12Crack-Powder-WaltonTestimony.pdf

House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security taking up this important issue, as well.

Congress established the crack-powder disparity with the passage of the Anti-Drug Abuse Act of 1986.[13] Legislative history suggests that it did so not out of contempt for the Sentencing Reform Act of 1984 (which, *inter alia*, sought to eliminate unwarranted sentencing disparity in the federal courts),[14] 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,[15] was associated with greater levels of violence than was powder cocaine,[16] and was especially damaging to the unborn children of users.[17]

I understand the circumstances under which Congress passed the 1986 Act because many

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[13]Pub. L. 99–570, 100 Stat. 3207 (1986).

[14]*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"); 28 U.S.C. § 991(b)(1)(B)(2007) ("The purposes of the United States Sentencing Commission are to...provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

[15]*See, e.g,*. U.S. SENTENCING COMM'N, 2002 REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002) 93, *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm ("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.").

[16]*See, e.g., 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.").

[17]*See, e.g., 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.").

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 have taught us all that many of the beliefs used to justify the 1986 Act were wrong. Research has shown that the addictive properties of crack have more to do with the fact that crack is typically smoked than with its chemical structure.[18] The national epidemic of crack use that many of us feared never actually materialized,[19] and recent studies suggest that levels of violence associated with crack are stable or even declining.[20]

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,[21] there is now widespread support by many in the United States to reduce the existing sentencing disparity between crack and powder cocaine.[22]

The federal courts must be fundamentally fair, but that is not enough: they must also be *perceived as fair* by the public. And today, that is not always the case. More than once, I have had citizens refuse to serve on a jury in my courtroom because they are familiar with the existing disparity between crack and powder sentences, and believed that federal statutes (and the courts

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[18]*See, e.g,.* U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at 63 (linking risk of addiction to mode of administration).

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

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

[21]*See 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.").

[22]*See e.g., Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Comm'n* (Nov. 13, 2006) , *available at* http:www.ussc.gov

that interpret those statutes) are racist.

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,[23] they comprise approximately 81.8 percent of federal crack cocaine offenders, but only 27 percent of federal cocaine powder offenses.[24] (Hispanics, though, account for a growing proportion of powder cocaine offenders. "In 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."[25]) Furthermore, because crack offenses carry longer sentences than equivalent powder cocaine offenses,[26] African-American defendants sentenced for cocaine offenses wind up serving prison terms that are greater than those served by other cocaine defendants.[27] I have a concern that disparate impact of crack sentencing on African-American communities shapes social attitudes. When large segments of the African-American population believe that our criminal justice system is racist, it presents the courts with

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

[24]U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, 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.").

[25]*Id.* at 15.

[26]*See supra* note 4 (noting crack sentences that are 1.3 to 8.3 times longer than their powder equivalents).

[27]*See, e.g.,* U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, 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 whites. Four years later, the average federal drug sentence for African Americans was 49 percent higher than for whites.").

serious practical problems. People come to doubt the legitimacy of the law–not just the law associated with crack, but *all* laws. I have experienced citizens refusing to serve on juries, and there are reports of juries refusing to convict defendants.[28] Skepticism about the judiciary also presents us with symbolic problems. The facade of the Supreme Court of the United States is an evocative image, an icon that connotes the rule of law. It is important that the federal courts are recognized as places in which the citizens stand as equals before the law. If, instead, some segments of the population view the courts with scorn and derision, as institutions that mete out unequal justice, the moral authority of the federal courts is dimmed.

The Judicial Conference strongly supports legislation to reduce the unsupportable 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,[29] but Congress may find it prudent to reconsider whether existing minimum penalties are necessary to achieve the goals of sentencing. This would be consistent with the parsimony provision of the Sentencing Reform Act.[30]

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[28]*See* 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).

[29]For specific legislative recommendations, see, *e.g.,* U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at 8-9.

[30]*See* 18 U.S.C. § 3553(a) (2007).

Although the Judicial Conference does not have an established view on how to reduce the disparity, it does have an established and longstanding opposition to mandatory minimum penalties.[31] 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 and engender additional appellate review, and increase the expenditure of public funds without a corresponding increase in benefits.[32] Accordingly, as a general matter, the Conference favors legislation that leaves sentencing decisions to judges, those individuals best situated to apply general rules to the particular circumstances. Crack legislation that increases the drug weights required to trigger mandatory minimum penalties would be more consistent with Judicial Conference policy inasmuch as they narrow the pool of defendants subjected to mandatory minimum provisions.

All four of the bills before this Committee would reduce the sentencing disparity that exists between crack and powder cocaine. Congressman Roscoe Bartlett's bill, the "Powder-Crack Penalty Equalization Act of 2007,"[33] would do so by reducing the amount of powder cocaine required to trigger mandatory minimum penalties to the levels currently associated with crack cocaine. While this would presumably increase the population of defendants subjected to mandatory minimum penalties and would therefore be inconsistent with the Judicial

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[31]*See, 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).

[32]JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93.

[33]H.R. 79, 110th Cong. (2007).

Conference's position on mandatory minimum penalties,[34] it would redress the existing disparity between crack and powder.[35]

Congressman Charles Rangel's bill, the "Crack-Cocaine Equitable Sentencing Act of 2007,"[36] would treat the possession, trafficking, and importation of crack the same as the possession, trafficking, and importation of other forms of cocaine. Simple possession of crack would be treated like simple possession of powder; five grams of crack would be treated as five grams of powder; fifty grams of crack would be treated as fifty grams of powder. This approach, too, would reduce the sentencing disparity between crack and powder, as supported by the Judicial Conference,[37] and because in practice this approach would reduce the pool of defendants subjected to mandatory minimum penalties, it would also be consistent with the Judicial Conference's longstanding opposition to mandatory minimum sentences.[38]

Congresswoman Sheila Jackson-Lee's bill, the "Drug Sentencing Reform and Cocaine Kingpin Act of 2007,"[39] appears to be the analogue to Senator Joseph Biden's bill.[40] By increasing the drug weights required to trigger mandatory minimum penalties for crack, and by

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[34]*See supra* note 31 (outlining Conference opposition to mandatory minimum sentences).

[35]*See supra* note 5 and associated text (describing support of the Judicial Conference for reduction of the difference between crack and powder sentences).

[36]H.R. 460, 110th Cong. (2007).

[37]*See supra* note 5 and associated text (describing support of the Judicial Conference for reduction of the difference between crack and powder sentences).

[38]*See supra* note 31 (outlining Conference opposition to mandatory minimum sentences).

[39]H.R. 4545, 110th Cong. (2007).

[40]S. 1711, 110th Cong. (2007).

eliminating the mandatory minimum for simple possession, the bill both would reduce the disparity between crack and powder sentences and would winnow the pool of defendants subjected to mandatory minimum penalties.[41] The bill's focus on aggravating and mitigating factors is consistent with the Judicial Conference's general view that judges should have discretion in sentencing matters, tailoring the terms of sentences to the specific circumstances of individual cases.[42]

Like Congressman Rangel's and Congresswoman Jackson-Lee's bills, Subcommittee Chairman Scott's bill, the "Fairness in Cocaine Sentencing Act of 2008,"[43] would eliminate increased penalties for crack, reducing the disparity between crack and powder sentences. As noted above, this would be consistent with the policy of the Judicial Conference.[44] Subcommittee Chairman Scott's bill would also eliminate all mandatory minimum penalties for cocaine offenses that were established by section 401(b)(1)(A) of the Controlled Substances Act. This provision would square neatly with the Conference's longstanding and unqualified opposition to mandatory minimums.[45] Additionally, Subcommittee Chairman Scott's bill would authorize funds to the Administrative Office of the United States Courts to provide pretrial

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[41] *See supra* note 5 and associated text (describing support of the Judicial Conference for reduction of the difference between crack and powder sentences), *supra* note 31 (outlining Conference opposition to mandatory minimum sentences).

[42] *See* JCUS-SEP 95, p. 47 (Recommendation 30 of the Long Range Plan for the Federal Courts).

[43] H.R. 5035, 110th Cong. (2008).

[44] *See supra* note 5 and associated text (describing support of the Judicial Conference for reduction of the difference between crack and powder sentences).

[45] *See supra* note 31 (outlining Conference opposition to mandatory minimum sentences).

diversion and post-conviction drug courts for federal defendants charged with illegal use of controlled substances. The Judicial Conference has generally opposed the establishment of specialized courts within the judicial branch.[46] The Conference's view is guided by the understanding that federal district courts are intended to be courts of general jurisdiction. This, however, should not imply a rejection of drug court principles in particular.[47] Several district courts have drawn upon the existing research literature and applied drug court principles in the management of their dockets, and other courts in the federal system are currently studying the principles of drug courts.

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 both symbolic and 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 encourage Congress to pass legislation that would reduce the disparity between crack and powder cocaine sentences.

Thank you for your attention and I would be happy to answer any questions.

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[46]*See* JCUS-SEP 62, p. 54; JCUS-SEP 86, p. 60; JCUS-SEP 90, p. 82 (all expressing opposition to proposals to establish specialized courts); *see also* JCUS-SEP 95, p. 46 (Recommendation 24 of the Long Range Plan for the Federal Courts–stating a preference for generalist courts except in certain limited contexts).

[47]Research from state court systems suggests that drug courts can be cost-effective tools in reducing recidivism. *See, e.g.*, Steve Aos, Marna Miller, and Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates,* WASH. STATE INST. PUB. POLICY, Oct. 2006, at 9 (suggesting that drug courts reduce recidivism by approximately 8%, at a net social savings of $4,767 per participant), *available at* http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf.