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WRITTEN STATEMENT  
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Cocaine Sentencing Policy

of

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Thank you very much for the honor of inviting me to testify before the Commission regarding cocaine sentencing policy.

## My Background

From 1979 to 1989 I was Assistant Counsel to the Committee on the Judiciary, U.S. House of Representatives, responsible for federal drug laws, oversight of the federal anti-drug effort, and other matters.

In 1979 and 1980, I helped the Committee develop the Criminal Code Revision Act of 1980 (H.R.6915). Among its features was a precursor to the Sentencing Reform Act of 1984, providing that sentencing guidelines be promulgated by the Judicial Conference of the United States.

In 1982, I helped develop on the House side "drug czar" legislation proposed by Senator Joseph Biden (D-DE) that Congress passed to guide national anti-drug strategy. It was vetoed by President Reagan in January 1983. I worked on subsequent drug czar legislation culminating in the 1988 Act creating the Office of National Drug Control Policy in the White House.

In 1984, I participated in the development of the Comprehensive Crime Control Act of 1984 (P.L.98-473), which included the Sentencing Reform Act creating this Commission, and other provisions.

**In 1986, I was the staff counsel principally responsible for processing the development of the Narcotics Penalties and Enforcement Act that created 5- and 10-year mandatory minimum sentences for crack cocaine, powder cocaine and other drugs. In**

1988, I worked on the Anti-Drug Abuse of 1988 which extended the mandatory minimums to attempts and conspiracies, and created the crack possession mandatory minimum.

#### The Statutory Goal of Mandatory Minimum Legislation

In 1986, Congress had a laudable goal for the legislation – **“to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources.”** The Judiciary Committee said in its report, “The Committee strongly believes 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.Rep’t. 99-845, Part 1, Sept. 19, 1986).

This point deserves emphasis. First, by 1986, every state police organization, and most county and municipal law enforcement agencies of any size, had dedicated, highly-trained narcotics agents and bureaus. Far more state and law enforcement officers than DEA Special Agents were engaged in the specialized tactics and procedures necessary to enforce the drug laws. Suppressing the illegal drug trade was not primarily a Federal government activity.

Second, throughout the 1980s, in numerous committee hearings in both houses of Congress, Members of Congress expressed a strong concern that there be much more effective coordination and division of labor in fighting the drug trade.

For example in 1983, U.S. House of Representatives Select Committee on Narcotics Abuse and Control, on a mission to Mexico, Peru, Bolivia, Colombia and Jamaica that I accompanied, encouraged U.S. enforcement personnel and the law enforcement officials of those nations to focus on the most important drug traffickers in order to raise the effectiveness of our efforts.

In another example, in 1986, in addition to creating mandatory minimum sentences for major drug traffickers, Congress created the new crimes of money laundering as another tool to prosecute the high level drug traffickers (another bill that I was involved in developing).

The enormous capacity of state and local law enforcement agencies to effectively police neighborhood, local and city-wide retail drug trafficking is that collectively they have been making between 1 and 1 ½ million arrests for drug abuse violations each year for the last decade. State courts impose about one-third of a million felony drug convictions annually.

In contrast, the number of federal drug cases that can be brought is dramatically smaller - - in the range of 20 to 30 thousand cases per year.

Congress’s stated goal made sense – focus the federal effort, with assistance from the military and intelligence agencies, and foreign governments, with the ability to gather evidence globally on the cases promising the greatest impact in dismantling the drug trade and supply.

Congress’s decision to modify the Controlled Substances Act penalty structure to provide

much longer penalties for major trafficking as a tool to encourage the federal enforcement agencies to focus on major traffickers made sense.

But as this Commission has heard in repeated testimony for over fifteen years, Congress made a colossal mistake. Congress, in its haste, chose quantity triggers, particularly for cocaine and crack cocaine that have pointed the federal effort in precisely the wrong direction, the lowest level of the retail trade.

### Congressional anti-drug activity in its political context

Congress has historically addressed the drug problem in highly emotional and highly political terms. The drug problem is always devastating. It is always an enormous menace. The language is that of the moral crusade, rich in the anecdotes of devastated lives and hyperbolic warnings of the dangers to generations, to populations, even to civilization itself. ("Crack cocaine threatens our society's future. . . we have a duty as a civilization, as a lawful society, to do all that we can to fight this threat," Rep. Ed Bryant (R-TN), Oct. 18, 1995, 104<sup>th</sup> Congress, Cong Rec. H10267) In drug rhetoric, the phenomena of drug use and drug production trumps all other social phenomenon as the cause of crime and disorder. Partial truths regarding drugs become distorted.

It is true, for example, that an enormous fraction of those in prison for property crime and violent crime have long histories of alcohol abuse and drug abuse. This fact creates a political drugs and crime *gestalt* that obviates the need for analysis of the genuine complexity of the many dimensions of drug use and abuse and crime commission.

In this universe, drugs are an agency of evil and inevitably corrupt those who use them. In its more sophisticated modern articulation this corruption is accomplished through the changing of brain chemistry. Normal people who use illegal drugs (or legal prescription drugs illegally) are changed, and once said to be addicted, suffer from a "brain disease." The enlightened response of providing drug treatment to drug users is nearly universally endorsed. The legal principle that warrants punishment for the conduct that results from this "brain disease," use of prohibited drugs is rarely thoughtfully examined. (See Douglas Husak, *Legalize This! the case for decriminalizing drugs*, Verso, New York, 2002.)

The other context is political combat. Dissent from political hegemony regarding drugs brings attack. U.S. Rep. Gerald Solomon (R-NY) most famously defeated the Democratic incumbent in his 1978 race, U.S. Rep. Edward W. Pattison, who admitted having tried marijuana (long before Rep. Newt Gingrich, and many other national political leaders in the years since), by regularly referring to him as "Pot-tison."

For twenty years, reform of the cocaine sentences has been stymied by fears (both real and exaggerated) that it will be characterized as being "soft on drugs" or to structure a political debate to force opponents into casting such votes.

In both 1986 and 1988, the Anti-Drug Abuse Acts were conceived by the House

Democratic leadership as vehicles to improve Democratic political prospects in November.

As the Commission knows very well, the effort to correct the 1986 legislation runs against the charge that increasing the quantity trigger “lowers the penalty” for crack cocaine trafficking offenses. One senior Member of Congress even suggested Congress “is softening its stance regarding *the acceptability of their behavior*,” implying that rationalizing the sentence carries the implication that crack cocaine trafficking would be acceptable behavior (Rep. Bill McCollum, 104th Congress, Cong. Rec. H01264, Oct. 18, 1995, in the debate on H.R.2259 to disapprove certain sentencing guidelines amendments).

If trafficking in crack cocaine no longer had a five year mandatory minimum and merely remained a felony that could be punished by up to twenty years in prison, would a reasonable person argue that now this conduct borders “acceptability?”

Sadly, often those engaged in the discourse around drugs in the Congress and elsewhere sound like they are hallucinating.

#### Commission’s approach to its findings

The Commission has issued carefully researched reports in 1995, 1997 and 2002 that demonstrated that federal cocaine sentencing has offended one of the key goals of the Sentencing Reform Act of 1994, to provide fairness and uniformity in sentencing.

The Commission has found racially disparate sentencing in the area of cocaine sentencing, exemplified by the crack cocaine cases.

The federal government prosecutes ten Black drug offenders for crack cocaine offenses for every White drug offender.

So a key approach has been to correct the apparent racial imbalance by trying to bring the quantity triggers for crack cocaine and powder cocaine closer together. This approach is exemplified by the legislation that has been introduced in every Congress for the past decade by Rep. Charles Rangel (D-NY), the Crack Cocaine Equitable Sentencing Act, which sets the quantity triggers for the mandatory minimums for both crack and powder cocaine at the powder cocaine level, now 500 grams for the 5 year minimum and 5000 grams for the 10 year minimum.

This approach is laudable for its simplicity and for recognition of the pharmacological fact that cocaine base and cocaine hydrochloride are neuro-pharmacologically the same.

But this approach has not addressed the political fact that crack cocaine is believed to be a much more dangerous drug than powder cocaine.

#### Crack cocaine versus powder cocaine – the dangers

It is widely believed that crack cocaine leads to more violence than powder cocaine and is more destructive of the communities in which it is used than is powder cocaine.

The problem with this analysis has been its pharmacological bias. Since the analysis is attempting to find the differences between crack and powder cocaine to justify the sentencing difference, it attributes the differences that are found to the drug, and not to other factors that cause or contribute to the problems, independent of the form of the drug.

A little more than a century ago, the acclaimed sociologist, W.E.B. Du Bois, published his study, *The Philadelphia Negro*. Contemporary sociologist, Elijah Anderson, at the University of Pennsylvania, has continued this work in *Code of the Street: Decency, Violence and the Moral Life of the Inner City* (1999).

A century ago, Du Bois,

developed a typology [of the black community] made up of four classes. The first were the well-to-do; the second, the hardworking, decent laborers who were getting by fairly well; the third, the 'worthy poor,' who were making or trying to work but barely making ends meet; and the fourth, 'submerged tenth,' those who were in effect beneath the surface of economic viability. Du Bois portrayed the submerged tenth as *largely characterized by irresponsibility, drinking, violence, robbery, thievery, and alienation...* Today the counterpart of this class, the so-called ghetto underclass, appears much more entrenched and its pathologies more prevalent, but the outlines Du Bois provided in *the Philadelphia Negro* can be clearly traced in the contemporary picture. (Anderson, p. 108, emphasis added).

Some contemporary observers, seeking to justify the current sentencing scheme look for the effects of crack cocaine, point to conditions that have plagued a portion of the African-American population for generations, and say this is the fault of crack cocaine.

But the problems in the ghetto have gotten worse, and started getting worse when crack cocaine appeared. Dr. Anderson argues however,

"The growth and transformation of this underclass is in large part *a result of the profound economic changes* the country – especially urban areas like Philadelphia – had undergone in the past twenty to thirty years. Deindustrialization and the growth of the global economy have led to a steady loss of the unskilled and semiskilled manufacturing jobs that, with mixed results, had sustained the urban working class since the start of the industrial revolution. At the same time 'welfare reform' has led a much weakened social safety net. For the most desperate people, many of whom are not effectively adjusting to these changes – elements of today's submerged tenth – *the underground economy of drugs and crime often emerges to pick up the slack.* (Anderson, p. 108, emphasis added).

Crack cocaine, it must be conceded, has aggravated these underlying problems. However,

the profits from the crack cocaine trade, however, are not profoundly different from the profits of the heroin, marijuana, methamphetamine trade.

The reality is that attributing the plight of the most disorderly, run down, and impoverished neighbors to crack cocaine omits too many other very real phenomena: four centuries of North American white privilege, the legacy of slavery and racial segregation and continuing racial discrimination, historic poverty and a lack of jobs and economic opportunity, overcrowded and substandard housing, teenage pregnancy and families without the presence of fathers, domestic violence, welfare dependency, lack of health care including mental health care, poor schools and a variety of other cultural problems.

No doubt crack cocaine addiction aggravates these problems, as does alcohol abuse and addiction, and heroin addiction, as far as chemicals go. But so does a culture of conflict resolution by violence (*See Fox Butterfield, All God's Children, 1996*).

Claims about crack cocaine's unique addictiveness or its unique *in utero* devastation of fetal development have been demolished because epidemiological methodology has exposed those claims to statistical fact.

That leaves the supporters of the harsh crack cocaine mandatory minimum sentences with arguments that are statistically harder to disprove such as crack cocaine is especially destructive of community order because it is impossible to control for the other independent variables such as poverty and jobs, schools and educational success, family structure and parenting, health care, mental illness and treatment, and the hard to measure reality of racism and racial discrimination.

Powder cocaine addiction leads to impoverishment and death. But to the extent that there is a middle class stigma against crack cocaine, powder cocaine may be more prevalent in the middle class than crack cocaine. Yet powder cocaine addicts in this class often convert their powder to crack or buy crack cocaine because inhaling vaporized cocaine is a more efficient way of getting cocaine to the brain and produces a more intense high. Yet such cocaine users more frequently have health insurance and economic resources to get treatment, and don't come as readily to the attention of the public hospitals and the public defenders.

Arguably ineffective national firearms control laws contribute to the availability

### Violence

Does crack cocaine cause more violence than powder cocaine? Is the crack cocaine trade more violent than the powder cocaine trade?

The Sentencing Commission's data on federal cocaine offenders demonstrates that weapons involvement is found only among a very small minority of crack cocaine offenders. Carrying and using guns is not, at least as far as the Sentencing Commission's research goes, a normative behavior for crack offenders.

It seems to be the case that pharmacologically there is no difference in the violence propensity of crack users versus powder cocaine users.

Regarding the violence associated with the cocaine trade, one must consider the violence of the wholesale and international powder cocaine trade. In Mexico and Colombia, thousands of persons are murdered each year in the struggles between the powder cocaine producers, wholesalers and shippers. Surely that violence, even though it takes place outside the United States, must be put on the scale of relevant violence.

In the early 1980s, the wars between Cuban and Colombian criminal organizations for control of the South Florida powder cocaine market were fought in the streets and shopping centers with automatic weapons.

When illegal drug markets are unstable and immature, violence is more common than when the markets are mature and stabilized. Violence is an inherent tool of all the illegal drug markets. Disputes among market participants cannot be resolved by resort to the courts. The only way to resort to arbitration is to turn to organized crime organizations, and their judgments are enforced with violence. Violence is a tool of competition in the illegal drug markets.

The illegal drug markets sell very high volumes of enormously valuable commodities exclusively for cash. They are always targets for robbery and cannot rely upon off-duty police or private security businesses for protection. They must protect themselves. The best protection is to employ persons with reputations for lethal and unrestrained violence with "street credibility" to deter potential robbers. As the markets mature, the risk of such robberies and such violence diminishes.

The crack market in the late 1980s was a new, immature and unstable market and characterized by violence, especially youth related gun violence.

Nothing about crack cocaine markets is intrinsically more prone to violence than another busy illegal drug market.

#### Time for an old approach

Congress was correct in 1986 in identifying the federal role in national drug enforcement as a focus upon the highest level traffickers. State and local enforcement have the staffing, the legal authority, and the punishment capacity to prosecute the retail drug trade.

To the extent that federal law enforcement agencies spend time on retail drug cases, they are not focusing their unique powers on the international, continental and nationwide criminal organizations that assure the local crack markets of their inventory.

When local citizens protest that they want their streets cleaned up, implicit in their

complaint is fact that the local police are not sufficiently mobilized to protect them from the retail cocaine trade, and that the federal government is not focused on stopping the international traffic that keeps the corner crackhouse supplied.

The local complaint should not be allowed to distract the federal agencies from their job. The local law enforcement agencies naturally would like federal personnel to join them on the street. But that is not the proper federal role.

The complaint of the local homeowner should no more redirect national anti-drug policy than their complaint would be allowed to skew national mortgage policy or energy policy.

The federal government should no longer be involved in retail drug cases. The federal drug enforcement focus, if it is to provide the correct support to state and local law enforcement, must be to fully engage the international production and trafficking in cocaine, i.e., the highest level traffickers.

Crack cocaine is almost always only created by retail organizations a short distance from where it is sold. It is not the form of international smuggling.

### Conclusion

This leads to two conclusions.

First, as a general rule, there should be no federal crack cocaine cases. A case that involved crack cocaine is, almost by definition, basically a retail case.

Second, the mandatory minimum quantity triggers should be set at appropriate levels for high level traffickers. For the ten year mandatory, an appropriate target for managing DEA and U.S. Attorneys offices should be one metric ton, 1000 kilograms of cocaine. For the five year mandatory, a more appropriate target quantity would be in the range of 100 to 200 kilograms.

When these become the typical levels of federal prosecutions – not 52 grams of crack cocaine or 500 grams of powder cocaine – then state and local police will be getting the federal law enforcement support they need to fight neighborhood crack houses. And local communities may begin to enjoy a reduced drug problem that the prohibition strategy purports to offer.

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