

*New Federal Initiatives Project*

**Proposals to Eliminate Sentencing  
Disparities between Crack and Powder  
Cocaine Offenses**

**By  
Chris Byrnes**

**August 5, 2009  
UPDATED: April 13, 2010**



*The Federalist Society  
for Law and Public Policy Studies*

*The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author or authors. We hope this and other publications will help foster discussion and a further exchange regarding current important issues.*

**[www.fed-soc.org](http://www.fed-soc.org)**

## **Proposals to Eliminate Sentencing Disparities Between Crack and Powder Cocaine Offenses**

***EDITOR'S NOTE:** On March 17, 2010, the Fair Sentencing Act of 2009 (S. 1789) passed the Senate with an amendment by unanimous consent. The bill would reduce but not completely eliminate the sentencing disparity by reducing it to an 18-1 ratio.*

Amidst public concern over the dangers of crack cocaine and soon after the death of Boston Celtics first-round draft pick Len Bias from a cocaine overdose, Congress enacted the Anti-Drug Abuse Act of 1986, which imposed mandatory minimum sentences for persons convicted of trafficking in crack cocaine, powder cocaine, and other substances.<sup>1</sup> The Act imposed a five-year minimum sentence for persons convicted of trafficking 5 grams of cocaine base or 500 grams of cocaine powder and a ten-year minimum sentence for trafficking 50 grams of cocaine base or 5,000 grams of cocaine powder.<sup>2</sup> Soon afterwards, the United States Sentencing Commission<sup>3</sup> applied this 100-to-1 quantity ratio to set sentencing ranges for crack and powder cocaine offenses involving quantities above and below these threshold amounts.<sup>4</sup> Thus, a drug dealer trafficking in crack cocaine is subject to the same sentence as one trafficking in 100 times more powder cocaine.<sup>5</sup>

Supporters of the disparity argue that crack offenses warrant harsher sentencing because it is a uniquely addictive drug and is more associated with violent crime than powder cocaine. Critics of the disparity argue that this policy has a racially discriminatory impact on sentencing because the majority of those arrested for powder cocaine offenses are white, while the majority of those arrested for crack offenses are African-American.

There are several bills pending in the House that would eliminate this disparity.<sup>6</sup> Senate and House subcommittees have already held hearings on these proposals.<sup>7</sup> H.R. 3245, the Fairness in Cocaine Sentencing Act of 2009, has recently passed the House Judiciary Committee by a 16-9 vote and will next be considered on the House floor.<sup>8</sup> The Obama administration has taken the sentencing policy on as a civil rights issue, with the Department of Justice asking Congress to “completely eliminate the sentencing disparity between crack cocaine and powder cocaine.”<sup>9</sup>

Why did Congress single out crack in the first place? And should the law continue to distinguish between crack and powder cocaine this way? The legislative history suggests that Congress created a two-tiered penalty structure in part to target “serious” traffickers with the five-year mandatory minimum and “major” traffickers with the ten-year mandatory minimum.<sup>10</sup> Also, the legislative history indicates that Congress targeted crack cocaine trafficking for higher penalties than powder cocaine based on the assumptions that (1) crack was extremely addictive; (2) crack use and distribution was more associated with serious and violent crimes than other drugs; (3) crack was more physically harmful to users than powder cocaine and posed a danger to infants exposed to it prenatally; (4) young people were especially prone to use and distribute crack; and (5) crack’s potency, low cost, and ease of administration were leading to its widespread use.<sup>11</sup>

Opponents of the sentencing policy believe that the crack epidemic envisioned by these assumptions failed to materialize and as such, no longer justifies the current 100-to-1 quantity ratio.

With respect to the association of crack with violence, some have argued that the level of violence associated with crack cocaine use and distribution has stabilized or is even declining.<sup>12</sup> A 2002 report from the Sentencing Commission found that, “more recent data indicated that significantly less trafficking-related violence or systemic violence, as measured by weapon use and bodily injury...is associated with crack cocaine offenses ... than previously assumed.”<sup>13</sup> While some attribute this decrease to a reduction in new users of crack cocaine and the resulting reduction in its street markets,<sup>14</sup> others credit tough sentences with getting dealers and profiteers off the streets.<sup>15</sup>

Others have argued that crack cocaine use is still more associated than powder cocaine with systemic violence, in part because crack transactions tend to be hand-to-hand and often involve gang members. Also, the Department of Justice argued in 2002, “crack users are less likely to use a regular supplier or a main source; and the pattern of crack use (a short high followed by additional drug use) may mean that users and sellers interact in a manner that elevates personal and aggregate risk.”<sup>16</sup> It should be noted that the Sentencing Commission recently found that the rate of weapon involvement increased to 27.0 percent for powder cocaine offenses and 42.7 percent for crack cocaine offenses from 2000 to 2005.<sup>17</sup> In 2002, the Department of Justice cited a study linking crack use and prostitution.<sup>18</sup> Additionally, a representative of district attorneys pointed to a 1998 study identifying crack as the drug most closely linked to trends in homicide rates and to the same study on crack use and prostitution.<sup>19</sup>

More specifically, opponents of the 100-to-1 quantity ratio argue that the distinction categorically presumes violent conduct on the part of crack defendants. They also argue that the distinction double counts the charged conduct for crack defendants charged with a concurrent violent offense. According to these critics, federal criminal law also contains penalties and enhancements for violent conduct at the disposal of prosecutors and that the circumstances of the individual case should govern their applicability.<sup>20</sup>

Third, opponents of the sentencing policy argue that it has a racially discriminatory impact on minorities, since most crack defendants are African-American and most arrested for powder cocaine offenses are white. According to the Sentencing Commission’s 2002 Report, approximately 85 percent of defendants convicted of crack offenses in federal court were African-American.<sup>21</sup> The Commission’s 2007 Report found that 81.8 percent of crack cocaine offenders in 2006 were African-American, but that Hispanics accounted for 57.5 percent of powder cocaine offenders in 2006.<sup>22</sup>

The racial disparity should be of particular concern to law enforcement and the judiciary, these critics argue, because the crack/powder sentencing differential “fosters disrespect for and lack of confidence in the criminal justice system” because of a “widely-held perception” that it “promotes unwarranted disparity based on race.”<sup>23</sup> Some have testified that it deters crime victims and witnesses from cooperating with law enforcement, encourages jurors to ignore the law and facts when judging a criminal case, and leads the public to question the motives of governmental officials because of the perceived unfairness.<sup>24</sup>

Some concede that minorities are in the majority of defendants convicted and sentenced for crack offenses, but counter that this disparity may stem from the possibility that, statistically, African-Americans use and sell crack more than whites.<sup>25</sup> Some praise Congress' distinction insofar as it may disproportionately help African-American communities victimized by crack distribution.<sup>26</sup> They argue that, under any decrease in drug-related penalties or decriminalization altogether, minorities would comprise a disproportionate number of those permitted to pursue self-destructive drug habits without intervention from the government. African-Americans would also make up a disproportionate number of those victimized by the destructive behavior of unrestricted drug offenders in their communities.<sup>27</sup>

With these concerns in mind, some, like the Sentencing Commission itself, have recommended that Congress increase the threshold quantities for crack offenses to focus the penalties more closely on serious and major traffickers.<sup>28</sup> The Sentencing Commission has previously proposed reductions in the quantity ratio at least three times. In 1995, it proposed amendments to the Guidelines which called for a 1-to-1 ratio and allowed special enhancements for trafficking offenses involving weapons or bodily injury.<sup>29</sup> Congress rejected this amendment. A 1997 Commission report proposed a 5-to-1 ratio.<sup>30</sup> Finally, the 2002 Report recommended lowering the ratio to at least to 20 to 1.<sup>31</sup> Congress adopted neither of these proposals.

What if Congress were to address these concerns by raising these threshold quantities for crack cocaine offenses? What impact would this have on law enforcement, crime, and incarceration? The Sentencing Commission's 2007 Report estimated the impact of reductions in the quantity ratio on prisons and sentences. A 25-to-1 ratio decreased the average sentence of all affected cases from 121 months to 90 months and the number of prison beds by 2,538 within five years. A 20-to-1 ratio decreased the average sentence further to 86 months and the number of prison beds by 3,018. A 10-to-1 ratio decreased the average sentence to 75 months and the number of prison beds by 4,658. A 5-to-1 ratio decreased the average sentence to 66 months and the number of prison beds by 6,477. Finally, a 1-to-1 ratio decreased the average sentence of all affected cases from 121 months to 50 months and the number of prison beds by 10,010.<sup>32</sup> Some have pointed out that this analysis fails to take into account a potential increase in crime resulting from early release of crack cocaine distributors under departure from the 100-to-1 quantity ratio.

Other branches of government have already addressed the quantity ratio. Pursuant to its own authority, the Sentencing Commission promulgated an ameliorating amendment in 2007 to the Sentencing Guidelines.<sup>33</sup> The amendment, now applied retroactively,<sup>34</sup> modified the drug quantity thresholds in the Guidelines, assigning to crack cocaine offenses base offense levels corresponding to guideline ranges that include, rather than exceed, the statutory mandatory minimum penalties. Also, crack cocaine quantities above and below the mandatory minimum threshold quantities will be adjusted downward by two base offense levels. The 2007 Report estimated that this amendment would impact 69.7 percent of all cases, reducing the average sentence to 106 months and prison beds by 20 within the first year, 101 within 2 years, 307 within 3 years, 542 within 4 years, and 894 within 5 years, 2,623 within 10 years, and 3,808 within 15 years.<sup>35</sup> It should be noted that preliminary data from May 2009 indicates that, with respect to cases affected by the retroactive application of the amendment, the average sentence is

now 117 months and that 85.9 percent of those granted a sentence reduction under it were African-American.<sup>36</sup>

As the Sentencing Commission addressed the sentencing policy on its own, several cases had wound their way through the Supreme Court impacting the overall applicability of the Sentencing Guidelines. In *United States v. Booker*,<sup>37</sup> the Supreme Court rendered the Guidelines advisory. In *Kimbrough v. United States*, the Court held, among other things, that (1) the Anti-Drug Abuse Act did not require that the 100-to-one ratio prevail throughout the Sentencing Guidelines; (2) Congress's previous rejection of a proposed one-to-one ratio did not require that 100-to-one ratio be maintained in Guidelines; and (3) district courts may conclude that the ratio yields a sentence “greater than necessary.”<sup>38</sup> The Court clarified its *Kimbrough* holding in *Spears v. United States*,<sup>39</sup> in which it held that the district court had the authority to vary from the cocaine sentencing guidelines based on policy disagreements with them, but not just on a determination that they demanded an excessive sentence in a particular case.<sup>40</sup>

It seems that the Sentencing Commission and federal judges already have some leeway in deviating from the 100-to-1 quantity ratio. It remains to be seen what full impact these deviations will have on crime and incarceration, and whether Congress will take this impact into account when taking up proposals to amend the ratio.

---

<sup>1</sup> The Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986).

<sup>2</sup> See 21 U.S.C. § 841(b) (2008).

<sup>3</sup> Created by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984, the Sentencing Commission is an independent agency in the judicial branch charged, in part, with establishing sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes.

<sup>4</sup> See UNITED STATES SENTENCING GUIDELINES MANUAL 2D1.1 at 62 (1987). The Sentencing Guidelines specify a range of imprisonment based on the offense and offender characteristics. Two factors—base offense level (assigned according to the nature of the offense) and criminal history category (assigned on the basis of the seriousness of the offender's criminal history)—primarily determine the applicable range of imprisonment in particular cases. For example, the base offense level for a defendant in criminal history category I trafficking in 5 grams of crack cocaine or 500 grams of powder cocaine is 26, with a sentencing range of 63 to 78 months. These can be altered by aggravating (for example, firearm possession) or mitigating factors. Judges are also permitted to impose sentences outside of the range if the circumstances of the cases are not adequately addressed by the Guidelines or the defendant provided substantial assistance to prosecutors. Finally, mandatory minimum sentences under the drug laws do not apply in certain cases involving nonviolent, low-level drug offenders. See U.S.S.G. § 5C1.2, 18 U.S.C. § 3553(f).

<sup>5</sup> The Sentencing Commission has pointed out that this ratio typically yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. See UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY iv (May 2002), available at

---

[http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.pdf](http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf) (last visited June 18, 2009) (hereinafter the 2002 Report).

<sup>6</sup> See, e.g., The Powder-Crack Cocaine Penalty Equalization Act of 2009, H.R. 18, 111<sup>th</sup> Cong. (2009) (increases the mandatory minimum threshold amounts for crack to those amounts applicable to powder cocaine); the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009, H.R. 265, 111<sup>th</sup> Cong. (2009) (same); the Fairness in Cocaine Sentencing Act of 2009, H.R. 1459, 111<sup>th</sup> Cong. (2009) (eliminates increased penalties for crack cocaine offenses and mandatory minimums for all cocaine offenses); the Crack-Cocaine Equitable Sentencing Act of 2009, H.R. 2178, 111<sup>th</sup> Cong. (2009) (eliminates mandatory minimum threshold amounts for crack cocaine).

<sup>7</sup> The Senate Judiciary Committee's Subcommittee on Crime and Drugs held a hearing, "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity," on April 29, 2009. Witness testimony and member statements are available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3798> (last visited June 24, 2009). The House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing, "Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?," addressing the various House proposals on May 21, 2009. Witness testimony and member statements are available at [http://judiciary.house.gov/hearings/hear\\_090521.html](http://judiciary.house.gov/hearings/hear_090521.html) (last visited June 24, 2009).

<sup>8</sup> "Conyers Bill Passes to End Crack Cocaine Sentencing Disparity" press release, July 29, 2009: <http://judiciary.house.gov/news/090729.html>

<sup>9</sup> See *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Senate Committee on the Judiciary, Subcommittee on Crime and Drugs* (2009) (testimony of Lanny A. Breuer, Assistant Attorney General for the Criminal Division, United States Department of Justice) available at <http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf> (last visited June 22, 2009).

<sup>10</sup> See, e.g., 2002 Report at 6-7 (citing 132 CONG. REC. 27, 193-94 (daily ed. Sept. 30, 1986); 132 CONG. REC. 22,293 (daily ed. Sept. 30, 1986); and H.R. Rep. No. 99-845 (1986)).

<sup>11</sup> See, e.g., 2002 Report at 9-10 (summarizing legislative history).

<sup>12</sup> See UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: FEDERAL COCAINE SENTENCING POLICY 86-87 (2007) (citing testimony of Alfred Blumstein, Ph.D.) (hereinafter the 2007 Report), available at [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf) (last visited June 22, 2009).

<sup>13</sup> See 2002 Report at 100.

<sup>14</sup> See *id.*

<sup>15</sup> R. Alexander Acosta, United States Attorney of the Southern District of Florida, testified to the Sentencing Commission that "[t]here is substantial proof that crack cocaine is associated with violence to a greater degree than other controlled substances, including powder cocaine.... The strong federal sentencing guidelines are one of the best tools for law enforcement's efforts to stop violent crime...and reducing those sentences would create a risk of increased drug violence." See 2007 Report at Appendix B2-B4.

<sup>16</sup> See UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL COCAINE OFFENSES: AN ANALYSIS OF CRACK AND POWDER PENALTIES 8 (2002) (hereinafter 2002 Justice report)

<sup>17</sup> See *id.* at 32. The Sentencing Commission had previously held in 2002 that "to the extent that trafficking in crack cocaine is associated with somewhat greater levels of systemic crime, the

---

cocaine penalty structure should reflect that greater association, regardless of the underlying cause.” Consequently, because the Commission believed “specific sentencing enhancements for weapon involvement and bodily injury would not fully account for this factor,” it conceded at that time that “some differential in the quantity-based penalties for crack cocaine and powder cocaine is warranted on this basis.” See 2002 Report at 102.

<sup>18</sup> See 2002 Justice Report at 9 (citing Ko-Lin Chin & Jeffrey Fagan, *The Impact of Crack on Drugs and Crime Involvement* 15 (1991) (“In this study, 86.7 percent of women surveyed were not involved in prostitution in the year before starting crack use; one-third become involved in prostitution in the year after they began use”)

<sup>19</sup> See *Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?: Hearing Before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security* (2009) (testimony of Joseph Cassilly, President of the National District Attorney’s Association), available at <http://judiciary.house.gov/hearings/pdf/Patterson090521.pdf> (last visited June 22, 2009) (“In this study, 86.7% of women surveyed were not involved in prostitution in the year before starting crack use; one-third become involved in prostitution in the year after they began use. Women who were already involved in prostitution dramatically increased their involvement after starting to use crack, with rates nearly four times higher than before beginning crack use”).

<sup>20</sup> See *Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?: Hearing Before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security* (2009) (testimony of Marc Mauer, Executive Director of the Sentencing Project), available at <http://judiciary.house.gov/hearings/pdf/Mauer090521.pdf> (last visited June 22, 2009).

<sup>21</sup> See 2002 Report at 102-103.

<sup>22</sup> See 2007 Report at 15.

<sup>23</sup> See 2002 Report at 103.

<sup>24</sup> See *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Senate Committee on the Judiciary, Subcommittee on Crime and Drugs* (2009) (testimony of Judge Reggie Walton, Chair of the Judicial Conference of the United States) (“When large segments of the African-American population believe that our criminal justice system in any way influenced by racial considerations, our courts 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”) (citing William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1282 (1996); *Symposium: The Role of Race-Based Jury Nullification in American Criminal Justice*, 30 J. MARSHALL L. REV. 911 (1997)), available at <http://judiciary.senate.gov/pdf/09-04-29WaltonTestimony.pdf> (last visited June 22, 2009).

<sup>25</sup> See Elizabeth Tison, *Amending the Sentencing Guidelines for Cocaine Offenses: The 100-to-1 Ratio Is Not As “Cracked” Up As Some Suggest*, 27 S. ILL. U. L.J. 413, 430-31 (2003) (citing Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179, 189-90 (1996)).

---

<sup>26</sup> See e.g., *United States v. McMurray*, 83 F. Supp. 1454, 1466-67 (D. Neb. 1993); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1269 (1994)

<sup>27</sup> See Tilson, *supra* note 24, at 432 (citing Days and Kennedy).

<sup>28</sup> See 2007 Report at 8. The Commission has also rejected a decrease in the mandatory minimum threshold quantities for powder cocaine offenses.

<sup>29</sup> See Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25075-25077 (1995).

<sup>30</sup> See UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997), *available at*

[http://www.ussc.gov/r\\_congress/newcrack.pdf](http://www.ussc.gov/r_congress/newcrack.pdf) (last visited Jun 24, 2009).

<sup>31</sup> See 2002 Report at viii..

<sup>32</sup> See 2007 Report at D-10.

<sup>33</sup> Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28571-28572 (2007).

<sup>34</sup> See Sentencing Guidelines for the United States Courts, 73 Fed. Reg. 217-220 (2008)

<sup>35</sup> See 2007 Report at E-21.

<sup>36</sup> See UNITED STATES SENTENCING COMMISSION, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT (2009) *available at*

[http://www.ussc.gov/USSC\\_Crack\\_Retroactivity\\_Report\\_May2009\\_1.pdf](http://www.ussc.gov/USSC_Crack_Retroactivity_Report_May2009_1.pdf) (last visited June 24, 2009).

<sup>37</sup> 543 U.S. 220 (2005)

<sup>38</sup> See *Kimbrough v. United States*, 128 S. Ct. 558, 574-75 (2007).

<sup>39</sup> 129 S. Ct. 840 (2009) (per curiam)

<sup>40</sup> See *id.* at 843-44.

### **Related Links:**

The Senate Judiciary Committee hearing on S. 1789 held on March 11, 2010:

<http://judiciary.senate.gov/hearings/hearing.cfm?id=4463>

S.1789 - Fair Sentencing Act of 2010: <http://www.opencongress.org/bill/111-s1789/show>

H.R.3245 - Fairness in Cocaine Sentencing Act of 2009, text as forwarded by Subcommittee to Full Committee by Voice Vote on July 22, 2009: <http://www.opencongress.org/bill/111-h3245/text>

“From Appendi to Book to Gall to Kimbrough,” by William Otis, *Engage*, July 3, 2008:

[http://www.fed-soc.org/publications/pubid.1083/pub\\_detail.asp](http://www.fed-soc.org/publications/pubid.1083/pub_detail.asp)

“Supreme Court Strikes Down Mandatory Provisions of Federal Sentencing Guidelines”

February 1, 2005: [http://www.fed-soc.org/publications/pubID.243/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.243/pub_detail.asp)