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Special Report to the Congress:

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# Cocaine and Federal Sentencing Policy

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UNITED STATES SENTENCING COMMISSION

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# Cocaine and Federal Sentencing Policy

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**Edward F. Reilly, Jr.**  
*(ex-officio)*

# **EXECUTIVE SUMMARY**

## **INTRODUCTION**

In the Omnibus Violent Crime Control and Law Enforcement Act of 1994, Congress directed the United States Sentencing Commission to study federal sentencing policy as it relates to possession and distribution of all forms of cocaine. Specifically, Congress directed the Sentencing Commission to report on the current federal structure of differing penalties for powder cocaine and crack cocaine offenses and to provide recommendations for retention or modification of these differences.

The Commission balanced conflicting policy goals in developing its recommendations concerning powder and crack cocaine sentencing. In reviewing the evidence, the Commission found that, under some criteria, crack offenses deserve lengthier punishment than powder offenses, but on other criteria differential treatment could not be justified. The recommendations reflect our weighing of these competing considerations to yield a cautious and balanced judgment of the best federal sentencing policy for cocaine offenders. The major conclusions can be summarized as follows:

1. Drugs are a serious problem, and crack and powder cocaine are dangerous drugs.
2. While some aspects of crack cocaine use and distribution suggest that a higher penalty for crack offenses compared to powder cocaine offenses is appropriate, the present 100-to-1 quantity ratio is too great.
3. Among other problems, the 100-to-1 quantity ratio creates anomalous results by potentially punishing low-level (retail) crack dealers far more severely than their high-level (wholesale) suppliers of the powder cocaine that served as the product for conversion into crack.
4. Congress established the Sentencing Commission to develop sentencing policies and practices that address congressional concerns, to evaluate the effectiveness of these policies, and to refine the guidelines and recommend legislation as needed.
5. The sentencing guidelines provide a more precise mechanism than the mandatory minimum penalty statutes for tailoring appropriate sentences to individual defendants.
6. The quantity and form of cocaine involved in an offense are two factors for determining appropriate punishment, but in a given case other characteristics of the offense and the offender can be equally or more important. The guidelines should be refined to address better those harms that prompted Congress to establish the 100-to-1 quantity ratio.

The Commission's recommendations are twofold:

1. That the Commission establish methods within the guidelines structure to deal with the crimes of possession and distribution of both crack cocaine and powder cocaine; such Commission action to take place by the normal 1995-1996 amendment cycle.
2. That, in light of the Commission's guideline amendments, Congress revisit the 100-to-1 quantity ratio as well as the penalty structure for simple possession that provides a mandatory five-year penalty for simple possession of crack cocaine but a statutory maximum penalty of one year for simple possession of any other drug.

## **BACKGROUND**

Examination of these issues necessarily requires an understanding of the role of the Sentencing Commission in the context of federal sentencing policy, mandatory minimum penalties for drug offenses generally, and cocaine penalties specifically. In 1984, after more than two decades of debate and study, a strongly bipartisan Congress enacted the most far-reaching reform of federal sentencing in this nation's history, the Sentencing Reform Act. The central features of that historic legislation included a comprehensive statement of federal sentencing laws; appellate review of sentences; abolition of parole; and the creation of the United States Sentencing Commission to develop a detailed system of guidelines that would structure and direct the previously unfettered sentencing discretion of federal district court judges.

Congress established the Sentencing Commission as an independent, permanent agency in the judicial branch of government. Composed of seven voting and two non-voting, *ex officio* members, the Sentencing Commission's mandate was to develop guidelines for federal criminal offenses that would bring greater certainty, honesty, and uniformity to sentencing, ensure just punishment, and promote crime control. While the legislative history describes a number of motivating concerns in establishing a guideline system, none was more important to Congress than the reduction of unwarranted sentence disparity.

The initial set of guidelines became law in November 1987. In January 1989, the Supreme Court upheld the constitutionality of the Sentencing Commission and the guidelines in Mistretta v. United States, 488 U.S. 361 (1989), and full nationwide implementation of the federal sentencing guidelines followed. The Sentencing Commission, consistent with its mandate, continues to promulgate guidelines and amendments that reflect changes in statutory offenses and their penalties, directives from Congress, empirical research, emerging case law, the changing nature of crime, and developments in knowledge about effective crime control.

At the same time that the Sentencing Commission was developing, promulgating, and amending guidelines, Congress enacted a number of mandatory minimum penalty statutes, largely for drug and weapons offenses and for recidivist offenders. Among the mandatory minimum penalties were those enacted in 1986 and 1988 for sentencing federal cocaine offenses. In establishing these mandatory minimum penalties, Congress differentiated between two forms of cocaine – powder and crack (the commonly consumed form of cocaine base) – and singled out crack cocaine for much harsher punishment. Congress implemented this differential by requiring substantially lesser quantities of cocaine base than powder cocaine to trigger the five- and ten-year mandatory minimum penalties applicable to both forms of cocaine.

As a result of Congress's legislative action, the federal criminal code today provides the following penalties for first-offense cocaine trafficking:

5 grams or more of crack cocaine  
or  
500 grams or more of powder cocaine = five-year mandatory minimum penalty

50 grams or more of crack cocaine  
or  
5,000 grams or more of powder cocaine = ten-year mandatory minimum penalty

This statutory 100-to-1 quantity ratio of powder cocaine to crack cocaine (*i.e.*, it takes 100 times as much powder cocaine compared to crack to trigger the mandatory minimum penalties) in turn is incorporated into the federal sentencing guidelines, thereby maintaining a similar quantity ratio for offenders involved with drug quantities above and below the specified mandatory minimum penalty amounts. These statutory/guideline differentiations mean that, for any given quantity of cocaine, sentences for offenses involving crack cocaine are much more severe than those for like offenses involving powder cocaine.

In the Anti-Drug Abuse Act of 1988, Congress further distinguished crack cocaine from both powder cocaine and other drugs by creating a mandatory minimum penalty for simple possession of crack cocaine, the only such federal penalty for a first offense of simple possession of a controlled substance. Under this law, possession of more than five grams of crack cocaine triggers a minimum sentence of five years in prison; simple possession of any quantity of any other substance by a first-time offender – including powder cocaine – is a misdemeanor offense punishable by a maximum of one year in prison.

In 1990, Congress directed the Sentencing Commission to respond to a series of questions concerning the compatibility between sentencing guidelines and mandatory minimum penalties, the effect of mandatory minimums, and options for Congress to direct sentencing policy through mechanisms other than mandatory minimums.<sup>1</sup> The Sentencing Commission's response concluded that the most efficient and effective way for Congress to direct sentencing policy is through the established process of sentencing guidelines, rather than through mandatory minimum penalties.<sup>2</sup> The Commission reasoned that Congress could thereby achieve the objectives of mandatory minimum penalties (*i.e.*, certain, lengthy sentences for specific categories of offenses and offenders) without compromising other important legislative goals.<sup>3</sup>

Within this context, the Sentencing Commission makes the following general observations based on its review of available relevant data:

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<sup>1</sup> See Pub. L. No. 101-647, 104 Stat. 4846 (1990).

<sup>2</sup> See U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Aug. 1991).

<sup>3</sup> The Commission's 1991 report did not specifically focus on the mandatory minimum penalties applicable to sentencing for federal cocaine offenses.

- 1) Congress addressed an indisputably deep public concern regarding the societal impact of cocaine, particularly in its derivative form of crack, when it established mandatory minimum penalties for trafficking and possession of cocaine in 1986 and 1988. Cocaine, including its relatively new form of crack, was viewed as dramatically increasing the national crime rate, significantly threatening public health, leading to an increasingly violent drug trade, and spreading in an "epidemic" manner. These concerns remain very much a part of the public debate today.
- 2) The general observations regarding the incompatibility of mandatory minimum penalties and sentencing guidelines made by the Sentencing Commission in its August 1991 report to Congress remain valid when applied to the specific issue of mandatory minimum penalties for cocaine offenses.<sup>4</sup>
- 3) Of particular note, when Congress established the mandatory minimum penalties for most drug offenses in 1986 and 1988, the federal sentencing guidelines had not been fully implemented. Consequently, when Congress established the 100-to-1 quantity ratio in 1986, no vehicle other than mandatory minimums existed to ensure that specified types of offenses and offenders received certain punishment. Since nationwide implementation of the guidelines in 1989, Congress has had the ability to set national sentencing policy through the more sophisticated guidelines system.
- 4) Despite the unprecedented level of public attention focused on crack cocaine, a substantial gap continues to exist between the anecdotal experiences that often prompt a call for action and empirical knowledge upon which to base sound policy. Three factors account for this gap. First, although powder cocaine and crack cocaine are two forms of the same drug that are consumed in different ways, much of the data collected on cocaine and its effects does not distinguish between its different forms. Second, because drug users constitute a primary source of information, conclusions are difficult to draw with any degree of confidence. Third, as crack cocaine has only been on the market a relatively short period of time, research that might more fully address outstanding concerns has not yet occurred. Accordingly, given the current information gap, policymakers must draw conclusions cautiously.

## FINDINGS

The extant research and empirical data support the following findings:

- **Pharmacology** (*see* Chapter 2): Cocaine is a naturally occurring substance, derived from the leaves of the erythroxylon plant, that has two prominent actions: 1) it is a potent anesthetic; and 2) it is a powerful stimulant.
- **Forms of Cocaine** (*see* Chapter 2): Powder cocaine and crack cocaine are two forms of the same drug, containing the same active ingredient – the cocaine alkaloid. Powder cocaine (cocaine hydrochloride), the most commonly used form of cocaine, is produced by reacting coca paste, derived from leaves of the coca plant, with hydrochloric acid. Crack cocaine, in turn, is made from powder cocaine in a simple process that requires baking soda, water, and a stove or microwave. Approximately

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<sup>4</sup> U.S. Sentencing Commission, *supra* note 2 at ii-iv.

ten percent of the drug is lost during the conversion process; hence, one gram of powder cocaine will yield .89 grams of crack cocaine. Less frequently consumed forms of cocaine include coca leaves, coca paste, and freebase cocaine.

- **Routes of Administration** (*see* Chapter 2): Cocaine in any form – paste, powder, freebase, or crack – produces the same physiological and psychotropic effects. The onset, intensity, and duration of effects, however, differ according to the route of the drug's administration which, in turn, is dictated in part by the form of cocaine. Powder cocaine can be snorted, injected, or ingested; crack cocaine can only be smoked.
- **Time to Maximum Effect** (*see* Chapter 2): Reactions to cocaine use differ; the faster cocaine reaches the brain, the greater the intensity of the psychotropic effects. Research shows that maximum psychotropic effects can be realized as quickly as one minute after smoking crack cocaine; these effects dissipate after approximately 30 minutes. Some four minutes or more are required to achieve maximum effects after injecting powder cocaine, with the effects lasting for a similar 30 minutes. Powder cocaine that is snorted, on the other hand, takes up to 20 minutes or more to reach maximum psychotropic effect, but the "high" lasts as much as 60 minutes – twice as long as injecting or smoking.
- **Physiological and Psychotropic Effects** (*see* Chapter 2): Cocaine use produces alertness and heightens energy, increases the user's heart rate, elevates blood pressure, and produces symptoms similar to hypertension. Additionally, cocaine acts on the pleasure centers of the brain, causing a sense of euphoria, decreased anxiety and social inhibitions, and heightened sexuality. Increased doses of cocaine, together with the most rapid drug administration routes (*i.e.*, smoking or injecting), produce euphoric experiences that create vivid, long-term psychological memories that, in turn, form the basis for subsequent craving for the drug.
- **Addiction** (*see* Chapter 2): Neither powder cocaine nor crack cocaine are physiologically addictive; however, both are psychologically addictive. Moreover, psychological dependence usually is as devastating as physiological addiction. The greater the intensity of cocaine's psychotropic effects and the shorter their duration, the greater the likelihood cocaine use will lead to dependence and abuse. As discussed above and in Chapter 2, the route of administration determines the intensity and duration of these effects. For a given quantity of cocaine, smoking crack cocaine or injecting powder cocaine produces the most intense physiological and psychotropic effects. However, the ease of smoking, compared to the greater difficulty and unpleasantness involved in injecting any substance, suggests that smoking is more tempting for the first time user and more appealing for the repeat user than is injection. This observation is borne out by the limited available data (*see* Chapter 3), which suggest that almost three times more people smoke cocaine than inject it.
- **Usage Trends** (*see* Chapter 3) Determining patterns and trends of powder and crack cocaine use is difficult. Usage data suggest that casual use of cocaine has diminished

while heavy use of cocaine has remained constant.<sup>5</sup> Data on current cocaine usage from the National Household Survey on Drug Abuse show that 75 percent of users snort powder cocaine, 28 percent smoke crack, and 10 percent of cocaine users inject powder cocaine.<sup>6</sup>

- **Importation** (*see* Chapter 4): Crack cocaine is not cultivated or imported independently of powder cocaine. Rather, cocaine is cultivated, processed, imported, and distributed almost exclusively in the powder form at the higher levels of the drug distribution chain. Some of this powder cocaine is later processed into crack cocaine at the wholesale and retail levels. Wholesale distributors generally smuggle large quantities of powder cocaine into the United States from Colombia, Mexico, and the Caribbean nations through Arizona, southern California, southern Florida, and Texas. The powder cocaine is channeled to what Drug Enforcement Administration (DEA) refers to as "source" cities – Houston, Los Angeles, Miami, and New York City – for distribution throughout the country.
- **Evolution of the Crack Market** (*see* Chapter 4): The types of organizations dominating crack cocaine distribution have undergone an evolution, at least in big-city markets like Los Angeles and New York City. In the early days of crack cocaine sales (1984-1985), freelance distributors operated in a growing, non-competitive market. By 1986, well-organized gangs used violence to consolidate individual dealers and eliminate uncooperative distributors, and, together with small-group distributors, took control of the crack cocaine market. This is a pattern typical of the introduction of new illicit drugs. However, today, researchers and law enforcement officials believe the market is again dominated by a "cottage industry" of small-group and freelance distributors, a deviation from the "normal" pattern. Because these smaller volume distributors now are competing in a market that no longer is expanding, this may indicate that a higher level of violence will continue to be associated with crack cocaine distribution.
- **Forums for Distribution** (*see* Chapter 4): Powder and crack cocaine are distributed at the retail level by similar means, primarily in urban and suburban dwellings and on innercity street corners. Street-corner or open air sales typically involve small retail quantities sold to walk-up or drive-up buyers. This distribution forum particularly is prone to violence, as security of street-corner transactions often is maintained by lookouts or enforcers who carry firearms. A second cocaine distribution system involves "beepermen" who exchange drugs with a user after having been contacted by telephone or beeper. Crack houses and shooting houses for powder cocaine provide a third forum for distribution and involve the use of a fixed location from which drugs are sold to visiting consumers.
- **Marketability** (*see* Chapter 4): Crack cocaine's ease of manufacture and relatively low cost-per-dose have made it more readily marketable than powder cocaine to large numbers of lower income people. For example, crack can be packaged efficiently and marketed in single-dosage units weighing 0.1 to 0.5 gram and priced

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<sup>5</sup> Determining patterns in the effects of powder and crack cocaine use is equally difficult. DAWN data report, however, that smoking crack accounts for twice as many hospital emergency room admissions than powder cocaine use.

<sup>6</sup> The sum of the percentages exceeds 100 percent because some respondents report multiple routes of administration.



from \$5 to \$20. In contrast, powder cocaine generally is sold by the gram (*i.e.*, five to ten doses) for between \$65 and \$100 per gram.

- **Cost/Dosage Comparisons** (*see* Chapter 4): Five hundred grams of powder cocaine (the quantity necessary to trigger the five-year mandatory minimum penalty) generally produces 2,500 to 5,000 doses. In contrast, five grams of crack cocaine (the five-year mandatory minimum penalty amount) produces 10 to 50 doses. According to DEA estimates, 500 grams of powder cocaine costs between \$32,500 and \$50,000. In contrast, five grams of crack cocaine costs between \$225 and \$750.
- **Role of Juveniles and Women** (*see* Chapter 4): Research indicates that both powder cocaine and crack cocaine distributors are young, but those distributing crack are younger. For example, in New York City, 38 percent of offenders arrested for distributing crack cocaine were under 21 years of age, compared to 29 percent for powder cocaine. Older crack cocaine dealers tend to use juveniles in visible roles such as lookouts, steerers, and drug runners in the belief that juveniles are more likely to escape detection and prosecution. The DEA suggests that women also have greater roles in crack cocaine distribution relative to distribution of other drugs. As with juveniles, women are used in more visible roles (such as, making straw purchases of firearms and renting residences to use as crack stash houses) because of the perceived decreased likelihood of detection and prosecution perception.
- **Violence** (*see* Chapter 5): Crack cocaine is associated with systemic crime ( crime related to its marketing and distribution ) to a greater degree than powder cocaine. Researchers and law enforcement officials report that much of the violence associated with crack cocaine stems from attempts by competing factions to consolidate control of drug distribution in urban areas. Some portion of the distribution of powder cocaine, and the majority of the distribution of crack cocaine, is done on street-corners or in open-air markets, crack houses, or powder shooting galleries between anonymous buyers and sellers. These distribution environments, by their very nature, are highly susceptible to conflict and intense competition. As a result, individuals operating in these surroundings are prone to be involved in, as well as victimized by, increased levels of violence. Consistent with its distribution forums, crack offenders are more likely to carry weapons than individuals trafficking in other drugs (27.9% of crack offenders possess dangerous weapons compared to 15.1% of powder cocaine offenders ) *see* Chapter 7) and are more likely to have more extensive criminal records (10.4% of crack cocaine defendants have the highest criminal history category compared to 4.8% for powder cocaine defendants ) *see* Chapter 7).

Many cocaine users, both crack and powder, sell drugs to raise money to support their drug habits. There is little empirical evidence, though, to suggest that either crack or powder cocaine users commit large numbers of violent acts to raise money to buy drugs. However, some research reports a significant percentage of petty property offenses and trading sex for drugs associated with crack cocaine use. Furthermore, one study reports that 98 percent of crack users sell drugs to help support their habits. The Commission finds no research to suggest, however, that powder cocaine users are any less likely to commit crimes to support their habits.

Studies report that neither powder nor crack cocaine excite or agitate users to commit criminal acts and that the stereotype of a drug-crazed addict committing heinous crimes is not true for either form of cocaine.

- **HIV/STD Transmission** (*see* Chapter 3): Crack cocaine smokers and powder cocaine injectors exhibit more high-HIV-risk behavior than powder cocaine snorters, but for different reasons. Intravenous powder cocaine use presents a higher risk of HIV infection than heroin and other IV-injected drugs because of the relatively short-lived euphoria of cocaine (*i.e.*, cocaine injectors are likely to reinject more frequently to sustain the high, thereby presenting a greater risk of acquiring the HIV virus through contaminated needles). Research also shows that, compared to powder cocaine injectors, crack smokers exhibit more high-risk sexual behaviors, including multiple sexual partners, sex without condoms, and sexual activity during or following drug use. Given such behaviors, crack cocaine users also are more likely to contract other sexually transmitted diseases like syphilis and gonorrhea. Additionally, sex-for-drugs – while not unique to crack cocaine – thrives in venues like crack houses. Consequently, the rates of HIV infection are nearly equal between crack smokers and powder cocaine injectors.
- **Effects on Fetus** (*see* Chapter 3): Cocaine use by pregnant women can produce detrimental effects on the fetus that include premature delivery, brain lesions, and malformed limbs. In general, however, reliable information comparing babies born to mothers using crack versus those born to mothers using powder is not available, because medical tests cannot distinguish between the presence of crack as opposed to powder in mother or newborn child. Unless the mother self-reported crack cocaine use, blood tests would simply reveal the presence of cocaine. Nevertheless, because crack cocaine produces more intense "highs" and quicker "lows" than powder cocaine, crack users are more likely to use increased quantities of the drug or to engage in binging. Such practices by pregnant women expose their babies to greater quantities of the drug and, thus, greater potential for harm. Furthermore, babies exposed to crack may experience greater problems because crack smokers achieve a higher concentration of the drug in their bloodstreams than do cocaine snorters. While data are sketchy at best, one researcher estimates that 7.5 percent to 17 percent of all pregnant women use illicit drugs during their pregnancy, resulting in 100,000 to 740,000 drug-exposed babies each year. The estimate of cocaine-exposed babies ranges from 30,000 to 160,000.
- **"Boarder Babies" and Maternal Neglect** (*see* Chapter 3): The Commission's research reveals virtually no studies that address concerns related specifically to crack cocaine use and maternal neglect, teenage pregnancy, and the phenomenon of "boarder babies." That these societal problems exist seems quite clear, but research has focused on the association of these problems to substance abuse in general as opposed to their association with powder or crack cocaine. Furthermore, that these phenomena coincide with a rise in crack cocaine use leads many to believe that the two are related. Research necessary to support or refute that relationship has not been done.

Many states consider the birth of drug-exposed infants to be evidence of maternal neglect. Several states have enacted laws that allow child abuse charges to be brought against any woman with illegal drugs in her bloodstream who gives birth to a child. Other states simply remove drug-exposed babies from their mothers, making

them wards of the state. Some states have tried these methods and rejected them in favor of mandatory treatment programs in which mothers must enter treatment or lose their children.

- **State Distinctions** (see Chapter 6): Thirty-six states do not distinguish between powder cocaine and crack cocaine in their statutory penalty structures. No state has elected to follow, in its entirety, the federal penalty scheme for powder and crack cocaine offenses and none provides a differential between powder and crack cocaine that approaches the federal system's 100-to-1 quantity ratio at the five- and ten-year mandatory minimum levels.<sup>7</sup>
- **Prosecutorial Discretion** (see Chapter 6): Federal cocaine prosecutions vary widely by district. For example, four defendants were sentenced for trafficking in less than 50 grams of crack cocaine in the Central District of California (which includes Los Angeles) in 1993. By comparison, 111 defendants were sentenced for the same offense during the same period in Washington, D.C. In 1993, the Southern District of West Virginia sentenced 113 offenders for trafficking in any amount of crack cocaine; the Eastern District of New York – which includes Brooklyn – sentenced 24. During the same period, the Southern District of West Virginia sentenced 41 offenders for trafficking in powder cocaine compared to Eastern New York's 175.<sup>8</sup>
- **Demographic/Offender Information** (see Chapter 7): The data show that federal crack cocaine offenders, on average, are younger than federal powder cocaine offenders, have somewhat less education, and have more extensive prior criminal records. Crack cocaine defendants also are more likely to possess a weapon.
- **Race** (see Chapter 7): Blacks accounted for 88.3 percent of federal crack cocaine distribution convictions in 1993, Hispanics 7.1 percent, Whites 4.1 percent, and others 0.5 percent. The racial breakdown for powder cocaine distribution offenses sentenced in 1993 shows 32.0 percent White, 27.4 percent Black, 39.3 percent Hispanic, and 1.3 percent other. On the other hand, the 1991 Household Survey shows that 52 percent of those reporting crack use in the past year, as opposed to distribution, were White, 38 percent were Black, and 10 percent Hispanic; 75 percent of those reporting powder use in the past year were White, 15 percent were Black, and 10 percent Hispanic (see Chapter 3).<sup>9</sup>

Based on this limited information, the Sentencing Commission identifies the following concerns:

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<sup>7</sup> North Dakota provides a 100-to-1 distinction between powder and crack cocaine but limits it to the five-year mandatory minimum amounts.

<sup>8</sup>The Commission does not mean to suggest that any apparent disparities are unwarranted. As a general matter, the Commission has not analyzed various factors that might explain these and other differences, including the strength of the state and local law enforcement efforts directed at the crack cocaine trade, the relative punishment available through state statutes, differing needs and problems facing each district, and resource allocation issues.

<sup>9</sup> The National Household Survey potentially underrepresents lower-income populations and overrepresents middle or upper-income populations or those who reside in households.

1) **Racial Disparity:** Federal sentencing data leads to the inescapable conclusion that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine. This does not mean, however, that the penalties are racially motivated. Clearly the penalties (both statutory and guideline-based) apply equally to similar defendants regardless of race. Many individual criminal statutes, when enforced, produce a pool of defendants who are not representative of the racial make-up of criminal law violators generally or of society. However, as all appellate courts have found, there is no evidence that Congress or the Sentencing Commission acted with any discriminatory intent in setting different statutory and guideline penalties for different forms of cocaine.

Nevertheless, the high percentage of Blacks convicted of crack cocaine offenses is a matter of great concern to the Sentencing Commission. Penalties clearly must be racially neutral on their face and by design. The Sentencing Commission is committed to these goals. When one form of a drug can be rather easily converted to another form of the same drug and when that second form is punished at a quantity ratio 100 times greater than the original form, it would appear reasonable to require the existence of sufficient policy bases to support such a sentencing scheme regardless of racial impact. Moreover, when such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population, it is particularly important that sufficient policy bases exist in support of the enhanced ratio.

Further, it is instructive that ) although appellate courts have not found the 100-to-1 quantity ratio constitutionally deficient ) some have commented upon the problematic nature of the sentencing scheme from a policy standpoint<sup>10</sup> and further indicated that the resolution of such questions is better left to those with the proper authority and institutional capacity.<sup>11</sup>

2) **Quantifying Harm:** Some argue that a sentencing system must punish different forms of the same drug equally. The Sentencing Commission disagrees. If a particular form of a drug results in greater harms than a different form of that drug, then logically a harsher penalty for the more harmful drug can be justified. In assessing the relative harms posed by the two forms, the aim is to arrive at a penalty differential that approximates the increased dangers posed by the more harmful drug.

The Sentencing Commission maintains, however, that there are better ways to achieve the desired result. Recognizing that Congress has ultimate authority over sentencing policy, the question becomes how Congress can best translate its judgment as to appropriate levels of punishment severity into sentences imposed. To a degree, Congress has already spoken on this issue. Because of its ability to accommodate the vast array of relevant offense/offender characteristics, the guidelines system established by Congress is superior to an approach based solely on automatic ratios and mandatory minimums, including mandatory minimums for powder and crack cocaine offenses. Congress has effectively communicated its policies on sentencing through the Sentencing Reform Act and subsequent legislation. It has continuing oversight of the work of the Sentencing Commission through the statutory requirement that proposed guidelines and amendments to guidelines be submitted to Congress for 180-day review before they become effective.

3) **Level Within the Drug Chain:** The substantial difference in the ratio between crack and powder cocaine punishes the retail dealer of crack far more severely than the powder cocaine

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<sup>10</sup> See United States v. Singleterry, 29 F.3d 733, 741 (1st Cir.), *cert. denied*, 115 S.Ct. 647 (1994).

<sup>11</sup> See United States v. Frazier, 981 F.2d 92, 96 (3rd Cir. 1992); *see generally* Appendix C.

supplier who may have sold the powder cocaine from which multiple street dealers made crack. This issue, however, cannot be viewed in the abstract, because concerns over street violence and other harms affect the determination of an appropriate quantity ratio. Nevertheless, five grams of crack cocaine – the quantity that triggers a five-year mandatory minimum penalty ) appears to be much more a retail quantity than 500 grams of powder cocaine ) the quantity of powder cocaine necessary to trigger the five-year mandatory penalty. Consequently, retail-level crack cocaine dealers are being punished like wholesaler- and importer-level powder cocaine dealers.

For example, under the 100-to-1 quantity ratio, a wholesaler convicted of moving five kilograms of powder cocaine may receive a lesser sentence than a distributor who buys one of the five kilograms but is caught after having converted the powder into crack cocaine. This anomalous result highlights the fact that individuals higher in the cocaine distribution chain can be punished less severely than certain lower-level traffickers because of the intervening change in the form of cocaine, *i.e.*, the change to crack.

**4) Societal Concerns:** Congress and the public are troubled by the apparent relationship between crack and societal problems, particularly in American cities. The Sentencing Commission shares these concerns.

Many Americans do not feel safe walking the streets, driving in their automobiles, or even sitting in their homes for fear of stray bullets from drive-by shootings or disputes between rival drug traffickers. The medical community sees increased incidence of gunshot victims, infants born exposed to drugs, boarder babies, HIV/AIDS and other sexually transmitted diseases, and increasingly younger victims and perpetrators of violent crime. The use of women and youth to facilitate the drug trade seems higher at this point in the country's history than ever before, with no clear answer as to why this may be true.

There has been significant growth in the rate of drug-exposed infants in this country, with nine percent or 350,000 babies each year exposed to drugs in the womb. Certainly, the rate of cocaine-exposed babies continues to rise. And while medical science cannot distinguish between the two forms of cocaine, certain factors put crack-exposed babies at greater peril; because the highs and lows associated with drug use are quicker when using crack cocaine, crack users are more likely to use increased quantities of the drug or engage in binging, exposing the infant to greater quantities of the drug and, thus, to more harm.

With the growth in drug-exposed babies has come an increase in maternal neglect and the phenomenon of boarder babies. In general, studies have not focused on a particular drug type when studying these issues, instead looking broadly at the question of substance abuse. The problem of substance abuse among women and its effect on children raises serious policy concerns.

As Americans have watched these devastating changes to their everyday lives, they also have witnessed the proliferation of crack cocaine sale and use. While there is some indication that crack use is declining, it is difficult to ignore the potential association between these phenomena.

In summary, while it is true that powder cocaine and crack cocaine pharmacologically are the same drug and equally true that neither form of cocaine is physiologically addictive, important distinctions between the two may warrant higher penalties for crack than powder. For example, factors in the route of administration (*i.e.*, smoking versus snorting) and attributes of the crack cocaine market make crack different from powder from a policy perspective. These factors generally include: 1) a greater risk for psychological addiction due to the rapid high and concomitant rapid low resulting from inhalation of crack; 2) because powder cocaine can be converted easily into smaller

doses of crack that can be sold more cheaply and in potent quantities, crack is more readily available to a larger segment of the population, particularly women, children, and the economically disadvantaged; 3) the apparently higher correlation between crack and violence than between powder and violence; and 4) the increased use of young people in the distribution of crack.

Even so, given its review of the subject, the Sentencing Commission cannot support the current penalty scheme. The factors that suggest a difference between the two forms of cocaine do not approach the level of a 100-to-1 quantity ratio. Research and public policy may support somewhat higher penalties for crack versus powder cocaine, but a 100-to-1 quantity ratio cannot be recommended.

Notwithstanding the Sentencing Commission's broad examination of these issues, much more research is needed into the distinctions between powder and crack cocaine. To the extent practicable, medical and social science research, as well as law enforcement arrest data, must distinguish between the two forms of cocaine. The present failure to distinguish between crack and powder in data on arrests, cocaine-exposed babies, maternal neglect and substance abuse, and violence associated with drug use and distribution continuously frustrated the Commission's study.

**Recommendations:** The Sentencing Commission shares congressional and public concern about the harms associated with crack cocaine ) both to users and to the society as a whole ) including the violence associated with its distribution, its use by juveniles, the involvement of women and juveniles in its distribution, and its addictive potential. However, the Sentencing Commission concludes that Congress's objectives with regard to punishing crack cocaine trafficking can be achieved more effectively without relying on the current federal sentencing scheme for crack cocaine offenses that includes the 100-to-1 quantity ratio.

Rather than propose a specific statutory change in the current 100-to-1 quantity ratio, the Sentencing Commission recommends that the guidelines system be revised to further the purposes of sentencing and to address congressional concerns. Given the Sentencing Reform Act of 1984, the most efficient and effective way for Congress to direct cocaine sentencing policy is through the established process of sentencing guidelines, rather than relying solely on a statutory distinction between the two forms of the same drug. This has not yet occurred because the current guideline sentencing scheme was overlaid onto the already existing mandatory minimum structure for cocaine sentencing that Congress created in 1986. The current sentencing scheme, therefore, should be amended to account for and punish more fully and appropriately for the dangers associated with both crack and powder cocaine.

A number of related sentencing policies currently under consideration by Congress and the Sentencing Commission may affect the final sentencing scheme for cocaine. For example, the Commission is now considering amendments concerning the use of juveniles in offenses, gang involvement, and the drug guidelines generally. Congress is considering changes to sentences for offenses involving firearms and enhanced penalties for drug sales to, or distribution involving, minors.

As a priority matter upon completion of this report, the Sentencing Commission will further develop appropriately weighted guideline enhancements (*i.e.*, specific offense characteristics, general adjustments, offender characteristics) corresponding to important offense and offender characteristics present in crack cases that justify higher sentences. The guidelines currently provide enhancements for a number of societal harms associated with crack; to the extent Congress factored in these same harms in establishing the 100-to-1 quantity ratio, double punishment occurs. If guideline enhancements cannot sufficiently account for harms associated with crack, the guidelines can provide

an increased ratio through the base offense level. Workable guideline provisions can be developed to account fully for harms related to crack and powder cocaine without the difficulties associated with an automatic 100-to-1 ratio.

In setting these guidelines, the Commission will consider, to the extent relevant to congressional concern and the purposes of sentencing as set forth at 18 U.S.C. § 3553(a)(2), the following: 1) the form of cocaine involved; 2) whether a firearm or other dangerous weapon was involved; 3) whether the offense resulted in serious bodily injury or death to another person; 4) the quantity of cocaine involved; 5) the extent to which the powder cocaine defendant knew the drug would be converted into crack; 6) the extent to which the offense involved systemic crime, that is, crime related to the drug's marketing, distribution, and control; 7) the extent to which the offense involved social harms, that is, harms associated with increased addictiveness, parental neglect, child and domestic abuse, and high risk sexual behaviors; 8) whether the offense involved the use or employment of any person under the age of 18; 9) whether the defendant performed a managerial or leadership role in the offense; 10) the defendant's prior criminal record; and 11) any other aggravating or mitigating factors necessary to ensure adequate and appropriate punishment for defendants convicted of cocaine offenses.

Assuming that the guidelines can be reshaped to account more fully for the heightened harms associated with crack, grounds may still exist for differentiating between otherwise similar crack and powder cocaine offenses. Any such differential could be implemented through guideline base offense levels and would represent the Sentencing Commission's best judgment regarding a more appropriate quantity ratio between powder and crack cocaine. However, until the possibility has been thoroughly explored of using specific guideline enhancements to account for the more significant societal harms associated with crack, the Sentencing Commission cannot state definitively that some base differential is warranted and whether that differential should be guideline-based or statutory.

The Sentencing Commission contemplates that this guideline refinement procedure can be accomplished within the current and next amendment cycles, resulting in the submission to Congress no later than May 1, 1996, of a comprehensive revision of the guidelines applicable to cocaine offenses.

The considerations described above similarly warrant congressional reconsideration of the dramatic distinction in simple possession penalties for crack versus powder cocaine and other drugs. The Sentencing Commission recommends that Congress revisit the unique penalties for simple possession of crack enacted in 1988 and, as with the trafficking penalty scheme, afford sufficient latitude for the Commission to design a fairer, more proportional approach within the guidelines structure.

Having broadly delegated to the Sentencing Commission responsibility for developing a comprehensive and rational system of sentencing guidelines for all offenses, Congress should consider relying on the same approach to implement appropriate policy adjustments in this specific area. Among other advantages, this approach would permit the Sentencing Commission, which is responsible for continually refining the guidelines system, greater flexibility to make adjustments reflecting advances in knowledge about the impact of cocaine on society. Most importantly, through the guidelines system, consistent, appropriately individualized, and substantially fairer outcomes can be achieved that effectively promote the concerns of Congress as identified in the statutory purposes of sentencing.