

BACKGROUND

A. INTRODUCTION

This report updates and supplements much of the research and data presented in the United States Sentencing Commission’s *1995 Special Report to Congress: Cocaine and Federal Sentencing Policy*¹ [hereinafter the 1995 Commission Report] and referred to in the Commission’s *1997 Special Report to Congress: Cocaine and Federal Sentencing Policy*² [hereinafter the 1997 Commission Report]. The Commission submits this report pursuant to both its general statutory authority under 28 U.S.C. §§ 994-95 and its specific responsibility to advise Congress on sentencing policy under 28 U.S.C. § 995(a)(20).³

As discussed in more detail below, Congress disapproved the Commission’s guideline amendment addressing crack cocaine penalties submitted on May 1, 1995, and has not acted on the statutory recommendations set forth in the 1995 Commission Report and the 1997 Commission Report.⁴ Federal sentencing policy for cocaine offenses continues to come under substantial criticism from various public officials, private citizens, criminal justice practitioners, researchers, and interest groups. The Commission renewed its assessment of federal cocaine sentencing policy in part to consider and address those concerns.

¹ United States Sentencing Commission [USSC], 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (as directed by section 280006 of Public Law 103–322) (February 1995).

² USSC, 1997 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (as directed by section 2 of Pub. L. 104–38) (April 1997).

³ The Sentencing Reform Act of 1984 created the Commission as an independent agency in the judicial branch of government. Pub. L. No. 98–473 (1984). The Act directed the Commission to establish and maintain sentencing policies and practices for the federal criminal justice system through a detailed framework of sentencing guidelines. *See generally* 28 U.S.C. § 994. In addition, the Act requires the Commission to monitor and report periodically on the operation of the sentencing guidelines and gives the Commission ongoing sentencing and crime policy research responsibilities. *See* 28 U.S.C. § 995(a)(8), (9), (12)(A), (13)-(16), (21). Specifically, the Commission is required to “make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional markers that the Commission finds to be necessary to carry out an effective, humane, and rational sentencing policy.” *See* 28 U.S.C. § 995(a)(20). The Commission’s duties and authorities are fully set forth in chapter 58 of title 28, United States Code.

⁴ The commissioners who authored the 1995 and 1997 Commission Reports no longer sit on the Commission, having left on a staggered basis, either by expiration of term or resignation, by October 1998.

Critics typically focus on the differences in federal penalty levels between the two principal forms of cocaine – cocaine hydrochloride [hereinafter referred to as powder cocaine] and cocaine base [hereinafter referred to as crack cocaine].⁵ For example, the Commission received a statement from 28 United States Circuit Court of Appeals and District Court judges who had previously served as United States Attorneys stating that the “current disparity between powder cocaine and crack cocaine, in both the mandatory minimum statutes and the guidelines, cannot be justified and results in sentences that are unjust and do not serve society’s interest.”⁶ That statement echoed the sentiments expressed in a similar letter sent to the U.S. Senate and House Judiciary Committees in September 1997. *See* Judge John S. Martin, Jr. et al.’s September 16, 1997 statement on Powder and Crack Cocaine to the Senate and House Judiciary Committees.⁷

The statements of those 28 federal judges are in accord with the results of a survey of federal judges recently conducted by the Commission. The Commission surveyed federal judges for their views on whether the federal guideline system is achieving the purposes of sentencing as established in 18 U.S.C. § 3553(a)(2).⁸ A total of 562 judges completed the multiple choice

⁵ As explained in more detail below, 100 times as much powder cocaine as crack cocaine is required to trigger the same five-year and ten-year statutory mandatory minimum penalties. As a result, based solely on drug quantity the sentencing guideline penalties for crack cocaine offenses generally are three to over six times as long as the sentence guideline penalties for powder cocaine offenses involving equivalent drug quantities.

⁶ Statement by Certain United States Circuit Court of Appeals and District Court Judges who Previously Served as United States Attorneys, regarding the penalties for powder and crack cocaine, to the U.S. Sentencing Commission (April 16, 2002).

⁷ *Statement on Powder and Crack Cocaine to the Senate and House Committees on the Judiciary*, 105th Cong. (1997) (letter from Judge John S. Martin, Jr. et al., p. 1). This statement was signed by 27 federal judges, each of whom had served as United States Attorney. The judges stated:

It is our strongly held view that the current disparity between powder cocaine and crack cocaine, in both the mandatory minimum statutes and the guidelines, cannot be justified and results in sentences that are unjust and do not serve society’s interest.

. . . . At either end of the distribution chain, the substantially greater sentences for those who are involved with crack cocaine do not appear to have any greater deterrent impact than that achieved by the lower powder cocaine penalties.

Thus, the differences in the current mandatory minimums and guidelines for powder and crack cocaine result in the imposition of overly severe sentences on those who are involved with relatively small amounts of crack at the lowest levels of the distribution chain, without providing any corresponding benefit to society.

⁸ As the Sentencing Guidelines approach their 15th year anniversary, the Commission is undertaking a study of various aspects of the federal guideline system. One component of this study is a

questionnaire. Almost half of the respondents (276) took the additional step of providing written responses regarding what they view as specific challenges facing the guideline system. Of the 276 judges who provided written comments, 56 judges stated that a major challenge is drug sentencing and an additional 37 judges specifically identified cocaine sentencing as that challenge.

Other critics assert that the current penalty structure disproportionately impacts minority populations. *See, e.g.*, written statement by Wade Henderson, Executive Director, Leadership Conference on Civil Rights,⁹ citing Commission statistics that show 84.7 percent of federal crack cocaine offenders sentenced in fiscal year 2000 were black, 9.0 percent were Hispanic, and 5.6 percent were white; written statement by Charles Kamasaki, Senior Vice President, National Council of La Raza,¹⁰ citing Commission statistics that show the proportion of Hispanic powder cocaine federal offenders has increased from 39.8 percent in fiscal year 1992 to 50.8 percent in fiscal year 2000.

Since receiving the 1997 Commission Report, members of Congress have continued to express interest in exploring possible changes to the federal cocaine penalty structure, and a number of different approaches have been proposed. Several bills have been introduced that proposed equalizing the quantity-based penalties for the two forms of cocaine, either by increasing the penalties for powder cocaine¹¹ or by decreasing the penalties for crack cocaine.¹² In 2000, the Senate passed by one vote an amendment to the Bankruptcy Reform Act of 2000 offered on behalf of Senator Abraham that, among other things, would have established a 10-to-1

survey of federal district and circuit court judges soliciting their views on whether the guidelines are achieving the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

⁹ Written statement by Wade Henderson, Executive Director, Leadership Conference on Civil Rights, to the U.S. Sentencing Commission regarding Drug Penalties (February 25, 2002).

¹⁰ Written statement by Charles Kamasaki, Senior Vice President, National Council of La Raza, to the U.S. Sentencing Commission regarding Drug Penalties (February 25, 2002).

¹¹ *See, e.g.*, S. 1162, 105th Cong. (1997) introduced by Sen. Wayne Allard; S. 209, 105th Cong. (1997) introduced by Sen. John Breaux; S. 1593, 105th Cong. (1998) introduced by Sen. Allard; H.R. 332, 105th Cong. (1997) introduced by Rep. Gerald Solomon; H.R. 2229, 105th Cong. (1997) introduced by Rep. William Pascrell, Jr.; and H.R. 4026, 107th Cong. (2002) introduced by Rep. Roscoe Bartlett.

¹² *See, e.g.*, H.R. 2031, 105th Cong. (1997) introduced by Rep. Charles Rangel; H.R. 939, 106th Cong. (1999) introduced by Rep. Rangel; H.R. 1241, 106th Cong. (1999) introduced by Rep. Maxine Waters; and H.R. 697, 107th Cong. (2001) introduced by Rep. Rangel.

drug quantity ratio by reducing the five-year powder cocaine trigger quantity from 500 grams to 50 grams.¹³

More recently, Senators Jeff Sessions and Orrin Hatch introduced Senate Bill 1847, the Drug Sentencing Reform Act of 2001, which among other things, would reduce the 100-to-1 drug quantity ratio to 20-to-1 by increasing the statutory mandatory minimum penalties for powder cocaine and decreasing the statutory mandatory minimum penalties for crack cocaine.¹⁴ In addition, Senators Patrick Leahy and Hatch, Chairman and Ranking Member of the Senate Judiciary Committee, respectively, recently wrote the Commission requesting that it examine federal cocaine penalties and study certain specific issues.¹⁵ The Commission welcomes this renewed congressional interest and hopes to work with Congress and other representatives of the criminal justice system to develop appropriate modifications to the federal penalty structure for cocaine offenses.

B. CURRENT PENALTY STRUCTURE FOR FEDERAL COCAINE OFFENSES

The Anti-Drug Abuse Act of 1986¹⁶ [hereinafter the 1986 Act] established the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties differed for various drugs and, in some cases, including cocaine, for different forms of the same drug.

In establishing the mandatory minimum penalties for cocaine, Congress differentiated between powder cocaine and crack cocaine – and singled out crack cocaine for significantly higher punishment.¹⁷ As a result of the 1986 Act, 21 U.S.C. § 841(b)(1) requires a five-year

¹³ Bankruptcy Reform Act of 2000, H.R. 833, 106th Cong. § 1772 (2000).

¹⁴ See 147 CONG. REC. S13,961-65 (daily ed. Dec. 20, 2001) (statements of Sens. Sessions and Hatch) for discussion of the relevant legislative history for the current federal penalty scheme and the proposed changes contained in the bill.

¹⁵ Senators Leahy and Hatch specifically requested that the Commission study: (1) whether the present sentencing structure remains empirically supportable; (2) whether raising the mandatory minimum threshold drug quantities for crack cocaine offenses would adversely affect crime rates; (3) whether the current penalties for crack cocaine offenses act as a deterrent and whether increasing the threshold drug quantity would diminish any deterrent effect; (4) whether the pharmacological effects of crack cocaine are substantially more severe than the effects of powder cocaine; (5) the effect changes to the mandatory minimum threshold drug quantities for cocaine offenses would have on minority populations; and (6) the prison impact of any changes to the penalties for cocaine offenses. These issues are addressed in pertinent parts of this report.

¹⁶ See Pub. L. 99-570, 100 Stat. 3207 (1986).

¹⁷ The heightened statutory mandatory minimum penalties provided in 21 U.S.C. § 841 apply to “cocaine base,” which is undefined in the statute but interpreted by some courts to be broader than crack

mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the “100-to-1 drug quantity ratio.”

1. Two-Tiered Penalties for “Serious” and “Major” Traffickers¹⁸

In response to a number of well-publicized tragic incidents, such as the death of the Boston Celtics’ first-round basketball draft pick, Len Bias, in June 1986, Congress expedited passage of the 1986 Act. Because of the heightened concern and national sense of urgency surrounding drugs generally and crack cocaine specifically, Congress bypassed much of its usual deliberative legislative process.¹⁹ As a result, there were no committee hearings and no Senate or House Reports accompanying the bill that ultimately passed (although there were 17 related

cocaine, and include, for example, coca paste. In 1993, the Commission narrowed the definition for purposes of guideline application to focus on crack cocaine, which the Commission believed was Congress’s primary concern. Specifically, the Commission added the following definition to the notes following the Drug Quantity Table in USSG §2D1.1(c): “‘Cocaine base,’ for purposes of this guideline, means ‘crack.’ ‘Crack’ is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.” USSG, App. C, Amend. 487 (effective Nov. 1, 1993). The amendment resolved a circuit conflict over the statutory and guideline definitions of “cocaine base.” *Compare, e.g., United States v. Shaw*, 936 F.2d 412 (9th Cir. 1991) (cocaine base means crack) *with United States v. Jackson*, 968 F.2d 158 (2d Cir. 1992) (cocaine base has a scientific, chemical definition that is more inclusive than crack). As a result of the amendment, the guidelines treat forms of cocaine base other than crack cocaine (*e.g.*, coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride) like powder cocaine.

¹⁸ See Chapter 6 of the 1995 Commission Report for a more detailed history of the federal penalty structure for cocaine offenses; *see also United States v. Peterson*, 143 F.Supp. 2d. 569, 571-581 (E.D.Va) (discussing legislative history of the 1986 Act and subsequent developments regarding federal cocaine sentencing policy).

¹⁹ 132 CONG. REC. 26,436 (daily ed. Sept. 26, 1986) (statement of Sen. Paula Hawkins) (“Drugs pose a clear and present danger to America’s national security. If for no other reason we should be addressing this on an emergency basis.”).

reports on various issues).²⁰ Thus, the legislative history for the bill that was enacted into law is limited primarily to statements made by senators and representatives during floor debates.

Floor statements delivered by members in support of the 1986 Act and a committee report on a predecessor bill suggest that Congress intended to create a two-tiered penalty structure for discrete categories of traffickers. Specifically, Congress intended to link the five-year mandatory minimum penalties to to what some called “serious” traffickers and the ten-year mandatory minimum penalties to “major” traffickers. Drug quantity would serve as a proxy to identify those types of traffickers.

Senator Robert Byrd, then the Senate Minority Leader, summarized the intent behind the legislation:

For the kingpins – the masterminds who are really running these operations – and they can be identified by the amount of drugs with which they are involved – we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for

²⁰ H.R. 5484, the bill which eventually became the 1986 Act, was amended well over 100 times while under consideration from September 10, 1986 to October 27, 1986. Several members of Congress were critical of the speed with which the bill was developed and considered. Sen. Charles Mathias reflected this sentiment in his floor statement:

Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process, tempered by the heat of debate. The committees are important because, like them or not, they do provide a means by which legislation can be carefully considered, can be put through a filter, can be exposed to public view and public discussion by calling witnesses before the committee. . . . [T]his bill is a moving target. . . . You cannot quite get a hold of what is going to be in the bill at any given moment. We have had drafts of different portions of the bill circulating around the Senate corridors within the last 24 hours.

132 CONG. REC. 26,462 (daily ed. Sept. 26, 1986). *See also*, 132 CONG. REC. 26,441 (daily ed. Sept. 26, 1986) (statement of Sen. Daniel Evans noting that the bill was being considered in September of an election year); 132 CONG. REC. 26,434 (daily ed. Sept. 26, 1986) (statement of Sen. Robert Dole) (“I have been reading editorials saying we are rushing a judgment on the drug bill and I think to some extent they are probably correct.”); 132 CONG. REC. 22,658 (daily ed. Sept. 10, 1986) (statement of Rep. Trent Lott) (“In our haste to patch together a drug bill – any drug bill – before we adjourn, we have run the risk of ending up with a patch-work quilt . . . that may or may not fit together in a comprehensible whole.”).

the kingpins, but they nevertheless would have to go to jail – a minimum of 5 years for the first offense.²¹

A committee report issued by the House Judiciary Subcommittee on Crime following its consideration of a predecessor bill (House Bill 5394) also provides evidence of Congress’s intent to establish two-tiered mandatory minimum penalties for serious and major traffickers. According to the report, the Subcommittee determined that the five and ten-year mandatory minimum sentencing structure would create proper incentives for the Department of Justice to direct its “most intense focus” on “major traffickers” and “serious traffickers.” (House Report 99-845.)²² “One of the major goals of this bill is to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources.”²³ The Subcommittee defined major and serious traffickers as follows:

- **major traffickers:** “the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities;”
- **serious traffickers:** “the managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities.”²⁴

2. Specific Congressional Concerns About Crack Cocaine

Of particular relevance to this report, there is no authoritative legislative history that explains Congress’s rationale for selecting the 100-to-1 drug quantity ratio for powder cocaine and crack cocaine offenses. The legislative history shows that Congress considered a variety of powder cocaine/crack cocaine drug quantity ratios before adopting the 100-to-1 ratio. The original version of the House Bill that was ultimately enacted into law, House Bill 5484, contained a drug quantity ratio of 50-to-1.²⁵ A number of other bills introduced during this period contained drug quantity ratios of 20-to-1, including one (Senate Bill 2849) introduced by Senate Majority Leader Robert Dole on behalf of the Reagan Administration that proposed five-

²¹ 132 CONG. REC. 27,193-94 (daily ed. Sept. 30, 1986); *see also* 132 CONG. REC. 22,993 (daily ed. Sept. 11, 1986) (statement of Rep. John LaFalce) (“[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.”).

²² H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986).

²³ *Id.* at 11.

²⁴ *Id.* at 11-12.

²⁵ H.R. 5484 would have provided a five-year mandatory minimum for 20 grams of crack cocaine and 1,000 grams of powder cocaine and a ten-year mandatory minimum for 100 grams of crack cocaine and 5,000 grams of powder cocaine, reflecting a 50-to-1 drug quantity ratio. *See also*, H.R. 5394, Narcotics Penalties and Enforcement Act of 1986 (containing a 50-to-1 drug quantity ratio).

year mandatory minimum penalties for cases involving 500 grams of powder cocaine or 25 grams of crack cocaine.²⁶

The legislative history surrounding these earlier bills suggests that they were intended to provide drug quantity triggers for crack cocaine offenses that fit into the overall serious/major trafficker structure being contemplated at the time. For example, at a mark-up of House Bill 5394, Representative William J. Hughes, Chairman of the House Crime Subcommittee, stated that: “[t]he quantity is based on the minimum quantity that would be controlled or directed by a trafficker in a high place in the processing and distribution chain. . . . For the major traffickers, the levels we have set [include] . . . 100 grams of cocaine freebase” (The Narcotics Penalties and Enforcement Act: Markup on House Bill 5394).²⁷ Chairman Hughes added that the “serious trafficker” definition applied to dealers selling quantities of 20 grams of cocaine base.

As the 1986 Act advanced through the legislative process in late summer and early fall of that year, the drug quantity ratio was rapidly ratcheted up from 20-to-1 to 100-to-1. The legislative history does not provide conclusive evidence of Congress’s reason for doing so, but it does suggest that Congress (particularly the Senate) purposely may have deviated from the serious/major trafficker penalty structure for crack cocaine offenses. In other words, for crack cocaine trafficking offenses, Congress might have set aside its general objective of targeting “major” and “serious” drug traffickers. While considering House Bill 5484, Senator Lawton Chiles, explained that:

This legislation will . . . decrease the amount for the stiffest penalties to apply. Those who possess 5 or more grams of cocaine freebase will be *treated as* serious offenders. Those apprehended with 50 or more grams of cocaine freebase will be *treated as* major offenders. Such treatment is absolutely essential because of the especially lethal characteristics of this form of cocaine. Five grams can produce 100 hits of crack. Those who possess such an amount should have the book thrown at them. The damage 100 hits can inflict upon users more than warrants this treatment.²⁸

This passage, albeit not conclusive, suggests that Congress may have been motivated by the perceived heightened harmfulness of crack cocaine to prescribe mandatory minimum penalties for crack cocaine based on the harm such quantities could cause, regardless of whether

²⁶ See, e.g., Mandatory Crack and Other Drug Penalties Act, S. 2787, 99th Cong. (introduced Aug. 15, 1986); Drug Free Federal Workplace Act of 1986, S. 2849, 99th Cong. (introduced Sept. 23, 1986); Drug Enforcement Act of 1986, S. 2850, 99th Cong. (introduced Sept. 23, 1986).

²⁷ *The Narcotics Penalties and Enforcement Act: Markup on H.R. 5394 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong. 131 (1986) (statement of Rep. Hughes).

²⁸ H.R. 5484, 132 CONG. REC. 26,447 (daily ed. Sept. 26, 1986). (emphasis added.)

the offenders were “serious” or “major” traffickers as defined elsewhere.²⁹

Although whether Congress intended the penalties for crack cocaine to fit within the general serious/major trafficker penalty structure is ambiguous, the legislative history does suggest that Congress concluded that crack cocaine was more dangerous than powder cocaine and therefore warranted higher penalties based on five important beliefs:

- Crack cocaine was extremely addictive. The addictive nature of crack cocaine was stressed not only in comparison to powder cocaine, but also in absolute terms.³⁰
- The correlation between crack cocaine use and distribution and the commission of other serious and violent crimes was greater than that with other drugs. Floor statements focused on psycho-pharmacologically driven, economically compulsive, as well as systemic crime (although members did not typically use these terms).³¹

²⁹ Other passages, equally inconclusive, may suggest the opposite conclusion: that Congress intended for crack cocaine penalties to fit within the overall two-tiered structure. Much of the drug package in H.R. 5484 was first introduced as the Comprehensive Narcotics Control Act of 1986. 132 CONG. REC. 27,177 (daily ed. Sept. 30, 1986) (statement of Sen. Christopher Dodd). The Comprehensive Narcotics Control Act of 1986 was introduced in the Senate on September 9, 1986 (the day before the House introduced H.R. 5484). Speaking in favor of this bill, Sen. James Sasser explained:

[Crack] is as dangerous as any drug on the street and more addictive than almost any of them. Then we say that if you possess 50 grams you are a major trafficker – 10 years to life for the first offense. If you have even 5 grams in your possession, it’s 5 to 25 years.

132 CONG. REC. 22,437 (daily ed. Sept. 9, 1986).

³⁰ 132 CONG. REC. 22,667 (daily ed. Sept. 10, 1986) (statement of Rep. James Traficant) (“Crack is reported by many medical experts to be the most addictive narcotic drug known to man.”); 132 CONG. REC. 22,993 (daily ed. Sept. 11, 1986) (statement of Rep. LaFalce) (“Crack is thought to be even more highly addictive than other forms of cocaine or heroin.”); 132 CONG. REC. 31,329 (daily ed. Oct. 15, 1986) (statement of Sen. Chiles) (“[I]f you try it once, chances are that you will be hooked. If you use it up to three times, we know that you will become hooked, and it is the strongest addiction that we have found.”).

³¹ 132 CONG. REC. 22,667 (daily ed. Sept. 10, 1986) (statement of Rep. Traficant) (“The widespread use of crack in New York City is said by many law enforcement officials in that city to have caused a rise in violent crimes last year.”); 132 CONG. REC. 31,329-30 (daily ed. Oct. 15, 1986) (statement of Sen. Chiles):

We find again once people are hooked, all they can think about is staying high, that euphoria which they get, but there is a corresponding down that is just as deep in its trough as the high is at the crest of the wave. And so we find that people, when they are

- Physiological effects of crack cocaine were considered especially perilous, resulting in death to some users and causing devastating effects on children prenatally exposed to the drug.³²
- Young people were particularly prone to using and/or being involved in trafficking crack cocaine.³³
- Crack cocaine's purity and potency, low cost per dose, and the ease with which it was manufactured, transported, disposed of, and administered, were all leading to its widespread use.³⁴

3. Commission Response to the 1986 Act

When Congress passed the 1986 Act, the Commission had not completed promulgating the initial sentencing guidelines. The Commission responded to the legislation by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. Offenses involving five grams or more of crack cocaine or 500 grams or more of powder cocaine were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78

addicted, will go out and steal, rob, lie, cheat, take money from any savings, take refrigerators out of their houses, anything they can get their hands on to maintain that habit. That, of course, has caused crime to go up at a tremendously increased rate in our cities and in our States – the crimes of burglary, robbery, assault, purse snatching, mugging, those crimes where people are trying to feed that habit. Our local police and our sheriffs have found themselves unable to cope with the crime

³² 132 CONG. REC. 27,176 (daily ed. Sept. 30, 1986) (statement of Sen. Gary Hart) (“Then along came crack-cocaine – and the high was available to all. So too, however, were the lows: The raging paranoia, the addiction rooted deep in the brain’s chemical structure, and worst, the senseless deaths.”).

³³ 132 CONG. REC. 26,447 (daily ed. Sept. 26, 1986) (statement of Sen. Chiles) (“[Crack] can turn promising young people into robbers and thieves, stealing anything they can to get the money to feed their habit.”); 132 CONG. REC. 27,187 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (“Crack is available to the young, and it will be in the schools this fall. I have heard stories of children as young as nine who are already crack users. The sellers also use these children as lookouts and as workers in houses that manufacture crack.”); 132 CONG. REC. 944 (daily ed. Mar. 21, 1986) (statement of Rep. Rangel) (“What is most frightening about crack is that it has made cocaine widely available and affordable for abuse among our youth.”).

³⁴ 132 CONG. REC. 22,993 (daily ed. Sept. 11, 1986) (statement of Rep. LaFalce) (“While a gram of cocaine sells for at least \$100, two small pieces of crack, or enough to get three people high can be purchased in almost any American city for about \$10.”); 132 CONG. REC. daily ed. Sept. 26, 1986) (statement of Sen. Chiles) (“[Crack] can be bought for the price of a cassette tape, and make people into slaves.”).

months for a defendant in Criminal History Category I,³⁵ (a guideline range that just exceeded the five-year statutory minimum for such offenses). Similarly, offenses involving 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that just exceeded the ten-year statutory minimum for such offenses). Crack cocaine and powder cocaine offenses for quantities above and below the mandatory minimum penalty threshold quantities were set accordingly using the same 100-to-1 drug quantity ratio.³⁶

Because of the 100-to-1 drug quantity ratio, the sentencing guideline range (based solely on drug quantity) is three to over six times longer for crack cocaine offenders than powder cocaine offenders with equivalent drug quantities, depending on the exact quantity of drug involved. As a result of both the statutory and guideline differentiation between the two forms of cocaine, as well as other relevant factors examined in Chapter 4, sentences for offenses involving crack cocaine are significantly higher than those for similar offenses involving powder cocaine for any quantity of drug.

4. Simple Possession of Crack Cocaine

Congress further evidenced its intent to treat crack cocaine offenses differently than other drug offenses by enacting the Anti-Drug Abuse Act of 1988, Pub. L. 100–690, 102 Stat. 4181 (1988) [hereinafter the 1988 Act]. The 1988 Act further distinguished crack cocaine offenses from both powder cocaine and other drug offenses by creating a mandatory minimum penalty for simple possession of crack cocaine. This is the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance.

Under the relevant statute, 21 U.S.C. § 844, possession of five grams or more of crack cocaine triggers a *minimum* sentence of five years in prison; simple possession of any quantity of any other controlled substance (except flunitrazepan) by a first-time offender – including powder cocaine – is a misdemeanor offense punishable by a *maximum* of one year in prison. In other words, pursuant to the 1988 Act, an offender who simply possesses five grams of crack cocaine receives the same five-year mandatory minimum penalty as a serious trafficker of other drugs. The guidelines subsequently were amended to incorporate the statutory mandatory minimum for simple possession of crack cocaine. (*See* USSG §2D2.1(b)(1) (Unlawful Possession, Attempt or Conspiracy).)

C. RECENT ACTION CONCERNING FEDERAL COCAINE SENTENCING POLICY

³⁵ Defendants with no prior convictions or minimal prior convictions are assigned to Criminal History Category I.

³⁶ *See* Chapter 7 of the 1995 Commission Report for a more thorough explanation of how sentences are determined under the federal sentencing guidelines.

In 1994, in the Omnibus Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322 (Sept. 12, 1994), Congress directed the Commission to prepare a report and recommendations on cocaine and federal sentencing policy. In response, on February 28, 1995 the Commission issued a comprehensive report to Congress in which it unanimously recommended that changes be made to the current cocaine sentencing scheme, including a reduction in the 100-to-1 drug quantity ratio between powder cocaine and crack cocaine. (*See* 1995 Commission Report.)

On May 1, 1995, by a four-to-three vote, the Commission submitted to Congress an amendment to the sentencing guidelines that, among other things, would have equalized the guideline penalties for powder cocaine and crack cocaine offenses based solely on drug quantity.³⁷ In support of the amendment, the Commission concluded that:

[i]nstead of differential treatment of crack and powder cocaine defendants based solely on the form of the drug involved in the offense . . . fairer sentencing would result from guideline enhancements that are targeted to the particular harms that are associated with some, but not all, crack offenses. Harm-specific guideline enhancements will better punish the most culpable offenders and protect the public from the most dangerous offenders³⁸

Accordingly, the amendment also included more severe sentencing enhancements for weapon involvement for all drug trafficking offenses and would have authorized an upward departure for bodily injury to any victim.³⁹

Pursuant to 28 U.S.C. § 994(p), however, Congress passed and the President signed legislation disapproving the guideline amendment.⁴⁰ The legislation further directed the Commission to submit to Congress new recommendations regarding changes to the statutes and sentencing guidelines for the unlawful manufacturing, importing, exporting, and trafficking of cocaine, and specified that the recommendations “shall reflect” that “the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine.”⁴¹ The directive also required the Commission to consider several other factors, specifically:

³⁷ *See* 60 Fed. Reg. 25,074 (May 10, 1995.) Pursuant to 28 U.S.C. § 994(p), these amendments were slated to take effect November 1, 1995.

³⁸ *Id.* at 25,076.

³⁹ *Id.* at 25,077-78.

⁴⁰ *See* Pub. L. No. 104–38, 109 Stat. 334 (Oct. 30, 1995).

⁴¹ *Id.*

(1) high-level wholesale cocaine traffickers, organizers, and leaders of criminal activities generally should receive longer sentences than low-level retail cocaine traffickers and those who played a minor or minimal role in such criminal activity;

(2) if the Government establishes that a defendant who trafficks in powder cocaine has knowledge that such cocaine will be converted into crack cocaine prior to its distribution to individual users, the defendant should be treated at sentencing as though the defendant had trafficked in crack cocaine; and

(3) enhanced sentences generally should be imposed on a defendant who, in the course of a drug offense –

(i) murders or causes serious bodily injury to an individual;

(ii) uses a dangerous weapon (including a firearm);

(iii) involves a juvenile or a woman who the defendant knows or should know to be pregnant;

(iv) engages in a continuing criminal enterprise or commits other criminal offenses in order to facilitate the defendant's drug trafficking activities;

(v) knows, or should know, that the defendant is involving an unusually vulnerable victim;

(vi) restrains a victim;

(vii) distributes cocaine within 500 feet of a school;

(viii) obstructs justice;

(ix) has a significant prior criminal record;

(x) is an organizer or leader of drug trafficking activities involving five or more persons.

In response to the 1995 directive, the Commission issued another report to Congress on cocaine and federal sentencing policy in April 1997. (*See* 1997 Commission Report.) The Commission unanimously reiterated the core finding of the 1995 Commission Report that the 100-to-1 drug quantity ratio for crack cocaine and powder cocaine offenses is not justified. The Commission set forth for congressional consideration a range of alternatives for revisions to the federal statutory penalty scheme for cocaine offenses. Unlike in 1995, the Commission did not promulgate a revised drug trafficking guideline in conjunction with the report of recommended

statutory penalty changes.

D. METHODOLOGY

In completing this updated report, the Commission: (1) considered the general purposes of sentencing that Congress referred to in the Sentencing Reform Act (*see* 18 U.S.C. § 3553(a)(2)); (2) identified specific congressional concerns regarding cocaine use and trafficking, particularly those set forth in Pub. L. 104–38, the legislation disapproving the Commission’s 1995 amendment, and in the legislative history of the relevant penalty provisions, particularly of the 1986 Act; and (3) evaluated the current federal cocaine penalty structure in light of those general and specific objectives. The Commission (i) reviewed findings from recent research literature, (ii) conducted an extensive empirical study of federal cocaine offenders sentenced in fiscal year 2000 and compared those results with the findings in the 1995 Commission Report, (iii) surveyed state cocaine sentencing policies, (iv) solicited and weighed public comment on the appropriateness of the current federal cocaine sentencing policy (*see* 67 Fed. Reg. 2456),⁴² and (v) held three public hearings at which it received testimony from the scientific and medical communities, federal and local law enforcement officials, criminal justice practitioners, academics, and civil rights organizations.⁴³

The organization of the remainder of this updated report is as follows:

Chapter 2 describes the methods of use, effects, and addictive potential of crack cocaine and powder cocaine.

Chapter 3 describes the effects of prenatal cocaine exposure.

Chapter 4 analyzes Commission data on cocaine offenses. Appendix C explains the methodology used in this chapter.

Chapter 5 provides the demographics of federal cocaine offenders.

Chapter 6 describes trends in cocaine use, price, and supply.

Chapter 7 reviews state sentencing policies and examines the interaction of state penalties with federal prosecutorial decisions.

Chapter 8 presents the Commission’s findings and recommendations regarding federal

⁴² 67 Fed. Reg. 2456 (Jan. 17, 2002). *See* Appendix D for a summary of written public comments. Copies of the public comment are on file with the U.S. Sentencing Commission and are available upon request.

⁴³ *See* Appendix E for a summary of public hearing written statements. Copies of the written statements are on file with the U.S. Sentencing Commission and are available upon request.

cocaine sentencing policy. Appendix A shows how the Commission's recommendations to Congress, if adopted, might be implemented in the sentencing guidelines, and Appendix B provides the sentencing impact of the Commission's recommendations.

Appendices D and E summarize the written public comment and written public hearing testimony, respectively.