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COMMENTS OF

THE AMERICAN CIVIL LIBERTIES UNION

TO THE

UNITED STATES SENTENCING COMMISSION

REGARDING

IMPLEMENTATION OF CONGRESSIONAL DIRECTIVE
ON COCAINE SENTENCING

submitted by

MARK KAPPELHOFF
LEGISLATIVE COUNSEL

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INTRODUCTION

The American Civil Liberties Union (ACLU) appreciates this opportunity to comment on the congressional directive¹ regarding recommendations for changes in the federal sentencing of cocaine offenses. In particular, we intend to comment on whether the U.S. Sentencing Guidelines should be amended from the current 100-to-one quantity ratio between cocaine base [hereinafter "crack"] and powder cocaine, but still maintain a disparity. Last year, in an effort supported by the ACLU, this Commission proposed recommendations to Congress that would equalize the penalties between powder and crack cocaine possession and distribution. Notwithstanding this Commission's extensive study and consideration of the issue, Congress and the President disapproved the Commission's proposed amendments that would have eliminated the 100-to-one disparity in base penalties for crack and powder cocaine trafficking offenses and mandatory minimum sentences for simple possession of crack cocaine.

The ACLU, once again, reasserts its belief that the Commission's amendments proposed last year were correct and should not have been disapproved by Congress. We remain further resolved that the 100-to-one disparity in cocaine sentencing is unwarranted and racially discriminatory in effect. Accordingly, finding no justification for a contrary proposal, we strongly urge this Commission to stand by its previous findings and propose these same amendments to Congress this amendment cycle.

The ACLU is a nonpartisan organization of over 275,000 members nationwide dedicated to the defense and enhancement of civil liberties. Because protection of the Bill of Rights stands at

¹See Pub. L. 104-38, 109 Stat. 334 (Oct. 30, 1995).

the core of our mission, we have a particular interest in ensuring that equal protection of the law and freedom from disproportionate punishment are upheld wherever threatened. The ACLU has previously submitted testimony before this Commission on the issue of the disparity in sentencing between crack and powder cocaine on October 25, 1993, March 18, 1994 and March 7, 1995. We wish to incorporate by reference those comments.

Our comments will be specifically directed in support of the Commission resubmitting to Congress the same amendments proposed last year that eliminate the 100-to-one quantity ratio between powder and crack cocaine and establish a one-to-one quantity ratio. We also will comment in opposition to any proposals to enhance penalties for violence and other harms associated with crack and powder cocaine.

II. UNITED STATES SENTENCING COMMISSION'S FINDINGS CONFIRM DISPARITY IN COCAINE SENTENCING IS UNWARRANTED

A. Commission's Findings:

Last year, the United States Sentencing Commission completed a very thorough study and review of the disparity in the sentencing of crack cocaine defendants and powder cocaine defendants.² The Commission issued its findings in a Special Report to Congress entitled "Cocaine and Federal Sentencing Policy." In the Report, the Commissioner's unanimously agreed that the present 100-to-one quantity ratio "is far too great and should be reconsidered."³

²U.S. Sentencing Commission Special Report to Congress: Cocaine and Federal Sentencing Policy, (February 1995), (hereinafter, "Report."

³Id.

As a result of its findings in the Report, this Commission subsequently submitted to Congress recommendations for modifying the sentencing policy between differing forms of cocaine. When it submitted its recommendations, this Commission unanimously concluded that:

the current 100-to-1 ratio [between crack and powder cocaine] found in the mandatory minimum penalty statutes, and replicated in the current sentencing guidelines, cannot be recommended and should be changed. Further, the Commission unanimously believes that the current five-year mandatory minimum for simple possession of crack cocaine should be reconsidered.⁴

In addition to unanimously advocating the equalization of penalties between crack and powder cocaine possession in the U.S. Sentencing Guidelines, a majority of the Commissioners also voted to equalize the sentences of cocaine distribution.

B. Evidence Supports Commission's Findings:

This Commission relied on sound evidence to support its recommendations for equalizing cocaine sentencing. In addition to confirming that racial disparity exists in cocaine sentencing, this Commission discounted the reasons often cited for the distinction in sentencing between powder and crack cocaine: pharmacologically distinctive; violence; and accessibility due to low cost.

1. Disparate Racial Impact

With respect to the issue of racial disparity in cocaine sentencing, this Commission unequivocally stated that:

⁴Id. In addition to unanimously advocating the equalization between crack and powder cocaine possession in the U.S. Sentencing Commission Guidelines and in their recommendations to Congress, a majority of Commissioners also voted to equalize the sentences of cocaine distribution.

[f]ederal sentencing data leads to the inescapable conclusion that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine . . . [and that] the high percentage of Blacks convicted of crack cocaine offense is a matter of great concern to the Sentencing Commission.⁵

Among other troubling statistics, this Commission disclosed that in 1993, 88.3% of those sentenced federally for crack cocaine offenses were African American, while only 4.1% of the defendants were Caucasian, despite a finding that a majority of the nation's reported crack users are White.⁶ Consistent with this evidence, this Commission went on to conclude that:

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 such an existence of sufficient policy bases to support such a sentencing scheme . . . [especially] when such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population. . .⁷

2. Lack of Pharmacological Distinction

In addition to exposing the racial disparity found in cocaine sentencing, this Commission discounted the reasons often proffered in support of the gross distinction in sentencing between powder and crack cocaine. First of all, this Commission dismissed the notion that crack and powder cocaine are pharmacologically different substances. In powder or crack form, cocaine is cocaine. Indeed, this Commission noted that cocaine in any form produces the same physiological and psychological effects. It further found that both powder cocaine and crack cocaine carry a risk of addiction. Cocaine powder is easily transformed into crack. Thus, as the Commission majority ultimately concluded, "[i]n light of the fact that crack cocaine can easily be produced from powder

⁵Id.

⁶Id.

⁷Id.

cocaine, the form of cocaine is simply not a reasonable proxy for dangerousness associated with use."⁸

3. **Violence Not Uniquely Associated With Crack Cocaine**

This Commission also rejected the assertion that there is more violence associated with the use of crack than with the use of powder cocaine. There is no evidence that such violence is attributed to the pharmacological effects of smoking crack. Or, as this Commission stated:

We are aware that a host of maladies have been attributed to the emergence of crack cocaine, such as urban decay or parental neglect among user groups. After careful consideration, the Commission majority concluded that increased penalties are not an appropriate response to any of these problems. We are unable to establish these social problems result from the drug itself rather than from the disadvantaged social and economic environment in which the drug is used. We note that these problems are not unique to crack cocaine, but are associated to some extent with abuse of any drug or alcohol.⁹

4. **Cost and Availability Do Not Justify Higher Penalties**

Finally, this Commission concluded that higher penalties for crack cocaine are not justified because of it is generally inexpensive and readily available. In fact, higher penalties for crack cocaine guarantee that small time street level users will be penalized more severely than larger distributors who possess powder cocaine before it is transformed into crack. In rejecting this type of policy which disproportionately impacts on low income people, this Commission stated that:

[T]he fact that crack is typically sold in small amounts which may make it more readily available among lower income groups [does not] justify increased punishment compared to a form of the drug that is more commonly sold in amounts available only to the affluent.

⁸Letter From Richard A. Conaboy, Chairman, United States Sentencing Commission to The Honorable Orrin Hatch, Chairman, Senate Judiciary Committee, (May 1, 1991); See also Special Report to Congress.

⁹Id.

The Commission does not believe that longer punishment can be justified solely because a particular form of a drug is more likely to be used by a disadvantaged population.¹⁰

III. CONGRESS AND PRESIDENT UNWISELY DISAPPROVE COMMISSION'S PROPOSED AMENDMENTS BASED ON "TOUGH ON CRIME" POLITICS

On May 1, 1995, acknowledging the overwhelming evidence against maintaining the inequitable sentencing guidelines for cocaine, this Commission submitted to Congress proposed amendments to the federal sentencing guidelines.¹¹ These amendments were drafted with the intention of eliminating the disparity between the penalties for crack and powder cocaine possession and distribution. Unless Congress acted to disapprove them, the amendments would have taken effect on November 1, 1995.

Unfortunately, Congress acted. Despite this Commission's comprehensive and exhaustive efforts analyzing the issue of the disparity in federal cocaine sentencing, Congress, in a highly political and divisive debate, disapproved the Commission's recommendations and sent the issue back for further study.¹² President Bill Clinton followed suit and signed the disapproving legislation into law on October 30, 1995. As a result, the disparity in cocaine sentencing continues unabated today.

¹⁰Id at 4.

¹¹See Letter to the Honorable Orrin Hatch, Chairman Judiciary Committee, from Richard Conaboy, Chairman, U.S. Sentencing Commission, May 1, 1995. See also Amendment No. 5, "Amendments to Sentencing Commission, 60 Fed. Reg. 25074 (May 10, 1995).

¹²See CONG. REC. H10,281 (daily ed. Oct. 18, 1995). It is interesting to note that, since its creation in 1984, this was the first time that Congress rejected a recommendation from the United States Sentencing Commission. See United States Sentencing Commission FY1994 Annual Report, Appendix C.

The ACLU, as well as other civil rights organizations, religious leaders and Members of Congress expressed outrage at the Congress' and the President's apparent indifference to the issue of racial disparity in federal cocaine sentencing. Congressman Mel Watt (D-NC) captured the essence of this frustration when he stated what many believed to be true:

We are going to discuss this to death. Let the Sentencing Commission go back and study it for ten years so we do not have to deal with it in the Congress of the United States. That is what this is all about. Justice delayed is justice denied, and we are delaying and denying justice to the very people who need it in our society.¹³

Moreover, several civil rights organizations expressed their disappointment by submitting a joint letter to President Clinton that stated in part:

Nothing undermines the racial fairness of the criminal justice system more than these crack laws; Mark Fuhrman and the beaters of Rodney King operate outside the system, but the racism of the crack laws is official, written, legislatively sanctioned part of the system. Rooting out the Mark Fuhrmans will take time, rooting out discriminatory crack sentencing is as easy as a stroke of a pen.¹⁴

Consistent with these comments, the ACLU believes that the Congress and the President were wrong to disapprove this Commission's proposed amendments. Further, we applaud this Commission's exhaustive efforts and demonstrated commitment to correcting the unjustified and irrational disparity in federal cocaine sentencing. This is a worthy goal today, just as it was last year. As such, we firmly believe that there is no persuasive reason for this Commission to abandon its previously proposed amendments.

¹³ CONG. REC. H10,259 (daily ed. Oct. 18, 1995).

¹⁴ See Letter to The President, October 25, 1995.

**IV. COMMISSION SHOULD REJECT POLITICAL PRESSURE AND RESUBMIT
SAME AMENDMENTS TO CONGRESS**

It is all too clear that political expediency remains the primary obstacle preventing this Commission from enacting amendments that eliminate racial disparity in cocaine sentencing. Congress and the President have substituted their own distorted "tough on crime" politics for that of this Commission's independent decision-making process. Ironically, Congress originally created the Commission as an independent agency so it could remain insulated and free from the traditional political pressures associated with criminal justice matters.¹⁵ In agreeing to create the United States Sentencing Commission, Congress essentially acknowledged that it, as a political branch of government, could not be trusted to fairly and neutrally address the politicized nature of federal sentencing policy. The Commission, on the other hand, as an independent agency in the judicial branch, could be trusted to objectively consider provocative criminal justice sentencing issues and render decisions unencumbered from political influences.

In fact, the politically independent design worked as intended when this Commission was asked to consider cocaine sentencing. This fact was made clear by the somewhat prophetic testimony of Commissioner Wayne A. Budd:

[I]n 1994 . . . Congress specifically directed the Commission to tackle the cocaine issue. Led by Chairman Conaboy the Commission did what it was asked to do: face head-on this type of political hot potato and provide the dispassionate, non-partisan leadership on the basis of hard facts and hard data."¹⁶

¹⁵See 18 U.S.C. 995.

¹⁶Testimony of Wayne A. Budd, United States Sentencing Commission, before the Subcommittee on Crime of the House of Representatives, Committee on the Judiciary (June 29, 1995) at 1-2.

To be sure, the ACLU commends this Commission for being true to its stated purpose of fairly and objectively analyzing the disparity in sentencing between crack and powder cocaine. We also appreciate and share in this Commission's disappointment that the Congress and the President rebuffed these efforts. However, we urge the Commission not to compromise its principles and independence by acquiescing to irrational political pressures. Simply stated: this Commission was absolutely correct in proposing amendments to the federal sentencing guidelines to equalize cocaine sentencing. No contrary evidence has emerged in the past several months to support a different result.

Indeed, we are cognizant that Congress is likely to reject the same amendments if they are offered again. This fact alone should not dissuade this Commission. Compromise in the name of political expediency cannot be condoned and should not be pursued. Rather, fundamental fairness and justice demands that this Commission continue to propose amendments that eliminate entirely the disparate impact of cocaine sentencing laws.

V. **DISPARITY IN SENTENCING GUIDELINES FURTHER CONTRIBUTES TO
RACIAL DISPARITY THROUGHOUT THE CRIMINAL JUSTICE SYSTEM**

The disparate racial impact of the federal cocaine sentencing guidelines is further aggravated by race-based law enforcement and prosecutorial strategies. Racial bias begins with street level enforcement strategies, where African Americans are disproportionately targeted, stopped, arrested, prosecuted and then exposed to long mandatory minimum sentences under the federal sentencing

system.¹⁷ These discriminatory law enforcement strategies, such as selective prosecution and arrest initiatives, result in subjecting a disproportionate number of minorities to the racially disparate federal cocaine sentencing laws. Consequently, this combination further magnifies the already disproportionate impact of the unfair federal sentencing guidelines, resulting in a dramatic increase in the incarceration rates for African Americans and other minorities.

A. Selective Prosecution Strategies Contribute to Racial Disparity

Prosecutorial race-based decision-making results in exposing a disproportionate number of minorities to the disparate federal sentencing guidelines. A recent illustration of this procedure is found in Los Angeles where the U.S. Attorney's office openly admitted to targeting its resources towards minority communities.¹⁸ According to a Los Angeles Times article, not a single white offender had been convicted of a crack cocaine offense in the federal courts serving the Los Angeles metropolitan area since Congress enacted its mandatory sentences for crack in 1986. This occurred, despite the fact that whites account for a majority of crack users. During this same period, however, hundreds of white crack traffickers were prosecuted in state courts, where their sentences for the same offense were as much as eight years less than in federal courts.

This Commission found much the same results in other areas in the nation. A 1992 Commission survey shows that only minorities were prosecuted for crack cocaine offenses in more

¹⁷See Marc Mauer and Tracey Huling, Young Black Americans and the Criminal Justice System, Five Years Later, (1995). See also David Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind. L.J. 659 (1994).

¹⁸Dan Weikel, "War on Crack Targets Minorities Over Whites," Los Angeles Times, May 21, 1995.

than half the federal court districts handling crack cases.¹⁹ No whites were federally prosecuted in 17 states and many cities, including Boston, Denver, Chicago, Miami, Dallas and Los Angeles. Out of hundreds of cases, only one white was convicted in California, two in Texas, three in New York and two in Pennsylvania.

A case currently pending before the United States Supreme Court may prove instructive on the selective prosecution issue. On February 26, 1996, the United States Supreme Court heard oral arguments in United States v. Armstrong²⁰, a case in which indictments were dismissed against five Black defendants who alleged that the U.S. Attorney's Office selectively prosecuted them based on their race. Although the case involves a narrow discovery issue of whether federal prosecutors must disclose their charging criteria in crack cocaine cases, the Court's ruling could have far-reaching implications for defendant's prosecuted pursuant to the crack statutes.

The raw statistics cited in the Armstrong case that involve prosecutions in Los Angeles are troubling indeed. For example, the federal public defender's office in Los Angeles discovered that of the 24 crack cocaine cases closed out in 1991, all of the defendant's were African American. Whereas, from 1990 to 1992, 222 white defendants charged with crack cocaine offenses were prosecuted in state court; thus, effectively avoiding the harsh sentences required under the federal sentencing guidelines.

¹⁹Id.

²⁰United States v. Armstrong, 21 F.3d 1431 (9th Cir. 1995), rev'd on rehearing en banc 48 F.3d (9th Cir. 1995), cert. granted No. 95-157 (Oct. 30, 1995).

B. Arrest Policies Contribute to Racial Disparity

Race-based arrest policies of law enforcement agencies have also disproportionately impacted on African Americans and other minorities. Drug arrests alone have increased dramatically in the 1980s, rising from 471,00 in 1980 to 1,247,000 by 1989.²¹ Just as these nationwide arrest rates increased dramatically, the proportion of African Americans arrested grew disproportionately, from 24% of all drug arrests in 1980 to 39% in 1993.²²

Claims are unfounded that African Americans are arrested in larger numbers because they tend to have higher rates of drug use and sales. African Americans, in fact, account for a disparate amount of those arrested for drug offenses. The best evidence supporting this conclusion comes from the National Institute on Drug Abuse in its annual household survey on drug possession. The most recent survey reveals that African Americans comprise 13% of monthly drug users, while accounting for 39% of the those arrested for drug offenses.²³

C. Racial Disparity Found in Incarceration Rates

Racial disparity throughout the criminal justice system, including selective law enforcement and prosecutorial strategies coupled with the federal sentencing guidelines, has ultimately resulted in a disproportionate explosion in the prison population. The United States recently surpassed the

²¹"Drugs and Crime Facts, 1990," Bureau of Justice Statistics, 1991.

²²Federal Bureau of Investigations, Uniform Crime Reports, various years, cited to in Young Black Men and the Criminal Justice System, Five Years Later.

²³Id. See also National Institute on Drug Abuse, National Household Survey on Drug Abuse: Main Findings (1991), (May 1994).

one million mark in its prison population. Although over half of the prison population is Black, African Americans comprise only 12% of the nation's population.²⁴ This leads to one of the most striking statistics: one out of every three young Black men are either imprisoned, on probation, or parole at any given time.²⁵

Our nation's harsh drug laws and enforcement policies have largely contributed to this dramatic rise in prison population. The number of adults imprisoned for drug offenses more than tripled from 1986 to 1991. Over 60 percent of federal prisoners are drug offenders and that figure is expected to rise throughout the decade.²⁶

African Americans pay the greatest price for these enforcement policies. A Department of Justice commissioned study on federal sentencing policies disclosed that between 1986 and 1990, both the rate and average length of imprisonment for federal offenders increased for Blacks in comparison to Whites. It further concluded that the highest proportion of Blacks charged with crack offenses was "[t]he single most important difference accounting for the overall longer sentences imposed on Blacks, relative to their racial groups."²⁷ The study's analysis concluded the following:

²⁴See U.S. Department of Justice Statistics Bulletin, "Prisoners in 1994 (Department of Justice, Washington, D.C. 1995).

²⁵See Young Black Americans and the Criminal Justice System: Five Years Later.

²⁶See David B. Kopel, "Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety," (CATO Institute, May 17, 1994)(relying on U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 1993, NCJ-141874 (Washington: U.S. Department of Justice, May 9, 1993)).

²⁷See U.S. Department of Justice Programs, Bureau of Justice Statistics, Sentencing in the Federal Courts: Does Race Matter? (Nov. 1993). See also U.S. Sentencing Commission Special Report to Congress, p. 162.

If legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study's analysis suggests that the Black/White difference in sentences for cocaine trafficking would not only evaporate but would slightly reverse.²⁸

VI. PROPOSED ENHANCEMENTS TO DRUG GUIDELINES ARE UNNECESSARY

The ACLU believe that it is unnecessary to promulgate additional guideline enhancements for cocaine penalties. The existing guideline enhancements sufficiently account for any additional harm that may be associated with crack (or any other drug). The federal sentencing guidelines already take into account additional harms such as involvement of firearms or other dangerous weapons, serious bodily injury or death, use or employment of juveniles, leadership role in the offense, prior criminal history, among other aggravating factors. These offenses are either treated as separate offenses or statutory enhancements to offenses. Therefore, there is no reason to render the statutes irrelevant by creating enhancements.

We are particularly troubled by the addition of systemic crime (crime related to the drug's marketing, distribution, and control) and social harms (harms associated with increased addictiveness, parental neglect, child and domestic abuse) as factors to be considered for guideline enhancement. No objective data exists to support a conclusion that certain offenses or societal harms are uniquely associate with crack cocaine. In fact, this Commission concluded that "pulling

²⁵Id.

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apart the systemic crime associated with crack cocaine versus powder cocaine is difficult if not impossible."²⁹

VII. RAISING PENALTIES FOR POWDER COCAINE WILL FURTHER CONTRIBUTE TO RACIAL DISPARITY

The ACLU believes that the Sentencing Commission should reject any proposal to increase the penalties for powder cocaine as an alternative to reducing the sentences for crack cocaine offenses. Chairman Conaboy already addressed this issue in his testimony by simply stating that "[t]he current sentencing guidelines [already] provide for severe and tough sentences for all drug offenses."

Moreover, employing this methodology will simply flood the courts and prisons with more nonviolent, unarmed first time drug offenders. It is estimated that sentencing powder cocaine defendants the same as crack defendants are currently sentenced will result in 41,000 person-years to federal prison population, at a cost of \$800 billion within ten years.³⁰

CONCLUSION

The ACLU maintains that the 100-to-one disparity in federal sentencing between powder and crack cocaine is irrational, unwarranted and discriminatory in fact. We maintain that the overwhelming weight of the evidence shows that the federal sentencing structure for crack cocaine

²⁹United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy, at 95 (Feb. 1995).

³⁰See Bureau of Prisons, "State of the Bureau 1991" (Summer 1992).

has a disparate impact on African Americans and is not supportable on pharmacological, scientific or social grounds. Moreover, racially discriminatory prosecutorial and law enforcement strategies have further exacerbated the disparate impact of the cocaine sentencing scheme on African Americans.

Last year, this Commission, after thorough consideration, properly concluded that there was no justification for treating the two forms of the same drug differently. As such, it proposed amendments to the federal sentencing guidelines that would eliminate the 100-to-one disparity in base penalties for crack and powder cocaine trafficking offenses and the mandatory minimum sentences for simple cocaine possession. However, in a blatant, politically expedient act, Congress and President Clinton disapproved these amendments. While we appreciate the complication this situation presents, we urge the Commission not to be influenced or dissuaded by transparent "tough on crime" politics. We strongly urge the Commission to resubmit these same proposed amendments to Congress.

Our comments today reconfirm our commitment to the belief that justice and fairness demands that the only appropriate ratio between powder cocaine and crack cocaine is one-to-one. In light of the lack of evidence to support any other sentencing scheme, we believe that proposing a ratio other than one-to-one is simply an endorsement of racial discrimination in cocaine sentencing.

We thank the Commission for this opportunity to comment.