

The Criminal Justice Policy Foundation
8730 Georgia Avenue, Suite 400
Silver Spring, MD 20910-3649
301-589-6020, Fax 301-589-5056
www.cjpf.org

**STATEMENT
SUBMITTED TO THE
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES**
at a
**HEARING ON
MANDATORY MINIMUM SENTENCING LAWS –
THE ISSUES**

JUNE 26, 2007

**By
Eric E. Sterling
President, The Criminal Justice Policy Foundation
Adjunct Lecturer in Sociology, The George Washington University
Former Assistant Counsel, House Subcommittees on Crime and Criminal Justice,
1979-1989**

Chairman Scott, Representative Forbes, Members of the Subcommittee, I respectfully submit this statement for your examination of federal mandatory minimum sentencing laws.

I applaud you for holding this hearing on an important matter that has long been both ignored and misunderstood. **This is the single most important issue your subcommittee can address when you consider its impact on crime in American streets and on the day to day operation of every facet of the federal criminal justice system.**

Mandatory minimum sentencing directly affects how the federal government uses its criminal justice resources. The failure of the Department of Justice to follow the spirit of the 1986 sentences has unintentionally allowed major criminal organizations to avoid prosecution and become more efficient – now selling cocaine of higher quality for less money than they did in 1986. Hopefully this hearing renews the critical process of Congressional oversight of the federal criminal justice system.

As Mr. Conyers, Mr. Lungren, and Mr. Coble recall, from 1981 through 1988, I was

Assistant Counsel to this subcommittee. During those years I was the subcommittee counsel principally responsible for federal drug laws, and oversight of the federal anti-drug effort.

In 1986, I was the subcommittee counsel principally responsible for developing the Narcotics Penalties and Enforcement Act (reported as H.R. 5394 and enacted as Subtitle A of Title I of the Anti-Drug Abuse Act of 1986, P.L. 99-570) that created 5- and 10-year mandatory minimum sentences for drug offenses, most infamously for crack and powder cocaine.

The law enforcement problem with mandatory minimums

The popular focus on the general unfairness of mandatory minimums, the racial imbalance of crack cocaine prosecutions specifically, and the excessive 100 to 1 ratio of crack and powder quantity triggers have concealed another critical failing of the current drug mandatory minimum sentences – **the minimal trigger quantities have distracted federal law enforcement agencies and prosecutors from their mission by improperly defining high level drug trafficking.**

All Members of Congress can agree that one consideration in Congress's determination of sentences for offenses is to identify the most serious offenses in order to guide the Justice Department to give its greatest emphasis to cases of federal significance. Congress's goal in 1986 in creating the mandatory minimum sentences was to redirect the Justice Department's priorities to **more effectively** fight the drug trade by focusing on disruption of high-level trafficking.

Defining the mission of federal drug enforcement

Congress needs to resolve the important question of the mission of federal drug enforcement. Drug cases completely dominate federal criminal dockets and criminal justice activities. These cases are brought by local United States Attorney offices.

Should each U.S. Attorney simply bring whatever drug cases of local significance are brought to him or her, in effect serving as local "super prosecutor?" That is, should the primary decisions about how to use the uniquely powerful federal criminal justice resources be decided locally on a case by case basis?

Or, should each U.S. Attorney be part of a nationally coordinated anti-drug team that focuses precious federal resources on cases of national and international significance? Should the activities of a few thousand federal agents and few thousand federal prosecutors be coordinated to target the most powerful and dangerous criminal organizations with undistracted in-depth and sophisticated investigations and prosecutions?

While Congress can recognize the temptation of the first role, the wiser approach is the latter. Otherwise, federal criminal justice initiatives will be scattered, haphazard and half-hearted. **Perhaps half the federal districts in the country should see no drug prosecutions at all because they do not have jurisdiction over genuinely appropriate federal cases.** The

number of prosecutors in many federal districts should be reduced so that they can be assigned to high-level investigations coordinated in Miami, Houston, Phoenix, San Diego, New York, etc. where enormous shipments of drugs arrive routinely for redistribution around the nation..

If America's anti-drug strategy is going to reduce the quantity and quality of cocaine sold in America's crackhouses or drive up the price of crack to discourage use and to encourage drug dependent persons to seek treatment, **the well-managed, sophisticated organizations that collectively deliver hundreds of tons of cocaine to the American market must be attacked and destroyed.** This is the unique mission of federal drug enforcement.

Does any Member of this Subcommittee imagine that the law enforcement agencies in Mexico, for example, have the sophistication, independence, resources, and integrity to effectively take down the major drug cartels that are rampaging across our border? Is any Member under the misimpression that these organizations' cocaine distributions are measured in grams as opposed to tons?

Just as the Sentencing Reform Act of 1984 brought a large measure of uniformity to federal sentencing across the nation's 96 districts, in 1986 Congress attempted to guide federal prosecutors to fight global criminal organizations involved in drug trafficking, money laundering, assassination and terrorism in a more nationally focused manner. An effective assault on these criminal organizations requires centralization in identifying and carrying out priority investigations. **Congress utterly botched the job by picking quantity triggers of 5, 50, 500 and 5000 grams of crack and powder cocaine to define high priority cases because these amounts are more typical of the amounts sold over a short period of time by an active cocaine retail operation.**

The distraction of minor cases

In my first year working for the House Judiciary Committee I learned an aphorism that I was told was an informal mantra in the Justice Department: "Little cases, little problems. Big cases, big problems." Congress hoped to address that problem by creating mandatory minimums and identifying categories of major cases, but Congress placed the bar at ankle height, and failed to change Justice Department patterns or practices.

Only the United States federal government has the resources to effectively combat global criminal organizations. But around the country, U.S. Sentencing Commission data demonstrate that federal agents pursue mostly local low-level, and street-level drug cases even though they trigger the mandatory minimums with 50 grams of crack or 5000 grams of powder. Frankly, they are wasting federal resources and, ultimately, betraying their local law enforcement allies, and the American people who are desperate to see progress in the war on drugs.

If the federal drug prosecutions were brought against appropriate high-level defendants, whatever their race, would there be political challenges about the racial mix of the defendants? I don't think so. The current scandal is that the majority of the overwhelmingly Black and Hispanic crack and powder defendants are low-level offenders receiving long sentences more

appropriate for major traffickers.

Congress' goals for the mandatory minimum legislation

In 1986, Congress had a laudable goal for the mandatory minimum legislation – **“to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources.”** The Judiciary Committee said in its report, **“The Committee strongly believes that the Federal government’s most intense focus ought to be on major traffickers, the manufacturers or heads of organizations, who are responsible for creating and delivering very large quantities of drugs.”** (H.Rep’t. 99-845, Part 1, Sept. 19, 1986, pp. 11-12).

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

Second, throughout the 1980s, in numerous committee hearings in both Houses of Congress, Members of Congress expressed a strong concern for more effective coordination and division of labor in fighting the drug trade. Congress passed legislation in 1982 (vetoed), in 1984 and 1988 to try to require a more coherent, prioritized and focused federal drug enforcement effort.

Most Members of this subcommittee fully understood the enormous capacity of state and local law enforcement agencies to police neighborhood, local and city-wide retail drug trafficking. This capacity is even greater today than it was in 1986. For the past decade, state and local law enforcement agencies have collectively been making between 1 and 1 ½ million arrests for drug abuse violations each year. State courts impose about one-third of a million felony drug convictions annually. State prisons hold between 400,000 and 500,000 drug offenders.

In contrast, even after the vast expansion of the federal effort over the past two decades, the number of federal drug cases that are brought is dramatically smaller -- in the range of 20 to 30 thousand cases per year.

Congress’s primary goal made sense: focus the federal effort, using the assistance of the military and intelligence agencies, the cooperation of foreign governments, and the ability to gather financial evidence globally, upon the cases promising the greatest impact in dismantling the drug trade and supply – the high level cases. Focus federal drug enforcement upon the most serious criminals – those who use their profits and acquire the power to assassinate, to corrupt, and to finance terrorism.

The Subcommittee’s approach in 1986 was to tie the punishment to the offenders’ role in the marketplace. A certain quantity of drugs was assigned to a category of punishment because

the Subcommittee believed that this quantity was easy to specify and prove and “is based on the *minimum* quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.” (*Ibid.* emphasis added).

However, we made some huge mistakes. **First, the quantity triggers that we chose are wrong. They are much too small. They bear no relation to actual quantities distributed by the major and high-level traffickers and serious retail drug trafficking operations, the operations that were intended by the subcommittee to be the focus of the federal effort.**

The second mistake was including retail drug trafficking in the federal mandatory minimum scheme at all. Unfortunately, without holding any hearings to gather expert advice and operating in haste and without full consideration of the implications, the Subcommittee also envisioned a federal enforcement role against the managers of the retail traffic. (*Ibid.*) Federal retail drug enforcement should be an anachronism. Forty and more years ago, when the national and international drug trafficking universes were much smaller, the Federal Bureau of Narcotics routinely made retail level arrests, in part because a retail dealer would have been likely to provide information to prosecute “up the chain” of distribution. However, now, retail distribution is many organizations and many transactions removed from the genuine large scale organizations. Major drug trafficking organizations are much larger, richer enterprises now than 40 or 50 years ago, and are a much greater threat to global stability.

The myth of an anti-Black crack law

In the years following the 1986 enactment, it became apparent that the Department of Justice, in its crack cocaine prosecutions, was disproportionately targeting African-Americans. In 1995, Dan Weikel, writing for *The Los Angeles Times* (May 21, 1995), reported that since 1986 no whites had been prosecuted for crack cocaine offenses in the federal courts in Los Angeles, Boston, Denver, Chicago, Miami, and Dallas, or seventeen states.

Even in 2006, the Department of Justice prosecuted ten Black defendants on crack cocaine charges for every white defendant. Because of the sentencing guidelines, low-level crack defendants, on average, get longer sentences than high-level powder cocaine defendants, according to the U.S. Sentencing Commission’s 2002 report to Congress.

The apparent Justice Department emphasis on incarcerating black crack defendants has led to the myth that the crack sentences, compared to the powder sentences, were intended to punish blacks. **Congress did not intend to more harshly punish black drug offenders in 1986.** But the real inequality in sentencing crack and powder cocaine defendants legitimately demands reform. The inequality in sentencing has led to the observation that the quantity trigger ratios between crack and powder cocaine are 100 to 1, and the suggestion that the 100 to 1 ratio is the source of the racial disparity in sentencing.

The myth of the 100 to 1 ratio

How did the 100 to 1 ratio of 500 grams of powder to 5 grams of crack come about? The

suggestion that this ratio was based on a Congressional finding or understanding that crack was a “black drug” and powder cocaine was a “white drug” is false. Congress may have believed that the crack problem in 1986 was particularly acute in poor black urban neighborhoods, but that did not drive the selection of the quantity triggers.

Responding to the inflammatory idea that the ratio was designed with race in mind, an alternative narrative has been constructed – equally unfounded – that Congress determined that crack was much more dangerous than powder cocaine and therefore more deserving of greater punishment than powder cocaine on a weight basis. This is completely untrue as well.

I was at the table in 1986 when this bill was being drafted. The Subcommittee on Crime was attempting to apply higher punishments in the mandatory sentences strictly on the basis of the more significant role of the offender in the drug trafficking pipeline. Higher-level traffickers were to be punished more severely. Based largely on information that I obtained from an expert consultant to the Select Committee on Narcotics Abuse and Control, a Metropolitan Police Department narcotics detective named Jehru St. Valentine Brown, the Subcommittee concluded that a trafficker in 20 grams of crack cocaine was trafficking at the same “serious “ level in the marketplace as a trafficker in 1000 grams of powder cocaine. We believed a “major” trafficker could be identified if he trafficked in 100 grams of crack or 5 kilograms of powder cocaine. This is spelled out in the report of the Committee on the Judiciary (H. Rept. 99-845, Pt. 1, pp.16-18). Coincidentally, these both were a ratio of 50 to 1. There were no findings regarding addictiveness of crack, the prevalence of *in utero* cocaine exposure (i.e., “crack babies”), or violence in the drug market, or other measures of harmfulness or dangerousness of crack *vis a vis* powder cocaine. **Congress never developed a ratio of relative harms between crack and powder to create a ratio between the quantity triggers.**

Many critics of the large proportion of and long sentences for low-level Black and Hispanic crack offenders have highlighted the 100 to 1 ratio to illustrate the irrationality of the crack quantity triggers compared to the powder cocaine triggers, since crack and powder cocaine are pharmacologically similar.

The fallacy of only fixing the crack- powder ratio

The emphasis on *the ratio* led some members of the Sentencing Commission, officials in the Clinton Administration, and U.S. Senators to fix the racially disproportionate prosecutions of crack cases by finding a new *ratio* between crack and powder to adjust the low crack cocaine triggers. Their approach, which has a certain logic, is to ascertain the correct *ratio* of harmfulness between crack cocaine and powder cocaine. **This misses the point of federal cocaine enforcement.** *Federal* cocaine quantity triggers should not be sending a message that crack is more harmful (that’s the job for NIDA, CSAP, and the Department of Education). The quantity triggers should be sending a message to DEA agents and federal prosecutors that high-level cases are the only appropriate subjects for federal investigations.

The preoccupation with the ratio has led to bills that lower the powder cocaine quantity triggers to achieve the correct “harmfulness” ratio. Such bills fail to credit the proper role of

Federal drug enforcement and, more ominously, perpetuate the serious problem that the small quantity triggers present to the criminal justice system. **The law enforcement goal should be to elevate the federal focus to the highest-level, multi-ton traffickers**, not prosecute more low level powder cocaine traffickers on the mistaken impression that they are more likely to be white. Meaningful federal prosecutorial activity is being sacrificed to the symbolism of being tough on crack or being tough on powder cocaine.

Well-intentioned legislation now pending in the U.S. Senate risks repeating the mistakes of 1986 by affirming a flawed definition of a high level cocaine trafficker. The quantity triggers in those bills could be quickly measured by children with a kitchen scale. Congress must not fix the wrong thing which is the *coincidence* of a 100 to 1 ratio between tiny (50 grams) and insignificant (5000 grams) without fixing the fundamental mistake of 1986 – absurdly low quantity triggers for powder cocaine that lead federal agents away from targeting the heart of the illegal drug business.

Current evidence of the distraction of low quantity triggers

Low quantity trigger mandatory minimums have given the Justice Department the wrong signal about the drug cases Congress and the American people want fought with federal resources. They distract DEA and other Federal agents from the high-level cases.

The U.S. Sentencing Commission has compiled data that illustrate the system-wide misuse of federal mandatory sentences. The Commission deserves the nation’s thanks for detailing in May 2007 the enormous number of insignificant cases brought by U.S. Attorneys around the nation, cumulatively, and on a district by district basis.

My nomination for the most egregious waste of federal criminal justice resources in a federal district for FY 2006 is New Hampshire. The United States prosecuted 41 crack cocaine cases with a median weight of 3.1 grams, and only 10 powder cocaine cases with a median weight of 200 grams. (U.S.S.C. 2007 Report to Congress on Cocaine and Federal Sentencing Policy, pp.108-114). What a waste of hundreds of thousands of dollars in agent, prosecutor, judicial, imprisonment and support staff time are in these cases!

In quantitative terms more appropriate examples of federal cocaine case selection in FY 2006 were:

	# cases crack	median wt. gms.	# cases powder	median wt. gms
Southern California	1	33.6	97	22,020
Puerto Rico	12	77.5	48	332,350
Arizona	4	143.0	147	13,040

Unfortunately the data do not reveal the fraction of these cases that may have been simply “mules,” and not the leaders of organizations responsible for delivering such quantities.

Another example of wasted federal resources was **Eastern Virginia**, which had the highest number of crack cocaine prosecutions of any district in the nation, 253. Over one-third of

those crack cases involved less than 25 grams – all retail level cases easily prosecuted by Virginia’s competent Commonwealth’s Attorneys.

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

Twenty years after the enactment of the crack and powder cocaine mandatory minimums, America’s anti-drug effort is far from disrupting the heart of the global cocaine trade. Federal cases devoted to crack cocaine prosecutions are a distraction from that focus. Placing federal prosecutors in districts which have no role in the international drug trade to simply bring some drug cases of local significance is a waste of national resources.

Conclusion

Until Congress decides to repeal mandatory minimum sentences for the various reasons well expressed by other witnesses, the pro-law enforcement issue for reform of drug mandatory minimums is to set the quantity triggers at the appropriate levels for high level traffickers.

I suggest, for the ten year mandatory (up to life imprisonment), an appropriate quantity trigger that would properly direct the investigative energy of highly trained, dedicated and well equipped federal agents and prosecutors against major global criminals is on the order of one metric ton, 1000 kilograms of cocaine. For the five year mandatory (up to 40 years imprisonment), an appropriate trigger quantity to target mid-level but important cocaine traffickers would be in the range of 100 to 200 kilograms.

Similar revisions would make sense for all of the drug quantities set forth in 21 U.S.C. 841(b).

When these quantities become the typical levels of federal prosecutions – not 52 grams of crack cocaine nor 16 kilos of powder cocaine which was the median for high level traffickers in 2000 as reported by the U.S. Sentencing Commission in 2002 – then America’s neighborhoods will be getting the federal drug law enforcement they deserve to fight their neighborhood’s crack houses and open air drug markets. Then our communities may begin to enjoy a reduced cocaine problem that our White House National Drug Control Strategy purports to offer.

###