

**Testimony of Judge Reggie B. Walton Presented to the United States Sentencing  
Commission on November 13, 2007, on the Retroactivity of the Crack-Powder Cocaine  
Guideline Amendment**

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Thank you for affording me the opportunity to appear before you today on behalf of the Criminal Law Committee of the Judicial Conference of the United States. I would like to begin my remarks by noting that I testified before the Commission on the subject of the sentencing disparity between cocaine base (“crack”) and powder cocaine penalties on November 14, 2006 – almost one year ago to the day. Of course, it is not surprising that this should be an ongoing discussion. Crack has long been a contentious subject, a specter that has haunted the federal criminal justice system for more than twenty years.<sup>1</sup>

It is a subject that is of great personal interest to me, and one that has captured the attention of the Criminal Law Committee and the Judicial Conference.

I can trace my personal interest in this matter back to the late 1980s, when I served as the White House’s Associate Director of the Office of National Drug Control Policy. At that time, I advocated for different sentences because of the greater potential for addiction from the use of crack,<sup>2</sup> and the level of violence associated with the crack trade that existed.<sup>3</sup> Even today, as a

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<sup>1</sup> The notorious 100-to-1 ratio was established with passage of the Anti-Drug Abuse Act of 1986. Pub. L. 99–570, 100 Stat. 3207 (1986).

<sup>2</sup> See, e.g., U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002), available at [http://www.usssc.gov/r\\_congress/02crack/2002crackrpt.htm](http://www.usssc.gov/r_congress/02crack/2002crackrpt.htm).

[A]lthough both powder cocaine and crack cocaine are potentially addictive, administering the drug in a manner that maximizes the effect (e.g., injecting or smoking) increases the risk of addiction. It is this difference in *typical* methods of administration, not differences in the inherent properties of the two forms of the drugs, that makes crack cocaine more potentially addictive to *typical* users. Smoking crack cocaine produces quicker onset of, shorter-lasting, and more intense effects than snorting powder cocaine. These factors in turn result in a greater likelihood that the user will administer the drug more frequently to sustain these shorter “highs” and develop an addiction.

*Id.* at 19.

sentencing judge regularly called upon to sentence drug offenders, I firmly believe that people who distribute illegal drugs should be punished for their conduct. I also believe it may be defensible to punish crack more severely than powder-form cocaine, given the differential in the risk of addiction. But what seems unconscionable to me is the scale of the difference that has existed between crack and powder penalties. This disparity was the subject of my testimony in 2006.<sup>4</sup> At that time, using a hypothetical example, I discussed the disparate treatment that crack and powder offenders faced in the federal courts;<sup>5</sup> I discussed the racial effects of the penalty disparity,<sup>6</sup> and I discussed the corrosive effect that the disparity had upon confidence in the courts.<sup>7</sup> All of this was included in my testimony from one year ago, and my personal views have not changed. For these reasons, as an individual sentencing judge, I am pleased that the Commission has amended the guideline.

Of course, crack-powder disparity has also been an issue of ongoing interest to the Criminal Law Committee and the Judicial Conference of the United States. In June 2006, the Criminal Law Committee discussed the fact that 100 times as much powder cocaine as crack is required to trigger the same five-year and ten-year mandatory minimum penalties, resulting in crack penalties that are 1.3 to 8.3 times longer than powder sentences.<sup>8</sup> The Committee

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<sup>3</sup> See, e.g., *id.* at 100 (“An important basis for the establishment of the 100-to-1 drug quantity ratio was the belief that crack cocaine trafficking was highly associated with violence generally.”).

<sup>4</sup> See generally Testimony of Judge Reggie B. Walton Presented to the United States Sentencing Commission on November 14, 2006, on Sentencing Disparity for Crack and Powder Cocaine Offenses, available at <http://www.uscc.gov>.

<sup>5</sup> *Id.* at 3-4.

<sup>6</sup> *Id.* at 5-6.

<sup>7</sup> *Id.* at 7-8.

<sup>8</sup> See U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 19 (2002), available at <http://www.usdoj.gov/olp/cocaine.pdf>.

concluded that the disparity between sentences was unsupportable, and undermined public confidence in the courts. Upon the Committee's recommendation, on September 19, 2006, the Judicial Conference voted "to oppose the existing sentencing differences between crack and powder cocaine and agreed to support the reduction of that difference."<sup>9</sup>

Whether in response to the actions of the Judicial Conference or upon its own initiative, the Sentencing Commission, implementing the policy conclusions that follow from its series of special congressional reports on cocaine and sentencing policy,<sup>10</sup> has amended downward the guideline for crack cocaine.<sup>11</sup> And Congress, with virtually no debate or opposition, has allowed the amendment to move forward and to become effective.

Today, the Commission is confronted with the next logical question. It must determine whether the amendment should be made retroactive. It is an important question, one with profound consequences for the federal criminal justice system. On one side of the matter, there are considerations of fundamental fairness and an opportunity to undo a little of the harm that has been wrought by two decades of too-severe crack guidelines; on the other, there are serious concerns about community safety and practical implications for the workload of the federal judiciary.

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<sup>9</sup> JCUS-SEP 06, p. 18.

<sup>10</sup> The Commission has repeatedly condemned the crack-powder disparity in its reports to Congress. *See, e.g.* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997); U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002); U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007).

<sup>11</sup> *See* 72 FR 28558 (submitting guideline amendments to Congress).

The Criminal Law Committee has deliberated the matter and has wrestled with these competing considerations, and ultimately, has adopted the position that the amendment should be made retroactive.<sup>12</sup>

In arriving at this position, the members of the Criminal Law Committee engaged in extensive discussions and considerable introspection. For example, in my own deliberations on this matter, I was gravely concerned about the potential adverse impact that retroactivity could have on the courts, the probation and pretrial services system, and the communities into which offenders will return upon their release. Only after considering the procedures that can be implemented to mitigate the impact,<sup>13</sup> and only after weighing the representation of the Probation and Pretrial Services Chief's Advisory Group that probation offices can handle the anticipated increased workload, did I determine that under the circumstances, fundamental fairness compels retroactivity. I suspect that many of my fellow Committee members engaged in similar evaluation.

Fundamental fairness *does* compel retroactive application of the guideline amendment. The words “equal justice under law” – etched into the very stone of the Supreme Court of the United States – are not mere rhetoric; they are the expression of a principle that lies at the heart of the rule of law. In a nation of laws, people should receive the same treatment under the law. Indeed, parity in punishment was one of the paramount objectives of the Sentencing Reform Act. Like offenders were to receive like punishments. Therefore, if, as the Commission explained in justifying its amendment, “the 100-to-1 drug quantity ratio significantly undermines the various

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<sup>12</sup> See Committee on Criminal Law of the Judicial Conference of the United States, Comments on Retroactivity of Crack Cocaine Amendments, November 2, 2007, available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/clc\\_letter\\_re\\_crack\\_retroactivity.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/clc_letter_re_crack_retroactivity.pdf).

<sup>13</sup> Several of these procedures are outlined in the Committee's letter to the Commission. *See id.*

congressional objectives set forth in the Sentencing Reform Act,”<sup>14</sup> then the same logic applies to those who were sentenced last year, or five years ago, as to those who will be sentenced for crack tomorrow. It is not often that courts are afforded the opportunity to ameliorate the wrongs of the past; however, by applying the guideline amendment retroactively, the Commission has the ability to undo some of the injustices associated with crack sentencing over the last twenty years.

Furthermore, there is reason to believe that Congress would want the Commission to take this step, ensuring that sentences (retrospectively as well as prospectively) comport with the objectives of the Sentencing Reform Act. The legislative history of the Commission’s retroactivity authority suggests that Congress conferred this authority to the Commission in order to cope with *precisely* this kind of situation. Retroactivity was not intended as an instrument to make isolated or minor adjustments;<sup>15</sup> rather, it was meant as a means to make sweeping and serious changes: changes precisely like those associated with crack retroactivity.

Fundamental fairness, justice, and the faithful implementation of the Sentencing Reform Act all compel retroactivity of the amendment. On the other side of this balance, however, are very serious concerns about community safety and workload. According to the Commission’s analysis, a retroactive guideline amendment could impact more than 19,000 offenders.<sup>16</sup> The

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<sup>14</sup> U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (2007).

<sup>15</sup> See U.S.S.G., § 1B1.10, Background (citing S. Rep. 225, 98th Cong., 1st Sess. 180 (1983) [T]he legislative history of 28 U.S.C. § 994(u) . . . which states: “It should be noted that the [Senate Judiciary] Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the [amended] guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.

*Id.*

<sup>16</sup> See Memorandum of U.S. Sentencing Commission, Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive, October 3, 2007.

average reduction in sentence would be 27 months, and in the first year, an estimated 3,804 offenders would be released from prison if the guideline is made retroactive.<sup>17</sup> It would be an obvious challenge for the courts to smoothly absorb such a large influx of offenders. Yet, as I have intimated previously in my testimony, I have been persuaded that the judiciary can accommodate the increased workload without compromising community safety. The work associated with retroactive application would be significant, but a policy statement from the Commission could narrow the range of issues to be considered at the resentencing hearings that would follow in the wake of a retroactive amendment.<sup>18</sup> The Criminal Law Committee stands ready to work with the Commission to prepare a one-page form that judges could use to reduce an offender's sentence in an expedient manner.

Of course, retroactivity would not only affect judges. Others in the judiciary, particularly probation officers (those individuals who would be responsible for supervising affected offenders as they emerge from prison, and who may be asked to provide updated guideline calculations or presentence reports to judges), would be impacted. But after reviewing the Commission's analysis, the Probation and Pretrial Services Chief's Advisory Group has

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<sup>17</sup> *Id.*

<sup>18</sup> *See* 18 U.S.C. § 3582(c)(2):

[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, *if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.*

*Id.* (italics added). A policy statement that could successfully narrow the range of resentencing issues would be: In resentencing a defendant in light of this retroactive guideline change, the court should only consider the change in the crack guideline made by the Commission and whether this change now suggests a lower sentence in light of the factors set forth in 18 U.S.C. § 3553(a) to the extent that they are applicable.

*See* Committee on Criminal Law, *supra* note 12, at 6.

concluded that the system is capable of absorbing the influx of offenders in the system.<sup>19</sup> To do so will require careful planning, however. Accordingly, the Committee has already directed the Office of Probation and Pretrial Services at the Administrative Office of the United States Courts to begin planning for the increased workload, in the event the amendment is applied retroactively.<sup>20</sup>

The Criminal Law Committee is sensitive to the workload implications of retroactivity. Resentencing nearly twenty thousand offenders would have serious implications for the courts and would require careful coordination among members of the judiciary. The members of the Committee understand this. But the Committee believes that the courts can handle the increased work without degradation of the judiciary's services and without compromising the safety of our communities.

I would like to thank you for the opportunity to testify before you today. The matter of whether the amendment should be made retroactive is an important issue with great penological consequences. The Committee appreciates the gravity of the concerns by those who oppose making the amendment retroactive, but believes that the federal judiciary can process the volume of offenders emerging from prison, in need of re-entry services, and can do so without compromising public safety. Given that belief, the Committee has determined that fundamental fairness and faithful implementation of the Sentencing Reform Act compel the retroactive application of the amendment.

I would be happy to answer any questions that you might have.

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<sup>19</sup> The Chiefs Advisory Group also supports retroactive application of the guideline amendment. *See* Committee on Criminal Law, *supra* note 12, at 6.

<sup>20</sup> *Id.* at 10.