UNITED STATES SENTENCING COMMISSION



TRANSCRIPT

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UNITED STATES SENTENCING COMMISSION

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2002 PUBLIC HEARING

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PROCEEDINGS

CHAIRPERSON MURPHY: I'd like to call the public hearing to order. The Sentencing Commission is very glad to have the assistance of some important spokespeople here this afternoon.

We do have a very tightly scheduled hearing because we are in the process of gathering information and data so that we can consider the merits and positive changes in how crack and cocaine offenses are sentenced.

We've been asked to do a report to the Senate on this, and we know that input from others will help us in this.

Those of you who were here last year remember that we had a similar situation. We're having more time this year for public hearings, but we also have more topics that we are seeking assistance on.

So we have the bell that we used last year, the timer. I apologize ahead of time to you for it. I know that each of you have been informed that you have 10 minutes in which to speak. So I

have asked my assistant to have it ring at 8 minutes; then you will know that there are 2 minutes left to really collect if there's more important than the sentence that you're in, and then finally a second bell at 10 minutes. I apologize for that, but it just is necessary to move along.

In our first panel this afternoon are representatives from what might be called the medical scientific academic world. We have Dr. Glen Hanson, who's the Acting Director of the National Institute on Drug Abuse, and Dr. Deborah Frank, who is a Professor of Pediatrics at Boston University School of Public Health; Dr. Ira Chasnoff--hope that I'm doing justice there--from the University of Illinois, College of Medicine; and then Dr. Alfred Blumstein from Carnegie Mellon University.

We plan on going from my left to right or your right to left and starting with Dr. Hanson. I know the Commissioners are going to have questions. I think it might be best if the questions, in

general, are reserved until each speaker has been able to talk.

But if there's something that you need to clarify when the speaker is finished, then I'd ask the Commissioners to do at that time. But, otherwise, I think we could do the questions and answers better after each member has had a chance to testify. So with that, Dr. Hanson.

STATEMENT OF GLEN HANSON, D.D.S.

DR. HANSON: Thank you for the opportunity to come and testify before the Sentencing Commission. I appreciate the honor to represent the National Institute on Drug Abuse, or NIDA, at this session.

NIDA supports approximately 85-percent of the world's research on drugs of abuse, and this research has taught us a great deal about how these drugs are used, how they affect the brain and other systems and how they cause short and long term consequences.

Today I will address my comments principally to cocaine and the issues, the things,

that we've discovered through the research supported by NIDA and by other institutions.

Then at the end, if time permits, I'll just mention a little bit about methamphetamine and heroin, to give you some basis for comparison.

Use patterns of cocaine have been monitored by surveys supported both by us, monitoring the future, and by SAMSA, which uses the national household survey mechanism.

They show that currently there's about 1.2 million users of cocaine in total, and about a fifth of those use crack cocaine. In comparison to the middle of 1980s, this incidence of use is down considerably; however, it has pretty much leveled off over the past few years with some slight declines occurring more recently.

Cocaine comes in two basic forms, either as a hydrochloride salt or as a neutralized or alkalinized form, which is sometimes referred to as free-base, and crack would fit into this latter group.

The form of administration or the type of

administration depends on the form of the cocaine. The hydrochloride salt typically can be administered either orally, internasally or by IV administration; whereas, the neutralized or alkalinized form makes the drug volatilizable when exposed to heat and then can then be smoked.

The graphic that we placed up on the easel gives you some sense as to the differing properties based on the form of administration of these different types of cocaine.

We talk about these properties as pharmacogenetic, and they have to do with onset. As you can see from the graphic, the more rapid onset are the smoked and intravenous forms of administration; whereas, the intranasal is in between, and the oral form is the slowest onset, being in the neighborhood of about 30 to 40 minutes.

The duration of action is also dependent on the form of administration, with the intravenous and smoking being fairly short, in a matter of 10 to 20 minutes duration of action; the longest being

after oral, in the neighborhood of about 1 to 2 hours, and then intermediate being the nasal form of administration, which is about 45 to 60 minutes.

Now the potency of the drug, although the drug itself doesn't change regardless of how it's administered, the potency is dependent on the concentration; that is, how high the drug gets inside the body.

As you can see from the graphic, that after intravenous and smoking, you tend to get higher levels, so that has a more potent effect; whereas, after oral administration, the levels tend not to be as high, so the effect is going to be less potent, and then in between that would be your intranasal administration.

The immediate effects of cocaine are seen principally on the central nervous system and the cardiovascular system. The effects on the brain and central nervous system includes effects such as euphoria, individuals are energized, talkative, somewhat alert. They experience decreased appetite

and a decreased sense of need of sleep.

If doses go higher, the effects can become toxic, causing agitation, bizarre psychotic behavior, even violent paranoia. Extreme high doses can result in tremors which can turn into seizures and can become lethal.

As far as effects on the cardiovascular system, this drug tends to cause vaso constriction, tends to stimulate the heart so it beats more rapidly, resulting in an elevated blood pressure.

With high doses or toxic responses, this can turn into arrhythmias, heart attacks, strokes. There can be vaso spasms. Emboli can form moving-these are basically clots that can then move into other vital tissues causing occlusion and interfering with blood profusion and resulting in tissue damage.

Pharmacologically, cocaine is also-besides being a stimulant--is also a local
anesthetic, and this was the only FDA approved use
of the drug is as a local anesthetic to block nerve
conduction and specifically to block pain.

As far as long term consequences are concerned, cocaine is highly addicting. There have been data recently suggesting that long term effects do occur on the brain which may comprise its function.

Another phenomena with cocaine over chronic use is what we call sensitization. This means that doses which originally didn't cause serious sequeli, systems become sensitized or overly sensitive to the drugs, so now the drug could cause paranoia, psychosis and even induce seizures because of these altered responses to the drug.

Other medical consequences of use of cocaine include things such as increased chance of contracting infectious diseases, diseases such as HIV or AIDS, Hepatitis C and other sexually transmitted diseases.

The reason are twofold. One is that individuals who administer their drug through intravenous means may be using contaminated needles and/or paraphernalia.

Another possible reason is under the influence of this drug, individuals tend to engage in risky sexual activity which makes them vulnerable to the transmission of these disorders.

Another medical consequence has to do with the perinatal effects of this drug. Cocaine is used in about one-percent of the women during pregnancy. The numbers equate to approximately 45,000 women a year who take cocaine while they're pregnant.

The effects of cocaine are somewhat controversial. Some of the early studies suggested dire consequences in the offspring of women who used cocaine during pregnancy. Some of those early studies were not controlled well. There were other confounding issues which were not taken into account.

So now the consequences appear to be less severe than originally anticipated; however, there are some issues that have been identified, things such as diminished circumference of head in offspring and perhaps effects on the development of

attention and emotional properties and abilities.

Another factor, another medical consequence are individuals who consume alcohol while using cocaine, and this represents the majority of those who have a cocaine dependence. They can form a metabolite called cocaethylene which is fairly toxic, especially to the liver, so it can result in significant liver toxicity.

As far as the mechanism, how does this drug work, it causes what we refer to as a blockade of the uptake system. What this means is it interferes with neurochemical transmitters or messengers once they're released from their nerve cells, particularly interfering with dopamine systems. And these pathways are important for pleasure as well as for emotional function. So that's one of the reasons we tend to see users going for the cocaine, because of its reward properties, euphorogenic properties, as well as inducing psychosis by interfering with that system that has to do with emotionality.

It also interferes with the uptake of

another transmitter called noradrenalin which is important in controlling cardiovascular systems, and so that's one of the reasons it has these very profound cardiovascular effects.

Finally, just for comparison,
methamphetamine is also a stimulant with similar
properties to cocaine with the following caveats.
Methamphetamine tends to be longer acting than
cocaine. It tends to have more severe and
persistent psychosis than does cocaine. It's more
likely to cause long term damage to the brain than
is cocaine. And perhaps, anecdotally, it's more
difficult to treat dependence on methamphetamine
than it is cocaine.

As far as heroin is concerned, heroin is a very different drug. Although it has extreme addicting potential, it tends to be more of a depressant rather than a stimulant, and it's most likely to cause death by respiratory depression, which is sort of a depressant phenomena, than through stimulation, which is what we see with cocaine. Thank you.

CHAIRPERSON MURPHY: Thank you very much. Yes, Judge Sessions?

COMMISSIONER SESSIONS: You talk about the importance of the way in which the drug is administered or taken.

DR. HANSON: Right.

COMMISSIONER SESSIONS: Can you just compare for me the medical differences between the smoking of crack and the IV cocaine, powder cocaine user? Is there any medical differences from those two different processes?

DR. HANSON: In both cases, regardless of how you administer it, the issue is still cocaine getting into the brain or affecting cardiovascular systems.

So the differences in responses would be more in terms of how much cocaine can you get in and how quickly can it get into the body. So as you see from the graphic, both IV and smoking gives you levels which are comparable. So the medical consequences are going to be very similar from the two.

COMMISSIONER SESSIONS: How about your addiction, the rate of addiction, would there be any consequence--any difference between crack and a person who uses powder intravenously?

DR. HANSON: You're not likely to see significant differences.

CHAIRPERSON MURPHY: Yes, Professor O'Neill?

mean, part of the issue obviously that we're having to deal with as policy-makers is right now we have a differentiation in the ratio or the way in which we punish crack cocaine from powder cocaine, and that's one of the things that we're really looking at.

Ordinarily, when society chooses to punish a drug, like it's already chosen to punish cocaine
-I think we probably all agree that cocaine is not a good thing and people shouldn't be using--the difficulty, I suppose, for us as policy-makers is trying to make a determination as to whether or not the level of punishments that are different between

crack and cocaine, whether in terms of each drug's harm to the individual substantiates that difference.

Is crack significantly more harmful to the individual in terms of its pharmacological effects than regular powder cocaine?

DR. HANSON: I would say in general no; that they would be very similar.

COMMISSIONER O'NEILL: So really the difference is almost the delivery system then, right; the fact that, for example, if you snort powder cocaine or if you put it on your tongue or however you ingest it, that what we're really talking about is the difference in delivery system?

DR. HANSON: That's correct, and how much cocaine you can get into the body and how quickly you can get it into the body.

COMMISSIONER O'NEILL: Now ordinarily with other sorts of drugs--because there are a number of drugs that can be smoked, they can be ingested orally, they can be snorted, whatever--do we normally think that it's useful to differentiate

punishment on the way in which the drug is delivered into the system?

DR. HANSON: Well, I don't want to make a policy statement, but in terms of the medical consequences, as a general rule, intravenous administration and smoking, where the drug goes into the lungs, usually will have very similar patterns of response.

So I would say that those two types of administrative systems are likely to be comparable in terms of their addictive properties as well as likely to be comparable in terms of their general medical sequeli.

COMMISSIONER O'NEILL: So then early on the evidence that was suggested that said that crack cocaine is somehow pharmacologically worse than powder cocaine in terms of its effect on the body just isn't substantiated by additional research?

DR. HANSON: It wouldn't be substantiated if you're talking about intravenous administration.

COMMISSIONER O'NEILL: That's what I mean

DR. HANSON: Right.

COMMISSIONER O'NEILL: --given the fact that the delivery systems are the same.

DR. HANSON: They're very similar.

COMMISSIONER STEER: Do we have time for

another?

CHAIRPERSON MURPHY: Sure.

COMMISSIONER STEER: Dr. Hanson, I'm glad you made a few comments about heroin. I think one of the issues that is before us, to an extent, is whether or not powder cocaine is punished insufficiently.

Could you comment or overall--and I understand they're very different drugs--as a medical and a societal problem, compare powder cocaine to heroin as far as seriousness?

DR. HANSON: It's not clear to me what comparison you want me to make.

COMMISSIONER STEER: Do you agree that heroin--heroin is punished more severely. Do you agree that it is a more severe medical and societal

problem? Is it --

DR. HANSON: They have very different features in terms of what it is that they're going to do and who would be vulnerable to the effects of those drugs.

As I said, heroin tends to be more of a depressant, and so individuals that use that may have different needs, at least emotional needs or different reasons for administering the drug versus someone who's using cocaine.

And both of them, when you overdose, people die. On the one hand, they die from seizures or heart attacks or strokes. On the other hand, they die from respiratory collapse--they stop breathing--and cardiovascular collapse. So it's--

COMMISSIONER STEER: I take it addiction would be different; that addiction would be more of a problem for heroin and treating addiction, is that fair?

DR. HANSON: No, I don't think I would say that because we have some very good ways of treating heroin addiction, and actually, we do not

have really good strategies for treating some of the cocaine addiction.

We have methodology or therapeutic approaches, but I would say that we're probably more successful in dealing with heroin addiction than we are with extreme cocaine addiction.

COMMISSIONER STEER: Interesting. Thank you.

CHAIRPERSON MURPHY: Mr. Elwood?

COMMISSIONER ELWOOD: I'm going to do a trick which I saw in Congress which is to ask two questions and thereby to cheat.

First of all, how do differences in administration, particularly the sort of rapidity of onset and how quickly it goes out of your system--what are the effects on addictiveness and on use patterns; that is, likelihood of bingeing?

My second question is how common is IV use compared to smoking, and how would you account for any differences or what are the reasons for differences?

DR. HANSON: The likelihood of addiction

forming seems to be correlated somewhat with the rapid onset of the effect. The more rapid onset you have, which reflects how quickly the drug gets into the brain and exerts its effect, the more likely it is to be addicting.

So on that basis, one would expect--and it turns out to be the case--that intravenous administration and smoking are more likely to be addicting or severely addicting than the other forms.

That's not to say they can't be addicting, but those two types of administration are more likely to create addiction over a shorter period of time.

As far as the numbers of people who administer the drug intravenously versus those that administer the drug by crack, you will see some crossover there. It's not uncommon to have people smoke it and also administer the drug intravenously depending on what they have access to.

So it's somewhat artificial to say, well, we have this many intravenous users and we have

this many crack users. But, in general, as I mentioned, about a fifth of those who claim to use cocaine in general are what we would describe as primarily crack users. And the other question was?

COMMISSIONER ELWOOD: Versus IV--how many are IV users primarily?

DR. HANSON: I would say probably about 50-60-percent of those who use cocaine have a history of using intravenous administration.

Now why would you select IV over smoking or vice versa? One of the reasons that smoking became so popular in the '80s was the concern about AIDS and the concern about using contaminated needles.

So it was thought if we smoke it and we're getting comparable effects from it compared to what we get when we administer it intravenously, then why not smoke it and that way we won't expose ourselves to the possibility of contracting AIDS or getting HIV. So that was one of the reasons they started smoking instead of administering it intravenously, although we find a very high

proportion of those who claim to be relatively pure smokers who also are HIV positive, and that has to do with getting involved in the risky sexual activity plus they may be smoking intravenously administrations on the side as well.

COMMISSIONER CASTILLO: So do you agree that crack is more psychologically addictive than powder cocaine or not?

DR. HANSON: Powder cocaine taken as--see, that's the issue. If you're taking the powder cocaine, putting it in saline solution and injecting it, no. They're very similar.

If you're taking it orally, which people don't do in this country very much, it's not terribly addicting. If you're snorting it or administering it internasally, it's moderately addicting.

COMMISSIONER O'NEILL: So then really at the end of the day what you're really saying is if we were going to differentiate punishment between crack and powder and any of the types of cocaine, that we're probably better off doing it on a

delivery system than we are dividing some sort of a line between crack and powder; that that really is an arbitrary distinction?

DR. HANSON: That's correct. If you're saying that's based on basic pharmacology, it is not, but the delivery system--it would make more sense to make a separation between oral administration and crack cocaine rather than intravenous and crack.

CHAIRPERSON MURPHY: Thank you. There may be more questions for you when we're done with the panel. Dr. Frank?

STATEMENT OF DEBORAH FRANK, M.D.

DR. FRANK: Judge Murphy and members of the Commission, thank you for giving me the opportunity to speak with you today.

I am a principal investigator of a

National Institute on Drug Abuse project which, for
the past 10 years, has followed the developmental
and behavioral outcomes of the cohort of inner city
children with and without cocaine, crack exposure.

I say cocaine, crack in one breath because

there are no physiologic indicators that show to which form of the drug the child was exposed. The biologic thumbprints of exposure to the two substances in utero are identical.

My co-authors and I, as pediatricians and researchers in inner city Boston, are on the front lines. My gut reaction to the question about snorting versus needles is you're still more likely to get AIDS and other bad stuff from needles. I say that as somebody who sits up with AIDS babies.

So we witness the negative impact of addictive disorders on families, children and the community. In response to this experience, in addition to our own research, we've conducted a number of reviews of the published medical psychological data regarding the effects of prenatal cocaine-crack exposure, and the most recent of which was published in the Journal of American Medical Association in March of 2001, and you've got it.

In brief, we conclude that there are small, but identifiable effects of prenatal

cocaine-crack exposure on certain newborn outcomes very similar to those associated with prenatal tobacco exposure.

There is less consistent evidence of long term effects up to ages 6 years, which is the oldest age for which published information is available. There are no long term studies which identify any specific effect of crack compared to cocaine on children's development.

Based on years of careful research, we conclude the crack baby is a grotesque media stereotype, not a scientific diagnosis.

You may recall the initial predictions of the crack baby: inevitable prematurity, multiple birth defects, agonizing withdrawal with cat-like cry, early death and profound long term disabilities for survivors.

Actual data are really quite different.

The majority of exposed infants are not born

prematurely in any case, but prenatal care--and

this is something Dr. Chasnoff actually taught us a

long time ago--decreases the risk of prematurity to

approximately that of other infants from the same impoverished backgrounds, even if their mothers do not succeed in becoming fully abstinent, as long as they well and truly engaged in pre-natal care.

After taking into account that often cooccur with cocaine exposure and pregnancy, such as
poverty, tobacco and alcohol use, poor nutrition
and so forth--infections--the most consistently
observed effects of prenatal cocaine-crack exposure
are small, but statistically significant decreases
in birth weight, length or head circumference.

These deficits are similar in magnitude to those seen after exposure to one pack a day of cigarettes during pregnancy, a day.

In contrast to the effects of heavy prenatal alcohol exposure, there's no convincing evidence that prenatal cocaine-crack exposure is associated with any increased risk of birth defects.

In other words, while there are detectable newborn effects of prenatal exposure to cocaine or crack, they are not different from and certainly

not worse than the effects of far more common exposures to legal substances.

I would actually say that my reading of the literature is that although these children may have small head circumferences, that unlike the small head circumference from alcohol, they catch up, and that's been our clinical experience and our research experience.

Now what about drug withdrawal? Unlike prenatal exposure to heroin, methadone, barbiturates or benzodiazepines, which are drugs like Valium or Xanax, prenatal cocaine exposure does not cause a recognizable withdrawal syndrome in the newborn or require prolonged hospitalization for pharmacologic treatment.

Some investigators have found that heavy prenatal cocaine-crack exposure is associated with subtle differences in newborn behavior or in detailed research assessments. But these effects are not usually clinically obvious.

In other words, any experienced pediatrician can walk into any nursery and identify

from like across the room a baby who's withdrawing from opiates. That's really clinically obvious.

But an infant exposed to cocaine or crack without opiates will be clinically indistinguishable from the other babies in that nursery.

What about sudden infant death syndrome?

Unlike prenatal tobacco or opiate exposure--and here I mean either heroin or methadone--prenatal cocaine or crack exposure has not been shown to be an independent risk factor for sudden infant syndrome or for the increased risk of death in the first two years of life.

Now you may well ask if there are no such newborns as crack babies, do exposed infants still grow up to the "crack kids," popularly depicted as so irreversibly damaged by their mother's drug use as to be unlovable, uncontrollable and unteachable?

These stereotypes evolve from distortions of information from early studies whose methods in some cases were so flawed as to preclude drawing valid conclusions.

Only about half of the published studies

about the post-neonatal--that is after one month of age--outcomes of prenatal cocaine or crack exposure have been done using methods, such as making sure the testers don't know the exposure history of the children that they are testing, that give careful scientists some confidence in the accuracy of their finding.

If you look at 18 independent samples from 15 cities and about 40 studies, only one group specified that their subjects only use powder cocaine, and two others described the percent of their sample who use crack or inject or snort, but said, just as Dr. Hanson said, that many women use multiple forms of the drug during pregnancy.

All the other studies which we reviewed made no attempt to differentiate cocaine from crack because they generate identical metabolites in a mother's urine or hair or in an infant's urine or hair or first stool, meconium, which is the markers that we use to identify children with prenatal cocaine exposure and other drug exposure.

If you now look at do these children grow

up to be retarded, well replicated findings have shown detrimental effects on IQ scores of exposure to one to two drinks a day of alcohol in pregnancy and about a pack or more of cigarettes.

In contrast, the majority of studies of prenatal cocaine-crack exposure alone do not show negative effects on developmental test scores from infancy to 6 years; that is, if you parcel out the effects of other drugs, the incremental effect of cocaine is often undetectable.

In most samples which are comprised of poor children, all the kids, with and without cocaine exposure, deteriorate over time reflecting the overriding negative effect of poverty.

There is no evidence to suggest that children exposed prenatally to cocaine are at any more risk for developmental delays than children exposed to legal substances such as alcohol and tobacco.

DR. FRANK: There will soon be an article coming out which actually found a five point decrement of cocaine on 2-year-old developmental

test scores, but what you will not learn from the media--and I suggest you go read the article--is there's also a very strong tobacco effect, and that won't hit the headlines.

But when you look at other aspects of development, like motor or language development, the most recent research suggests that the increased muscle tone in young infants once attributed to cocaine-crack is, in fact, a heavy prenatal tobacco effect. There are no studies that show motor problems after early infancy, and the language data is basically split down the middle.

In the behavior area, if you simply use the same kind of measures that you use to study cigarettes or alcohol, you don't find a cocaine effect, and you do find tobacco and alcohol effects on pretty simple checklists, with the threshold for alcohol effects on one study being as low as one drink a week in pregnancy.

On the other hand, there are some sophisticated psychological and physiological laboratory experiments that have detected possible

effects of prenatal cocaine-crack exposure. But the real life implications of these findings are unknown. In fact, the attentional finding that Dr. Hanson referred to, the children's teachers didn't detect it; only the labs found this.

Clearly, future research is seriously
needed because the only data we've got is up
through age 6, and many positive factors, such as
good schooling, or negative factors, such as loss
of a parent to death or incarceration, can diminish
or exacerbate the effects of biologic risks.

So in conclusion, I want to say that there are no data suggesting any specific adverse effect of prenatal crack as compared to prenatal cocaine.

The most pessimistic interpretation of available data to date suggests that prenatal cocaine or crack exposure may be almost detrimental to children's later development and behavior as prenatal tobacco or moderate prenatal alcohol exposure, but clearly less detrimental than heavy prenatal alcohol exposure. Many findings once thought to show specific effects of in-utero

cocaine or crack are scientifically explained today by other factors.

From the perspective of practicing physicians and research scientists, singling out any one drug or users of any one drug for uniquely punitive measures is neither rational nor effective in reducing the biologic and social risks to children associated with adult substance use.

Instead, clinicians and public health providers strive to reduce use of all potentially toxic substances, legal and illegal, among all members of our society.

To enhance the wellbeing of infants and children specifically, which is my job, we work to provide prenatal care and, if necessary, priority treatment for addiction to pregnant women and parenting women and to support families with the resources necessary for safe and stimulating environments.

Can I read my last sentence?

CHAIRPERSON MURPHY: Yes.

DR. FRANK: Okay. None of these measures

require believing in "crack kids" who are mythical figments of media imagination, figments which I hope will not influence the distinguished members of this Commission as they construct sentencing guidelines. Thank you.

CHAIRPERSON MURPHY: Thank you, Doctor.

Are there any immediate questions?

COMMISSIONER SESSIONS: Just so our record is clear, you are a graduate of the Harvard Medical School, and you're a Professor of Pediatrics at Boston University?

DR. FRANK: That's correct.

COMMISSIONER SESSIONS: It talks here about your background in dealing with inner city kids, and I would assume that that's the people affected by what we're talking about here and--

DR. FRANK: My entire career. From 1981, when I ended my fellowship, I've been at the same inner city hospital.

COMMISSIONER SESSIONS: Which is?

DR. FRANK: It used to be called Boston City. It's now called Boston Medical Center.

COMMISSIONER SESSIONS: Is that the public hospital?

DR. FRANK: It was the public hospital; then we were merged with a private hospital, but we're still the public hospital.

COMMISSIONER SESSIONS: Okay.

COMMISSIONER CASTILLO: So what you're saying now, Dr. Frank--and I appreciate all the articles that have been submitted--is the aspect of the "crack babies" is a myth at this point?

DR. FRANK: Correct.

of drugs is bad, but there certainly is no way scientifically to differentiate either cocaine or crack as being a particularly pernicious drug for use during pregnancy, is that accurate?

DR. FRANK: I would say that there's cumulative risks, but it's very hard to sort out the specific effects of any one drug except in the case of the neonatal withdrawal system which is pharmacologically very specific.

COMMISSIONER CASTILLO: Okay, thank you.

COMMISSIONER SESSIONS: I think you're saying that there is such a thing as a "crack baby," but it's less serious, less--

DR. FRANK: There are children with inutero exposures to potential toxins, but it doesn't
have to be cocaine and crack. And the only thing
that I know that is a real syndrome is fetal
alcohol, and as Dr. Chasnoff will tell you, those
kids are also poly-exposed, certainly to tobacco
and often to other stuff as well, depending on the
part of the world they're from.

COMMISSIONER SESSIONS: But, essentially, your position is that alcohol creates much greater risk to--

DR. FRANK: Heavy alcohol, absolutely, no argument.

CHAIRPERSON MURPHY: Thank you, Doctor. Then we'll turn to Dr. Chasnoff now.

STATEMENT OF IRA J. CHASNOFF, MD.

DR. CHASNOFF: Thank you. One of the driving forces behind current policy that discriminates between crack cocaine and powder

cocaine use is the phenomenon of the so-called "crack baby," and that's what I've been asked to address today.

In 1993, I had the opportunity to testify before this Sentencing Commission as it deliberated sentencing guidelines for crack cocaine and powder cocaine, and to begin this discussion today, I'd like to quote from my testimony in 1993.

"Our longitudinal research has shown without any doubt that the single most important factor affecting the life of a child is the environment of the home in which the child is being raised."

When I was first asked to come back today, my first response was, "I haven't changed my mind." What we have to understand is that a child's development is a dynamic process, including both social and biological factors, that contribute to success and failure.

From day one, children interact with the environment around them and seek the nurturing support that will help them achieve their full

potential for health and development.

In our program in Chicago, we see over 1000 children per year who have been exposed prenatally to alcohol, cocaine, crack and other drugs.

I've been doing this work for 26 years; I have never once met a "crack baby," and I wouldn't know how to describe one if someone had asked me to; the reason being I have never met a child whose mother used only one substance, whether it be cocaine in crack form or powder form, amphetamines, ecstasy, alcohol, marijuana. The most common form of drug use in this country is poly-drug use.

Unfortunately, the areas of the brain vital to cognitive functioning and behavioral regulation appear to be the most vulnerable to prenatal exposure to alcohol and other drugs.

Fetal alcohol syndrome is the most common cause of diagnoseable mental retardation in the United States. Children whose mothers use illicit drugs, such as cocaine, whether in powder or crack cocaine form, suffer from the direct impact on the

dopamine receptor system of the developing fetal brain.

In this context, I do want to make some important points:

Number one, as has been noted before, the physiology of powder cocaine and crack cocaine is the same, and changes in the dopamine receptors in the fetal brain would be identical whether the mother used powder cocaine or crack cocaine;

Number two, substance abuse is a poly-drug phenomenon. It is impossible to differentiate the detrimental effects of any one specific drug from that of any other and foolhardy to try to protect the unborn child from any one drug.

Our prevention efforts and treatment efforts must turn attention to substance abuse; not specifically alcohol, powder cocaine, crack cocaine, amphetamines or any other drug that happens to be popular at the time;

Number three, long term, children exposed to maternal substances of abuse, no matter what these substances are, may suffer a wide range of

mild to severe physical and behavioral problems.

By school age, prenatally exposed children have high rates of off task behavior, distractibility, short attention span, impulsive behavior and aggressive behavior; however, again, these difficulties cannot be attributed to any one substance, but occur in the context of poly-drug abuse;

Number four, it is vital that we understand that the home environment is the critical determinant of the child's ultimate outcome. Children depend on their parents to guide and nurture their development.

However, addicted women frequently have poor family and social support networks; thereby increasing their vulnerability to physical and sexual abuse. In turn, children of substance abusing women are at greater risk for neglect and sexual, physical and psychological harm;

Number five, significant psychiatric problems, such as personality disorder or depression, are not uncommon in women who use drugs

or abuse alcohol. These factors, almost invariably, hinder parenting capabilities further and lessen the chance for a normal developmental course for the child;

And number six, women's attempts to seek services for themselves and their children often are hindered by the fragmentation that exists in the services community. Most frequently families are referred to a variety of providers through categorical programs addressing a single need.

These categorical programs most often are established by the Federal Government, focusing on a specific drug or a specific condition of eligibility.

Thus, as we turn our attention to the question at hand, we must ask ourselves how to develop policies and guidelines that serve the best interests of the child.

These best interests are not served by automatically removing a child from its mother's care. They are not served by meting out sentences that are based on false assumptions that one drug

is worse than another.

Every legal or illegal drug one can name has a pharmacologic basis through which it exerts its effects on the fetus, on the pregnancy and on the resulting child. In the final pathway, neither scientists, clinicians or a judge and jury will be able to tell you what harm was done by crack cocaine versus what harm was done by powder cocaine or by alcohol or by any other substance you can name.

We have an opportunity to examine laws that have no basis in science, but laws that allow us to express moral outrage. These laws, unfortunately, do not affect or change the complex realities of substance abuse.

We have an opportunity, instead, to view substance abuse for the non-categorical problem that it is and turn to unification that public health, public law and child welfare approaches that will serve the best interests of the children and the families of our nation. Thank you.

COMMISSIONER O'NEILL: So, Dr. Chasnoff,

you're basically agreeing with Dr. Frank that in terms of its impact upon unborn children, there's no difference really between crack and powder cocaine--

DR. CHASNOFF: I almost saved -COMMISSIONER O'NEILL: --that's been
measured at least.

DR. CHASNOFF: I almost saved us all time and just said ditto, but, yes, I do agree.

COMMISSIONER O'NEILL: That's what I thought.

CHAIRPERSON MURPHY: Maybe you could say a word about the Children's Research Triangle that's supposed to be achieving--

DR. CHASNOFF: The Children's Research
Triangle is an organization in Chicago. We have
three components. We have a large clinical
program, the Child Study Center. Our data last
year, we saw 1008 children, all of whom had been
prenatally exposed to various substances of abuse.

In addition, through that clinical program, we run research programs. We currently

are funded by a number of Federal and state agencies. One of our grants is through the CDC. We're one of five national centers conducting research into the treatment of fetal alcohol syndrome.

We also conduct training and have published extensively, mainly focusing our attention on policy work. And currently we're working with a number of states to develop policy guidelines that are driven by good scientific research.

CHAIRPERSON MURPHY: Thank you. Then we'll turn to Dr. Blumstein--

COMMISSIONER REILLY: Judge --

CHAIRPERSON MURPHY: Yes?

COMMISSIONER REILLY: --I just wanted to pose a question for all of the three first panelists we've heard from about--you talked about pharmacologic basis, but I haven't heard anyone mention anything regarding violence associated with one over another of these drugs, and I'd just be interested in what comments you'd have with regard

to the level of violence associated with, say, heroin, cocaine, methamphetamine, marijuana, what have you.

DR. HANSON: I think in terms of violence, you're probably referring to the issue of what does the drug affect--how does it affect--

COMMISSIONER REILLY: Right.

DR. HANSON: --an individual? Is it likely to encourage violent responses.

DR. HANSON: Right. So you tend not to see psychosis. You tend not to see violent responses as a consequence of the drug itself. Now there may be violence in the context of "I need money to go out and get some more heroin," but it's not the heroin itself or the pharmacology of the heroin that's driving the violent behavior.

Heroin is related to the opioid narcotics, and if you've ever had a surgical procedure, you were likely prescribed a drug that belongs to this group of drugs. It includes things like Morphine

and Darvon, Percocet or Percodan. They're all part of that same family, and they tend not to make people violent; if anything, they tend to sedate and cause people to relax.

On the other hand, the psychostimulants, such as cocaine, they can induce this state of paranoia, and with that, there may be some violent episodes or violent reactions or over-reaction to what they perceive as a threatening environment.

But whether they take it intravenously or whether they smoke it will make no difference.

This relates to, again, the levels of the drug in the brain and how much it interferes with the normal brain processing, especially related to this dopamine chemical that is used by emotional centers within the brain. So there would be no difference in the tendency to induce violent behavior versus those two administration forms. Thank you.

CHAIRPERSON MURPHY: Dr. Frank, did you have anything you wanted to add on that?

DR. FRANK: Well, the problem -- there is violence associated with the drug trade that is

non-pharmacologic, but I don't think, again, is particularly substance specific, but it's very damaging to children.

In our research, we found that even the mothers having witnessed violence was a better predictor of a child's behavior than cocaine exposure. And now as our kids are getting older, we're finding a lot of symptoms in the children related to witnessed violence as well as experienced violence. But alcohol also is a huge trigger of violence in the community I serve.

CHAIRPERSON MURPHY: If you could respond too, Dr. Chasnoff, but we've got to get to the--

DR. CHASNOFF: Just very quickly. The part of the brain where the dopamine receptors are specifically affected, it's the front of the brain called the pre-frontal cortex which is the part of the brain that controls aggressive and irrational behavior.

Our findings are similar whether the child was exposed to cocaine, powder cocaine or crack cocaine, in that it's the dopamine receptors that

are at the heart of their--and we look at it not from a perspective of violence, but the ability of the child to regulate and control behavior.

In fact, exposure to violence affects the dopamine receptor system also. So we're talking about a circle here that we have not been able to disrupt.

CHAIRPERSON MURPHY: Professor -
Dr. Blumstein, you are a Professor of Urban Studies and Operations Research, and so you have somewhat of a different perspective that you're coming from than the first three speakers?

STATEMENT OF ALFRED BLUMSTEIN, Ph.D.

DR. BLUMSTEIN: Yes. The previous speakers have spoken on the micro aspects of biological and pharmacologic effects. I want to talk about the system effects related to where there's much more information relative to the issue that Mr. Reilly raised, and that is violence.

Let me start with just some empirical background. We saw a significant rise in violence in the United States beginning at about 1985,

reached a peak in '93, and has been coming down since then. And the rate of violence in the U.S. today is the lowest we've had since the late '60s.

The rise that went on between '85 and '93 was all attributable -- in terms of homicide, was all attributable to young people -- that is, under 20 -- using handguns.

To a very large degree, this was a direct consequence of changes in drug markets at that time, and everyone that has looked at the issue of violence and its relationship to--I'm sorry--of violence in relationship to drugs has found negligible pharmacologic effect predominantly associated with the drug markets in large part because illegal markets don't have access to normal civil dispute resolution mechanisms, and so their access is to violence.

The '80s saw the introduction of an important new technological innovation, and that was crack, which made cocaine and its effects available to people who didn't have access to powder.

As with most new marketing innovations, we saw vigorous competition in that market, and part of the competition in that new market was associated with violence, of some sellers dealing with violence against their competition or violence in relationships between drug sellers and drug buyers.

There were also street markets because that new drug was being marketed rather aggressively, and in street markets, one is very vulnerable to robbers, and as a result, they have to defend themselves. And that gave rise to much more presence of handguns in the street.

That was a period when the national policy committed to major incarceration as the response to the drug problem. In the Figure 1 that I have in the testimony, you get a sense of the massive growth by a factor of 10 in the incarceration rate for drug offenses between 1980 and 1986, a really major growth, to the point where drug offenders now represent over 20-percent of state prisoners and about 60-percent of Federal prisoners with a

growing presumption that that was going to deal with the drug problem of the nation.

One of the consequences of that massive incarceration was the recruitment of young people as replacements for the people who were sent to prison and particularly associated with crack which was associated with African American neighborhoods, African American participants.

We saw major growth in arrests for drugs by adults starting in 1980. It wasn't until about 1985 that we saw the major growth in young people getting arrested, and Figure 2 in the testimony I submitted shows this major growth from a period when non-whites were being arrested at a lower rate than whites through the '70s, for juveniles; through the early '80s at about the same rate; starting in 1985, a rapid growth to four times by 1989; stayed at four times until '92 and then came down.

Here we saw a situation where young people are recruited into the markets armed with handguns for their self-defense and major diffusion of those

guns to their colleagues who weren't even in the drug market, with a lot of indication of this across different cities in terms of this diffusion process.

The early '90s saw growing recognition in many of the drug-using crooks of the crack-using communities about the harm and evils associated with crack pharmacologically. And so there's good evidence from ethnographers that the new users simply dried up. Old users continued in the crack market, but new users dried up; therefore, old users could be served more readily than with these large street markets, and so there was no longer the comparable need for the young people.

Fortunately, they were able to move into the robust legitimate economy of the '90s so that we saw this decline, and all of that contributed to this continuing decline of violence through the 1990s.

With this background then, I want to address what I do consider one of the most distressing aspects of the sentencing guidelines

and of the mandatory minimums, and that's this hundred to one disparity in the guidelines and in Federal sentencing.

It's unfortunately seen by many observers as blatant proof of racial discrimination in the criminal justice system, and a concern is raised about the legitimacy of the system under the variety of attacks of racial disproportionality associated with it.

It just seems utterly reasonable that the sentences imposed should be based on culpability in the offense rather than the particular chemical nature of the individual drug being used, and as my predecessors have indicated on the panel, there's not much difference in the chemical effect.

We certainly recognize that there were important violence differences in the crack markets of the '80s, but those markets have changed rather dramatically, and again, I think it impressive that the Commission has decided to introduce the notion of augmentations as a means of reflecting individual culpability in terms of participation in

violence rather than what had been merely a correlate and not a cause by distinguishing powder from crack.

The culpability should be associated with the use of violence, should be associated with the role of the individual, and it just strikes me that the evidence that the Commission has accumulated provides some real guidance on that important aspect of it.

It is clear that with violence down, with crack markets having matured, that there may well be differences in violence, but those could well be attributable to the individuals and can be taken account of in the augmentation to the sentences under the guidelines rather than simply maintaining a difference based on the chemical nature.

So that we now have an aggregate low rate of violence. Violence by young people is back down to the level that it was in about 1985 when all of this started up.

I was struck in looking at the data briefing that the Commission has put together on

the issue of role, and again, one would think that the role issue is also an important consideration in culpability; that is, those who are operating a high level in the distribution chain should be treated more severely than those at a lower level.

I was struck by the fact that two-thirds of the Federal cases involving crack are street dealers and a much smaller number of the cocaine folks--of the powder folks are shown to be street dealers.

It's also the case that about 75-percent of the crack people who were arrested are involved in local or neighborhood settings; whereas, about 37-percent are at local or neighborhood involving powder cocaine. So that, again, an augmentation associated with role becomes a very important consideration in the sentence that should be applied to a particular individual.

This again suggests that it's the behavior of the individual being sentenced and ways to articulate the punishment associated with those behaviors become the more salient consideration

rather than the particular form of the drug in which they're involved in.

Let me just say a few words on the issue of mandatory minimums. I have been arguing for a long time that legislative bodies engage in passing mandatory minimums as an act of passion when a drug suddenly comes on the scene or a particularly heinous event occurs, and it's very difficult once those mandatory minimums get enacted to ever get the legislative body to repeal them.

But as an act of good government in a wide variety of areas, one should consider sunsetting mandatory minimums because the moment of passion will inevitably pass, and then government is stuck with the consequences of those mandatories.

And if they sunset them, then a review, whether it's 3 years or 5 years later, allows them to rethink the appropriateness or inappropriateness of that mandatory in the larger context of the work going on and leaves it to Sentencing Commissions, which are the body with the principle of thinking through an orderly deliberative process for

generating sentencing policy.

DR. BLUMSTEIN: I have the sense--and we see this in many ways--that the passions that fueled mandatories in the '80s have largely passed.

We're seeing President Bush's proposal for the new budget emphasizing treatment with a statement that the supply will respond to the demand; what we've got to do is deal with demand.

We're seeing Prop 36 in California. We're seeing Arizona pursuing treatment rather than incarceration, and we're seeing a move in this direction in a wide number of states. So that the political environment seems to be ready to do some serious rethinking of how we deal with the drug problem, particularly now that violence is down at the low level that it's at.

Let me urge that the Commission follow
this route of bringing augmentations to reflect the
factors that would have been concerned, that
contribute to differences between crack and powder:
factors like violence, factors like role.

It just strikes me that once you bring

those factors to bear, I don't see a meaningful difference in the punishment that should be meted out based on the chemical process by which the individual drug was formulated, particularly in light of the similarity of the individual consequences.

It strikes me that we are in a mood for doing lots of rethinking. There's numerology going around of how we revised a hundred to a more comfortable number. It just strikes me that the approach of dropping the guidelines for--dropping the threshold for powder is not the most helpful way to do it, but raising it for crack--and I don't see a reason for making an important difference.

But I also see an argument for having augmentation for the other kinds of actions associated with improper behavior beyond drug dealing in the market. Thank you very much.

CHAIRPERSON MURPHY: Thank you. Are there any questions?

COMMISSIONER STEER: I just have a quick point of clarification.

CHAIRPERSON MURPHY: Mr. Steer?

COMMISSIONER STEER: Your Figures 1 and 2, under the category of drugs, I take it that includes both trafficking and possession?

DR. BLUMSTEIN: That includes trafficking and possession, but recognizing that the folks in prison will be there for possession charges because they might not have been able to prove trafficking charges. But it's rare that people have ended up in prison simply because of possession with no presumption of involvement in the market.

COMMISSIONER STEER: Well, I think that's true in the Federal system; I'm not so sure about states. But this is about state and Federal--

DR. BLUMSTEIN: That graph is based on state. The paper that was drawn from also has the Federal system, and I think they might--if it's simple possession, they're more likely to be on probation or more likely to be in jail; whereas, the people who end up in the prisons are the ones who are more likely to be involved or presumed to have been involved in some aspect of the market.

CHAIRPERSON MURPHY: I know that Judge
Sessions has a question and Professor O'Neill. So
I saw his hand first so, so we will go with
Sessions first.

testimony about violence associated with a newness of the market in the 1980s is rarely interesting to me. Essentially there's a shake-out period in which the new drug is admitted into the market and people try to figure out who's going to be in charge of their own little areas, and as a result, violence increases. As the maturing process evolves, then it decreases.

I wonder if there are other examples, other than crack cocaine, which are analogous; in other words, when powder became much more a significant drug as opposed to heroin, let's say, if you know of any other--

DR. BLUMSTEIN: I'm not sure that I do know of others. Some of you might.

COMMISSIONER SESSIONS: How about prohibition?

CHAIRPERSON MURPHY: Yes.

DR. BLUMSTEIN: Well, alcohol during prohibition. I think what made it so aggressive was, number one, the fact that it was really a cheap accessible drug, accessible to large numbers of people and took place--the marketing took place predominantly in inner city neighborhoods where violence was much more going on.

Suburban neighborhoods would have gotten those markets out of there very quickly, and so there was just a lot going on. I think the prohibition example is a useful one. But you see this in lots of drug illegal markets where there's competition.

COMMISSIONER SESSIONS: So there was something unique about crack, at least in the 1980s, as it was admitted into the local communities. But if the violence associated in the '80s no longer exists--I mean, the violence which resulted--

DR. BLUMSTEIN: "No longer" is a bit stronger than I'd go along with--

COMMISSIONER SESSIONS: But -- yeah.

DR. BLUMSTEIN: --but it's markedly reduced, and I think a big part of it was the young people that got recruited as one of the unintended consequences of the massive incarceration of the older folks, and the young people were far more volatile and far more copying each other, so that we just saw major presence of guns in those neighborhoods that ended up getting used and the emergence of gangs, which weren't necessarily involved in a corporate way in the drug marketing.

But it was very comfortable to be a gang member if you're a drug seller because you have buddies who are going to protect you against somebody who tries to rip you off, either as a buyer or as a robber.

CHAIRPERSON MURPHY: Okay. Professor O'Neill and then Judge Castillo.

COMMISSIONER O'NEILL: Yes. Professor

Blumstein, let me ask you--I'll follow up

Mr. Elwood's earlier trick and ask you sort of a

two-part question, I guess.

One would be if, in fact, part of what we're doing by having penalties is shaping preferences, we're essentially saying, "If you're going to go and use drugs, we would prefer essentially that you use powder cocaine as opposed to crack cocaine," and as a virtue of that, we're going to have crack penalized much higher.

Is there a problem with if crack, in fact, is sort of cheaper, easier to market, is a quicker and faster hit as opposed to other means of delivering cocaine except for injection, is there a benefit to maintaining a higher penalty for crack precisely on that basis?

The second part of my question would be is--

DR. BLUMSTEIN: Could I just --

COMMISSIONER O'NEILL: Sure, go ahead.

DR. BLUMSTEIN: To a large degree, it's not the user that you're targeting your punishment at, but it's the dealer. It's not clear to me how you're shaping use patterns by shaping your penalty of the dealers who, to a reasonable degree, as an

aggregate market, are not terribly responsive to your penalties anyway.

They are much more a--the penalties-COMMISSIONER O'NEILL: Do you have
evidence for that? I mean, do you have evidence
for that they're not responsive to the--

DR. BLUMSTEIN: The resilience of the market in responding and recruiting young people in particular.

As long as there's a replacement supply out there, the punitiveness, the deterrent effect, those who drop out of the market, the incapacitation effect, those who are sent to prison, as long as there are replacements, they're going to respond where the profits and opportunities exist.

commissioner o'neill: What about those who argue the fact that obviously the replacements aren't perfect and unending by virtue of the fact that we see--as we see incarceration go up, we see a drop or a leveling in terms of use and in terms of violence, and can that be attributed to the fact

that we've--some would argue we've overincarcerated and that itself has had an effect upon
the markets?

DR. BLUMSTEIN: The fundamental theory behind the punitiveness in terms of reducing use is that by increasing the sanction to the seller, he will demand a higher risk premium to be paid for selling; thereby increasing the price; thereby reducing the demand in response.

Between 1980 and 1990, we had this growth of a factor of about eight in incarceration rate for drug offenses. During that period, the price of cocaine dropped by a factor of three to five.

Now I'm not prepared to argue that this was essentially a negative response to the growth of incarceration. Some of it may have been increased deficiency in the production or marketing.

But certainly you would have expected that massive growth of incarceration to have driven the price up to some degree, and we saw a major drop in the price of cocaine over that period.

COMMISSIONER O'NEILL: What about massive growth of incarceration and drop in use and drop in violence?

DR. BLUMSTEIN: That's a correlation that is hard to make as a causal connection. Lots of people have looked at the 1990s with a drop in crime and a growth of incarceration and attributed one to the other.

It's the case, however, that during the 1980s there was also significant growth of incarceration, but at least during the second half of the 1980s we also saw significant increases in crime.

Much of the information I've talked about is in this edited volume called The Crime Drop in America, part of which was undoing the factors that contributed to the crime rise.

There were two papers in there that tried to attribute the effect of incarceration counting data from the '80s and the '90s, and both of them attributed about 25-percent of the crime drop to the rise of incarceration.

So incarceration certainly contributes; not so much contributes to the avoidance of drug transactions, but contributes, in large part, through incapacitation by taking off the street people who are otherwise violent.

COMMISSIONER O'NEILL: So what my--

DR. BLUMSTEIN: The drug market was driven much more by demand structure which was growing in the '80s with the prevalence of crack and then the decline in the '90s with the avoidance by new users.

COMMISSIONER O'NEILL: What then might be the--if I can--

CHAIRPERSON MURPHY: --the last point-COMMISSIONER O'NEILL: The last point,

yes. What might then be the expected effect of
lowering then penalties for crack?

DR. BLUMSTEIN: Of raising the threshold-let me estimate that your proposal would be to
bring crack at roughly the comparable level of
powder.

COMMISSIONER O'NEILL: My hunch is that

it's not going to have a major impact on drug dealing, on the recruitment; that the major effect is likely to be the aggressiveness or diminished aggressiveness for having to go out and recruit new people because you're still going to impose punishment on people who, say, have a hundred grams of cocaine or crack.

The issue is where do you impose this mandatory 5 year minimum sentence, and what looks like a profound inequity because crack is dealt with by blacks and powder is dealt with by whites and Hispanics.

COMMISSIONER O'NEILL: Thank you.

CHAIRPERSON MURPHY: Judge Castillo?

COMMISSIONER CASTILLO: Doctor, I understand that out of our panelists, you're really the expert on violence, and I understand your theory of the reduction in violence.

What I'm getting at is what you were already addressing is the statistics that you're relying on for the point that violence has gone down as these markets have matured, are they our

statistics? Are they the statistics in that book that you just mentioned, The Crime Drop in America, or are there others? And can you make those available to us?

DR. BLUMSTEIN: Oh, sure. They're based on the FBI's uniform crime reports, both in terms of crimes themselves and particularly who commits crimes, which we don't know from the crime statistics, but, rather, from arrest statistics.

And the arrest statistics are the ones that indicate by age, for example, this major rise during the 1980s and early '90s and the corresponding decline to the point where young people--and young people were clearly the folks contributing to the rise because people over 30 steadily declined throughout that entire period of the '80s and the '90s.

COMMISSIONER CASTILLO: Do the FBI crime statistics differentiate between powder and crack cocaine offenses?

DR. BLUMSTEIN: No--well, I take that back. I don't know, and the arrest statistics

might, but they haven't been involved in the work here.

It's been taking drug arrests as the aggregate and the demographics of those who get arrested. Okay.

COMMISSIONER CASTILLO: Okay, thank you.
CHAIRPERSON MURPHY: Mr. Elwood?

COMMISSIONER ELWOOD: I don't want to talk about how you approach it because we've already had some interest from the panel in sort of separately punishing the people who are actually violent.

But one thing that's interesting is that even now, after the major wave of violence has passed, crack defendants are twice as likely as powder defendants to have a gun, and they're more likely than even methamphetamine defendants to have a gun, and meth is punished basically the same as a gram/5 year mandatory minimum.

Do you think that this reflects, again, sort of a continuation that the markets are still more violent than powder markets?

DR. BLUMSTEIN: That may well be somewhat,

and I would argue that what you should do is use the augmentation to get at the individuals who have the guns, and if they are more prevalent in crack markets, then that augmentation should appropriately should be used more often with those individuals based on who has a gun and particularly—and I would anticipate that you're likely to find presence of a gun more often in crack markets because they tend to be at greater vulnerability.

Powder markets will more often be behind closed doors and with other forms of security, so that I can easily see why they would have it.

I particularly want to augment the guidelines sentence for those who use the gun as well as for those who might be carrying it because the guns are conscious acts of rational people out there to either protect themselves or to engage in aggressive behavior, but don't apply it to the drug that happens to be correlated with it; apply it to the behavior, whether that's engaging in violence or carrying a weapon inappropriately.

COMMISSIONER ELWOOD: Is that because of an expected deterrent effect for higher penalties?

DR. BLUMSTEIN: Potentially a deterrent effect, but I would think the deterrent effect is much stronger for what goes on in the street than what the criminal justice system does.

And if the individual is deterred by the threat of a robber taking him off, he's more likely to carry a gun. But the issue is one of appropriate dessert in terms of what is an appropriate punishment for those who generate a greater potential for engaging in violence or who engage in violence as part of their illegal drug marketing activity.

CHAIRPERSON MURPHY: Well, we could spend several more hours probably from our point of view in talking with those of you on this panel because we really are in need of this kind of information.

I think you can tell by the questions that have been generated how much we appreciate it, and we do have your written materials and may call upon you again. Thank you very much.

Now I'd like to invite Wade Henderson and Charles Kamasaki to come forward.

Mr. Henderson is the Executive Director of the Leadership Conference on Civil Rights, and Mr. Kamasaki is the Senior Vice President of the Office of Research Advocacy and Legislation--it seems like quite a big office--for the National Council of La Raza.

MR. KAMASAKI: Small office, big title.

CHAIRPERSON MURPHY: Broad

responsibilities. So, Mr. Henderson, would you
begin, please.

STATEMENT OF WADE HENDERSON

MR. HENDERSON: Thank you, Judge Murphy. Good afternoon to the members of the Sentencing Commission.

I'm Wade Henderson, the Executive Director of the Leadership Conference on Civil Rights. I'm pleased to appear before you on behalf of the Leadership Conference to urge the Commission to take an aggressive action to remedy racial disparities in Federal drug sentencing.

The Leadership Conference is the nation's oldest and most diverse coalition of civil rights organization. The Leadership Conference consists of over 180 national organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians and major religious groups.

It is a privilege to represent the civil and human rights community before the Commission, especially in a building named for a legendary civil rights leader and Supreme Court Justice.

My testimony this afternoon addresses one of the issues for comment that the Commission recently published in the Federal Register, and that is should the threshold quantities of crack cocaine and powder cocaine that trigger longer sentences under the guidelines and statutes be revised.

This matter is of paramount importance to our coalition. The well known 100-to-1 crack powder ratio in Federal law is one of the most visible manifestations of racial disparity in the

criminal justice system.

In 1995, I submitted a statement on behalf of the NAACP to the then House Judiciary Committee in support of a 1-to-1 ratio for crack powder equalization.

I refer to that testimony this afternoon because it was complete with both medical and economical evidence in favor of equalization and is, of course, available to the Commission for review.

As you might imagine, the civil rights community was bitterly disappointed by Congress' rejection of the Commission's 1995 proposal to eliminate the disparity, and we have grown increasingly frustrated by the failure of Federal authorities to address the subject since then.

Recent statistics compiled by the

Commission show that the problem relates not just

to the differences between crack and powder cocaine

penalties; rather, minorities are now

disproportionally subject to harsh penalties for

both types of cocaine involvement.

The issue is no longer just the ratio between crack and powder. The issue is that minorities are almost exclusively targeted for Federal cocaine arrests and then find themselves in a mechanical sentencing system that results in unacceptably high incarceration rates.

For this reason, I strongly urge the Commission to adopt significant changes to the relevant sentencing guidelines and to propose similar changes to the corresponding statutes.

Now in my written testimony, I explained the civil rights context in which this issue arises. Federal sentencing rules for crack cocaine do not exist in a vacuum. They are part of a pattern of inequity that threatens the credibility of the justice system in minority communities.

Two years ago the Leadership Conference on Civil Rights issued a report entitled "Justice on Trial, Racial Disparities in the American Criminal Justice System."

We concluded that the criminal justice system is beset by massive unfairness and that both

the reality and the perception of this unfairness have disastrous consequences for minority communities and for the criminal justice system itself.

In my oral presentation, I will not repeat the report's extensive findings. But this Commission should be aware that we focused significant attention on Federal sentencing.

We urged repeal of Federal mandatory sentencing laws which deprive Judges of too much discretion and transfer sentencing authority to unaccountable prosecutors.

We endorse the concept of guideline sentencing, but urge that the Federal guideline system be improved to eliminate provisions that contribute to disproportionate minority incarceration rates.

Specifically, we urge that the crack powder cocaine disparity be eliminated in both statutes and the guidelines. Few policies have contributed more to minority cynicism about the war on drugs.

The disparate cocaine sentencing laws were mostly enacted by Congress in 1986 in a wave of racially tinged media hysteria. We do not contend that Congress was motivated by racial animus in enacting these laws, but race was a sub-text of the congressional debate, especially in the uniquely harsh penalties assigned to crack cocaine.

There is no scientific or pharmacological evidence to justify treating crack as though it were a hundred times more dangerous than powder cocaine. The Commission found as much in 1995, and the updated scientific testimony before the Commission today confirms this fact.

Nor is there anything special about the crack cocaine market to justify these differences.

Rates of crack use, which have never exceeded rates of powder cocaine use, have remained stable over the decade.

At the same time, the number of street crack level dealers charged in Federal court has climbed from 48-percent to 66-percent of all crack defendants while the number of importers, leaders

and supervisors has fallen.

And the Commission's statistics show that the crack market is less violent than it was a few years ago. Less than half of the crack cases involved a weapon, and only 8-percent of the cases involved actual violence.

So whatever anecdotes and stereotypes caused Congress to treat crack cases so harshly in 1986 are no longer valid, if they ever were.

Violent crack dealers should be punished for their violence. Non-violent crack dealers should not be punished on the false assumption that all crack dealers are violent.

In fiscal year 2000, 93.7-percent of those convicted for Federal crack distribution offenses were black or Hispanic, and only 5.6-percent were white. That shocking figure has not changed much over the past decade.

But the racial make-up of the powder cocaine defendants has shifted in the last decade. By 2000, the percentage of white powder cocaine defendants had dropped from 34-percent to

17-percent while the percentage of black powder cocaine defendants had increased to 30-percent.

And the percent of Hispanic cocaine defendants had increased to 51-percent. About 81-percent of Federal powder cocaine defendants are now minorities.

Thus, the problem of racial disparity has become more deeply ingrained than in the early 1990s. The unjustifiably harsh penalties for crack offenses still fall almost exclusively on black defendants. But now, unlike 10 years ago, the somewhat more moderate, but still very harsh penalties for powder cocaine offenses, fall disproportionately on minority defendants, both black and Hispanic as well.

So Federal enforcement efforts against cocaine distribution are directed almost exclusively against minorities, 93-percent of all crack defendants and 81-percent of all powder defendants.

We know from Federal health statistics that minorities are no more likely to use cocaine

than whites, and the National Institute of Justice has found that drug users typically purchase drugs from sellers of the same race. So there is no rational basis for these statistics and certainly no compelling reason to justify a Government policy that has such a disparate impact on minorities.

Three policy imperatives emerge from these statistics. First, the threshold quantities for crack cocaine should be raised substantially. While powder cocaine sentences are themselves too harsh and mechanical, there is certainly no reason why crack cocaine sentences should automatically be so much higher than powder cocaine sentences.

Second, powder cocaine sentences should under no circumstances be raised. Now that the defendants charged with powder cocaine offenses are predominantly minorities as well, raising powder sentences would make the overall racial disparity worse.

Third, with the Commission's assistance,

Congress should immediately review the interaction

of mandatory minimum drug sentencing laws and the

tactics and priorities of Federal law enforcement agencies. In tandem, these policies result in catastrophic rates of minority incarceration with untold adverse consequences for minority communities.

In 1995, the Commission recommended to Congress that drug statutes and sentencing guidelines be altered to eliminate the differences in crack and cocaine sentencing thresholds. We were proud to support that proposal, and we regret that Congress rejected it.

We continue to believe that the threshold quantities for these two drugs should be equalized. We will continue to urge Congress to adopt that change. But we understand that in the law rejected, the 1995 proposal, Congress limited the Commission's ability to propose a 1-to-1 ratio. We, therefore, urge the Commission to adjust the crack threshold so that it is as close to the powder threshold as feasible, consistent with scientific evidence, without raising the powder threshold.

If anti-drug efforts are to have any credibility, especially in minority communities, these penalties must be significantly revised.

Such a change in Federal law would be a significant step toward restoring balance and racial fairness to a criminal justice system that has increasingly come to view incarceration as an end in itself.

The Leadership Conference on Civil Rights would welcome the opportunity to work with this Commission to rationalize drug sentencing laws and practices. Such criminal justice reforms are a civil rights challenge that can no longer be ignored. Thank you.

CHAIRPERSON MURPHY: Any questions-COMMISSIONER CASTILLO: I thank you for
your testimony. I take it, in a very direct way,
you're saying that the unfounded sentencing
disparity between crack and powder then motivates
Federal agents to prosecute what have been
historically and continue to be historically
minorities and bring them into the Federal criminal
justice system?

MR. HENDERSON: Yes, Judge, that is certainly one of the premises behind our testimony. I mean, we certainly believe that much of the difficulty and the disparity in sentencing is found at the very outset of the arrest and prosecution determination by police and prosecutors, both in deciding who to arrest for what circumstances, who to charge and the nature of the sentences under which they are charged, whether to use state and Federal laws or whether to use--or rather, state laws--or whether to use Federal laws as the basis for the prosecution. That's certainly one basis for the disparity.

The second is, of course, found, as you've suggested, in the wide variation in penalties associated with crack and powder use, and certainly the wide penalty, the heavy penalty for crack utilization, promotes, we believe, targeted enforcement efforts aimed at minority communities; not for any racial animus, but, rather, because the penalties are high, and there is a stereotypical belief that the use of the drug in those

communities is having a widespread impact not only on the quality of life there, but on violence and the associated problems of the drug trade.

COMMISSIONER CASTILLO: Isn't this exacerbated by the fact that most states have eliminated any type of penalty disparity between crack and powder?

MR. HENDERSON: That is correct.

COMMISSIONER CASTILLO: What would you think--I know, Mr. Henderson, you have a lot of political experience. What would you think is the best way for the Sentencing Commission to proceed to address this?

MR. HENDERSON: Well, I think that the Sentencing Commission, in its 1995 recommendation, made a sound, well reasoned judgment based on the facts that were available to you at the time.

COMMISSIONER CASTILLO: Nevertheless, it failed.

MR. HENDERSON: It failed because, of course, it came into a politically charged atmosphere where the war on drugs was paramount,

and both parties, Democrats and Republicans, postured politically to avoid grappling with the underlying issue.

But today things have changed. As we've heard from the last panel, the perception of violence associated with the crack trade has changed dramatically because the evidence, indeed, bearing out that perception has changed. It simply isn't there.

Secondly, while there continues to be a war on drugs obviously carried out by the Administration with the support and blessing of Congress, things have changed with respect to current public emphasis, and there does seem to be a reasoned belief that one should re-examine these proposals de novo.

Recently, for example, I had the privilege of meeting with Senator Sessions to talk about the proposal that he and Senator Hatch had prepared for introduction--I believe it's a proposal--that reduces the disparity down to 20-to-1.

We believe that that disparity, even at

the 20-to-1 ratio, is far too high. But the fact that Senator Sessions, a well known conservative Republican, would adopt to-- or rather, seek to introduce legislation to modify that disparity I see as a tremendous opening, both substantively and politically.

It is akin to President Nixon going to China, if you will, to have a conservative of Senator Sessions' type, willing to offer and discuss a proposal of that magnitude.

Now the fact that it is joined by the ranking member of the Judiciary Committee in the Senate, Senator Orin Hatch, is an indication of just how dramatically the attitude on these issues has changed.

We'd like to build on that, make the kind of record that the Commission has chosen to do today, focus on some of the empirical evidence with respect to the medical and community effects of these issues and make a case--again, a strong case, a bipartisan case--that the current approach to these issues is simply wrong-headed.

COMMISSIONER CASTILLO: Thank you.

CHAIRPERSON MURPHY: Judge Sessions, no relation to Senator Sessions?

COMMISSIONER SESSIONS: Although at one point in my career, I did hope that I would be called Senator Sessions at some point, but that never happened.

Mr. Henderson, I really appreciate the testimony that you've given today. Can I assume from the last part of your prepared text that you understand that, in 1995, there was a directive from Congress that suggested that there should be a difference between crack and powder; that crack should be treated more harshly, in a sense, than powder and that we might very well be looking for a compromise figure?

Would you be willing to work with us despite the fact that the result may not be equalization?

MR. HENDERSON: Well, certainly, Judge, we would be willing to work with the Commission and, in fact, would seek to do that.

I go back to your first assumption that Congress rejected the notion of equalization.

Certainly Congress rejected that proposal. I'd like to feel, however--and I think the record reflects--that there was very little substantive consideration of the evidence presented by the Commission which led to what I thought was a revolutionary judgment on the part of this body.

I do think that Congress, if properly educated on the underlying medical considerations as well as the criminal justice considerations associated with the disparity, might be more willing to take a fresh look at this issue; certainly of the kind that both Senator Sessions and Senator Hatch have talked about, but perhaps even to move beyond that, and that would be the premise under which we'd like to proceed.

CHAIRPERSON MURPHY: Professor?

COMMISSIONER O'NEILL: What sort of efforts have you made most recently to work with the Department of Justice on this issue? I mean, obviously, the Department is an enormous player on

this.

Recently, General Ashcroft had announced a certain restructuring at the Department, to be more concerned about terrorism offenses--

MR. HENDERSON: Absolutely.

COMMISSIONER O'NEILL: --to redirect some of the efforts--prosecutorial efforts of the Department. Has much of an outreach been made with either General Ashcroft or the second in command, Larry Thompson, or Mike Chertoff, who is head of the Criminal Division?

MR. HENDERSON: We have had limited contact with General Ashcroft himself on this issue. The matter has been addressed at the Office of the Assistant Attorney General for Civil Rights, Ralph Boyd, and there has been an effort to initiate this conversation at the level of Deputy Thompson.

As you know, the Department is, of course, understandably preoccupied with a number of considerations right now associated with the Campaign for Homeland Defense. Obviously much

attention is directed there.

There has not really been, I think, a moment, a receptive moment, to discuss these issues in a dispassionate way. But I do think now that proposals have been floated, certainly in the Senate, of the kind we've discussed that that opportunity will present itself.

I think it is really difficult to expect any Administration to initiate of its own volition a change in this area of the kind that we are talking about without first having a lead prepared either by the Commission or by some outside group, whether it's members of Congress or others who would seek to break the ice.

I think you know that politically these issues have resulted in charges and countercharges being made against those who would seek to advance this kind of enlightened thinking under the premise that they're soft on crime. And I think no Administration wants to open itself up to that kind of criticism on the front end. While I reject that—I think it's short-sighted—I do think, at

the same time, it's somewhat understandable.

So what I'm hoping is that with the new proposals on the table and with a new sense, a new spirit of openness on the part of Congress, that the Administration will join in that spirit and engage in that debate in a meaningful way.

COMMISSIONER SESSIONS: Do you think that because of that history of political stalemate that the Sentencing Commission really has to take a leadership role on this particular issue? Do you think that's fundamental to any change that's going to follow?

MR. HENDERSON: I do, Judge. I think the Sentencing Commission has both an obligation and, in my view, a special moral authority to speak to these issues unlike any other governmental body currently on the scene.

I think it is certainly the Commission that is charged with the responsibility of evaluating, of course, the efficacy of our Federal --our criminal justice statutes.

But I also think that the Commission has

the ability to draw on a number of valuable sources of information as we've seen today with the first I think the kind of medical information which comes into play, as well as an analysis of the implications of these changes and the actual enforcement of our criminal laws gives the Commission a unique vantage point.

And I think your voice is really deeply respected and sought in the public debate. think that the Commission has that special responsibility, and I think people are looking to see what ultimately you will do with these proposals.

CHAIRPERSON MURPHY:

Judge Kendall? COMMISSIONER KENDALL: Do you think that our moral authority would carry sway with the black congressional caucus if we did something other than equalization because we're certainly hearing that they would be satisfied with nothing less?

MR. HENDERSON: Well, you raise an important question. I think that many of you -- your 1995 proposal -- as being a proposal which was based

on the scientific evidence available to you at the time and was the proposal that was least directly affected by external political considerations.

The fact that you may come back with a proposal that offers something less than a 1-to-1 equivalency suggests that you have taken into account other political considerations that did not affect your decision in 1995. And so some will find it hard to embrace that recommendation, recognizing that it may be a pragmatic decision, but not one that is based entirely on the evidence available to you or in principle.

And I think there are going to be some that will hold out for what they believe to be a better and more principle judgment.

CHAIRPERSON MURPHY: Little is unanimous in life. I think you can all agree on that.

I'd like to turn now to Mr. Kamasaki.

STATEMENT OF CHARLES KAMASAKI

MR. KAMASAKI: Thank you, Judge Murphy, Vice Chairs Castillo, Sessions and Steer. On behalf of the National Council of La Raza, the

nation's largest Latino civil rights institution, I appreciate the opportunity to testify here today.

My statement has three parts. I will begin with a very brief overview of the National Council of La Raza's work on criminal justice issues.

Second, I will highlight the disparate impact of existing drug laws on the Latino community and conclude with recommendations to promote drug sentencing policies and practices that are fair and equitable to all Americans.

Traditionally, the National Council of

La Raza activity on criminal justice issues has

been quite modest, focused principally on

addressing egregious individual incidents and

broader patterns of law enforcement abuse,

particularly by the Immigration and Naturalization

Service.

In recent years, however, numerous reports from credible sources, including, I might add, the Leadership Conference on Civil Rights, have documented severe growing racial and ethnic

disparities in the criminal justice system.

Many of these reports now include at least some Latino data which almost uniformly substantiate patterns of discrimination against Hispanics at every stage of the criminal justice system.

In part, as a result, in August 2000, the Executive Committee of the Board of Directors of the National Council of La Raza authorized the establishment of a new criminal justice policy project charged with the task of working to reduce disparities in the criminal justice system. It is in this context that I appear before you today.

The 2000 census shows that Latinos

constitute about 12.5-percent of the population of
the United States. Yet, according to the

Sentencing Commission's data, Hispanics accounted
for 43.4-percent of total drug offenders in 2000.

Of those, 50.8-percent were convicted for possession or trafficking of powder cocaine and 9-percent for crack cocaine.

Contrary to popular belief, however, the

fact that Latinos and other racial and ethnic minorities are disproportionately disadvantaged by sentencing policies is not because minorities commit more drug crimes or use drugs at a higher rate than whites.

As Mr. Henderson noted, according to Federal health statistics, drug use rates per capita among minorities and white Americans are remarkably similar.

The evidence strongly suggests that from the moment of arrest to the pre-trial detention phase to the charging and plea bargaining decisions of prosecutors, through the adjudication process, the determination of a sentence and the availability of drug treatment, Latinos encounter a criminal justice system plagued with prejudice and discrimination.

A forthcoming NCLR analysis of Federal crime statistics data--and those are noted in my written statement--shows, for example, that Hispanic and black Federal defendants are far more likely than white defendants to be charged for drug

offenses; that Hispanic defendants are only about one-third as likely as non-Hispanic defendants to be released before trial; that a prisoner's release by standards for drug offenses, Hispanics serve similar sentences as whites in prisons for the same offenses despite the fact that Hispanic defendants had far less extensive criminal histories than their white counterparts.

The statistics go on to show that approximately 3 out of 100 Hispanic men in the 25 to 29-year-old age range have been sentenced to Federal prison, three times the rate of that of white men; and finally, that Hispanics accounted for approximately 1 in 4 of the Federal inmate population in 1997; and further, that Hispanic Federal prison inmates were the least likely of any racial and ethnic groups to receive any form of substance abuse treatment while in prison.

That the sobering statistics are largely the result of irregularities in drug enforcement is largely beyond dispute. For example, as seen in the table cited in my written statement, nearly

three-quarters of Latino Federal prison inmates are incarcerated for drug offenses, by far the largest proportion of any group.

Moreover, as the data show, Latinos are the least likely of any major group to be incarcerated for violent offenses; thus, contrary to the popular stereotype, the overwhelming majority of incarcerated Latinos have been convicted of relatively minor, non-violent offenses, are first time offenders or both.

Recent public opinion research reveals that a large majority of the public is prepared to support more rational sentences for these first time offenders and little wonder. The cost of excessive incarceration to the groups affected and to the broader American society in terms of reduced current economic productivity, barriers to future employment, inhibitions on civic participation and growing racial and ethnic societal inequalities are extremely high.

NCLR believes that this Commission can play a critical role in reducing unnecessary and

excessive incarceration of race of Latinos in the United States.

This Commission has requested comments concerning sentencing of defendants convicted of crack and powder cocaine under the sentencing guidelines. NCLR shares the concern expressed by numerous commentators regarding the blatant discriminatory effect of the 100-to-1 powder crack sentencing disparity.

However, as Mr. Henderson noted, we would oppose any attempt to reduce such disparities by increasing penalties on powder cocaine users. As the Commission's data demonstrate, Latinos are significantly over-represented among those convicted of powder cocaine offenses.

Furthermore, lowering powder thresholds would increase average sentences by at least 14 months overall and probably higher for Latinos with the inevitable increase in overall incarceration rates.

In our judgment, the real world tangible harm produced by lowering the powder thresholds

would far outweigh the abstract, symbolic value of reducing statutory sentencing ratios.

Specifically, NCLR urges the Commission to, first, substantially redress the crack powder ratio disparity by raising the crack thresholds and maintaining the powder thresholds.

NCLR commends the Commission's 1995
recommendations to Congress, and while we recognize
that current law constrains the Commission from
resubmitting this recommendation, we would urge
that the ratio be equalized as much as possible by
raising to the greatest allowable extent the level
that triggers penalties for crack cocaine.

Second, we would urge that you resist proposals that would lower the powder thresholds. We note that reducing the powder threshold would have a disproportionate negative impact on the Latino community and know further that although this action might be perceived as reducing sentencing inequalities, it would have the perverse effect of substantially increasing incarceration levels.

Finally, we ask that you make more widely available alternative methods of punishment for first time, non-violent, low level drug offenders.

We urge the Commission to seize this unique opportunity to simultaneously narrow drug sentencing disparities and reduce incarceration rates of first time, non-violent, low level offenders.

CHAIRPERSON MURPHY: Mr. Kamasaki, those figures that you used when you were talking about Hispanics that were incarcerated, were those Federal defendants incarcerated or did they include state and Federal?

MR. KAMASAKI: These are Federal data. CHAIRPERSON MURPHY: Thank you.

COMMISSIONER CASTILLO: I just want to thank you for your testimony. I think it's important for the National Council of La Raza to be involved in criminal justice issues because there seems to be a vacuum among Latino organizations involved in this. So I want to thank you.

MR. KAMASAKI: Thank you. That was the

same observation that our Board of Directors made.

CHAIRPERSON MURPHY: Yes, I think Judge
Castillo talked with some groups to invite them or
encourage them to come, and it wasn't an issue, I
guess, that they wanted to address at this time.
Vice Chair Steer?

COMMISSIONER STEER: I want to thank you for your testimony. I think it's the first time that your organization has been represented before the Commission. It might be the first time you've even submitted comments. So I think we'll benefit and hope we'll continue to have you involved in the process.

I just wondered as a matter of historical involvement if your organization interacted with those in the past Administration who were responsible for that Administration's ultimate recommendations to increase powder penalties substantially?

MR. KAMASAKI: We had very modest involvement in the 1995 debate, and frankly, most of that was under the umbrella of the Leadership

Conference.

We had several discussions with officials in the Clinton Administration on the broad issues of criminal justice, and I think I would agree with Mr. Henderson's characterization that, at least at the time, it seemed many elected officials and appointed officials and other policy-makers of both parties seemed, in our judgment, unduly concerned about being accused of being soft on crime.

I would agree with Wade--and I think the public opinion polls would demonstrate--that to a large extent, we think that situation is changing.

Just to give you a sense from the Latino perspective, it is widely suggested by many that the Latino community is a very conservative community when it comes to crime, and I think there is some support for that in the public opinion research.

We have been struck in recent years both by some apparent shifts in the public opinion research as well as requests from our grassroots network of Latino organizations to get involved in

the criminal justice system, in part because given the high rates of incarceration, it is difficult at this point to find very many Hispanic families who have not been impacted one way or another by what we believe to be rates of over-incarceration.

So to the extent that the Latino community is at all representative of the general public, we think there is a clearly palpable, almost tangible shift in public attitudes on this issue, and we hope that would be reflected by policy-makers as well.

CHAIRPERSON MURPHY: You know, in the last Congress, there was an amendment to the bankruptcy bill that was put forward by Senator Abraham that would have raised the number of Hispanics.

Did you do anything in active concert in reaction to that?

MR. KAMASAKI: I don't think I'm familiar with the issue, no.

CHAIRPERSON MURPHY: Well, it was at the end of the session, so maybe--

COMMISSIONER STEER: Probably happened too

rapidly, I think, for him to have had much of a role when it was brought up on the Senate floor.

CHAIRPERSON MURPHY: Mr. Sessions?

COMMISSIONER SESSIONS: I guess this is a question for both of you and that is that in our publication, we've listed possible enhancements for possession or use of guns and injuries in the course of drug distribution, as example, together with prior drug felonies.

Naturally, that would result in increased penalties to all defendants who fall within those categories, and obviously disproportionately, according to your testimony, upon people of color.

On the other hand, it's in response to what Congress seemed to be concerned about; that is, violence, et cetera, and injuries within communities. And I guess I'm interested to know what your response is to those enhancements.

It would increase penalties with regard to power cocaine and crack cocaine, at least in those very limited circumstances.

MR. KAMASAKI: I guess I would answer that

in three ways. As an alternative to mandatory sentences predicated as Dr. Blumstein noted earlier, that entire categories of people are more likely to be violent, we certainly would prefer some what you called enhancement, I believe what he called augmentation, as a fairer and more rational strategy.

Second, however, I would raise some cautions regarding the notion that automatically there ought to be significant enhancements based on prior criminal history.

If Mr. Henderson and I are correct that at least some portion of the disproportionate incarceration of Latinos and African Americans is attributable not to their behavior, but to arrests and charging, as well as potentially sentencing, policies, we would argue that that practice, as an across-the-board practice, would tend to exacerbate these inequalities further over time.

So if you're asking if we had our druthers, I think we would prefer, as we testified to, a simple narrowing of the threshold without

further enhanced penalties on the powder sentencings.

MR. HENDERSON: I would agree with

Mr. Kamasaki. I think that Professor Blumstein set

forth, I think, a very rational basis for providing

augmentation where appropriate for culpability

based on the role that the individual may play or

whether that individual may have been associated

with violence.

I do think looking back too closely at prior criminal history does not take into account the degree to which that prior history may have itself have been the subject of a focus or targeted enforcement effort based on race and ethnicity.

And for that reason, the impact that such an augmentation could have on our communities I think could be quite substantial.

I certainly think it is far better to use culpability and the nature of the specific offense as the basis for making that decision far better than relying on the quantity of a particular kind of cocaine carried in this particular instance.

So I would support Mr. Kamasaki's remarks, and certainly I felt Professor Blumstein laid out a fair basis for making those judgments.

CHAIRPERSON MURPHY: We've reached the time when we're supposed to be concluding the hearing, and we have another topic. We have a terrorism panel.

Thank you very much for coming. It's probably hard to express how helpful it is for us to hear your thoughts as we try to think about the best way to proceed here.

MR. KAMASAKI: Well, thank you very much. We appreciate it.

CHAIRPERSON MURPHY: Mr. Jarboe and Ms. Corken.

CHAIRPERSON MURPHY: Mr. Jarboe is from the Federal Bureau of Investigation where he's the Section Chief of Domestic Terrorism,

Counterterrorism Planning Section. You must be busy these days.

And Cathleen Corken from the Department of Justice. She's the Deputy Chief for Terrorism, and

I would just say ditto.

As you know, the Commission did work on terrorism last year and sent a memo to Congress dealing with the guidelines related to terrorism and thought we had closed the book on that subject for a while, but obviously that wasn't the case. And we are busy again and working in response to the Patriot Act and so forth.

So without more ado, let me turn to you, Mr. Jarboe.

STATEMENT OF JAMES F. JARBOE

MR. JARBOE: Thank you, Judge. My name is James Jarboe, with the Federal Bureau of Investigation. I appreciate the Commission allowing us to come here and testify today.

The Federal Bureau of Investigation welcomes the efforts of the United States

Sentencing Commission to promulgate, assign appropriate sentencing guidelines for terrorism offenses.

I'm going to leave any detailed discussion of specific guidelines to the written comments that

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UNITED STATES SENTENCING COMMISSION

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PROCEEDINGS

CHAIRPERSON MURPHY: I know that the members of the first panel are all here, and this is very important for the Commission in the course of trying to do the best job we can in this amendment cycle to get information and views from outside sources, and so we're very appreciative of the witnesses who are going to be here today.

Because, of course, we come from all over the country to meet and we have so much to do, we always have limited time, and I know that you have already been informed about the time slots.

I hope you won't be offended, but my assistant has a little timer, and you'll hear a bell at 8 minutes so that you would have a chance, if it's taking longer, to say whatever you want to say. You would have a chance to finish up with the punch line and so forth before the 10 minute bell rings.

I had suggested yesterday that the

Commissioners wait until all of the panelists had

spoken before asking questions unless there was

something they really needed to clarify at the moment, but that didn't seem too attractive to them, and so I don't know whether they will or not.

But I think that the Commissioners have read the statements that you've submitted, so if you want to speak a little off the cuff, you can do that or you can go ahead with whatever you've prepared.

I would just indicate your names here before we start. The first person will be Bridget Brennan who is a special narcotics prosecutor for the City of New York and has worked in the past with Commissioner Judge Sterling Johnson, and I told her--

COMMISSIONER JOHNSON: More than that. She took my place.

CHAIRPERSON MURPHY: And then we have William Nolan, who is the Chair of the National Legislation Committee of the Fraternal Order of Police and Ronald--is it a soft ch?

MR. WEICH: Pretty much. It's Weich.
CHAIRPERSON MURPHY: Weich, Ronald Weich

of Zuckerman Spaeder, and he is representing the American Bar Association.

COMMISSIONER JOHNSON: And he also worked with Bridget Brennan.

MR. WEICH: That's true. We started in Trial 030 together in the District Attorney's Office.

CHAIRPERSON MURPHY: Is that right?

MS. BRENNAN: We shared a phone for about a year.

CHAIRPERSON MURPHY: Well, we'll see if you have the same viewpoint today.

[Laughter.]

CHAIRPERSON MURPHY: Okay. Ms. Brennan, would you like to begin?

STATEMENT OF BRIDGET BRENNAN

MS. BRENNAN: Thank you very much. Good morning, members of the Commission, Judge Murphy, Judge Johnson. Thank you very much for the opportunity to address you this morning.

I'm Bridget Brennan, the Special Narcotics

Prosecutor for New York City. As you know, Judge Sterling Johnson was head of my agency for many years, and to this day his name is linked with the Office of Special Narcotics.

I'd like to thank you for inviting me to come and share my experience in working with New York State's narcotics laws. I was an Assistant District Attorney in the Manhattan D.A.'s Office for 8 years, and I have been with the Office of Special Narcotics Prosecution for the past decade.

During that time I've developed a perspective and some insights on the narcotics trade, the violence that's inevitably associated with it, and I'd be happy to share those insights with you.

Although I don't have any specific experience dealing with the Federal mandatory minimums or with the Federal sentencing guidelines, I know that as you're contemplating changes in the guideline and making recommendations, particularly with regard to crack and cocaine, you're looking to develop a rational correlation between the

culpability of an individual defendant, the impact of his crime on the community and punishment.

What we have struggled to do with our narcotics laws is draw those correlations frequently by determining an appropriate weight, a narcotics weight, which tends to be associated with a defendant's individual role in a narcotics trade, in a narcotics trafficking organization, and develop that kind of correlation between the defendant's role and his ultimate punishment.

The role of weights is really central in our state's narcotics laws, and it's always been thought that the more substantial the amount of drugs the defendant had with him, most likely the more culpable he would be in a narcotics organization, and there certainly is a good deal of truth to that.

The lowest level members of a narcotics organization tend to be street sellers. They tend to be probably among our most vulnerable people, addicts, who are used, employed by the high level dealers in the narcotics trade.

Addicts are never trusted with a significant amount of the product as they call it, a significant amount of narcotics, and so there is definitely a correlation between weight and a person's culpability in a narcotics organization.

Now New York provides a unique perspective on the drug trade. It's a major importation site for cocaine and heroin. In addition, we have our own local neighborhood gangs and neighborhood organizations, frequently entrenched violent gangs that reap thousands of dollars, hundreds of thousands of dollars in profit annually.

Today I'll speak about the New York State laws governing the prosecution of crack and cocaine, the impact of crack and cocaine on New York and particularly the impact of crack trafficking, the impact the Federal sentencing regulations regarding crack have had on our local prosecutions, and finally, I'll talk a little bit about the challenges we face today.

My office was part of a set of reforms in New York in the 1970s when we were facing a

tremendous problem with heroin, and there was escalating violence in New York and a tremendous problem with heroin addiction.

There were many reforms at that time; my agency was one of them. We were created to give a city-wide jurisdiction over the five counties that comprise New York City. Because narcotics trafficking tends to be fluid, prior to the establishment of my agency, there were jurisdictional impediments to pursuing narcotics investigations and, thus, my office was set up and give city-wide jurisdiction over serious narcotics offenses, felony narcotics offenses.

And I think that was farsighted on the part of the state legislature because we have developed critical relationships with local organizations, with Federal law enforcement agencies and with Federal prosecutors.

Now I know your interest is very specifically on the penalties under Federal law for crimes involving crack and powder cocaine. Under New York state law, we do not treat powder cocaine

and crack differently and, thus, there's no sentencing distinction, none whatsoever.

However, I must point out that our penal law and sentencing structure are entirely different from the Federal sentencing statutory scheme, and for the most part, our sentences for narcotics crimes are probably more substantial.

The threshold amounts that we use--that the state legislature determined for our highest level felony, the A-1 felony, is 2 ounces; that is, someone who sells 2 ounces of a narcotic drug--narcotic drug in New York is defined as heroin or cocaine--is facing a mandatory 15 to life sentence, and the 2 ounces converts into 56 grams. So as you as see, it's a very different sentencing structure than the Federal structure.

Now, of course, the prosecutor is allowed to plea bargain down; however, we are statutorily barred from offering a less than state prison sentence for somebody who is charged with the top narcotics offenses.

Because when you're looking at our entire

state structure, it's very different. I've appended to my testimony a chart which outlines some of the specific state provisions.

We do have some specific state provisions addressing some of the concerns that the Sentencing Commission has already highlighted. We do have a specific state enhancement for dealing in drugs near to a schoolyard, within a thousand feet of a schoolyard--excuse me--a thousand yards of a schoolyard. We have a specific penalty for that, and that has generally been determined to be two city blocks.

We also have a sentencing enhancement for someone who uses a juvenile, someone under the age of 16, in the narcotics trade. That converts what would otherwise be a lower level B felony into an A-1 conspiracy, and again someone is facing that mandatory 15 to life sentence if convicted under that charge.

But just to give you some examples of the differences. If a defendant is convicted of selling 5 grams of cocaine or 5 grams of crack

cocaine, it makes no difference under New York state law. He still faces a minimum sentence of 1 to 3 years.

In fact, under New York state law, a defendant faces 1 to 3 years for selling any amount of a narcotic drug. It's the same felony offense even if it's less than 5 grams. However, if a defendant is convicted of selling 56 grams of powder cocaine or crack, he faces a mandatory 15 to life minimum.

Now I know one of the concerns expressed by the Commission in its 1997 report was whether the Federal crack sentencing guidelines affected local prosecutions; whether, in a sense, the Federal prosecutions would impinge on what had traditionally been local prosecutions, the focusing on the street gangs and whether resources would be diluted.

We have not found that to be the case in New York. We have worked many cases cooperatively with Federal prosecutors. It is neither in our interest, I think, nor in the Federal prosecutor's

interest to punish those who are not high level narcotics dealers with extremely substantial penalties.

So what we have done with the Federal prosecutors when it comes to low narcotics organizations is try to divide up targets and see where we can appropriately, most appropriately, punish those defendants; whereas, as Judge Johnson used to say, we can get the biggest bang for the buck, those who are--

COMMISSIONER JOHNSON: I said that?

MS. BRENNAN: You did many times. Those who are most culpable should face the most serious penalties. Sometimes that's under Federal law, and sometimes that's under state law, and we've tried to work those prosecutions jointly.

I think what you have to realize when you're talking about crack organizations is that they rely on heavy volume, and that creates a tremendous problem for the communities that are the sites of crack organizations. And those tend to be our most vulnerable communities because crack is a

low-priced product.

We see people selling \$3 vials, \$5 vials, \$10 vials, and we have organizations that are netting \$70,000 weekly. So you can do the math and see what kind of problems that's going to create for communities.

People can't get into their apartments
because they're locked out during crack deals.

There are substantial amounts of violence
associated with crack organizations, each seeking
to dominate a clientele and fighting with each
other over the clientele. So crack organizations
create unique problems for us, and we have focused
many of our efforts on them.

I would also like to briefly mention that an important part of our mission is alternatives toward incarceration where we try to take those addicts or the low level street dealers and with facing the threat of incarceration, we try to get them into treatment programs.

We have found that that threat of incarceration is a very powerful inducement for

someone to get into treatment.

Again, I would like to thank the Commissioners very much for the opportunity to testify today.

CHAIRPERSON MURPHY: Judge Sessions?

COMMISSIONER SESSIONS: You said that the significance of drug quantity is that you can determine the role that a particular defendant had in a conspiracy based upon a quantity, and I guess I have a number of questions which follow from that.

First, you have a system that uses relevant conduct, and that is as a sentencing factor, can you consider other instances of criminal behavior to increase the quantity?

MS. BRENNAN: No. There are certain charges that we can bring which do consider relevant conduct and certain charges that you might consider strict liability offenses; that is, if you sell or possess X amount of drugs, you are facing this certain sentence.

Now I must say that the quantity of drugs

is not always an indicator of a defendant's role.

Obviously there is not a direct 1-to-1 correlation in every case. It is some indicator, and that is the premise on which our sentencing statute is based--excuse me--our statutory structure is based.

COMMISSIONER SESSIONS: All right. Well, let me just follow up on that role. I think that at least you're implying that if a person had 5 grams of crack, that that probably is an indication that that is a street level dealer as opposed to a mid-level dealer, is that fair to say?

MS. BRENNAN: Yes, I would say that that's probably fair to say. Five grams of crack may translate into--I don't know--somewhere between 20 and 50 vials of crack, although, you see, you won't find the lowest level people with that much crack at any one time. They just wouldn't be trusted with it.

COMMISSIONER SESSIONS: I guess my question is based upon your experience, when does the threshold into mid-level dealer happen? I assume from what you're saying is that it probably

happens at the 56 gram or 2 ounces and that's why they've focused in upon the increased penalty, and that is that's directed at mid-level dealers, is that--

MS. BRENNAN: It's hard to put an exact number on it. I look at it in terms of vials more than in terms of specific amounts. I would say the way the organizations would work out, somebody wouldn't be trusted with holding the stash, as they say, the big amount, unless they're a fairly significant player.

The stash might be 100 vials, 50 to 100 vials, and again, there's no consistency in the amount of crack that's in those vials. The weight of the vials may be half a gram. It may be less than half a gram. It's anywhere probably between a tenth of a gram to half a gram.

The other thing to keep in mind is that the powder cocaine itself, we find our low level crack organizations will buy 2 ounces of powder; they might even buy less than that amount of powder and then it cooks up until probably a third more

than that when they cook it up into cocaine, and then they break it out into vials.

So we always reach for those direct correlations, but they're very hard to come up with. Again, I look at it in terms of the number of vials somebody has.

System, of course, this is a relevant conduct jurisdiction. The Judge can consider all of the behavior that the defendant engaged in, and then if you try, in that situation, try to determine where that threshold is from street level to mid-level, what you're suggesting is it's sort of difficult to do that, is that correct?

MS. BRENNAN: It's extremely difficult to do that, and the other difficulty in doing that is frequently in order to determine what the defendant's role or conduct was within the organization, you need inside from those within. You need a cooperating witness.

And frequently these organizations are so violent that the insiders are very, very--extremely

reluctant to testify, and we may have hearsay information about someone's role within that organization, but obtaining direct information is extremely difficult and sometimes impossible, which is probably why we have been reliant on the amounts rather than actually proving up the exact role of a defendant within an organization like this.

You might analogize it to Al Capone who was convicted of cheating on his taxes. We're able to get the high level dealers for these, in a sense, strict liability crimes; whereas, we would have great difficulty convincing someone to testify as to their role within an organization.

JUDGE JOHNSON: Let me ask you this. You say you cooperate with the Federal authorities, and I know that many times they'll come to you and you'll have source information you'll give to them, and maybe you'll prosecute or maybe they will prosecute.

Have you ever had an instance or do you have them frequently where the Federal authorities will come to you with a crack situation and ask you

to prosecute?

MS. BRENNAN: Yes, we do have those instances come up on a fairly regular basis.

Sometimes they'll make a referral over to us, and frequently, if we are doing a joint targeting of an organization where we pick up lower level or they may pick up lower level dealers where they think the penalties are more appropriate on the state side, they'll make that referral over to us.

COMMISSIONER CASTILLO: When you say more appropriate, do you mean more stringent?

MS. BRENNAN: No, lower.

COMMISSIONER CASTILLO: Lower?

MS. BRENNAN: Yes, lower. I mean, most of us have--well, I don't how to put it other--the same sense of justice that is clear that you all share, and we don't want to see--I don't want to see a low level dealer go away for 15 to life. I mean, there's no point in that. It strains the resources of the state; it's just not fair.

Federal prosecutors, most of the ones I've worked with, have the same feeling, and so they

don't want to see those low level guys go away for 5, 10 years. It is simply not appropriate given their conduct.

So within the confines of our various laws, we work together to try to figure out the most appropriate sanction, and we charge them accordingly.

COMMISSIONER JOHNSON: So what you're saying is that if you have a low level dealer and he's doing 5 or 6 grams of crack, the Federal authorities will bring this defendant to you, he will be indicted and allowed to plea where he'll get 1 to 3 years?

MS. BRENNAN: Yes, that certainly could happen. I mean, it happens on a--we see it happen fairly regularly. I don't know; I can't give you a number of times, but it's certainly not an unusual occurrence where there will be a referral over to us.

CHAIRPERSON MURPHY: Professor O'Neill has had his hand up. So if you want to just follow up with that and then we'll go to him.

COMMISSIONER JOHNSON: If that person--I don't know if you know or not--but if that person who had the 5 or 6 grams were prosecuted in the Federal jurisdiction, they would have a mandatory minimum of 5 years?

MS. BRENNAN: Again, I can't say. I haven't worked with the Federal guidelines specifically, so I don't know what is, in a sense, optional on the part of the prosecutor when they make their charging decision and what is not. So I can't specifically respond to that.

COMMISSIONER O'NEILL: What happens in the back end? I mean, most states, unlike the Federal Government, for example, have like two-thirds--after you serve two-thirds of your sentence--I'm not familiar with how New York handles that, but how does New York handle it with respect to release dates?

How long, in other words, do people actually serve?

MS. BRENNAN: It depends on what the sentence is. For example--and it depends on the

particular status of a defendant. Many of our lowest level defendants, the ones who are facing 1 to 3, you would think that would mean they must serve a minimum of 1 year and a maximum of 3 years; however, many of them are eligible for early release under shock incarceration programs and a variety of other programs which are within the discretion of the Department of Corrections. They make a determination as to whether the defendant is eligible for early release.

In addition to that, we have statutory good time, which is a third off. We have--

COMMISSIONER O'NEILL: A third off?

MS. BRENNAN: A third off the bottom line, a third off the minimum.

COMMISSIONER O'NEILL: So do you have any statistics as to how long, for example, looking at the lower level, even the mid-level folks, for drug use, how long they actually wind up serving in prison?

MS. BRENNAN: No, I don't have those statistics. I'm sorry.

COMMISSIONER O'NEILL: Do you have any sort of just anecdotal impression as to how those folks compare with the folks in the Federal system?

MS. BRENNAN: Again now I can only speak for New York City.

COMMISSIONER O'NEILL: Of course.

MS. BRENNAN: Most typically, New York
City, a first time offender who is convicted of
selling one vial of crack, if he goes to trial,
he's facing 1 to 3. If he is eligible for shock
incarceration--and you have to be a certain age.
There are various other criteria--he will
definitely be given shock incarceration, which is a
six-month, in a sense, rehabilitation program.

For those of our defendants who don't go to trial, we most typically plea bargain those cases out. Most of those cases get probation the first time out. If they're a predicate offender, that's when the mandatory sentencing provisions really kick in.

That's when no matter what, they are facing some kind of a state sentence--

COMMISSIONER O'NEILL: But a state sentence that may have one-third off the bottom?

MS. BRENNAN: Yes, it will have some amount of time off, and there are a number of other early release programs that are wholly within the purview of the Department of Corrections.

COMMISSIONER O'NEILL: So basically what you're saying is within the state system itself, there are a number of mechanisms built in typically to reduce what appear at the front end to be rather long sentences, but at the back end, actually wind up shortening the time someone actually serves?

MS. BRENNAN: Right. Now the bulk of our defendants are in on those low level sale cases.

For those who are facing the stiffer A-1 penalties, those people are going to do a substantial amount of time. There's no question about that.

COMMISSIONER O'NEILL: But they're unlikely to do the time that they're actually--

MS. BRENNAN: Again, I'm not comfortable directly answering that question. I just don't have the regs right off the top of my head. I'm

sorry.

CHAIRPERSON MURPHY: Well, the media has indicated that Governor Pataki was, I think, going to propose a modification of the legislation to make the sentencing more I'm not sure quite what, but reduced penalties or at least to take out that mandatory life.

I'm just struggling here not necessarily for the specifics of it, but, you know, when a political figure like that is making noises of this type, does that reflect some sense that this hasn't worked quite the way expected or it was producing some results that weren't desired or could you speak to that?

MS. BRENNAN: It's hard to--certainly

Governor Pataki has proposed revisions of the laws.

The most substantial--he has proposed reducing the top sentence for the A-1 offender to 10 to life I believe it is, the mandatory minimum; keeping the range the same between 10 to life and 25 to life, but reducing that minimum sentence to 10 to life.

The other proposals he has made apply to

primarily the predicate offenders and what kind of programs they might be eligible for, and there have been any number of proposals in recent years to change those laws.

I mean, clearly it reflects his view that the sentences are probably too severe at that level. We've had proposals to adjust the weights. We've had any number of proposals in New York. Over the past 4 years, there have been--the proposals have run the gamut of trying to, you know, more carefully correlate the punishment with the crime itself, with the kind of conduct we're trying to deter and punish.

CHAIRPERSON MURPHY: Mr. Reilly?

COMMISSIONER REILLY: Thank you. To follow up where the Chairwoman was going, I'm curious what--and you've touched a little bit on it--what the reaction of the people of New York is since it is a major import for a lot of the drugs that come into the country.

Do the people of New York feel the drug laws should be changed? Do you hear a human cry

about the fact that they're not just, they're not equal or is there--

MS. BRENNAN: There have been many, many proposals, and certainly there is a lot of talk about it. In terms of what the people of New York think, I can tell you when I go into the neighborhoods where crack dealing is rampant, they aren't saying change those drug laws and lighten them up a little bit.

The people who are directly affected by
the crime just want you to do something to clean up
their communities. To them, it frequently means
put the people who are dealing the drugs in jail.
And the last thing they want to see is them
arrested, then back out on their stoop the next
morning.

So that kind of human cry doesn't come from those communities, I would say, who are most affected by it when they're dealing with the reality of drug dealing in their neighborhood.

However, there are a lot of vulnerable people who are caught up in drug dealing. Most of

our street level drug dealers come from communities where there are few economic opportunities, where drug dealing is the best game in town, you make the quickest money and the most money.

The risk, of course, is state prison, and when somebody's brother or father or close relative or friend goes to prison, that's when the impact of those laws hits home.

I would say that the biggest human cry in New York is about the 15 to life mandatory minimum penalty for the 2 ounce sale or the 4 ounce possession. That seems to be where--there seems to be greatest consensus around that issue. When you're talking about just dealing, street level dealing, I would say the consensus diminishes.

COMMISSIONER CASTILLO: Just to follow up on that, do you believe that the effectiveness of your office has been diminished by New York's failure to distinguish between the crack and the powder cocaine penalties?

MS. BRENNAN: No. Our penalties for narcotics crimes, the threshold amounts are so--

they're small, relatively small when you compare them to the Federal statutes, that it really has had no effect.

COMMISSIONER CASTILLO: Are there instances where you might refer a case for Federal prosecution because you felt that a crack dealer could face a more substantial penalty than the ones that New York state law was presenting?

MS. BRENNAN: It could happen. It could happen. I can't think of any instance where we've actually done that. Where we're more likely to do it is if there's a firearm found.

I mean, the high level dealers are very rarely found with the stash as we would say, with the product on their hands.

COMMISSIONER CASTILLO: Right.

MS. BRENNAN: The Feds have better laws.

They might have a better conspiracy law which would enable them to take in the leader of the group.

They can aggregate sales; whereas, we are not able to do that under our law.

There are other nuances under the Federal

law which might enable the Federal prosecutors to more appropriately target and punish a leader of a group, but it tends not to be the crack distinction.

COMMISSIONER CASTILLO: As you sit here,
do you have any correlation between certain
indicators in a high level dealer, for example,
large amounts of money, firearms? What would you
say are the indicators of a high level drug dealer?

MS. BRENNAN: I'm trying to think of the ones that we've had most recently. Again, the drug dealers, so many of them don't save their money. I mean, we'll find a big collection of boots or fancy cars or gold jewelry at the end of the day. But, I mean, it tends to be their role within the organization. How many people are they supervising?

And if you're talking about who deserves the harshest punishment, of course it's the one who employ the greatest amount of violence, both towards their own workers, to protect their turf, to protect their clientele, and frequently against

the people to whom they're selling to.

CHAIRPERSON MURPHY: Okay. You have one more question.

COMMISSIONER SESSIONS: Just as a premise to the question, a large percentage of people who are charged with crack in the Federal system are first time offenders, and if you take all of the relevant conduct, all of the things that they've engaged in, if it arrives at 5 grams--we'll take 5 grams as an example--in the Federal system, they face a 5 year sentence, they do 85-percent of that sentence. So they do approximately 4-and-a-half years in Federal prison.

Now compare that to what happens in New York state. A first time offender at 5 grams ordinarily, if they plea bargain, would get probation or if they don't--

MS. BRENNAN: In New York City.

COMMISSIONER SESSIONS: In New York City.

Or if they don't, they'd be receiving a 1 to 3 year sentence, but they would be serving a lot less than that. I mean, that's a wide disparity of treatment

based upon whether you're in the state system or in the Federal system.

I guess from a social policy perspective, does that concern you at all or does it impact the way your office functions, knowing full well that there's this significant disparity in the way a person is treated at that low level based upon where they're prosecuted?

MS. BRENNAN: Well, I think we have attempted to address that disparity when we've worked with the Federal prosecutors. But, again, confining my comments to New York City, my experience with the Federal prosecutors there, I haven't seen them targeting those kinds of low level offenders.

The crack organizations that they target tend to be violent entrenched gangs. We do a lot of undercover--as we say, undercover buy and bust cases, where an undercover will walk up and buy a crack vial from somebody; turn around and charge them.

That's not the cases I see coming out of

the Eastern District of New York or the Southern
District of New York. Now again, I'm no expert on
Federal prosecutions, so I don't know whether that
is, in fact, the case. It's just not what I see.

I've never worked with them on those kinds of cases, and those aren't the referrals we get. So my guess is that they use their prosecutorial discretion to target those people who are more appropriately punished by serving that kind of time.

COMMISSIONER JOHNSON: But if you have a conspiracy and they do target a large organization and caught up into this net are some of the people that you have been referring to, first time, they will still be subjected to the harsh penalties of the Federal crack laws, right?

MS. BRENNAN: Well, again, not being an expert on the Federal laws, I can't directly comment on that. But what we try to do in our office is assure that the result, the penalty that somebody is facing is appropriate to their crime.

And I wouldn't want to see a low level

guy--I mean, a real low level street seller who's the hand-to-hand guy in an operation doing 5 years. It would not be something that I would be comfortable with.

COMMISSIONER SESSIONS: That, you would think, would be unfair?

MS. BRENNAN: Yes. If the hand-to-hand guy is selling one vial is facing a mandatory 5 year minimum, I wouldn't be comfortable with that.

CHAIRPERSON MURPHY: Obviously there's a lot of interest in your experience, but I'm concerned about making sure that we can hear from everybody else too.

MS. BRENNAN: Sure. Thank you very much.

CHAIRPERSON MURPHY: I'm sure they would continue if they could.

MS. BRENNAN: Thank you.

CHAIRPERSON MURPHY: Okay, Mr. Nolan, we're interested in what you have to say to us this morning too.

STATEMENT OF WILLIAM NOLAN

MR. NOLAN: Good morning, Judge Murphy,

and members of the United States Sentencing Commission.

My name is Bill Nolan, and I'm currently the Chairman of the National Legislative Committee of the Fraternal Order of Police. I'm here today on behalf of our National President, Steve Young, and representing our 300,000 members throughout the country to offer the views of the FOP on several issues related to the sentences for crack and powder cocaine offenses under the sentencing guidelines.

Let me just say at the outset, I believe this is the first time that the Fraternal Order of Police has had the opportunity to appear before this Commission, and we greatly appreciate your invitation to do so today.

In addition to serving the FOP on the national level, I am also the current President of Local Lodge 7 in Chicago, Illinois. Like many major metropolitan areas across the nation, our city witnessed an explosion in cocaine-related drug use and violence during the 1980s, especially due

to the emergence of crack cocaine.

During this time, Congress recognized the need to counter these rising trends with passage of sweeping new laws, establishing mandatory minimum penalties for persons convicted of offenses involving a given amount of a variety of controlled substances.

Measures such as the Anti-Drug Abuse Acts of 1986 and 1988 gave us in the law enforcement community the tools we needed to appropriately punish those often violent offenders.

Despite the progress we've made, the problem of both powder and crack cocaine have not vanished from our streets, and we, in Chicago, are still coping with this as well as the use of other illicit drugs.

In 1999, for example, the arrestee drug abuse monitoring program reported over 41-percent of adult males in our city tested positive for cocaine at the time of their arrest, posing a dangerous situation for the brave men and women of my department.

It is for this reason and many others that I recognize the urgent need to maintain the tough standards set forth in current law for the sentencing of those convicted of cocaine-related offenses.

The Commission has asked our organization to testify regarding the issues for comment following proposed Amendment No. 8 to the sentencing guidelines; specifically on several occasions regarding the sentencing of the defendants convicted of cocaine-related offenses.

Let me begin by telling you that the

Fraternal Order of Police does not oppose

addressing the disparate penalties associated with

crack and powder cocaine or a cross drug type. We

are, however, greatly concerned with the manner in

which any such changes are put into effect.

The current penalty structure for crack and powder cocaine offenses is based primarily on the quantity of the drug in the possession of the defendant at the time of his arrest. This priority given to the quantity of illegal drugs in

determining a defendant's role in the offense and a final sentence for the offender is as important today as it was in the 1980s.

That being said, is there a need for penalties that are tougher for crack than for powder cocaine offenses or for one type of drug over another? Several sources would support such a conclusion.

In a report to Congress in 1997, a prior Commission recognized that some drugs have more attendant harms than others and that those who traffic in more dangerous drugs ought to be sentenced more severely than those who traffic in less dangerous drugs.

There's also evidence to support the fact that crack cocaine does greater harm to both the user and to the wellbeing of the communities across the nation.

The Commission's findings in the 1997
report also stated that crack cocaine is more often
associated with systemic crime, is more widely
available on the street, is particularly accessible

to the most vulnerable members of our society, produces more intense effects than snorting powder cocaine, and that Federal sentencing policy must reflect the greater dangers associated with crack.

As a former police officer in one of
America's largest cities, one who has witnessed
first-hand the devastating impact that crack has
had on my community, I agree completely with this
assessment, and I believe that anyone who has ever
talked to the families who are forced to live
locked inside their own homes for fear of the crack
dealers who rule their streets would also agree
with this statement.

There are other factors which should also go into the sentencing of those convicted of crack powder cocaine offenses. We applaud the Commission for working to include additional aggravating factors within the guidelines.

However, these and other enhancements should continue to be in addition to a minimum sentence that is based first and foremost on the quantity of the controlled substance as provided

for under the current law.

We also appreciate the Commission's concern regarding the 100-to-1 drug quantity ratio for crack cocaine and powder cocaine offenses.

We further understand that some are concerned with the disparate impact of this ratio, particularly those who have expressed concern about its impact on minority communities.

Regardless of whether or not these concerns are well-founded, the appropriate response is not to decrease the penalties for engaging in one type of illicit behavior over another. Meeting in the middle or toughening the sentencing for powder while weakening those for crack is also not a feasible solution.

While it would definitely affect the lower drug quantity ratio, any measure that decreases penalties for crack offenders would harm the overall effort to keep drugs off the street and violence out of our communities.

That is why the Fraternal Order of Police supports increasing the penalties for offenses

involving powder cocaine through a reduction in the quantity necessary to trigger the 5 to 10 mandatory minimum sentence. This would decrease the gap between the two similar offenses, address the concerns of those who question the current ratio and would provide law enforcement with the tools they need to further restrict the possession, use and sale of powder cocaine.

The dangers associated with crack and powder cocaine have not completely disappeared since the current tough sentences for these crimes were enacted. Although our nation has seen an across-the-board reduction in crime rates in recent years, it is still true that illegal drugs have a devastating impact on society as a whole.

It is also clear that the Federal

Government, which has available resources and
policies in place to effectively investigate,
apprehend and punish drug offenders must continue
to take the lead in providing harsh penalties for
drug-related offenses.

The Administration, Congress and the

Commission must continue to send the message to drug dealers and traffickers that the Federal Government will fiercely protect the most vulnerable members of our society and will severely punish those who seek to exploit them.

The question of appropriate sentences for crack and powder cocaine offenses have received a great deal of attention in recent years from a variety of sources. Unfortunately, there has been too much demography and too little rational deliberation on this issue.

That is why we believe that today's hearing is an important step in the right direction. Our organization looks forward to the continuing discussion on the appropriate penalty levels for drug related offenses and welcomes the opportunity to participate in an ongoing dialogue with the Commission and others interested in this issue.

Again, on behalf of the membership of the Fraternal Order of Police, let me thank you again for the opportunity to appear here today. Thank

you.

COMMISSIONER JOHNSON: As I understand it, you're saying that they should keep the 100-to-1 ratio, but raise the penalty for powder cocaine, is that the position of the organization?

MR. NOLAN: That is correct, yes.

OUM ISSIONER JOHNSON: Now when they set out the penalty for crack cocaine in the '80s, there were several reasons why the Congress said that this would be appropriate. If these reasons no longer exist--and there is some evidence that it no longer exists--do you think that that is the appropriate thing to do at this particular time, to keep those penalties?

MR. NOLAN: Well, we have been dealing with narcotics for years, cocaine and heroin and all that. When the crack cocaine came on the scene many years ago, it seemed to change; it became more violent.

In a lot of the areas, the users and the sellers of crack cocaine are more violent people than the drug dealers that we've normally been

dealing with over the past several years. So there is something with the crack cocaine that does tend to have more violence--

COMMISSIONER JOHNSON: But there is statistics and evidence to show that the violence associated with the crack cocaine no longer exists or no longer exists to the extent it did in 1985, 1986. Do you still think that there should be a 100-to-1 ratio?

MR. NOLAN: Well, we believe that the ratios in the powder cocaine, if it was dropped a little bit, it may help some of the arguments that we've had that some of the other communities are being assessed more--maybe more stricter than others. So maybe that is a reason. We're not sure; we don't have all the reasons.

But we do like to see some of the sentencing guidelines take effect that would help the people out there in the street now, the men and women that are working out there. We seem to have more violence against police officers on people that are using crack cocaine or under the influence

of crack cocaine, and that seems to be a very big problem.

COMMISSIONER JOHNSON: Now what the Commission is looking at and thinking about is enhancing penalties for violence against police officers, possession of guns.

Would that help the Fraternal Order of Police or the people that think--

MR. NOLAN: Sure, absolutely.

COMMISSIONER JOHNSON: And you still think there should be a 100-to-1 ratio?

MR. NOLAN: In some instances, we believe that. I don't have all the statistics to be able to bring that out right now, but just in our overall view from interviewing our members and talking to them and getting their feelings on it.

CHAIRPERSON MURPHY: Commissioner Steer has a question and then Professor O'Neill.

COMMISSIONER STEER: Mr. Nolan, I want to thank you and your organization for participating in this process. I think it is the first time, and we hope it certainly won't be the last.

I'm trying to understand sort of the organizational and political basis for your views. First of all, do you have Federal law enforcement members or is it--

MR. NOLAN: Oh, yes, we have Federal officers--well, in Chicago, each lodge is different, but we do have Federal officers and Federal lodges throughout the country.

COMMISSIONER STEER: According to what we've learned, only some 16 of the states distinguish at all between crack and powder in their penalty structure, and only one has a 100-to-1 ratio, and we're not sure that it quite mimics the Federal penalty ratio in all respects.

Federally we sort of deal with the tip of the iceberg. In a given year, probably the Federal Government prosecutes, convicts and sentences less than 10-percent of all the drug traffic and offenders, probably something closer to 6-percent. The rest are dealt with at the state level.

So looking at it from that standpoint and if there is a basis for--is it your position that

the penalties once set by Federal Government can never be adjusted downward; that they can only be adjusted upward, is that--

MR. NOLAN: No. I think the current statutes and the penalty structure do what they're intended to do, and that's to keep the drug offenders out of the communities. And I think that the so-called low level who traffics in the smaller quantities of either powder or crack is no less a danger than those participating in large amounts. So you do have that problem.

COMMISSIONER STEER: But even the states-like New York is considered to be one of the
toughest with its so-called--some people refer to
it as the Rockefeller era, the drug laws--and we've
just heard testimony that even they don't treat
small time crack dealers as harshly as do the
Federal penalty structure.

In fact, there may be a state out there that does--

MR. NOLAN: Right.

COMMISSIONER STEER: But the overwhelming

evidence seems to be that it is not--it is the crack structure that is too harsh. I think there are some who, like your own organization, that say that powder penalties may be too lenient, but we haven't heard a whole lot of testimony to that effect.

So, again, it seems to me that maybe where a change is needed, first of all, is in the penalties for crack, wouldn't you think?

MR. NOLAN: Despite the fact a lot of these individuals represent the bottom line of the drug distribution doesn't necessarily translate into decreased behavior and all that, and so there just seems to be that correlation between the crack user as opposed to the marijuana smoker, the heroin user and people like that.

So we see there is a need to do something for the crack period.

COMMISSIONER STEER: Well, thank you for your perspective.

MR. NOLAN: Thank you.

CHAIRPERSON MURPHY: Professor O'Neill?

of questions. It's my understanding from your testimony--and correct me if I'm wrong--that part of the reason that you think that it's important to maintain this differentiation between the treatment of crack and powder is sort of twofold.

One concern is that the drug itself is worse on the individual, and the other is that there's a lot more violence associated with crack cocaine than there is powder cocaine, is that a fair--

MR. NOLAN: That's a fair statement.

COMMISSIONER O'NEILL: That's fair. If
you knew that studies that had been updated since
the 1980s and 1970s, when some of these original
studies were looked at, that it's not a matter of
the nature of the drug itself, but rather drug
delivery systems that make the difference between
whether somebody uses crack as far as its harm on
the individual and whether someone uses powder and
its harm on the individual, that distinction really
doesn't make sense anymore based upon more recent

scientific and pharmacological evidence, then probably what you'd still say is that it's important to main this distinction because of the harm that's involved, the violence that's involved; that crack is a more violent drug, is that a fair thing to say?

MR. NOLAN: Yes.

COMMISSIONER O'NEILL: Let me ask you this. In D.C., we had a problem a number of years ago with the Jamaican Posse. These guys almost exclusively distributed marijuana, but out of all the various drug organizations in D.C., they were probably the most violent organization in D.C.

Do you think it's better to decide to base our penalties, a heightened penalty, on the nature of the drug itself, i.e. being marijuana, or is it better to base it on the violence that's associated with the drug?

MR. NOLAN: Probably the violence I would say because that's a big problem that we're having. In Chicago, for example, it is so predominant that we have some areas where 10, 11 and 12-year-old

kids are making more money than somebody that has gone to college and had several degrees and working on LaSalle Street. They can make upwards of \$200-\$300 a day just by being lookouts.

COMMISSIONER O'NEILL: So do you think that we're probably better off, rather than differentiating between, say, Tennessee marijuana and Jamaican marijuana, that we're better off differentiating on whether or not there's violence associated with the distribution of that particular drug? Is that probably a better way to do it?

MR. NOLAN: Yes, I would say it probably is. Excuse me. Yes.

COMMISSIONER CASTILLO: Mr. Nolan, it's always good to see a fellow Chicagoan, and I'm well aware of all the work you do, and I know that you've gone to too many hospitals and too many funeral homes with regard to your members.

But let me ask you this. Nationally we're seeing a decrease in violence. Are you saying, in Chicago, you haven't seen a decrease in violence with regard to crack dealing?

MR. NOLAN: Unfortunately, in Chicago last year, we became number one. It's a title we didn't like. It was the number one in homicides. But a lot of those homicides had to do with drug-related gangs. Between domestic violence and the drugs, if we could have eliminated both of them, we would have probably been the lowest in homicides. But that's where it comes in.

We have had too many young kids killed in Chicago, innocent kids, standing out front of the same funeral homes of other members of their community that were killed in drug activities, and this is the thing that we're trying to stop in the Chicago area.

It is a problem. There is an awful lot of violence. Years ago, the police would be able to stop somebody or holler, "Stop. Police," and they stop. Today they turn around and they come out with every type of weapon imaginable.

And it's to protect their turf, it's to protect their incomes that they have, and they don't care about who they involve in this because

we have these young kids, as I've said, and they're out there making the money so that the bigger cogs in the wheel can get away because these kids are out there just as lookouts. But to give a 10-year-old kid a hundred dollars at the end of the day, that's something that's very hard to turn down.

COMMISSIONER CASTILLO: Has this been specifically tracked to crack cocaine?

MR. NOLAN: Well, it's narcotics in general. It's not only crack; it's all narcotics.

COMMISSIONER CASTILLO: Thank you.

CHAIRPERSON MURPHY: Are there any other questions for Mr. Nolan? Mr. Elwood, since he hasn't had a chance, and then we'll get to you again, Judge--

COMMISSIONER ELWOOD: Well, we heard from
Commissioner Steer that only 16 states
differentiate between crack and powder, but it's my
understanding that a lot of local enforcement
effectively distinguishes by sort of importing
Federal standards by asking the Feds to come in and
help them on local enforcement efforts. I don't

know if this is the case in Chicago.

MR. NOLAN: Yes, we do.

COMMISSIONER ELWOOD: But I understand that in a lot of places they have the Feds come in to help them break up local violent gangs; in part, using these stricter Federal sentences for crack and for drugs generally.

In your opinion, will it harm local enforcement efforts to break up violent gangs if Federal sentences or if the triggers are increased?

MR. NOLAN: No, I don't think so. No.

COMMISSIONER ELWOOD: You're saying if the penalties for crack are decreased, that is not going to harm your efforts to break up gangs?

MR. NOLAN: Oh, if it's decreased? Yes, I think it would. I think what we have to do is let the drug dealers out there know that if you're going to deal in drugs, if you want to take the chance and deal in one vial of crack or a couple kilos of heroin, you're going to go to the penitentiary, and that's the message that we have to send to them.

CHAIRPERSON MURPHY: Okay. Judge Johnson?

COMMISSIONER JOHNSON: We have spoken to a lot of people, law enforcement, treatment officials, corrections, legislators, and the consensus that we have had was that there should be a change in this disparate sentencing structure, 100-to-1.

As I recall, when they were formulating these laws, one party said that "There's a lot of violence associated; we have to be tough on this crack situation. We're going to make it 50-to-1. "

And the other party, whether it's

Republican or Democrat or Democrat or Republican
say, "We're not going to be outdone. We're going
to make it 100-to-1." So, therefore, we have this
100-to-1 situation.

We, in the Commission, have been very, very concerned, and we feel that maybe we have to do something about this situation. If something is done, there's a bill before Congress now, and it's a 20-to-1 ratio. If it had to be changed, what do

you think would be a fair ratio?

MR. NOLAN: I really couldn't say, Judge.

I really don't know what the fair ratio would be.

I'm really not that much involved in the day-to-day arrest and prosecution of narcotics offenders, and I would leave that up to the State's Attorney and the U.S. Attorneys to determine what they feel is best.

CHAIRPERSON MURPHY: Okay. I just want to remind the Commissioners that we've spent an hour on the first two witnesses, and we've got four sets here this morning and plus you know about the rest of the agenda.

I'm sorry to remind, but anyway, with that nice introduction, Mr. Weich.

STATEMENT OF RONALD H. WEICH

MR. WEICH: Good morning, Judge Murphy, and members of the Commission. My name is Ronald Weich. I'm a partner in the law firm of Zuckerman Spaeder, and I appreciate the opportunity to offer comments on behalf of the American Bar Association.

I'm appearing today on behalf of the ABA,

but I also bring several other relevant professional perspectives to the hearing. I began my career as an Assistant D.A. in Manhattan. I then served for 2 years as counsel to this Commission, and then I worked on Capitol Hill for several years and was chief counsel to Senator Kennedy at the time that the Congress considered the Commission's 1995 proposal on cocaine sentences.

Now in private practice I serve as an advisor to several organizations interested in sentencing laws, including the Leadership Conference on Civil Rights, whose Executive Director we heard from yesterday.

Having disclosed all of that, I want to emphasize that I'm speaking strictly on behalf of the ABA today.

The principal source of the ABA's views on proposed Amendment 8, which is the amendment we've been asked to focus on, is the ABA standards for Criminal Justice Sentencing Chapter, the Third Edition, which was published in 1994.

My written testimony explains at some length why the current system for sentencing Federal drug offenders substantially deviates from these standards. We recognize that many of the criticisms of the Federal system in my testimony are more properly directed to Congress because Congress has control over the statutes, and the statutes are so much at the root of the problem here.

But I want to take a few minutes of my time to discuss these big picture concerns because they put into perspective the ABA's views on Amendment 8 and because structural problems in Federal sentencing are, of course, a concern to this Commission, and I think it's important to step back from the tree sometimes and not just look at this particular quantity or that ratio or this specific offense characteristic and instead look at the whole system.

I think it has to be said that the tangled morass by which Federal defendants, Federal drug defendants in particular, are sentenced today is

deeply, deeply flawed.

MR. WEICH: Amendment 8 is, on balance, a step in the right direction, and the Commission should implement a portion of that amendment and also raise the threshold quantity for crack cocaine.

But even if the Commission moves forward with those proposals, there's so much more that needs to be done to make Federal sentencing less complex, less arbitrary and more rational.

The standards, the ABA standards, endorse a flexible guideline system, one in which an expert body develops general rules to govern the ordinary cases, but in which Judges are free to depart in cases that are different than the norm.

And the standards acknowledge the tension between individualized sentencing on the one hand and standardized sentencing and advocate a system that--it's a balanced system that guides judicial discretion without eliminating it.

The current Federal system deviates from that model in at least six ways. First of all,

Congress continues to rely on mandatory minimum sentences. This is contrary to three decades of ABA policy. The mandatory minimums are inconsistent with the guideline system. They undermine this Commission's work.

This Commission reported to Congress 10 years ago that mandatory minimums cause unwarranted racial disparity. It's long past time for Congress to abandon that sentencing system and put its eggs in the basket of Federal sentencing guidelines.

Secondly, both the laws and the guidelines are overly complex, rigid and mechanistic. On the back of my written testimony, I appended 21 USC 844, the possession statute, which is very rarely used, but it illustrates, I think, the complexity and the arbitrary nature, the layered nature.

Each Congress comes along and has a new drug that it wants to say it's really tough about, and so there's a new mandatory minimum, a new graduated system of penalties, and you find that the drug trafficking statutes, which are widely used, are even more dense and layered, but I didn't

append them because they take up 15 pages of the last compilation. And I think that the Commission and the Congress need to address this complexity because it's driving practitioners, prosecutors, defense attorneys and Judges crazy, and I know that members of the Commission share that frustration.

Third, Federal drug sentences are determined to an unreasonable degree by a single factor, drug quantity, and here, of course, proposed Amendment 8 is going to take a step away from that reliance.

Fourth, Federal drug sentencing is not a product of empirical scientific evidence. The 1986 determination by Congress to set these ratios was devoid of any scientific considerations.

The Commission did undertake a very
empirical, thorough scientific analysis in 1995.
Congress, unfortunately, rejected that proposal,
and frankly, you just need to go back--and you have
a stronger record now in light of the testimony
yesterday and I think even some of the testimony so
far today--to go back to them and say, "The current

system is unfair and needs to be revised."

Fifth, there's widespread that Federal drug sentences are more severe than necessary to achieve societal purposes for which they are authorized which is a provision both of 18 USC 3553 and the ABA standards.

I don't know if you're aware that Bureau of Prisons Director, Cathy Hawke Sawyer, testified before Congress that "Seventy-some percent of our female population are low level, non-violent offenders. The fact that they even have to come into prison is a question mark for me. I think it has been an unintended consequence of the sentencing guidelines and the mandatory minimums."

In an extraordinary letter from Judge
Martin, John Martin in New York, and 26 of his
colleagues, judicial colleagues, all former United
States Attorneys, Judge Martin and his colleagues
complained that crack cocaine sentences are unjust
and do not serve society's interest.

Sixth, mandatory sentencing laws and the guidelines exacerbated by the indefensibly harsh

treatment of crack result in unwarranted and inequitable disparities that the standard said must be avoided.

In 1995, the Commission said that.

Virtually every member of the House and Senate

Judiciary Committee acknowledged it. The Attorney

General of the United States said as much. But

here we are 7 years later and it seems as though

these rules, these laws are impervious to change.

It's time for the Commission and Congress to act,

and we strongly urge you to do so.

Proposed Amendment 8 would generally bring Federal drug sentencing closer to the principles embodied in the standards. The ABA has no institutional position on many aspects of the amendment, but in broad strokes, we support the Commission's efforts to reduce the dominant role of quantity in Federal drug sentencing and permit Judges to take greater account of the relative culpability of different defendants. I think both Mr. Nolan and Ms. Brennan endorse that basic concept.

Drug quantity is an unsatisfying ultimate sentencing factor because it's variable that's subject to manipulation by law enforcement officers, it's a poor proxy for culpability in conspiracy cases and under the relevant conduct guidelines as Judge Sessions pointed out.

The Commission's proposal to restrain the sentence of defendants who qualify for a mitigating role is a sensible effort to restore proportionality to the guidelines, and there's no reason, we think, to limit the scope of that provision to defendants who qualify for only some mitigating role adjustments. It should for anybody who qualifies for a mitigating role.

You also propose enhancements for violence and other circumstances of the offense. That makes sense, of course, if you also substantially increase the threshold quantities for crack cocaine. As we've discussed today, the current threshold levels have been defended on the grounds that the crack market is inherently more violent, but the Commission's own statistics show that that

has changed to some extent.

If you're going to add the violence enhancements to the guidelines, you should take it out of the base offense level so as not to double count.

On the other hand, we have practical concerns about the proposals to incorporate in the drug guideline the criminal history factors. It's in Chapter 4. It adds unnecessary complexity to put those factors as specific offense characteristics in Chapter 2.

Turning to the question of crack cocaine, we endorsed your 1995 proposal to equalize crack and powder. We relied on your empirical analysis. We are aware of no empirical evidence that's developed since then to call in to question your conclusions. Indeed, there's substantial evidence that things have made that position more defensible.

But where my--Public Law 104-38, we understand that Congress has constrained this Commission from proposing 1-to-1. On the other

hand, Congress explicitly said, "Change the ratio. Everybody knows that it's wrong."

A fair reading is that the Commission should return to Congress with a ratio between the discredited 100-to-1 and the rejected 1-to-1, and we urge the Commission to raise the crack penalties to achieve a ratio as close as possible to the previous 1-to-1 proposal.

We strongly urge that you not increase penalties for powder cocaine. It's completely unjustified by the empirical evidence. If you lower the threshold, you bring more low level defendants into the reach of the mandatory minimums or the guidelines and then the mandatory minimums by extension, and as Judge Martin and his colleagues wrote, "The penalties for powder cocaine should not be increased. The disparity should be remedied only by raising the amount of crack cocaine that would trigger the application of the mandatory minimum."

I would welcome any questions from the Commission.

CHAIRPERSON MURPHY: Judge Sessions?

COMMISSIONER SESSIONS: All right. You've talked about the Commission's responsibility to act, and you are certainly in a perfect position to answer this query. You were affiliated with the Sentencing Commission as legal counsel for a period of time. You also were on Senator Kennedy's staff in 1995 when that piece of legislation was passed by Congress.

The Commission's responsibility to act, there is some question about whether we should act by way of making a recommendation to change mandatory minimums or--and I will say on the record that this is my view and my belief, a view of many here--that we have the responsibility to change the guidelines to be fair to those persons who are in this system of justice.

My question is if we take on that responsibility to change the guidelines, does that offend in any way the spirit of the legislation that was passed by Congress in 1995 or does it, in fact, follow that directive?

MR. WEICH: First of all, Judge Sessions,

I hope there's no question about the Commission's

legal authority to propose guideline amendments.

Public Law 104-38 asks for the

Commission's recommendations, but in no way limited

the organic authority of the Commission under

28 USC 994 to amend the guidelines. So there's a

legal matter. You can move forward with guideline

amendments.

I think it's preferable for you to do so for the following reason. I think--

COMMISSIONER JOHNSON: --say to "do so," does that mean which one?

MR. WEICH: I'm sorry, Judge.

COMMISSIONER JOHNSON: Recommend or --

MR. WEICH: I think it's preferable to propose amendments. As you know, when the Commission sends up its guideline amendments on May 1st of each year, they lay before Congress for 6 months before becoming law in November.

So even when you amend the guidelines, it is, in effect, a recommendation, a proposal to the

Commission. I think you should take that step of formally sending amendments to the Congress, and if the Congress doesn't act, they would become effective on November 1st.

I think that's important for several reasons. First of all, we're 7 years past the Commission's 1995 report which demonstrated so conclusively that these sentences are unfair, unjust and, indeed, racially discriminatory.

We're 15 years since they were enacted.

So we've had 15 years of injustice. The Congress is, in my view, ready to consider this matter today. We have the bill introduced by Senators Sessions and Hatch.

We have lots of statements by members of Congress to indicate that it's time--I'm familiar, for example, with the letter from Chairman Leahy and Ranking Member Hatch to the Commission asking the Commission to take up this matter.

Our conversations with congressional staffers suggest the Congress is wanting to address this matter. If the Commission proposes guideline

amendments and at the same time recommends changes in the mandatory minimums, you frame the issue for congressional resolution by November 1st of this year, by the end of the congressional session, and I think that's appropriate.

I think that you will give Congress the necessary impetus to act this year as I think they actually want to.

CHAIRPERSON MURPHY: Mr. Steer?

COMMISSIONER STEER: Let me follow up on that issue since I take the other side and draw you out a little bit more about that.

Let's suppose that Congress did not see fit to change the statute, but allowed the guideline amendments to go into effect. Now our data show that one effect of that would be--let me just pick a--I have to give you a figure. I have to pick a hypothetical number that we might change the crack number too.

Let's say we made the threshold 50 grams for the 5 year mandatory minimum. The effect of that would basically be that whereas now mandatory

minimums trump the guidelines 10-percent of the time. If the Commission made that change in the guidelines and Congress did not act to change the mandatories, the mandatories would trump the guidelines in one out of three cases.

How can you square that result with ABA standards that call for eliminated, unwarranted disparities? The Commission has just, of its own accord, manufactured a disparity that will exist solely depending on how the offense is prosecuted, not based on its characteristics at all? So that's one part of my question.

Then I want to come back to the political aspect of it and ask you about--

MR. WEICH: Commissioner, it's obviously not desirable for that disparity to be there.

You're quite right that that is contrary to our standards.

I think that it is more likely that we will see a global resolution of this issue if the Commission proposes the changes to the sentencing guidelines and, in effect, spurs the Congress to

address the long overdue problem of the mandatory minimums.

Indeed, this may be an occasion for addressing the applicability of mandatory minimums generally. Nobody thinks we're going to repeal them this year, but I think that there are a number of proposals floating around in the Senate especially to limit the reach of the mandatory minimum.

So I think that you're more likely to achieve the result that everybody wants, which is to solve this intractable problem once and for all in the mandatories and in the guidelines if the Commission tees up this issue for congressional resolution.

But if Congress chooses not to change the mandatory minimums, it could, of course, alter, modify or block the Commission's recommendation if it did that. If it did so under those circumstances, it would not, in my view, duplicate the 1995 situation where, in effect, Congress was rebuking the Commission. Instead, it would

Congress saying, "We need more time to work on this, so we're going to hold up your guideline changes while we work on the mandatories."

Finally, if it works out that the changes in the mandatories--in the guidelines go into effect before the mandatories are changed, while that's not desirable from a theoretical perspective, it's not unprecedented.

The marijuana guidelines and the LSD guidelines both are, in effect, decoupled from the statutes. And again, I think that is just more of an incentive for Congress to finally rationalize these absurd rules.

COMMISSIONER STEER: You are an experienced insider with respect to Congress, and I value your perspective on that. But it is a calculated risk, is it not?

Recalling the 1995 situation, my recollection of it is that there was a great deal of animosity in the Congress that the Commission had taken the action that it did and forced the issue and put the Congress in the position of

having to vote on an issue in order to stop something from happening before the Congress apparently was willing to act, and that was not in an election year.

Now times have changed, but this is an election year, and I think the consequences long term, if that were to happen again, could be very deleterious for the whole guideline system.

Congress might, for example, decide that
"Enough of this. The Commission has done it once
too often, and we're going to stop this process of
amending the guidelines without congressional
action" and just change the statute so that instead
of the Commission being able to force it by sending
up an amendment, that the Commission can change the
guidelines only when Congress affirmatively acts,
as is the case in some state systems.

MR. WEICH: Well, I was working on the Senate Judiciary Committee staff at the time that the proposal came up. I think there was a serious problem at that time with consultation.

I think that members of Congress were

surprised; not as much by the fact that the

Commission was making proposals in this area

because people knew that it was under

consideration, but the substance of the

recommendation took a lot of us, including me and

Senator Kennedy, by surprise.

And I know that this Commission is not repeating that mistake. I'm aware that there's extensive consultation now. I think you need to work closely with the Chairman of the two judiciary committees, the ranking members, other interested members like Senator Sessions; make them aware that this is what you intend to do; solicit their views, as I know you have.

I mean, I could imagine if you received personal assurances from the two chairmen and the ranking members that this is an issue that the Congress is going to address this year and that the Commission's recommendations would somehow be more favorably viewed if not in the form of guideline amendments, you know. If the assurances were airtight and not the assurances that I've seen some

members of Congress give to others, that would be one situation.

But I don't hear that, frankly. I hear
Senator Sessions saying that he wants to address
this subject once and for all. I've heard him say
he wants to offer his bill as a floor amendment
just to get some consideration of this.

I know that Senator Leahy and Senator

Hatch are anxious to have the Judiciary Committee consider this matter. So I really think you would be facilitating the debate and the discussion that they want to have if you were to put this forward.

I'm as concerned as you are, Commissioner, about the reputation of the Commission. The Commission has done much to restore its luster on Capitol Hill. That should not be squandered. But its reputation is not an end in itself.

Having done much to restore the Commission's standing in this field with Congress, you now, I submit, need to lead in this important area.

COMMISSIONER JOHNSON: I happen to agree

with you, and I stand in the camp of those who should think we should have an amendment as opposed to a recommendation, and although Congress' consideration--I don't think that's the end-all because we on the Commission have taken an oath, and we have to do what we think is right.

If Congress feels that what we have done is not wrong, let them do what they have to do, but we have to do what we have to do.

CHAIRPERSON MURPHY: Are there any other questions for Mr. Weich?

COMMISSIONER ELWOOD: Yes.

CHAIRPERSON MURPHY: Mr. Elwood.

COMMISSIONER ELWOOD: Now one of the strong emphasis of your testimony was the empirical nature of it, but you acted as though the Commission hadn't said anything about the guidelines since 1995 which just isn't the case.

Now in 1995, the Commission voted 4-3 to equalize, even after recognizing in its statement that crack cocaine was more dangerous than powder cocaine.

Now, admittedly, more recently people seem to take a dimmer view of things that are decided by one vote, particularly by the Judicial Branch, but that's an entirely different matter.

[Laughter.]

COMMISSIONER ELWOOD: In 1997, the

Commission said unanimously that it should be moved
to something more like a 5-to-1 ratio with the

trigger moved for crack to between 25 and 75 grams
and for powder, to 125 to 375.

Given that that is a more recent empirical assessment, what is your view of the 1997 recommendation?

MR. WEICH: Well, Commissioner, I reject the idea that it was empirical. Empirical is this. This is the 1995 report from the Commission which I think is unassailable in its reliance on science, on economics--

COMMISSIONER JOHNSON: This being? For the record, what are you--

MR. WEICH: I'm sorry. I'm holding up the Commission's Special Report to Congress, Cocaine in

Federal Sentencing Policy, from February 1995.

I've looked at the 1997 document that the Commission forwarded to Congress. It's approximately 20 pages. It contains no empirical evidence, and I think what it reflects, frankly, is that that Commission--and I say this with respect for former Chairman Conaboy, who is here today--I think that Commission was cowed by the reception that the 1995 proposal received in Congress, and I think the Commission overreacted.

There is certainly nothing in that 20-page document which explains why the Commission chose to increase penalties for powder cocaine. It's simply an assertion that the--and, of course, all it says is that Congress might consider it, and it proposes ranges, and I think there was some negotiation with the Justice Department and members of Congress to try and arrive at a political solution to it.

But I just don't think in terms of the science, that you can compare the 1995 report with that 1997 document. I banished the 1997 document to a footnote in my testimony because, frankly, I

just saw it as ill advised and unsupported by the evidence.

CHAIRPERSON MURPHY: Okay. Well, we really appreciate your coming here to speak, and I think you can tell the interest that your testimony has produced on the part of the Commission. Thank you very much.

And with that, we'll call forward Judge
Conaboy. This is a very good introduction to Judge
Conaboy's testimony. Judge Conaboy. Judge
Conaboy, welcome to the other side of the table
here.

We know that you worked very hard on the issue that we're focusing on today, and we're looking forward to what you can help us with.

STATEMENT OF RICHARD P. CONABOY

JUDGE CONABOY: Well, as I said before,
Madam Chairman, it's, I think, relatively easier to
be on this side, and as I sit here today in the
back of the room, I'm reminded of Yogi Berra's old
saying about de-ja vu all over again, and it seems
as though that almost could have turned the hearing

around aimed in the other direction, and we're still hearing much the same arguments. I guess that's because we're talking about human conduct that doesn't change.

I'm also reminded of a recent comment of Yogi Berra's. Well, I heard it recently. It was an old comment of his. When somebody asked him why he continued to go to funerals, and he said, "Well, if I don't go to theirs, they won't come to mine."

[Laughter.]

JUDGE CONABOY: And that one seemed to be more appropriate for me today. I felt if I didn't come here--

[Laughter.]

JUDGE CONABOY: If I don't come down here to help you, maybe you won't help me. So I have a couple of comments to make today. It was somewhat short notice for me. I expected that maybe this hearing might be later in March, and I had talked to some of your staff members and had tried to make more preparation to come here today and giving you some benefit of history and comments from a

sentencing Judge.

And certainly I don't come here to try to tell anybody at all what you should do because it's obvious that you have a very difficult job. But I did prepare a few remarks, and I did go back to the 1995 report, and I excerpted from that what I thought was a fair summary of what that report said to the Senate.

I also excerpted a number of the remarks that I made when I presented it to the Senate on behalf of the Sentencing Commission at the time, and I'll make those available to all of you. You might want to just look at those because I think there was some significant misunderstanding--and the reasons for that are many-fold--as to exactly what was done in that report and at that time.

I also have prepared a listing of some of the things that we on the Commission back in 1994 and 1995 did that I perhaps think maybe were errors of judgment and errors of procedure, errors of naivete I think in large measure. And I'd be glad to talk to you a little bit about those.

But I will take just a minute or two to mention some of the formal remarks that I tried to prepare for today. I was reading these a minute before and I want to change them a little bit.

I said I came here to Washington before you today not as a protagonist for any particular cause or any action of this Commission. Indeed, I come here more out of empathy for your positions as members of the Sentencing Commission. I'm going to change that now to say I come out of sympathy for your positions.

You have been especially designated and appointed to perform one of the most difficult of all human tasks, passing judgment on the comment of others, and you're entitled, I think, to serve with great pride and to have--and you, indeed, do you have, I think, the highest respect from all the members of society who rely on you to guide them in this most difficult area.

So I come here today specifically to salute your dedication, and I welcome this chance to do that. And I hope that you will find in the

work and in the suggestions that you make the necessary support in other areas of the system to establish and to maintain what we all hope is a fair and a just sentencing process in the Federal Court system in this nation.

So in the context of today's hearing, and hopefully without imposing on your time, I would presume to accomplish just two things. One is to bring you perhaps a brief history of the prior Commission's actions on that exquisitely important issue of crack and powder cocaine sentencing that you've been hearing so much about this morning and secondly, to submit a brief commentary on your present suggestions and the proposed amendments that you have put out for comment.

I talk about the history or I will if you wish me to and submit that not with any intention at all of influencing your own deep and important consideration of this most troubling area of sentencing. But, rather, I would hope, if I can, to help you to flush out past actions on this issue for your own knowledge and your own review and

perhaps to help in presenting it again to the Congress.

On the second issue, I submitted some commentary on some of your suggested changes in the context of what I look at as a continuing effort to sustain and hopefully to reinvigorate a deep sense of responsibility in every Federal Judge to impose a just and a proper sentence in every criminal case.

After this commentary, I'll happily engage in discussions with you or take some questions if you have them and if you wish me to respond to any of them.

Federal Judges, as all of you know, are called upon to preside over many types of cases that are often complex and many times very difficult. But no duty is tougher or no duty is more demanding than sentencing.

I've been a Judge now almost 40 years, and I can tell you in talking to other Judges who have served that long and longer, they say to me and say to others over and over again, "No duty we have is

tougher than sentencing."

As an individual Judge and one who has worked with many others, I've always supported the concept that it is necessary to have some guidelines to be used by sentencing Judges in trying to determine a proper sentence in a given case.

I think it's absolutely necessary to have some type of guidelines, and I served on the days when there were none and can tell you it was a task that gave us great concern, and we were never sure that we were trying or ending up doing the right thing.

No direction at all, as you know, can--and it did lead to many problems, and it lead sometimes to great disparity in sentences when we were without direction or guidelines at all.

But like all legislation, like any laws or any guidance that comes out of governmental units like your own, we have to continue to try to balance the precious rights of freedom and individual action with the need for some type of

centralized direction.

Our nation, as all of you know I'm sure-and we're reading much more about this lately,
thank heavens, and I hope we'll hear more about it
in the teaching of history in our schools--that our
nation is the longest existing republic in the
history of the world. No other republic ever
lasted even half as long as our nation, and there
has to be some reason for that.

Many writers and historians attribute that success to the great foresight and the intelligence of our founding fathers and their meticulous attention and their efforts to maintain individual and state freedom in tandem with the concept of a centralized form of government, but they knew that both had to exist.

They knew that a centralized government was not the answer to everything, and they knew that centralized regulation of human freedom could not long exist because it never did before in the history of man.

And the more centralized power became, the

more certain the republic was going to reach its demise, and that's what history has taught us. And so we have to try, I think, to emulate that concept that was so important to the founding fathers of this nation.

JUDGE CONABOY: I say to you this continuing success in this kind of endeavor has to be maintained in large measure by people like yourselves, people who are willing to give your time and your talent and your thoughts to making our government work well, and that's what you should be all about.

Few I think would dispute in this day and age that a sentencing guideline system is necessary, and few I think would dispute the fact that it can work well. But the concept of an ideal guideline sentencing system is nebulous at best and almost impossible to reach.

In our Federal system, as all of the originators agree, and you see this in all the writings in the beginnings of this systems, all the originators of this system agreed that continued

attention and continued change were going to be necessary to make it work better.

So we shouldn't be afraid. We shouldn't shy away from the concept of changing the system, especially when we learn that it needs change and it can be made to work even better.

That's where your devotion and that's where your determination to do the right thing-your determination to do the right thing--becomes a solemn obligation and at the same it, it's very, very imposing and very difficult.

Like all of the citizens of this great nation, I commend your efforts on the proposed amendments that you now have put out in such areas as terrorism, career offenders and your recognition that in some areas establishing values, like where there's a cultural value, is a difficult thing, but should be faced, and your attention to victims' rights, along with many of the other items that are in your proposed amendments are deserving of great support and great consideration.

But I especially today come here to

commend you for addressing again this drug sentencing problem and especially the crack and powder cocaine problems. And your suggestions, I also want to commend very strongly your suggestions of endorsing a broader area of potential alternatives to imprisonment.

Those are two items that I think cry out for attention, and I'm happy to see that you are responding to that cry and to that request by everyone for attention to those two areas.

I don't know of anyone who disagrees with the need to change the disparate sentencing requirements between crack and powder cocaine, and I think it was a good thing today that you heard from someone like Mr. Nolan as well as others who talked about this and tells us of the problems that are on the street and that the police face in these areas.

But even in those areas, they know and we all know that disparate sentencing requirements are not good and do not serve the sentencing process well.

The arguments that favor change in the disparate system and change between crack and powder cocaine are too abundant for me to try to even summarize for you. You've heard lots of that this morning, and I won't even try to go into them.

But your determination, I think, that the time has come for a change is courageous and is unassailable. The time has come.

CHAIRPERSON MURPHY: Judge Conaboy, could I ask a question at this moment?

JUDGE CONABOY: Sure.

CHAIRPERSON MURPHY: You heard Mr.

Elwood's question about the 1997 report of the

Commission back to Congress, and I know a number of

other people in Washington refer to that report.

And it does have a number of options that are

reported back as possibilities, but there are

ranges in that, and that was your Commission and

now it's our turn to be looking at this, but we

respect the history of it.

I wonder could you tell us a little about what process was used to come up with that '97

report back to Congress?

JUDGE CONABOY: Sure, I can try to, and I was going to try to address that, if I could, Judge Murphy.

CHAIRPERSON MURPHY: I apologize then.

JUDGE CONABOY: No, not at all, because most of that is more important than any of these other general comments that I would make.

I was interested in listening to the discussions, as you might know, about the difference between recommendations and proposed amendments. I don't think anybody ever heard of that before 1995 because there's nothing that I know of in the statutory framework that makes up the Commission that tells us we should be making recommendations.

They do tell us--they do tell you, rather, that you have a very serious obligation to make amendments, suggested amendments, by the 1st of May every year so that the Congress can then consider them and determine by the 1st of November whether they want them to go into law.

Now it may be that it's a good thing, and I have no objection at all to the difference or to the concept of making recommendations and amendments. And I think maybe that's part of what happened in the past; that perhaps we didn't work as closely with some people as maybe we should have in that area.

But after our proposal was rejected essentially and we began to realize that there was some feeling that even if there was to be a change in the ratio, that abolishing it was not acceptable to a majority in Congress, what I did on the Commission, for better or worse, is I called together both sides of the people who served on the Commission; those who, in my judgment, kind of represented one extreme and those who represented the other.

I said, "We've learned apparently that abolishing the ratio is not going to work, and the Congress is now saying to us in return, 'Give us some other suggestions.'" So I asked those people, since they represented the extremes to sit down and

try to work out a variety of other possibilities that could be done in the way of ratios.

And they did and put some extensive work in on that, and my recollection is that that work of those people made up the recommendations that were then submitted in 1997 that provided some potential ranges in the ratios rather than abolishing them.

CHAIRPERSON MURPHY: So would the underlying work or material have been what was referred to by Mr. Weich in that 1995 report--and as I understand what you've just said, then you went back and tried to come back with some other options for Congress, but you didn't gather more information or do more studies?

JUDGE CONABOY: No, we did not, not to my knowledge, because we felt the--I was going to tell you a little bit--and maybe it's a good time to move to that now--about how we worked on the first 1994 recommendation, and this not a commentary at all on how anybody voted or why we voted one way or the other, but just some of the background.

First of all, that study was here when we, in the 1994 Commission, arrived. It had already been completed, and on my desk when I arrived up here, upstairs, was this big book that was some 200 pages long, a total study of this problem. And we were told that by the end of that year, we had to send recommendations and amendments to Congress consistent with the report.

So that frightened us naturally, and one of the first things I did was ask for an extension of that time, could they let us make it towards the end of February because we needed more time to study it. And they did agree to that.

But we did really have very little time to review the entire thing as thoroughly as if we had done it ourselves. We did, in fact--and I have to go back and commend the people who served with me--go over it almost line by line, but it was really working on other people's work.

And again, the recommendations were essentially based on studies done by others and at a different time than under the direction of that

particular Commission.

So in 1994 then, when the recommendations were made, we were in an era, perhaps without maybe realizing it, although I don't think that's fair, but it was an era of being tough on crime. And even though we were led to believe that those in other parts of the government were ready to agree to abolish that ratio or at least dramatically change it, perhaps we didn't give enough thought to the political parts of that recommendation.

We made what I would like to refer to as more of a judicious decision. One that we looked at the facts and we made the study and we made a decision as to what we thought was right, both on the majority and the minority votes.

But perhaps if we had it to do over again

--and I think perhaps you've been involved in this

--we might have decided that the recommendation,

the report that we made was perhaps too ambitious

because here's what we were faced with.

We were faced with the statute that we found out and came to realize that many people in

Congress felt they had worked on a long time and come up with the right answer, and we were asking them to agree that it was wrong and to completely change what they did. And that's not easy for any human being to do.

So I suppose it might follow that we would say that we needed to do more work in communication and extensive work with the Congress, and it was following some of that happening that we did, in fact, try to bolster the area of the Sentencing Commission staff that has to do with relations with Congress and try to instill in all of our work a bigger effort to relate more to Congress and to ask them to relate with us.

Many times when I went over myself and visited with many, many Senators and many Congressmen, I found that there was either, a, a misunderstanding of what we did as a Commission or really a total lack of knowledge of what our obligations were as a Commission.

Now it was nobody's fault. It was a fairly new endeavor, and I don't think--and this to

me is maybe one of the most important things. I don't think that everybody understood when that report went over to Congress in 1994 that we were saying much more than just abolish the ratio.

I have excerpted from the report a whole list of items of aggravating factors and mitigating factors that we said the Commission felt had to be done in order to make this sentencing process work right because there are differences sometimes in the conduct of parties who commit what seem to be similar crimes.

So we wanted to add enhancements for possession or use of a dangerous weapon, murder of a victim in the course of a crime, death or serious bodily injury, drive-by shootings, involvements of juveniles or street gangs, sales of drugs to juveniles or pregnant women, drug crimes in protected locations and significant prior records.

We were recommending changes in the guidelines, but what we were saying to the Congress and what I think you're saying, what I think is the important thing, that to make the guideline system,

which they initiated, to make it work well, you cannot start out at the wrong base level.

If you start out at a base level that's unfair or unjust, you're going to get an unjust result. So if you start out equally and you allow the probation officers and the people who investigate the case and the sentencing Judge to enhance or to mitigate the conduct with all these directions that the Commission would give, that's the way the guideline system is supposed to work.

The guideline system, as all of you know, and every report that any Commission has made, cannot work properly in tandem with mandatory minimums. As some of you have just said and some of the other witnesses or people testifying here today have commented that there's an inherent conflict in those two concepts.

I think the guideline system is great.

I'm one of those people who believes our Federal system is a little too complicated, but I think you can work at that. And I think you're trying your best to work at that, and I think this crack and

cocaine and drug sentencing area is one of the most important ones that you can attack because there is probably the most disparate results in that area of any other part of the sentence.

What I did, by the way, in this area, I asked our Probation Office and I asked our public defenders and I asked our United States Attorney's Office to give me some information and their comment on it.

The U.S. Attorney's Office sent me back a letter--and by the way, I had to compress their time that I gave them for doing this, and they did try to get something back to me last week even though I was out of the office for a few days.

The U.S. Attorney's Office says they were somehow constrained by the Department of Justice to speak with one voice, and they didn't want to comment specifically.

The Probation Office made a suggestion of a 2-to-1 ratio that they thought would be more important than the present 1-to-1 that they say would recognize some inherent differences in the

powder and in the crack areas.

The Public Defender's Office pretty well mimicked some of the commentaries that were made here by a prior witness, Mr. Weich, and I won't repeat those because you've heard all of those things so often.

But the important thing is to decide what change has to be made. That's the tough job you had. And just let me comment briefly, if you will, and I know you're compressed for time.

The other matter that I think is so important -- and that's the expansion of alternatives to incarceration. I think change in that area, perhaps expanding the zones as you suggest, I think that's so basically important again, and I think it would go a long way, not so much to expand judicial discretion. I don't even like that term. I've come to dislike it completely because it raises hackles in areas where they don't belong.

I think what it would do much more importantly, it would renew and rekindle judicial responsibility and judicial obligation at the time

for sentencing. I think Judges should pain over every sentence, and I think they should work very hard and very close with all those who are involved, the prosecutor, the defense counsel, the probation office, to impose a just and a fair sentence and to be sure that the sentence fits within the concepts of the guidelines of aggravating and mitigating circumstances.

In this area, by the way, I think it's very fair and very important to require that Judges put on the record the reasons that they impose a sentence. And it's interesting to note in Pennsylvania, where they have long had a guidelines system, as you know, that allows for mitigating and aggravating circumstances, but in a decision just last week, the Supreme Court of Pennsylvania has once again reasserted the necessity for the Judge, the sentencing Judge, to put on the record the reasons why he or she goes up or down from a suggested sentence.

CHAIRPERSON MURPHY: Judge, I hate to interrupt, but I think as an experienced District

Judge and as a former Chair, you understand. We're almost at the point where the hearing was supposed to be concluded, and we haven't reached the half point of the people that are going to testify.

So I wonder if I could see if there are any other questions that Commissioners have, if you don't mind, because--

JUDGE CONABOY: You can cut me off at any time because when I get in this area, I'm inclined to say a lot because I think it's so important.

CHAIRPERSON MURPHY: Well, you've got a lot to say. It's just that--

JUDGE CONABOY: --concern about your time, so I'll be happy--

COMMISSIONER CASTILLO: Judge Conaboy, we don't want to cut you off, and I really appreciate you coming here. I want to tell you, Judge to Judge, Sentencing Commissioner to Sentencing Commissioner, we all owe much to those who came before us, and a lot of whatever it is that we've accomplished in these two years are due to your efforts and the fine staff that you left us, and I

want you to know that before you head back to Pennsylvania.

JUDGE CONABOY: Thank you.

COMMISSIONER CASTILLO: You started out by mentioned Yogi Berra and funerals and I hope you don't come back to our political funeral, but I really believe that this is an important issue and that we have an obligation, as I think the majority of this Commission does, to act.

I know it's hard to go over what might have been, errors or as the old saying goes, "Hindsight is always the best sight, 20/20." It seems to me three key things arise from the 1995 report.

One was the closeness of the vote at the Commission, the 4 to 3 vote. The second thing was the reaction of the Department of Justice, and then the third thing being your relationship with Congress.

Are those the three areas that you would advise us to really keep an eye on as we proceed on this controversial issue?

JUDGE CONABOY: Absolutely. As I went around the country when I was Chairman to talk to people who imposed sentences, I tried to make a point that I think is important to them; that sentencing is no longer confined to just the Judges. Many other parts of the Government have a say, a very important say in sentencing anymore, and we have to be aware of that.

And we have to cooperate with the legislature and with the prosecutors, with the defense, to make sure we all are on the same page, at least trying to be. So I think those are three important things.

The split on the Commission I think represented, probably more than anything else, the reality of what you are talking about here today; that perhaps you can't just eliminate the ratio, at least the first time you try.

We maybe gave them too much to chew on over in Congress. Congress doesn't act fast. That was one of my frustrations here. As a Judge, you're used to looking at facts, deciding and go on

to the next case. Congress takes things under consideration, looks at them year in and year out, and I think this is a good example; that they're now coming back saying, "Help us with this." And so I think your three points are very important.

COMMISSIONER CASTILLO: Was the reaction of the Department of Justice something that surprised you?

JUDGE CONABOY: Yes, there were a lot of surprises in it.

[Laughter.]

JUDGE CONABOY: I was personally led to believe, and I don't blame anybody for this. I have no ill feelings towards anyone about my services as the Chairman of the Commission.

I have to be candid, and I'd be less than honest to say--I would be less than honest if I said I wasn't surprised at a lot of things that happened.

I was led to believe that Congress was ready, and the other phases of Government, to abolish that ratio. I may have been naive about

it. I may have been anxious about it and maybe too imbued with listening to my own reasoning, but whatever it was, I was very shocked at the reaction.

The day I went over to the hearing was one of the major shocks of my life. One of my 48 grandchildren, by the way, was there with me, one of my oldest ones, and he said to me when we got outside, he said, "Papa, I don't think you're used to being talked to like that, are you?"

[Laughter.]

JUDGE CONABOY: That summarizes it better than I could.

[Laughter.]

CHAIRPERSON MURPHY: Well, does anybody have a further question? Professor O'Neill.

COMMISSIONER O'NEILL: I'd just like to say, Judge Conaboy, that back when this--sort of when the Commission had made its decision back in 1995 and all this was going on, I was actually, at that time, as you'll recall--

JUDGE CONABOY: Yes.

COMMISSIONER O'NEILL: --a staffer. I worked as a general counsel for the Senate

Judiciary Committee for Senator Hatch.

JUDGE CONABOY: You're one of the first I met.

just have to say that, boy, it's a heck of a lot easier being on that side of this whole question than it is on being on this side. And I've come to appreciate to a much greater degree not only the political complexity with which you had to approach that decision, but just with the fact that the Committee or the Commission at that time was truly interested in doing what it thought was appropriate, what it thought was right and what it at least had been led to believe was the right time to do it.

So I'd just like to thank you both for your testimony today and for the good work that you performed for the Commission in the past.

JUDGE CONABOY: Thank you very much, and I appreciate that.

 $\label{eq:chair} \mbox{CHAIRPERSON MURPHY: I think we all share} \\$ that.

JUDGE CONABOY: Well, it's nice to be with you, and you have my constant prayers and my constant thought, and I still hear lots of complaints about guidelines and guideline systems, but I think those of you who give your time and effort and every day to make it better deserve a great deal of our thanks.

I think the Judges out in the field now are working harder to try to make the system work better.

COMMISSIONER O'NEILL: I certainly hope you brought your 48th grandchild along today to see how you were treated by the--

JUDGE CONABOY: I should have done that.

He's a law student now, by the way, here at

Catholic University, and I was afraid to ask him

over for fear of what would happen.

[Laughter.]

CHAIRPERSON MURPHY: Judge, if you would leave with my assistant the papers that you've

brought --

JUDGE CONABOY: Yes, I will.

CHAIRPERSON MURPHY: --I'll see that all the Commissioners get them. Thank you very much for coming.

JUDGE CONABOY: Thank you.

[Applause.]

CHAIRPERSON MURPHY: We'll proceed then with the next panel, Julie Stewart and Jamie Fellner.

Julie Stewart is a familiar face, a frequent visitor to the Commission public meetings. She's President of the Families Against Mandatory Minimums.

And then Jamie Fellner is also a well known figure at the Sentencing Commission. She's the United States Program Director and Associate General Counsel for Human Rights Watch.

So, Ms. Stewart, do you want to start us out?

MS. STEWART: Yes, thank you.

STATEMENT OF JULIE STEWART

MS. STEWART: Well, good morning, Judge
Murphy and Commissioners. Thank you for inviting
me to testify today. I believe this is the first
time in the 10 years that I've testified here that
I've actually been invited and haven't just hoisted
myself on you.

But I am happy to be here to represent the 25,000 members of FAMM, many of whom are crack defendants or who have family members who are in prison for crack cocaine.

As many of you are aware, I have appeared here every year for the past 10 years to urge you to amend the sentencing guidelines in ways that I had said increased judicial discretion, but after Judge Conaboy's testimony, I will say increase judicial obligation while providing appropriate penalties that fit the offense and the offender.

Each time I testify I try to bring something to the Commission that you have not or will not hear from any of the other experts who testify before you, and that's a very tough thing to do at the end of two days' worth of testimony,

which has been, I believe, very informative and helpful for you.

So sometimes I have been referred to as the conscience of the Committee, and perhaps that's what I bring today as every other time. I'm not a doctor; I'm not a lawyer; I'm not a law enforcement person; I am the sister of a former prisoner; and I have run an organization for the past 12 years that has heard from family members of people serving time for drug offenses; and I bring that unique perspective to this forum today.

I'm very impressed with what you are trying to accomplish. Crack cocaine penalties are unconscionable, and I believe this Commission knows that. You've stated so in your issues for comment, and the 1995 Commission's report also said that.

But to be honest with you, I'm very worried about how strongly politics will influence the decision that you must make or that you plan to make.

In 1995, when the Commission voted to equalize crack and powder cocaine, it was in this

very room, and I was here, and I remember afterwards stepping outside and going, "Well, that was a very brave moral vote, but I don't know how it's going to play in Congress." And I think a lot of us shared that concern.

I'm not naive about the need for the Commission to--I mean, you must pay attention to what Congress is wanting to do. You must be in line with them, and you clearly are. But I am worried about to what degree politics will influence your decisions in the areas of what the crack penalty should be, whether to raise powder cocaine penalties and whether to submit a recommendation or an amendment to Congress.

As previous speakers have said, equalizing crack is not even an option today given the congressional directives to you. So now the question is how do you decide what the penalties should be.

As FAMM totally opposes weight-based sentencing as I'm sure most of you know, but if weight is the primary factor, if it must be the

primary factor for now in establishing sentencing, we feel that there has to be some sort of justifiable process, some organizing principle by which to determine what that sentence should be, what that weight should be.

And I know that that's exactly what you're attempting to do; you're not going to pick a number out of the blue, which I see happens in Congress all the time, to create a fairer ratio. They just choose a new number without a lot of foundation to that figure.

So what we have been thinking about and I have been talking about widely for the last year or so to civil rights groups all over the country as well as our own membership is to try to focus on who the mid-level dealers are and who the high level dealers are, and I know that's something that you addressed in your earlier comments, Judge Sessions, to Bridget Brennan.

And it's difficult to determine that I realize, but the Commission has 15 years' worth of data to extract from what quantities represent mid-

level dealers, what quantities represent high level dealers. Your pretty blue briefing slides show the numbers for '95 and for 2000.

I think that both of those--just those two years that are cited in those charts show the numbers that are significantly larger than the 5 and 50 grams that are used today to currently trigger the 5 and 10 year penalties.

So I really urge the Commission to do the analysis that would somehow help identify what quantity constitutes a mid-level dealer and what quantity constitutes a high level dealer because I think that those are terms--that's a principled way to establish a new quantity for crack that I could take back to our membership and say, "This makes sense. This is what they've done with all the other drugs. They've tried to achieve the quantities that represent mid-level and high level dealers."

Along that line I would urge the Commission not to change powder cocaine penalties.

Again, back in 1995 when the Commission did vote to

equalize the two drugs, Commissioner Tacha, Deanell Tacha, wrote a very excellent dissent in which she recommended ratios of 5-to-1, 10-to-1 or 20-to-1, and provided really very reasonable explanations for each of those ratios.

But she did not propose raising powder cocaine penalties; no one did. And it's fascinating to me that 7 years ago that wasn't even on the table, and today that seems to be a very viable option both at the Commission level and in Congress and a discouraging one.

I would refer again to Ron Weich's comments about the 27 Federal Judges who wrote the letter to Congress in '97 urging not to raise powder cocaine penalties.

MS. STEWART: Powder cocaine penalties are not a problem. I believe the majority of this Commission recognizes that. Instead of lowering a ratio, it would merely lead to the incarceration of greater numbers of largely minority defendants as you heard yesterday.

Also, it's been pointed out to me that --

both by Senator Sessions' staff as well as the even Commission staff--that raising powder penalties a little would only affect 27-percent of the powder defendants coming into the system, into the Federal system.

But I interpret that as basically one in four powder defendants would be getting a higher sentence. It's hard for me to hear that without thinking to myself, well, let's ask prisoner Marty Sachs if he would rather be out in time to see his son Bar Mitzvah'd or if he'd rather miss it.

I mean, a year or 14 months, which is about the difference in the sentence of the powder cocaine penalties, would make a difference in the sentence, and it would put people behind bars for an extra year or so. So I urge you not to raise powder cocaine penalties.

Regarding the issue of whether or not the Commission send a recommendation or an amendment to Congress, I strongly urge that you send an amendment. I know that you need to be sensitive, and I saw what happened in the aftermath of 1995

when the crack cocaine amendment was sent forward.

But I think that this Commission has done a very good job of repairing relationships with Congress. I believe that it is a very different climate today. I think there's much more awareness of crack cocaine penalties and the injustice of them.

I mean, in 1995, it was difficult for me to get some of the civil rights communities to even understand this issue. Today everybody understands that crack penalties are too stiff, and I think that there is a very genuine interest in Congress to address these issues and to try to do something this year even or within the next couple of years.

I would sort of underscore that by saying, as you all know, that LSD and marijuana have been dealing from the guidelines, and there has been no fallout from that. LSD was dealing when Judge Wilkens was the Chair and marijuana, of course, when Judge Conaboy was the Chair.

I assume--and this came up in an earlier question--but that the mandatory minimum sentence

must trump in each of those drug cases in almost every case. The mandatory minimum for LSD must be tougher than the--I mean, would be trumping the guideline in every case and pretty much the same for marijuana growers.

There's certainly no legal bar to the coupling the amendments as has already been stated, and if Congress didn't like that concept, they would have stopped it back in '93 or '95.

Plus, I would just say from, again my perspective as a FAMM person who talks to family members all the time, I speak to parents whose children are serving 24-and-a-half years in Federal prison for crack cocaine all the time, and I'll say to them, "Well, you understand that 10 years of that is the mandatory minimum sentence, and the 14 years on top of that is really under the guidelines," and then they turn to me and they say, "Well, why does FAMM support the sentencing guidelines again?"

It's hard to explain. It's hard to explain to a grieving mother why we support such a

harsh system. Of course, what I try to tell them is it's the lesser of the evils and that sentencing guidelines do allow some judicial discretion and allow culpability to be taken into account. But when the sentences are driven so high by the guideline, it's very hard to explain that this is fair.

Finally, I think I just want to say that-and I really feel it in this room today, and I'm
sorry I wasn't able to be here yesterday--but I
really know you're trying to come up with a
recommendation or an amendment that reassures the
public that you have fulfilled your mandate in a
very rational and justifiable way, and I applaud
you for that because I was asked by the chief
counsel of a senior Senator recently, "If the
Sentencing Commission comes up with a
recommendation for crack cocaine, will FAMM and the
civil rights community support it?"

And I really had to pause because I said to them, "The Ecstacy proposals that were put forth last year did not garner my support," and the

process was very flawed, and I believe that you recognize that and made many changes to address that. And I definitely don't want to feel like that about the crack proposal, and at this point I don't.

I feel like you're putting a lot of effort into it, but I think that that's a \$60,000 question, will the civil rights communities and will FAMM and some of the sentence reform groups respect the decision that you come to, and I think that we all will if there is a truly justifiable basis at the end of the day, if you can explain to us in plain language how you came to the decision that you came to.

I will just close by saying that the guideline and the process you use must be of unassailable quality so that all Americans can trust the penalty you chose was a product of informed judgment and not just political expedience.

CHAIRPERSON MURPHY: You've thrown down a big challenge, plain language.

MS. STEWART: Yes, that's true. Thank you.

CHAIRPERSON MURPHY: Are there any questions at this point?

MS. STEWART: Come on, I have a bet. Somebody has to ask me a question. Okay.

COMMISSIONER SESSIONS: I'll ask a question.

CHAIRPERSON MURPHY: Okay. I think what's happening is that the realities of the time and the fact that we're going to be shortly--

MS. STEWART: I understand.

CHAIRPERSON MURPHY: --advisory group and we have a lot of agenda items is--

MS. STEWART: Besides, I don't tend to present things that require a question. As I said, I'm the conscience of the Commission.

CHAIRPERSON MURPHY: Okay, Judge Sessions.

COMMISSIONER SESSIONS: I mean, I do have a question. You've seen in the publication that we are considering a number of enhancements, and those enhancements for weapons, for injuries to persons

during the course of drug transactions, prior felonies, drug felonies or perhaps even violent felonies, would be applied, and that would necessarily increase penalties.

And what is your reaction to that, knowing full well that in addition to increasing penalties, it also shifts, in a philosophical way, the penalty structure away from drug quantities to other factors?

MS. STEWART: Philosophically I like it.

I'm not particularly happy with the specifics of those enhancements and certainly not on top of current drug sentences at the levels that they're at.

But, yes, I like the idea of focusing on culpability of the defendant rather than weight of the drug to determine culpability.

COMMISSIONER O'NEILL: I mean, I think that that's important because we talked about--and you made sort of the offhand remark about being the conscience of the Commission.

And it is important that we look at the

absolute fairness of sentences. But it's also the case we have to think about the communities and the individuals who are victimized by these crimes as well.

I mean, obviously there are people who-there are many grieving parents and many grieving
families and many grieving communities who not just
have people who are in prison for a long time, but
whose sons and daughters have been victimized
because somebody chose to sell them drugs as well.

So we have to make sure that we consider those folks as well. We can't remove the victims from the equation as well.

It's true ultimately what we're seeking to do, obviously, is to come up with fair sentences given the conduct that's been committed. But we shouldn't also at the same time forget about the fact that, well, let's face it; it's drug selling. This is not appropriate conduct. This has destroyed communities and destroyed many people's lives, and there's certainly people whose lives and whose careers have been damaged by these things.

We can't forget that either.

MS. STEWART: I totally agree.

COMMISSIONER SESSIONS: Can I make a

guess?

MS. STEWART: Please.

COMMISSIONER SESSIONS: That what you're suggesting to us, although you're doing this in an implicit way, is that we should use the delineation of mid-level dealer, between a mid-level and a street level dealer as what seems to be appropriate for the 5 year threshold. Is that--

MS. STEWART: Yes.

COMMISSIONER SESSIONS: You didn't say so, but that--

MS. STEWART: Yes.

COMMISSIONER SESSIONS: --is my--

MS. STEWART: My written testimony says so, yes.

CHAIRPERSON MURPHY: Thank you very much, and we'll turn now to Ms. Fellner.

STATEMENT OF JAMIE FELLNER

MS. FELLNER: First, I want to say how

grateful Human Rights Watch is to be here. We have communicated with the Commission in other years, and we have followed very closely the sentencing policies both at a Federal level as well as in many states, concerned with the extent to which those policies comply with the United States' human rights obligation.

I want to apologize, however, that I don't have a written statement prepared because of the short notice and that I was traveling. I will get it in as quickly as possible, and I can expand on my remarks then.

I would like to have some questions, so I will make this short. Like Julie, I'm going to try and avoid saying things you already know.

The data that the Commission has collected and the staff has put together I think of itself tells such a powerful story that it's hard for you, I would think, to ignore that, and almost our work now is on top of that, and I won't repeat the data.

I just want to make some points. The bottom of line of where we come out, Human Rights

Watch, is that you need to lower the sentences for low level crack offenses; that you need to reduce the disparities in the sentencing of crack and powder offenses; and that you should be urging Congress to eliminate mandatory minimums.

Now Human Rights Watch is an independent and non-partisan organization with the mandate of promoting respect for internationally recognized human rights. I suspect it's probably--nobody is going to contradict me when I say that respect for human rights has not been foremost certainly in Congress' mind when it enacted the drug laws that established the mandatory minimums, and it's been somewhat missing from the debate over the impact of drug sentences.

And I personally, as a U.S. citizen,
happen to believe that the opponents of the current
structure when they talk about that drug sentences
aren't deterred, that low level offenders are
primarily sent and all the adverse consequences
have the better of the argument; that the facts
support them.

But I want to restrict my comments here to the human rights argument. Now as you know, the Government's use of penal sanctions is subject to important human rights constraints.

Since World War II, the international community, including the United States, has repeatedly and consistently affirmed the right of all people to humane and just treatment at the hands of their governments.

Now a primary goal of the universal declaration of human rights and subsequent international treaties has been to define rights protecting the individual citizen against the coercive and penal power of the state.

And of course, sentences, the decision whether or not someone should go to prison or to alternative, is the most drastic penal exercise of penal power by the state short of capital punishment.

Now the treaties that are relevant here today are the international covenant on civil and political rights, the convention against torture

and other cruel, inhuman or degrading treatment or punishment, and the convention on the elimination of all forms of racial discrimination.

Under the supremacy clause of the U.S.

Constitution, these treaties are part of the law of the land, and you, as public officials, are bound to give effect to them, even though the treaties are not self-executing, meaning that nobody can go to court and sue for violation of the rights affirmed by those treaties.

In our judgment, the current crack cocaine Federal sentencing structure violates two of the key human rights principles contained implicitly in those treaties: proportionality and non-discrimination.

Now the international human rights underpinning for the proportionality arises from respect for the inherent dignity of each individual, the prohibition on inhuman or degrading punishment and the right to liberty. In my written comments, I'll expand on that.

When we look at proportionality in drug

sentences, we need to keep in mind three things.

The principle of proportionality requires that

punishment not exceed the gravity of the offender,

the individual offender specific conduct, and that

it reflects the individual offender's personal

responsibility and culpability.

Second, the principle of proportionality is violated if punishment exceeds that which is deserved by that individual based on his or her particular conduct.

Punishment must reflect the individual defendant, not the conduct of others with whom he's not connected in a common enterprise.

And third, the sentence for a particular drug offender should not incorporate penalties for other crimes or other conduct that the offender, in fact, did not commit.

Applying those notions to drug sentences under the Federal system, what do we see? One, we believe sentences for low level crack offenders are disproportionately harsh. You know, the United States is so addicted to prison over the last 20

years as a remedy for almost any social ill.

Sentences are given out like cough medicine almost.

And I don't mean to be glib, but if you look from Europe perspective, it's astonishing the difference in sentences and the harshness with U.S. sentences compared to for similar conduct in Europe.

Now somebody might say, "Well, yes, and in Indonesia, you could get your head cut off for the same offenses." But I don't think we want to look over there. I'd prefer to look to countries with long traditions of respect for human rights and systems of justice similar to ours to say, well, how do they treat these offenses, and I will give you some data on that.

Now prison is an extremely serious punishment and should be reserved for the most serious offenders. So if we look at the gravity of the criminal conduct, we have to look at the harm caused or threatened by that act.

And I will walk through this again more in my written remarks, but I think there's been an

exaggeration and a lot of hyperbole about the problems caused by drugs in any given offender's conduct.

I think we need to remember not just that many individuals have been hurt, but many individuals, in fact, consume drugs and they don't have their lives destroyed. And we cannot say that any individual seller of drugs at a retail level--and my comments are really focused at the lowest level--has harmed someone the same as we can say that if somebody murders someone, obviously they've injured that person's right to life. If somebody takes something, they've injured that right to property.

But any given drug transaction does not necessarily cause a serious injury. What we have is the social injury from thousands and thousands and thousands of repetitions of that conduct. But we would posit that it is not proportionate to impose a sentence on any given individual based on the cumulative conduct of many thousands of other people.

And it's not done, by the way, in any other system. If you look, for example, at environmental harms or other harms where any specific harm is small, but cumulatively can add up to very serious impact, you don't see sentences that are the same kind of sentence that you would get for rape or assault or murder which takes the other principle of violence.

Now we know that the distribution of crack has been historically accompanied by a lot of violence as markets are being established, and your report in '95 lays that out very well. It's not inherent in the drug. It's been systemic violence.

I would argue that while it is appropriate for the Commission to be concerned about violence and certainly Congress should be concerned about violence and laws on the use of violence and possession of illegal weapons should be substantially changed, it is not proportionate to incorporate into any individual drug offender's sentence penalties that actually reflect concerns about violence that that individual offender may

not have engaged in. In fact, the Commission's own statistics indicate that most of your low level offenders have not, in fact, engaged in violence.

Let me turn quickly to discrimination. No discussion of the crack powder cocaine sentencing structure can avoid the issue of race. I would argue that race--concerns about impact on minority communities has certainly influenced the determination of those sentences.

A certain indifference, oddly enough, to the impact of those sentences on minority communities has contributed to their perpetuation.

So I think we certainly have--and I would disagree with those court decisions which say intent has not played a role.

But what's interesting from your perspective should be under international human rights treaties is that intent is irrelevant or can be irrelevant. Human rights non-discrimination principles are violated when you have an unjustified disparate impact on a basis of race.

And your statistics show unquestionably--and I

don't think anybody would deny the disparate impact.

So the question is are those warranted?

Does it make sense? Are they justified? And I

think, again, whatever the merits or arguments

would have been in 1986, they do not apply now.

The findings of your 1995 report fully have been

validated by more and more data over the years.

Concern for the impact of drugs on minority communities, concern for those people who don't want drug dealers on their stoops, who don't want their children hustled, who want to be free of the scrimmage of drugs can be met by many social policies. You don't need to use penal sanctions and harsh prison sentences as a way of dealing with those broader social problems.

I'll stop now because my time is up. You know, I thought it was someone's cell phone. I thought, gee, why don't they have that cell phone turned off.

CHAIRPERSON MURPHY: I hate to say that

I've just gotten to know it, but the battery died

in it.

[Laughter.]

CHAIRPERSON MURPHY: But because of the lateness of the hour, I would have to try to replicate the noise.

MS. FELLNER: Does that mean my time is up or not? I'd love to take some questions. Again, I apologize for not having anything in writing.

CHAIRPERSON MURPHY: You're the first one that's brought up the treaties. That's interesting.

MS. FELLNER: Yes. Well, the international human rights treaties tend to get overlooked. But as I say, they are part of the law of the land, and they are part of your obligation as public officials.

CHAIRPERSON MURPHY: Any questions? Judge Sessions.

COMMISSIONER SESSIONS: I guess I want to say I'm sensitive to your organization and supportive of your organization, and I also just spent time speaking with Judges in England about

the system.

But I do want to say that I disagree in a real fundamental way with your concept which I think you were suggesting, and that is that drug offenses are almost victimless in nature.

I guess I'd invite you to come to a courtroom in Vermont, and even though you can't necessarily say that the drugs relate to this particular person, to this particular harm, the human misery that is caused by drug distribution is extensive.

MS. FELLNER: You know, I'm well aware that the notion of victimless and victim has become very polemic, so everybody shies away from it. But in so doing, I think we have distorted some fundamental notions of responsibility and proportionality in sentencing.

If somebody chooses to buy drugs and that life is, therefore, harmed, that is a very different kind--and someone sells them, it's a voluntary transaction, even though cumulatively that transaction can have a lot of adverse social

consequences which I don't think anybody denies.

But when you judge what is a proportionate sentence for that specific transaction, I think it is very difficult to equate it in any reasonable way with assault, which nobody would say would be a voluntary transaction; with murder or with rape.

You know, you were talking earlier about the--and the sentences that are being given under the Federal guidelines are extremely severe sentences. Five years is a long sentence.

So I don't want to get in the polemic of victimless or not victimless. I'm saying when you think that is proportionate, the low level dealer may or may not have caused any of that kind of harm.

Mid-level and high level, I think serious punishments are entirely proportionate, and I think your effort to try and identify through the proxy of quantity or through--I would prefer to see through role, you know, identifying other ways of getting that role, but if it has to be through the proxy of quantity, so be it--an effort to put

serious penalties where they should lie, which is with the high and mid-level dealers.

One other comment. You were talking earlier about the --when Ms. Brennan was talking about the New York drug laws, which we have written about, and I will send you copies of our report on the New York drug laws--a lot of the concern about them has been precisely because of low level offenders are being swept up in prison terms, many of them addicted, and not the high terms, but just even two, three, four years, which, again, is a serious sentence.

We tend to think, oh, two years, three years, four years, and we almost forget prison is a terrible place to put anybody, and as someone who does a lot of work in prisons, I mean, it's a terrible place to send someone.

You should only do it as a last resort.

The principle of parsimony should apply here. If there are alternatives to incarceration to which you can send, for example, addicted low level offenders, you certainly should be exploring those,

and I welcome the beginning discussion now of using alternatives to incarceration.

CHAIRPERSON MURPHY: We are looking at that. I'm sorry to interrupt. It's just that-MS. FELLNER: Time's up.

CHAIRPERSON MURPHY: Right, and we have one more topic away from drugs that's going to be covered. So you have the disadvantage of being at the end--the last speaker the way it's worked out.

I know you said that you were going to submit something further in writing.

MS. FELLNER: Yes, I will send it in writing.

CHAIRPERSON MURPHY: So we will all get that, and we certainly will attend to it, and we appreciate very much your coming here.

MS. FELLNER: All right.

CHAIRPERSON MURPHY: It's really helpful for us to get these different perspectives. A tough area.

Okay. Then if we can get the cultural heritage speakers, and I believe Mr. Dance is going

to sit at the table too.

If you could perhaps sort of raise your hand as I introduce you so I know who is who. Paul Warner, who is the United States Attorney from Utah, and I know that you're also the new Chair of the Attorney General's Advisory Council. You might well have been or in the future talk on these drug issues.

We did try to get people from the government for this hearing, but apparently people aren't ready yet. So we'll hear from those perspectives next month.

John Fryar, who is a criminal investigator in the U.S. Department of the Interior, the Bureau of Indian Affairs, and we're very glad to have him here with the kinds of practical experience you've had in this. And there are other things we're looking at in our agenda right now in developing a Native American Advisory Group that it would be nice to talk about too, but we won't have time.

Then Mr. Wayne Dance, who is Chief of the Appellate Section of the U.S. Attorney's Office in

Utah, and I'm not sure why we have the Appellate Branch here. We haven't done anything bad yet I don't think. But thank you very much.

Mr. Warner, we'll turn to you.

STATEMENT OF PAUL M. WARNER

MR. WARNER: Thank you. Honorable Judge Murphy and distinguished Commissioners, thank you for giving me the opportunity and privilege of appearing before the Commission today to testify concerning the proposed cultural heritage guideline.

I respectfully request that my full written statement be incorporated as part of the record of this hearing. My testimony today is taken from the full statement.

I'd like to say at the outset that the adoption of this guideline is not only necessary and appropriate, but, indeed, is long overdue. The cultural heritage guideline will, in my opinion, prove to be one of the most important of all the sentencing guidelines for the long term benefit of our nation. Consequently, I commend the Commission