

**Remarks made by  
Judge Richard P. Conaboy  
United States Sentencing Commission  
February 26, 2002**

INTRODUCTION

I come to Washington before you today not as a protagonist for any particular cause or action of the Commission. Indeed, I come more out of empathy for your positions as members of the Sentencing Commission. You have been specially designated and appointed to perform one of the most difficult of all human tasks, and you are entitled to serve with great pride and have the highest respect from all of society. So, I salute your dedication and hope you will find the support necessary to establish and maintain a fair and just sentencing process in the federal court system.

So, in the context of today's hearing, I presume to accomplish two things –  
ONE – To bring to you a brief history of the prior commission's actions on the exquisitely important issue of crack and powder cocaine sentencing – and  
TWO– To submit a brief commentary on your suggestions and proposed amendments.

The history is submitted not with any intention of influencing your own deep consideration of this most troubling area of sentencing. But, rather, to flesh out the past actions on this issue for your own knowledge and review.

The commentary is submitted in the context of a continuing effort to sustain and re-invigorate a deep sense of responsibility in every Federal Judge to impose a just and proper sentence in every criminal case.

**REMARKS**  
**JUDGE RICHARD P. CONABOY**  
**UNITED STATES SENTENCING COMMISSION**  
**FEBRUARY 26, 2002**

Federal judges are called upon to preside over many types of cases that are often complex and very difficult. But no duty is tougher or more demanding than sentencing.

I have always supported the concept of some type of guidelines to be used by sentencing judges in trying to determine the proper sentence in a given case.

The idea of no direction at all can, and did, lead to many problems and sometimes great disparities in sentences.

But like all legislation or guidance in a government like ours – we must continue to try to balance the precious rights of freedom and individual action with the need for some form of centralized direction.

Ours is the longest existing republic in the history of the world. Many writers and historians attribute that success to the great foresight and intelligence of our founding fathers – and their meticulous attention to efforts to maintain individual and state freedom in tandem with a centralized federal government.

Continuing success in this endeavor has to be established in large measure by people like you, who willingly give of your time, talent and thoughts to making our government work well.

Few would dispute in this day and age, that a sentencing guideline system is necessary and can work well. But, the concept of an ideal system is nebulous at best – and our federal system – as the originators of the system all agree – needs constant work – attention and change to make it work better. That's where your devotion and determination to do the right thing, becomes so solemn and imposing.

Like all citizens, I commend your efforts in your proposed amendments on such things as terrorism – career offenders – and recognition of problems in areas of establishing values regarding such things as cultural value – and victims' rights – along with the many other items in your amendments.

But I especially commend you for addressing – again – the drug sentencing problems (especially the crack and powder cocaine problem) and your suggestion of endorsing a broader area of potential alternatives to imprisonment.

These are areas that cry out for attention. I know of no one who disagrees with the need to change the disparate sentencing requirements between crack and powder cocaine. The arguments favoring change, and about what type of change, are too abundant to even summarize. But your determination that the time has come for a change is unassailable.

The most basic argument for change is the desperate need to let the guidelines work properly and appropriately in determining proportionality and the proper sentence in each case. To do that – the unequal and unfair beginning point must be changed. I wish there was a formula that all could agree upon – that's why I supported and still support, elimination of any difference. But that's where your job becomes so difficult – and at the same time, so significant.

In a report from the Probation Office of the Middle District of Pennsylvania, where I sit, there is a suggestion that a 2 to 1 ratio would be appropriate than the present one, and would recognize some inherent differences in the crack and powder areas. I suppose most could live

with that – but you will have to design a ratio that is workable and can also be sold to others in different parts of the government who have a very significant say in this area of sentencing.

The expansion of alternatives to incarceration would go a long way not so much to expand judicial discretion – but much more importantly, would renew and rekindle judicial responsibility and obligation. Judges should pain over each sentence, and should work very hard and close with all who are involved, to impose a just and fair sentence in each case.

**OUTLINE OF REMARKS  
JUDGE RICHARD P. CONABOY  
UNITED STATES SENTENCING COMMISSION  
FEBRUARY 26, 2002**

Of all the problems that faced the 1994 (new commission) – the cocaine sentencing policy was probably the most difficult.

1. The study was done under another commission.
2. The 1994 commission had little time to review the study and make recommendations.
3. The recommendations were essentially based on the studies done by others and commentary made by others.
4. The 1994 commission recommendation was to be made in an atmosphere when “tough on crime” was very popular.
5. Any recommendation seemed to contradict – or contravene – Congress’ own actions in passing the original statute that set up the differences in the penalties for crack cocaine and powder cocaine.
6. While the 1994 commission was ready to review, digest and make some recommendations, perhaps enough time was not given to planning how we would convince the Congress to accept our recommendations. The commission made a mostly judicious decision, but did not spend much time in considering the “political” aspects that Congress would be concerned with.
7. The original report and the subsequent amended report have given Congress much to consider and perhaps it was too ambitious a task to feel the commission could convince Congress to reverse action it had taken before the guidelines were in effect.
8. There may not have been a full understanding that sometimes Congress takes years to review similar reports and even where there’s an initial contrary reaction over a long period of time, the recommendations set in and are accepted by Congress. It would appear that some of this is presently happening in that now there seems to be a desire to follow through on some of the recommendations and make the needed changes so that the guideline system will work more appropriately in providing proportionally increased punishment for more serious offenses.

**Excerpts from Special Report to Congress  
“Cocaine and Federal Sentencing Policy”  
February, 1995**

SUMMARY

As discussed above, a review of the relatively sparse empirical evidence available concerning those factors Congress considered in distinguishing crack from powder cocaine leads to mixed conclusions and few clear answers. Nevertheless, the Commission concludes that a policymaker could infer that crack cocaine poses greater harms to society than does powder cocaine. For example, because smoking crack cocaine lends itself to binge use in a way not found with snorting powder – the most popular way of administering that form of the drug – crack has a greater potential for creating dependency. Moreover the ease by which crack can be administered and its ability to be marketed cheaply have made it particularly appealing and accessible to a broader population, including some of the most vulnerable members of society: the poor and the young. Further, both forms of cocaine appear to be associated with systemic violence, that is, violence associated with the marketing of a drug; however, crack dealers generally, tend to have a stronger association with systemic violence and are more likely to possess weapons than powder cocaine dealers. Finally, crack dealers, generally, have more extensive criminal records than other drug dealers, and they tend to use young people to distribute the drug at an increased rate. ‘95 Rep. p. 195

The Commission notes that there is no precise method by which one can determine the optimal penalty differential between drugs or even between kinds of offenses. ‘95 Rep. p. 195

First, when Congress established the quantity ratio in 1986, there were no sentencing guidelines; rather, the guidelines took effect in 1987 and were not fully implemented until 1989. Accordingly, Congress has only the possibility of an enhanced ratio to look to in capturing, in a sentencing structure, the additional harms that legislators felt inhered in crack cocaine. Therefore, to the extent that the guidelines now provide a punishment for some of those same factors subsumed in the ratio, those factors generate an enhancement both through an increased ratio differential and through guideline adjustments. In short, they are doubly punished through the interplay of the two structures. ‘95 Rep. p. 196

Specifically, the likelihood of violence in connection with the trafficking of a drug is increased greatly if those trafficking in that drug carry guns or have prior criminal records. Certainly the harm of the crime is greater if someone is killed. The guidelines can provide an enhancement for each of these factors. That is, a defendant who carries a firearm or is involved in a drug conspiracy in which another participant carries a firearm will receive an enhancement for possession of that firearm. In addition, the punishment of a defendant who has a prior record is increased in proportion to the extensiveness of that record. Further, if in relation to the crack distribution a victim is killed, the guidelines typically provide a life sentence and, because there is no parole in the federal system, a life sentence means life in prison. ‘95 Rep. p. 196

For example, no provision of the guidelines accounts for the increased addictiveness of

crack or it increased attraction as a result of its cheap marketability to a broader and more vulnerable part of the population. '95 Rep. p. 197

Another central basis for the Commission's rejection of this ratio is the extreme anomalies in sentencing produced by such a high differential in penalties between two easily convertible forms of the same drug. Crack cocaine is made through a simple conversion process applied to powder cocaine. Thus, those who traffic in crack necessarily have obtained the "raw material" for their drug through the powder cocaine distribution chain. One premise of the mandatory minimum sentencing structure is that, all other things being equal, a drug dealer's danger to society is in direct proportion to the quantity of the drug in which he/she deals. Yet, as a result of the ratio differential, a large scale powder cocaine dealer who traffics in 500 grams (2,500-5,000 dosage units) of powder cocaine will receive the same sentence as a crack dealer who has sold only 5 grams (10-25 doses) of crack cocaine; that is, a five-year sentence of imprisonment. '95 Rep. p. 197

Moreover, to the extent that some members of Congress expressed concern in 1986 that use of crack tends to alter a person's behavior in such a way as to cause that person to commit a crime (psycho pharmacologically induced crime), the evidence does not suggest any greater association for crack than for powder cocaine with that type of criminal activity. '95 Rep. p. 197

## RECOMMENDATIONS

The Commission will investigate the feasibility of a guideline enhancement that additionally punishes those who engage youth to distribute drugs. '95 Rep. p. 199

In addition to the currently available enhancements for weapons and prior criminal record, the Commission might add enhancements for type of weapon, discharge of weapon, injury to victims, bystander injury, and crack houses or shooting galleries. '95 Rep. p. 199

In comparison to a penalty scheme that relies exclusively or primarily on a quantity ratio to distinguish among offenders warranting greater punishment, this approach is distinctly fairer and more consistent with the more uniform but appropriately individualized sentencing approach Congress envisioned under the Sentencing Reform Act. '95 Rep. p. 199

Following this approach, the Commission will attempt to identify all such harms frequently and substantially associated with crack offenses and seek to determine the extent to which they can be addressed in a guideline system. '95 Rep. p. 199

Most importantly, through the guidelines system, consistent, appropriately individualized, and substantially fairer sentencing results can be achieved that will effectively promote the purposes of sentencing. '95 Rep. p. 200

## Constitutional Challenges

Defendants challenging the 100- to-1 quantity ratio in the federal system have argued that both the statutes that direct the mandatory minimum sentences for crack offenses and the federal sentencing guidelines are unconstitutional because they deny equal protection or due process, because the mandated penalties constitute cruel and unusual punishment, or because the statutes are unconstitutionally vague. As of the date of this report, all challenges to the constitutionality of the 100- to-1 ratio have failed in the federal appellate courts. '95 Rep. p. 213-214.

Excerpts from Testimony of Richard P. Conaboy, Chairman  
United States Sentencing Commission,  
before the Committee on the Judiciary of the United States Senate

August 10, 1995

As you know, in the 1994 crime bill, Congress directed the Commission to study the issue of cocaine and federal sentencing policy and to provide recommendations for appropriate changes in the policy.

After all the research, after long and sometimes difficult discussions, the Commission unanimously concluded that all of the current sentencing scheme for cocaine offenses could no longer be justified. This conclusion, and the facts that underlie it, are documented in the Commission's 200-plus page exhaustive report which we submitted to Congress in February.

Therefore, under the revised sentencing system that we submitted on May 1, the base sentences are raised dramatically for the kingpin or for the offender who possesses a gun or uses children to commit a crime or is involved with gangs or drive-by shootings. This year, as part of the guideline amendment process, the Commission added several new enhancements that will raise penalties substantially for dangerous crack offenders. Together with existing guideline enhancements, base sentences will be raised for a long list of aggravating factors associated with crack and powder offenders – facts that are associated more often with crack offenders. Some of these aggravating factors are listed on the chart now being displayed.

Under the amended sentencing policy, including base sentences and enhancements, sentences for crack cocaine offenders, on average, would remain significantly higher than sentences for powder offenders.

However, to reiterate that the differences on the Commission were small, you should be aware that the Commissioners who dissented from our recommendation did not seriously discuss any ratio greater than 5-to-1 and Commissioner Goldsmith specifically raised the possibility of a 5-to-1 ratio, at least for some crack cocaine traffickers.

Because the 100-to-1 quantity ratio predates the sentencing guidelines, it was not designed to target the most severe sentences and our valuable and scarce prison resources toward violent offenders and thus understandably does not allow for appropriate proportionality in sentencing.

Second, virtually all cocaine imported into the United States arrives as powder cocaine. Only in the final stages of distribution, at the local level, is some of that powder transformed into crack. This is vitally important because any sentencing system that provides higher base penalties for crack cocaine will lead to the unfair and unwise result that more sophisticated, higher-level powder suppliers will be sentenced relatively less severely than some of the retailers they supply.

There can be no doubt that the higher penalties for crack offenders fall disproportionately on minority defendants. Crack is cheap and thus distributed and attractive to the poor, many of whom are minorities. With the 100-to-1 ratio, we have unintentionally developed the anomaly of punishing the poor and minorities more severely under the guise of trying to protect them.

Of greatest concern to the public, and of greatest concern to the Commission, is the violence often associated with drug trafficking. Our amended sentencing system addresses this concern head on.

In studying this law – as you requested – we determined unanimously that, no matter how well intentioned the legislature was in passing the law, its implementation over the past several years has not been fair and it has had a startling disparate effect on one segment (the poor and the black) of our country. Everyone involved in the process recognizes this.

There remained only one item of disagreement; whether the 100-to-1 quantity ratio should be abandoned completely allowing the guidelines to be used to adjust penalties, or whether some small ratio should be retained to reflect concerns perhaps not addressable by the guideline system. We respectfully request a very close and thorough review of our recommendations and the reasons on which those recommendations are based, and we strongly suggest that an outright rejection of those recommendations would allow to continue a situation which everyone agrees was unintended and is unfair and which violates the basic tenets of our system of justice.

Crack is a horrible thing. All drugs are horrible. We need to send a strong message about our unwavering intolerance to drug use and drug trafficking. The Commission's guidelines punish all drug trafficking severely. But punishing Crack more harshly because it is the drug of choice of the poor – like the cheap wine of those same neighborhoods – we believe is wrong. We at the Commission are committed to policies we think are strong, smart, and fair. We believe our recommendations on cocaine sentencing policy are in that vein.