

FINDINGS, DISCUSSION, AND RECOMMENDATIONS

A. OVERVIEW

This chapter discusses the most important findings of the preceding chapters, evaluates the current federal penalty structure for cocaine offenses in terms of both the purposes of sentencing set forth in the Sentencing Reform Act and specific congressional objectives set forth in other relevant legislation, and offers concrete recommendations for changes to the penalty structure.

In 1986, Congress responded to a national sense of urgency surrounding drugs generally and crack cocaine specifically, expedited the usual legislative process, and enacted the Anti-Drug Abuse Act of 1986. The 1986 Act created the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses generally, and the legislative history indicates that Congress targeted “serious” and “major” drug traffickers for five and ten-year mandatory minimum sentences, respectively.

The 1986 Act also established the 100-to-1 drug quantity ratio between powder cocaine and crack cocaine offenses that lies at the heart of the ongoing debate over the federal sentencing policy for cocaine offenses. As a result of both the statutory and guideline 100-to-1 drug quantity differentiation between the two forms of cocaine, the sentencing guideline range for crack cocaine offenses based solely on drug quantity is three to over six times longer than powder cocaine offenses involving equivalent drug quantities, depending on the exact quantity of drug involved. In addition, the average sentence for crack cocaine offenses (118 months) is 44 months – or almost 60 percent – longer than the average sentence for powder cocaine offenses (74 months), in large part due to the effects of the 100-to-1 drug quantity ratio.

The legislative history is ambiguous as to whether Congress intended the penalty structure for crack cocaine offenses to fit within the general two-tiered, five and ten-year penalty structure for serious and major traffickers created by the 1986 Act. The legislative history is clear, however, that Congress considered crack cocaine much more dangerous than powder cocaine and, therefore, those who trafficked crack cocaine warranted significantly higher punishment. Specifically, the establishment of the 100-to-1 drug quantity ratio was based on beliefs that (1) crack cocaine was extremely addictive; (2) crack cocaine distribution and use were highly associated with violence and other systemic crime; (3) crack cocaine use was especially perilous, with particularly devastating harms to children prenatally exposed to the drug; (4) young people were particularly prone to crack cocaine use; and (5) crack cocaine’s purity, potency, low cost per dose, and ease of distribution and administration were leading to its widespread use.

Much as been learned about crack cocaine and crack cocaine offenders in the intervening years. Crack cocaine was a relatively new phenomenon at the time Congress was considering the 1986 Act, having been mentioned first in the major media by the *Los Angeles Times* only two years earlier on November 25, 1984.¹⁷⁷ Some of the information available to Congress in retrospect proved not to be empirically sound. For example, recent studies report that prenatal exposure to crack cocaine produces identical effects as prenatal exposure to powder cocaine and is far less devastating than previously reported.

Recent information also indicates that some of the conclusions reached in 1986 regarding the prevalence of certain aggravating conduct in crack cocaine trafficking may no longer be accurate. For example, establishment of the 100-to-1 drug quantity ratio was in part based on reports that crack cocaine offenses were highly associated with violence. Anecdotal evidence and Commission sentencing data indicate, however, that the violence has abated considerably. In 2000, almost *three-quarters (74.5%) of federal crack cocaine offenders had no weapon involvement*. Even when weapons were present, rarely were they actively used (2.3% of crack cocaine offenders).

Equally important, at the time Congress was considering the 1986 Act, the sentencing guidelines authorized by the Sentencing Reform Act of 1984 were still being developed by the Commission. Consequently, to effect its will that crack cocaine trafficking offenses be punished much more severely than powder cocaine trafficking offenses, Congress had only one instrument directly available to differentiate penalties for the two forms of cocaine: mandatory minimum penalties. Congress therefore used this mechanism and provided substantially different trigger drug quantities for the mandatory five and ten-year penalties for trafficking powder cocaine and crack cocaine. The advent of the more finely calibrated sentencing guideline system, which provides a more just and targeted mechanism to account for a number of aggravating factors, may in and of itself warrant some reconsideration of the severity of the mandatory minimum penalties.

After carefully considering all of the information currently available – some 16 years after the 100-to-1 drug quantity ratio was enacted – the Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act. The 100-to-1 drug quantity ratio was established based on a number of beliefs about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support.

Moreover, with the establishment and settled usage of the sentencing guidelines, sentencing proportionality can be better achieved by disentangling some of the harms accounted for in the 100-to-1 drug quantity ratio. This can be accomplished by (1) using specific

¹⁷⁷ USSC, *supra* note 1, at 122.

sentencing enhancements to target the minority of offenders who engage in the most harmful conduct that concerned Congress in 1986; (2) decreasing the residual quantity-based penalties that apply to all crack cocaine offenders accordingly (to at least 25 grams for the five-year mandatory minimum penalty, and at least 250 grams for the ten-year mandatory minimum penalty); and (3) maintaining at current levels the quantity-based penalties for powder cocaine offenses.

In reaching this conclusion, the Commission carefully considered the view of the Department of Justice that the current federal sentencing policy for crack cocaine offenses is appropriate.¹⁷⁸ In support of its position, the Department of Justice reports, among other things, that crack cocaine abuse is more associated with certain urban crime and risky sexual behavior. In addition, the typical user of crack cocaine is exposed to a greater risk of addiction than the typical user of powder cocaine. The Department of Justice concludes that the 100-to-1 drug quantity ratio is appropriate to ensure that those harms are adequately reflected in the penalty structure.

The premise apparently underlying this position is the view that because *all* of the discrete harms that may have been incorporated into the 100-to-1 drug quantity ratio cannot be fully addressed through specific guideline sentencing enhancements, *none* of the harms should be disentangled from the 100-to-1 drug quantity ratio. To the contrary, specific guideline sentencing enhancements can account for certain harmful conduct (*e.g.*, defendant weapon involvement and bodily injury) in a more targeted manner than quantity-based penalties, particularly for conduct that occurs in a small minority of offenses. If the Department of Justice's view on this point is accepted, *all* crack cocaine offenders would be punished *as if* they engaged in certain more harmful conduct, even though sentencing data demonstrate that the overwhelming majority of federal crack cocaine offenders are not involved in such conduct. As a result, the seriousness of most crack cocaine offenses and the culpability of most crack cocaine offenders would continue to be overstated.

The Commission agrees, however, that differences in the intrinsic harms posed by the two drugs (*e.g.*, addictiveness) should be reflected in different base offense penalties and therefore different quantity-based penalties. Similarly, differences in other harms that cannot be adequately accounted for by specific sentencing enhancements (*e.g.*, association with certain systemic crime) also should be reflected appropriately in different base offense penalties. Consequently, while there are reasons to punish crack cocaine offenses more seriously than powder cocaine offenses involving equivalent quantities, the Commission concludes that a

¹⁷⁸ See written statement by Larry D. Thompson, Deputy Attorney General, Department of Justice, to the U.S. Sentencing Commission regarding Drug Penalties (March 19, 2002); *see also*, U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* (March 17, 2002) [hereinafter DOJ Report].

100-to-1 drug quantity ratio is excessive to account for the differences in harms between the two drugs.¹⁷⁹

Congress and the Commission now have improved tools – namely a refined sentencing guideline system that can account for variations in offender culpability and offense seriousness and more recent extensive data about crack cocaine and crack cocaine offenders – to provide a more appropriate and proportionate penalty structure than currently exists.

B. FINDINGS

1. Current Penalties Exaggerate the Relative Harmfulness of Crack Cocaine

As explained in Chapter 1, the legislative history of the 1986 Act is ambiguous as to whether Congress intended the penalties for crack cocaine offenses to fit within the general two-tiered, five and ten-year penalty structure for serious and major traffickers. However, using the evidence then available, Congress clearly concluded that crack cocaine was a more dangerous form of cocaine than powder cocaine and that conclusion formed a significant basis for the establishment of the 100-to-1 drug quantity ratio. Assessing the relative dangers posed by any two drugs is a difficult and inexact task, but recent research indicates that the current penalty structure – which yields a five-year mandatory minimum sentence for ten to fifty doses of crack cocaine compared to 2,500 to 5,000 doses of powder cocaine – greatly overstates the relative harmfulness of crack cocaine.

a. Cocaine and Addiction

Both powder cocaine and crack cocaine are potentially addictive. (*See* Chapter 2.) The risk and severity of addiction to cocaine is directly related to the method by which the drug is administered into the body, rather than the form of the drug. Smoking or injecting any drug, including cocaine, generally produces the quickest onset, shortest duration, and most intense effects, and therefore produces the greatest risk of addiction.

Crack cocaine can only be readily smoked, which means that crack cocaine is always in a form and administered in a manner that puts the user at the greatest potential risk of addiction. Powder cocaine can be injected, snorted, or consumed orally. Injecting powder cocaine puts the user at a similar risk of addiction as smoking crack cocaine, but only 2.8 percent of powder

¹⁷⁹ One study heavily cited by the Department of Justice to support their position concludes that the 100-to-1 drug quantity ratio is excessive and recommends a drug quantity ratio of 2 or perhaps 3-to-1. DOJ Report, *id.* at 2, citing Dorothy Hatsukami & Marian Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 JAMA 1580, 1582 (1996).

cocaine users inject the drug.¹⁸⁰ Most powder cocaine users snort the drug, which puts the user at a lower risk of addiction than smoking crack cocaine.

In short, while crack cocaine always represents the most addictive form of cocaine, powder cocaine typically represents a somewhat less addictive form of the drug because it is usually snorted. Precisely quantifying this difference is impossible and, as a result, determining an appropriate degree of punishment differential to account for any difference in addiction potential is difficult.¹⁸¹ The addictive nature of crack cocaine, however, independently does not appear to warrant the 100-to-1 drug quantity ratio.

b. Prenatal Cocaine Exposure

Congress also provided heightened penalties for crack cocaine offenses based on the widespread fears of an epidemic of “crack baby syndrome.” During the congressional debates surrounding the 1986 Act, many members voiced concern about the increasing number of babies prenatally exposed to crack cocaine and the devastating effects such exposure causes. Congress further expressed its concern about prenatal exposure to drugs generally in the 1995 disapproval legislation. That legislation expressly stated that enhanced sentences should be imposed on a defendant who, in the course of a drug offense, “involves . . . a woman who the defendant knows or should know to be pregnant.”¹⁸²

A number of conclusions from more recent data are relevant to assessing the 100-to-1 drug quantity ratio in this context. First, recent research indicates that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. To this point, Dr. Deborah Frank states “there are no physiologic indicators that show to which form of the drug the newborn was exposed. The biologic thumbprints of exposure to these two substances in utero are identical.”¹⁸³ Since recent research reports no difference between the negative effects from prenatal crack cocaine and powder cocaine exposure, no differential in the drug quantity ratio based directly on this particular heightened harm appears warranted.

¹⁸⁰ See NHSDA, *supra* note 60.

¹⁸¹ It is noteworthy that the federal penalties for other major drugs of abuse that can be administered in multiple ways do not provide differentiation based on the method of administration. For example, the penalties for marijuana do not differ depending on whether the drug is smoked or orally ingested.

¹⁸² See *supra* note 40.

¹⁸³ Frank, *supra* note 64; Chasnoff, *supra* note 62. Dr. Ira J. Chasnoff supports this position, stating that “[t]he physiology of [powder] cocaine and crack are the same, and the changes in the dopamine receptors in the fetal brain are the same whether the mother has used [powder] cocaine or crack.”

Second, recent research indicates that the negative effects of prenatal cocaine exposure are significantly less severe than believed when the current penalty structure was established. Although there does appear to be an association between prenatal cocaine exposure and some negative developmental effects (*e.g.*, attention and emotional regulation), the Acting Director of the National Institute on Drug Abuse (NIDA), Dr. Glen Hanson, reports that “researchers have found the effects to be not as devastating as originally believed”¹⁸⁴

Additionally, Dr. Frank’s recent findings are in accord with NIDA’s position. Dr. Frank testified before the Commission that “there are small but identifiable effects” of prenatal cocaine exposure on infants, but that evidence of any negative long-term effects is inconsistent.¹⁸⁵ Dr. Frank further finds that the negative effects associated with prenatal cocaine exposure do not differ in severity, scope, or kind from prenatal exposure to other illegal and legal substances. In fact, the negative effects from prenatal exposure to cocaine are very similar to those associated with prenatal tobacco exposure and less severe than the negative effects of prenatal exposure to alcohol.¹⁸⁶ The fact that prenatal exposure to *legal* substances causes similar harms as prenatal exposure to cocaine further complicates accounting for the harms of prenatal cocaine exposure by quantity-based *criminal* penalties, particularly penalties that purport to distinguish between different forms of cocaine in part because of those perceived harms.

Third, even these findings of “small but identifiable effects” of prenatal cocaine exposure must be used cautiously in setting sentencing policy to account for this heightened harm because of other complicating factors. Dr. Hanson explained:

Factors such as the amount and number of all drugs used, inadequate prenatal care, socio-economic status, poor maternal nutrition, and other health problems, and exposure to sexually transmitted diseases are just some examples of why it is difficult to determine the exact effects of prenatal drug exposure. . . . [*W*]e must be cautious in drawing causal relationships in this area¹⁸⁷

Dr. Chasnoff echoed this warning, asserting that “the home environment is *the* critical determinant of the child’s ultimate outcome.”¹⁸⁸

In view of these research findings, the 1995 legislation disapproving equalization of cocaine penalties at powder cocaine levels sets forth a preferable way to address the heightened

¹⁸⁴ Hanson, *supra* note 49.

¹⁸⁵ Frank, *supra* note 64.

¹⁸⁶ *Id.*

¹⁸⁷ Hanson, *supra* note 49. (emphasis added.)

¹⁸⁸ Chasnoff, *supra* note 62. (emphasis added.)

harm of prenatal drug exposure in the penalty structure. Instead of accounting for prenatal exposure indirectly in quantity-based penalties, which apply to all offenders regardless of whether they contributed to this particular harm, sentencing proportionality would be better achieved by imposing enhanced sentences directly on the small minority of offenders who distribute drugs knowingly to pregnant women.¹⁸⁹

c. Young People as Users and Distributors

Congress also appears to have based heightened penalties for crack cocaine offenses in part on the widely-held belief that the drug's potency, low cost per dose, and ease with which it is manufactured and administered were leading to an epidemic of crack cocaine use. The legislative history surrounding the 1986 Act indicates that Congress was concerned that young people were especially prone to both using and distributing the drug. Congress further expressed its concern about involvement of minors in drug trafficking generally in the 1995 disapproval legislation by expressly stating that enhanced sentences should be imposed on a defendant who involves a juvenile.¹⁹⁰

Although these Congressional concerns of the mid-1980s were understandable at the time, recent data indicate that the epidemic of crack cocaine use by youth never materialized to the extent feared. The National Household Survey on Drug Abuse reports that crack cocaine use among 18- to 25-year old adults historically has been low. Between 1994 and 1998, on average less than 0.4 percent of those young adults reported using crack cocaine within the past 30 days.¹⁹¹ In fact, in 1998 *the rate of powder cocaine use among young adults was almost seven times as high* as the rate of use of crack cocaine.

Monitoring the Future surveys report similar findings about cocaine use by high school seniors. From 1987 to 2000, on average less than 1.0 percent of high school seniors reported crack cocaine use within the past 30 days. (Fig. 23.) During that same period, *the rate of powder cocaine use by high school seniors was almost twice as high*, but averaged only 1.9 percent. The low rate of crack cocaine use by young people also is consistent with Commission sentencing data indicating that in 2000 only 0.5 percent of federal crack cocaine offenses involved the sale of the drug to a minor. (Fig. 20.)

Data are not available regarding the number of underage crack cocaine traffickers at the

¹⁸⁹ The Commission draft model revised drug trafficking guideline (*see* App. A) would apply this enhancement to all trafficking defendants whose relevant conduct was proven by a preponderance of the evidence to have involved knowing sales to pregnant women. By expressing the enhancement in this form, the Commission believes it would apply more broadly and appropriately than the current enhancement, which covers only those charged and convicted of this aggravating conduct.

¹⁹⁰ *See supra* note 40.

¹⁹¹ NHSDA, *supra* note 147.

state and local levels, but sentencing data suggest youth do not play a major role in crack cocaine trafficking at the federal level. Minors were involved in only 4.2 percent of federal crack cocaine offenses in 2000. (Fig. 20.) The average age of federal crack cocaine traffickers was 29 years old, only four years younger than the average age of all federal drug traffickers (33 years).¹⁹²

The 1995 disapproval legislation sets forth a preferable way to address the heightened harm of involving minors in drug trafficking, either as users or co-participants in the crime. Instead of accounting for this harmful conduct in the quantity-based penalties, sentencing proportionality would be better achieved by imposing enhanced sentences on the small minority of offenders who sell any type of drug to juveniles, conduct drug distribution in areas likely to be frequented by juveniles (*e.g.*, near schools and playgrounds), or use juveniles in drug distribution activities.¹⁹³

2. Current Penalties Sweep Too Broadly and Apply Most Often to Lower Level Offenders

a. The Impact of the Mandatory Minimum Threshold Quantities on Prosecutorial Decisions

In passing the 1986 Act, Congress recognized that all drug trafficking offenses cannot be prosecuted at the federal level and established the current mandatory minimum penalty structure in part to “give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources.”¹⁹⁴

Data indicate that, as Congress intended, the drug quantities that trigger the five and ten-year mandatory minimum penalties significantly influence federal prosecutorial decisions regarding which cocaine cases to bring at the federal level. For both crack cocaine and powder cocaine, only a small proportion of cases involve drug quantities below the five-year mandatory minimum threshold quantities. (*See* Fig. 11.) Both drugs also have noticeable “spikes” in the proportion of cases involving the five and ten-year threshold quantities. (*See* Fig. 11.)

Nevertheless because of the low quantity threshold for crack cocaine, a significant proportion of federal crack cocaine offenses involve relatively small drug quantities. In 2000, 1,083 crack cocaine offenses, representing *over one-quarter* – 28.5 percent – of federal crack cocaine offenses, involved less than 25 grams of the drug. In contrast, only 2.7 percent of federal powder cocaine offenses involved less than 25 grams of the drug. (*See* Table 6.) The 100-to-1 drug quantity ratio no doubt significantly contributes to the fact that *ten times* as many

¹⁹² USSC 2000 datafile, USSCFY00.

¹⁹³ As incorporated in the Commission’s draft model drug trafficking guideline (*see* App. A), this enhancement would be more broadly applied based on a defendant’s relevant conduct. *Supra* note 189.

¹⁹⁴ *See* H.R. Rep. No. 99-845, *supra* note 22.

federal crack cocaine offenses involve less than 25 grams than powder cocaine offenses.¹⁹⁵

In terms of avoiding unwarranted sentencing disparity, the significant proportion of crack cocaine cases involving relatively small quantities is problematic for a number of reasons. Because the states generally have not adopted the federal penalty structure for cocaine offenses, the decision whether to federally prosecute an offense can have a significant effect on a crack cocaine offender, especially for an offense involving a small drug quantity. Further, Commission data indicate that the prosecutorial practices vary substantially among the various federal judicial districts, which may suggest some unwarranted geographical disparity.¹⁹⁶

b. The Sentencing Impact of the Current Penalty Structure on Offenders with Relatively Small Drug Quantities

The fact that a significant proportion of federal crack cocaine offenders are responsible for relatively small drug quantities is troublesome because they receive especially disparate penalties in comparison to similar powder cocaine offenders. The Department of Justice's report concludes that "crack defendants received higher average sentences than powder defendants, and that *the ratio of crack to powder sentences was greater for lower amounts of cocaine than for higher amounts of the drug.*"¹⁹⁷ Specifically, the Department of Justice reports that defendants convicted of trafficking less than 25 grams of crack cocaine received an average sentence 4.8 times longer than the sentence received by equivalent powder cocaine defendants.¹⁹⁸

However, couching the differential in terms of a "penalty ratio" masks the significant real impact that the 100-to-1 drug quantity ratio has on sentences. According to the Department of Justice, defendants convicted of trafficking less than 25 grams of powder cocaine received an average sentence of 13.6 months, just over one year. In contrast, defendants convicted of trafficking an equivalent amount of crack cocaine received an average sentence of *64.8 months, over five years.*

¹⁹⁵ The importance of the five-year trigger quantity in prosecutorial decisions is further evidenced by the fact that 72.7 percent (747) of those crack cocaine cases trafficking less than 25 grams involved between five and twenty grams, the quantities that receive the sentencing guideline range that currently corresponds to the five-year mandatory minimum penalty.

¹⁹⁶ See ch. 7, pt. B. As discussed in Chapter 7, the differences in prosecutorial practices suggested by the data can occur for a number of reasons.

¹⁹⁷ DOJ Report, *supra* note 178, at 23. (emphasis added.)

¹⁹⁸ *Id.*

Moreover, as the Department of Justice report admits, the “penalty ratio” widens even further to 8.3 to 1 for crack cocaine and powder cocaine offenders with *the lowest drug quantities and the least criminal history* (Criminal History Category I).¹⁹⁹ For those offenders, the 100-to-1 drug quantity ratio results in average sentences of 33 months for crack cocaine offenders compared to four months for powder cocaine offenders with equivalent drug quantities.²⁰⁰ The Department of Justice reports that this heightened differential in sentences affected 1,637 crack cocaine defendants sentences between 1996 and 2000. The Commission strongly believes that sentencing differentials of this magnitude are inappropriate especially for this category of least culpable offenders.

c. The Impact of the Current Penalty Structure on Crack Cocaine Offenders Who Perform Low-Level Functions

As explained in Chapter 1, the mandatory minimum penalty structure established by the 1986 Act generally was designed to target “serious” and “major” drug traffickers for federal prosecution. Committee reports issued by the House Judiciary Subcommittee on Crime following its consideration of a predecessor bill defined *serious traffickers* as “the managers of the retail traffic” and *major traffickers* as “manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities,” and provided five and ten-year mandatory minimum penalties for those categories of offenders, respectively.

Although Congress purposely may have deviated from that general structure for crack cocaine offenses, a number of results appear inconsistent with the fundamental purposes of the 1986 Act. In 2000, the majority of federal crack cocaine offenders – *two-thirds* – were *street-level dealers*. (See Fig. 5.) Because of this high concentration, the mandatory minimum penalties apply most often (64.2 percent) to smaller scale street-level dealers, not to serious and major traffickers as intended by Congress, at least for other major drugs of abuse.

The high concentration of federally sentenced street-level crack cocaine dealers also may indicate that scarce federal law enforcement resources are not being focused on serious and major traffickers, as Congress appears to have desired. According to the Commission’s analyses of sentencing data, in 2000, only 5.9 percent of federal crack cocaine offenders performed trafficking functions (manager, supervisor) that are most consistent with the functions described in the Subcommittee report as warranting a five-year penalty. And only 15.2 percent performed trafficking functions (importer, high-level supplier, organizer, leader, wholesaler) that are most consistent with the functions described as warranting a ten-year penalty.

In sum, instead of targeting serious and major traffickers in a manner similar to the articulated congressional design of penalties for other major drugs of abuse, crack cocaine mandatory minimum penalties currently apply most often to offenders who perform low-level

¹⁹⁹ *Id.* at 25.

²⁰⁰ *Id.* at Appendix B.

trafficking functions, wield little decision-making authority, and have limited responsibility. Based solely on trafficking functions, the penalties appear to overstate the culpability of most crack cocaine offenders.

3. Current Penalties Overstate the Seriousness of Most Crack Cocaine Offenses and Fail to Provide Adequate Proportionality

The legislative history of the 1986 Act suggests that the 100-to-1 drug quantity ratio was designed in part to account for certain more harmful conduct believed to be associated to a greater degree with crack cocaine offenses than with powder cocaine offenses. The underlying assumptions that existed in 1986 about the pervasiveness of some of that conduct, however, do not accurately reflect more recent federal crack cocaine offenses and no longer should be relied upon in setting sentencing policy.

An important basis for the establishment of the 100-to-1 drug quantity ratio was the belief that crack cocaine trafficking was highly associated with violence generally. More recent data indicate that significantly less trafficking-related violence or systemic violence, as measured by weapon use and bodily injury documented in presentence reports, is associated with crack cocaine trafficking offenses than previously assumed. In 2000, weapons were not involved to any degree by any participant in the offense in almost *two-thirds* (64.8%) of crack cocaine offenses. (Fig. 16.) Furthermore, *three-quarters* of federal crack cocaine offenders (74.5%) had *no personal weapon involvement*. (Fig. 16.) Further, when weapons were present, they rarely were actively used. In 2000, only 2.3 percent of crack cocaine offenders used a weapon. (Fig. 17.) Bodily injury of any type occurred in 7.9 percent of crack cocaine offenses in 2000. (Fig. 19.)

As mentioned earlier, recent data on protected classes of individuals and locations also do not substantially support previous concerns about the high prevalence of other aggravating conduct in crack cocaine offenses. In 2000, only 4.2 percent of crack cocaine offenses involved minor co-participants, and even fewer – 0.5 percent – involved the sale of the drug to a minor. (Fig. 20.) Only 4.5 percent of crack cocaine offenses occurred in protected locations such as near schools and playgrounds, and sales of crack cocaine to pregnant women were almost never documented.

In short, although the harmful conduct described above does occur more often in crack cocaine offenses than in powder cocaine offenses, it occurs in only a relatively small minority of crack cocaine offenses. This finding raises two principal concerns. First, to the extent that the 100-to-1 drug ratio was designed to account for the harmful conduct examined in this section, it sweeps too broadly by treating *all* crack cocaine offenders *as if* they committed these various harmful acts, even though most crack cocaine offenders in fact had not. In other words, the offense seriousness of most crack cocaine offenders is overstated by the 100-to-1 drug quantity ratio, suggesting that a differential this extreme is unjust.

A second, related proportionality problem is that the current penalty structure provides no

sentencing differential between crack cocaine offenders who do in fact commit those harmful acts and those who do not. Because the current penalty structure assumingly accounts for those harmful acts in the quantity-based penalties, there are no specific sentencing enhancements in the primary drug trafficking guideline more appropriately targeting those offenders who actually commit those acts for especially severe penalties (with the exception of a two-level sentencing enhancement for possession of a dangerous weapon). As a result, the current penalty structure fails to provide adequate sentencing proportionality. In other words, the current penalty structure results in inappropriate sentencing uniformity for the most serious offenders.

Congress itself recognized this deficiency as early as 1995. The disapproval legislation expressly stated that “enhanced sentences should generally be imposed on a defendant who, in the course of a drug offense,” among other things, murders or causes serious bodily injury to an individual, uses a dangerous weapon (including a firearm), involves a juvenile or a woman who the defendant knows or should know to be pregnant, or distributes cocaine within 500 feet of a school.²⁰¹ Providing specific sentencing enhancements appropriately targeted at the very offenders who cause those heightened harms, instead of accounting for them entirely in the overbroad, quantity-based penalties, would be more consistent with the 1995 congressional directive.

In sum, the current penalty structure’s almost exclusive reliance on quantity-based penalties to account for the entirety of the harms examined in this section fails to provide adequate sentencing proportionality. Proportionate sentencing would be better achieved by (1) providing specific sentencing enhancements targeted at the more culpable traffickers of crack cocaine or other drugs who commit those harmful acts, and (2) decreasing the quantity-based penalties for crack cocaine to correct for the overstatement of the offense seriousness and culpability of the majority of offenders who do not commit such acts.

Admittedly, Commission sentencing data on weapon involvement and bodily injury do not fully capture all systemic crime associated with crack cocaine (*e.g.*, crimes such as prostitution committed by users to sustain an addiction). The Department of Justice reports findings that urban crime rates in 1991 would have been 10 percent lower in the absence of crack cocaine use and distribution.²⁰² The Department of Justice also reports that crack cocaine is more closely linked to trends in homicide rates than any other major drug of abuse.²⁰³

²⁰¹ See *supra* note 40.

²⁰² See DOJ Report, *supra* note 178, at 8, 9, citing Jeff Grogger and Michael Willis, *The Emergence of Crack Cocaine and the Rise in Urban Crime Rates*, 4 REVIEW OF ECON. AND STATS. 519, 526 (2000).

²⁰³ *Id.*, at 9, also citing K. Jack Riley, *Homicide and Drugs: A Tale of Six Cities*, 2 HOMICIDE STUDIES 176, 196-97 (1998).

There is no single definitive reason for the link between crack cocaine and certain systemic crime. Dr. Alfred Blumstein suggests that the link with violence is a result of the means and locus of crack cocaine distribution. Describing the crack market in the 1980s, Dr. Blumstein states:

[T]he aggressive marketing of crack, particularly to new customers, typically took place in street markets, typically in the poorest neighborhoods where violence is much more common than in the more affluent neighborhoods where powder would be more likely to be sold. Also, the participants in street drug markets need their own protection against street robbers, who might see these markets as prime targets because their victims would not be likely to call for help from the police. Thus, those in the street markets were likely to carry a handgun for self-protection, and the presence of these handguns inevitably escalated the level of violence in any disputes.²⁰⁴

The Department of Justice suggests that the fact that crack cocaine typically is sold in smaller units and involves a higher volume of transactions than powder cocaine contributes to its association with violence. The crack cocaine market also is relatively decentralized, with many small independent groups competing for territory.²⁰⁵

The trafficking of any drug involves collateral systemic crime. To the extent that trafficking in crack cocaine is associated with somewhat greater levels of systemic crime, the cocaine penalty structure should reflect that greater association, regardless of the underlying cause. Because specific sentencing enhancements for weapon involvement and bodily injury would not fully account for this factor, some differential in the quantity-based penalties for crack cocaine and powder cocaine is warranted on this basis. The Commission believes, however, that this basis alone does not support the 100-to-1 drug quantity ratio.

4. Current Penalties' Severity Mostly Impacts Minorities

One of the key issues surrounding the debate concerning the different penalty structures for crack cocaine offenses and powder cocaine offenses relates to the racial composition of federal crack cocaine offenders. The overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000. This has contributed to a

²⁰⁴ Blumstein, *supra* note 123.

²⁰⁵ See DOJ Report, *supra* note 178, at 9, citing Ko-Lin Chin & Jeffrey Fagan, *The Impact of Crack on Drug and Crime Involvement* 19-21 (1991). The Department of Justice also cites studies linking crack cocaine use to prostitution, *id.*, citing Chin & Fagan, at 15; see also DOJ Report, *supra* note 179, at 2, citing Hatsukami & Fischman, at 1585.

widely-held perception that the current penalty structure for federal cocaine offenses promotes unwarranted disparity based on race.

In order to evaluate whether the crack cocaine penalties disproportionately impact blacks, data regarding the racial composition of the entire population of crack cocaine traffickers would be required. For example, if 85 percent of federally convicted and sentenced crack cocaine traffickers are black, the fact that the same percentage of all crack cocaine traffickers are black would tend to undermine the assertion of unwarranted disparity based on race. On the other hand, if 85 percent of federally convicted and sentenced crack cocaine traffickers are black, the fact that some lower percentage of all crack cocaine traffickers are black would tend to support the assertion of unwarranted disparity based on race. Although data regarding the racial composition of crack cocaine *users* are available, such data do not exist for crack cocaine *traffickers* generally. As a result, this assertion cannot be evaluated scientifically.

Nevertheless, the Commission finds even the perception of racial disparity to be problematic. Perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine. The legislative history surrounding the 1986 Act indicates that one of Congress's primary concerns was to protect poor and minority neighborhoods that were most afflicted by crack cocaine trafficking and its associated secondary harms. The fact that those same communities and many of their representatives now seek change in the federal cocaine penalty structure suggests a critical re-examination of the current penalty structure may be warranted.

Furthermore, to the extent that the preceding analysis has shown that the 100-to-1 drug quantity ratio results in unduly severe penalties for most crack cocaine offenders, the effects of that severity fall primarily upon black offenders.

C. RECOMMENDATIONS

In assessing the current federal cocaine sentencing policy, the Commission has carefully considered the purposes of sentencing set forth in the Sentencing Reform Act of 1984, the objectives of the Anti-Drug Abuse Act of 1986, and the factors listed in the 1995 legislation disapproving penalty equalization at powder cocaine levels. The Commission has thoroughly examined the results of its own extensive data research project, reviewed the scientific and medical literature, considered written public comment, and considered expert testimony at three public hearings from federal and local law enforcement representatives, including the Department of Justice, the scientific and medical communities, academics, and civil rights organizations.

The Commission strongly believes that Congress and the Commission, informed by updated research and data and making use of the sentencing guideline system's capacity to account for variations in offender culpability and offense seriousness, can and should work

together to revise federal cocaine sentencing policy to provide more appropriate and proportionate sentencing.

The Commission recommends that Congress generally adopt a three-pronged approach for revising federal cocaine sentencing policy: (1) increase the five-year mandatory minimum threshold quantity for crack cocaine offenses to *at least* 25 grams (and the ten-year threshold quantity to *at least* 250 grams); (2) provide direction for more appropriate sentencing enhancements within the guidelines' structure that target the most serious drug offenders (without regard to the drug involved) for more severe penalties; and (3) maintain the current mandatory minimum threshold quantities for powder cocaine offenses.

The specific recommendations set forth below would result in guideline sentencing ranges (based solely on drug quantity) for crack cocaine offenses approximately two to four times as long as powder cocaine offenses involving equivalent drug quantities, depending on the precise quantity involved. The Commission further estimates that the recommendations if adopted would significantly reduce the difference between average sentences for crack cocaine and powder cocaine offenses from 44 months to approximately one year.²⁰⁶ Specifically, average sentences for crack cocaine offenses would decrease from 118 months to 95 months, and the average sentences for powder cocaine offenses would increase from 74 months to 83 months (after accounting for aggravating and mitigating factors, other than drug quantity, discussed in Chapter 4 and addressed by the guidelines).

1. Penalties for Crack Cocaine

a. Mandatory Minimum Threshold Quantity

Having concluded that the 100-to-1 drug quantity ratio no longer is supportable, determining the appropriate threshold quantity for triggering the five-year mandatory minimum penalty for crack cocaine offenses is a difficult and imprecise undertaking. There is a strong sense by some Commissioners that an alternative to the current approach should be explored. One approach suggested is to equate crack cocaine penalties to those for other major drugs of abuse such as methamphetamine and heroin, that are themselves severely punished.

Making comparisons among various drugs of abuse, however, is a complicated task yet still deserving of fair consideration. Heroin is an opioid that is abused because of its euphoric properties. The pharmacologic effects on the user are dramatically different for heroin and crack cocaine, and it cannot be easily said that the pharmacologic effects of either drug are worse than the other. Heroin users can experience clouded mental functioning, a slowing of both breathing and cardiac function, and in some circumstances sufficient respiratory depression to cause death. Heroin is most frequently administered by injection, which is the method of administration with

²⁰⁶ See Appendix B for the prison impact of the recommendations set forth in this section assuming Congress increases the five-year mandatory minimum threshold quantity to 25 grams for crack cocaine offenses and the sentencing guidelines are amended as modeled in Appendix B.

an equal addictive potential as smoking crack cocaine. (See Chapter 2.) Injecting heroin, however, more directly exposes users to secondary health risks such as exposure to HIV (the AIDS virus), hepatitis, and other infections than does smoking crack cocaine.²⁰⁷

Although both heroin and crack cocaine are addictive and sudden cessation of using either drug causes withdrawal symptoms, there is an effective pharmacologic treatment for withdrawing heroin addicts. The prescription drug methadone is effective at eliminating heroin withdrawal symptoms and has an established record as a successful addiction treatment.²⁰⁸ No such pharmacologic treatments for cocaine have yet proven as broadly effective.

Crack cocaine also is more widely used than heroin. (See Fig. 24.) In addition, because the effects of crack cocaine are shorter lived than the effects of heroin (20 to 30 minutes for crack cocaine compared to a few hours for heroin),²⁰⁹ crack cocaine users require multiple doses to maintain the desired effects over a given period of time.

In many ways, comparisons between crack cocaine and methamphetamine are more straightforward. Both drugs are highly addictive stimulants that produce the same euphoric effects. Both drugs pose the same secondary health risks to the user, including increased heart rate, blood pressure, respiration, wakefulness, body temperature, irritation, and anxiety. Chronic abuse of either drug can lead to dependence, but crack cocaine may pose a greater risk of addiction to the user because it can only be readily consumed in a form most likely to lead to addiction, *i.e.*, by smoking. In contrast, methamphetamine can be snorted, smoked, injected, or ingested.²¹⁰ Dependence is dictated by the method of delivery as opposed to the drug itself.

The association of methamphetamine and crack cocaine with violence does not provide a clear answer as to how the two drugs should be penalized in relation to one another. Violence can be and sometimes is associated with both drugs, but no hard data exist to draw any concrete conclusions.

The quantity-based penalty structure for methamphetamine offenses, however, does provide some guidance as to what may be a more appropriate quantity-based penalty structure for crack cocaine offenses. Currently, fifty grams of a methamphetamine mixture trigger a five-year mandatory minimum sentence. As explained in chapter 2, crack cocaine is not pure. To

²⁰⁷ National Institute on Drug Abuse (NIDA), National Institute of Health (NIH), NIDA Research Report, *Heroin Abuse and Addiction*, Pub. No. 00-4165, (October 1997) at 15. <http://165.112.78.61/ResearchReports/Heroin/Heroin.htm>.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ National Institute on Drug Abuse (NIDA), National Institute of Health (NIH), NIDA Notes, *Comparing Methamphetamine and Cocaine*, Pub. No. 98-3478 (June 1998). http://www.nida.nih.gov/NIDA_Notes/NNVol13N1/Comparing.html.

manufacture crack cocaine, powder cocaine, which itself contains cutting agents and is less than 100 percent pure, is dissolved in a solution of sodium bicarbonate and water and boiled. Crack cocaine then separates from the boiling substance, is dried, and broken into “rocks.” The purity of the crack cocaine, like the purity of methamphetamine, depends largely on the level of care and expertise of the manufacturer. In New York City, for example, mid-level dealers typically convert a given amount of powder cocaine into *a third more crack cocaine*, indicating a significantly lower level of purity.²¹¹

In sum, crack cocaine’s impurity may suggest that the quantity-based penalties for crack cocaine should be less severe than the quantity-based penalties for pure methamphetamine. However, crack cocaine’s greater risk of addiction (because of its method of use) suggests that the quantity-based penalties for crack cocaine offenses should be higher than the quantity-based penalties for methamphetamine mixture.

As the discussion above indicates, tying the penalty structure for crack cocaine offenses to the penalty structure for another drug can be complicated. The Commission, however, unanimously concludes that the five-year mandatory minimum threshold quantity for crack cocaine offenses should be increased to *at least 25 grams*. If the threshold were benchmarked to methamphetamine mixture, the five-year threshold quantity would be 50 grams, and if to heroin, the five-year threshold quantity would be 100 grams. The Commission believes that the penalty structure for crack cocaine offenses should more closely reflect the overall penalty structure established by the 1986 Act, and that increasing the five-year mandatory minimum threshold quantity for crack cocaine offenses to *at least 25 grams* would provide a penalty structure significantly more consistent with the penalty structure for other major drugs of abuse.

For example, if Congress increased the five-year trigger quantity to 25 grams, the sentencing guidelines would incorporate such a change by assigning offenses involving 25 to 100 grams of crack cocaine a base offense level 26. Offense level 26 provides a guideline sentencing range that corresponds to a five-year mandatory minimum penalty (63 to 78 months for defendants with minimal or no criminal history). Furthermore, the sentencing guideline range would be adjusted for offenses involving almost any quantity of crack cocaine because resetting the mandatory minimum threshold quantities reverberates throughout the Drug Quantity Table. Appendix A shows in detail how the Drug Quantity Table would incorporate an increase in the five-year threshold quantity to 25 grams for crack cocaine offenses.²¹²

Based on information received from federal law enforcement representatives, the Commission also believes that a base offense level quantity range of 25 to 100 grams more closely reflects a serious trafficker of crack cocaine as described generally in the legislative

²¹¹ See Statement of Bridget Brennan, Special Narcotics Prosecutor, at Tr. 18-19.

²¹² See Appendix A, at A3-A6.

history of the 1986 Act.²¹³ The Drug Enforcement Administration reports that mid-level traffickers distribute ounce-sized (one ounce equals 28.5 grams) or multi-ounce packages of freshly processed crack cocaine to lower level distributors, who subsequently break down and repackage the crack cocaine into dosage units.²¹⁴ The Department of Justice also reports that mid-level distributors package crack cocaine into ounces for sale by retail sellers.²¹⁵ Testimony from an experienced state narcotics prosecutor confirmed the general association between these quantity thresholds and the serious trafficker classification.²¹⁶

Moreover, increasing the five-year threshold quantity to at least 25 grams for crack cocaine offenses would likely cause a modest shift in federal prosecutorial resources that is more consistent with the objectives of the 1986 Act and that also apparently corresponds more closely to the revised enforcement priorities recently announced by the Department of Justice. In 2000, a significant proportion (28.5%) of federal crack cocaine offenses involved less than 25 grams, but relatively few involved less than the five-year threshold quantity of five grams (8%). If prosecutorial decisions were to follow a similar pattern subsequent to increasing the threshold quantity, relatively few offenses involving small quantities of less than 25 grams of crack cocaine could be expected at the federal level. In contrast, a significant proportion of federal crack cocaine offenses could be expected to involve 25 to 100 grams, which would be more consistent with the goal of targeting mid-level crack cocaine dealers.

As examined in the preceding section, a number of harms more associated with crack cocaine, such as using a weapon or causing bodily injury, can be accounted for by specific sentencing enhancements narrowly targeted to those offenders who engage in such conduct. Other harms more associated with crack cocaine offenses, such as certain systemic crime and its greater addictive potential, cannot be fully accounted for by specific sentencing enhancements and therefore must be reflected in different quantity-based penalties for the two drugs. The Commission believes that a drug-quantity ratio of not more than 20-to-1 (by increasing the five-year mandatory minimum threshold quantity to at least 25 grams for crack cocaine offenses) would appropriately reflect those harms that cannot be fully addressed by specific sentencing enhancements.

²¹³ In addition, the five-year threshold quantities for methamphetamine mixture (50 grams) and heroin (100 grams) fall within this quantity range.

²¹⁴ See Teresi, *supra* note 44, at 2.

²¹⁵ DOJ Report, *supra* note 178, at 7.

²¹⁶ Brennan, *supra* note 211.

b. Specific Sentencing Enhancements

As part of a restructuring of federal cocaine sentencing policy, the Commission recommends that a number of sentencing enhancements be added to the primary drug trafficking guideline specifically targeting more severe punishment on offenders who cause heightened harm and are more culpable. Furthermore, the Commission recommends that these proposed sentencing enhancements apply across all drug types, including powder cocaine, and not solely to crack cocaine offenses. As discussed in the preceding section, the Commission believes that adding enhancements to the drug trafficking guideline to account for certain harms will better achieve sentencing proportionality than accounting for such harms entirely in the quantity-based penalties. In addition, providing such enhancements enables Congress to recalibrate the mandatory minimum penalties to more accurately reflect the seriousness of most crack cocaine offenses and the culpability of most crack cocaine offenders.

Specifically, the Commission recommends that Congress generally direct the Commission to provide appropriate sentencing enhancements to more adequately account for:

- (1) involvement of a dangerous weapon (including a firearm);
- (2) bodily injury resulting from violence;
- (3) an offense under 21 U.S.C. §§ 849 (Transportation Safety Offenses), 859 (Distribution to Persons Under Age Twenty-One), 860 (Distribution or Manufacturing in or Near Schools and Colleges), and 861 (Employment or Use of Persons Under 18 Years of Age);
- (4) repeat felony drug trafficking offenders; and
- (5) importation of drugs by offenders who do not perform a mitigating role in the offense.

Appendix A shows how sentencing enhancements accounting for these factors might possibly be incorporated into the primary drug trafficking guideline in response to such a directive.²¹⁷

The Commission has determined that the proposed sentencing enhancements are appropriate because offenses that involve those heightened harms are more serious, and the drug offenders who cause them are more culpable and warrant increased punishment.²¹⁸ The Commission also recommends that Congress provide the Commission emergency amendment authority to facilitate implementation of the directive as soon as practicable so that there is not a significant lag between enactment of modified crack cocaine mandatory minimum penalties and

²¹⁷ See Appendix A, at A1-A2.

²¹⁸ This analysis assumes that the quantity-based penalties for crack cocaine offenses are adjusted.

the effective date of these proposed enhancements.

(3) Simple Possession

The Commission again strongly urges Congress to repeal the mandatory minimum penalty for simple possession of crack cocaine.²¹⁹ Under the relevant statute, 21 U.S.C. § 844, the five gram five-year mandatory minimum threshold quantity *for distribution* of crack cocaine also applies to *simple possession* of crack cocaine. This unique mandatory minimum penalty for simple possession results in significantly disproportionate sentencing. Under the current penalty structure, an offender who simply *possesses* five grams of crack cocaine receives the same five-year mandatory minimum penalty as an offender who *distributes* five grams of the drug – and the same mandatory minimum penalty as a serious trafficker of other drugs. Simple possession of any quantity of any of the other serious drugs of abuse (*e.g.*, methamphetamine, heroin, LSD) and simple possession of less than 5 grams of crack cocaine, is punished under 21 U.S.C. § 844 by a maximum penalty of one years imprisonment, with no mandatory minimum (for a first offender). The crack simple possession statute is thus anomalous in its treatment of crack cocaine relative to other drugs, as well as in the structural “cliff” that occurs at the five gram threshold. Although relatively few crack cocaine offenses involve simple possession (a total of 69 over the past three fiscal years), the Commission unanimously reiterates its prior findings that the mandatory minimum for simple possession of crack cocaine is unjustified and should be repealed.²²⁰

(4) Statutory Definition of “Cocaine Base”

The heightened statutory mandatory minimum penalties in 21 U.S.C. § 841 apply to “cocaine base,” but the term is not defined in the statute. Some courts have interpreted cocaine base to be broader than crack cocaine and to include, for example, coca paste (an intermediate step in the processing of coca leaves into cocaine hydrochloride). To resolve a circuit conflict over the interpretation of the term, the Commission in 1993 defined cocaine base for purposes of guideline application to be limited to crack cocaine because the legislative history of the 1986 Act strongly suggested that crack cocaine was Congress’s primary concern.²²¹

The Commission further recommends that Congress amend the statutory penalties

²¹⁹ USSC, *supra* note 1; *supra* note 2.

²²⁰ Appendix A, at A9, shows how the sentencing guidelines might possibly be amended in response to a repeal of the mandatory minimum penalty for simple possession of crack cocaine.

²²¹ Specifically, the Commission added the following definition to the notes following the Drug Quantity Table in USSG §2D1.1(c): “‘Cocaine base,’ for purposes of this guideline, means ‘crack.’ ‘Crack’ is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.” USSG, App. C (amend. 487) (effective Nov. 1, 1993).

provisions similarly to limit application of the heightened mandatory minimum penalties to crack cocaine, and equate the penalties for trafficking offenses involving other forms of cocaine base that do not present the heightened concerns associated with crack cocaine with the penalties for powder cocaine.

2. Penalties for Powder Cocaine

The Commission unanimously concludes, further, that a restructuring of federal cocaine policy should *not* include an increase in the statutory *mandatory minimum penalties* for powder cocaine offenses, as some have proposed. Some have suggested that Congress and the Commission should address the differential treatment of crack cocaine and powder cocaine offenses by increasing the quantity-based penalties for powder cocaine offenses,²²² but others have cautioned against that approach.²²³

The Commission finds that there are insufficient reasons to justify an increase in the statutory, quantity-based penalties for powder cocaine offenses. First, and most important, there does not appear to be evidence that the current quantity-based penalties for powder cocaine offenses are inadequate. At the Commission's public hearing on the subject on March 19, 2002,

²²² See, e.g., the 1997 Commission Report (recommending that Congress decrease the five-year quantity threshold for powder cocaine offenses to a level between 125 and 375 grams); S. 1847, the Drug Sentencing Reform Act of 2001 (proposing to decrease the five-year quantity threshold quantity for powder cocaine offenses to 400 grams); Attorney General Janet Reno & Barry R. McCaffrey, Director, Office of National Drug Control Policy, letter to President Clinton: Crack and Powder Cocaine Sentencing Policy in the Federal Criminal Justice System (July 3, 1997) (recommending decreasing the five-year quantity threshold for powder cocaine offenses to 250 grams); see also *supra* note 11; see written statement of Larry D. Thompson, *supra* note 178, at 14 (“We believe it would be more appropriate to address the differential between crack and powder penalties by recommending that penalties for powder cocaine be increased.”).

²²³ See, e.g., written statement by 28 United States Circuit Court of Appeals and District Court Judges who previously served as United States Attorneys to the U.S. Sentencing Commission, April 15, 2002 (“We disagree with those who suggest that the disparity in treatment of powder and crack cocaine should be remedied by altering the penalties relating to powder cocaine. The penalties for powder cocaine, both mandatory minimum and guideline sentences, are severe and should not be increased); Judge Martin, Jr. et al., *supra* note 7, at 2 (“[W]e do not believe there is any reason to increase the severity of the penalties for those who deal in powder cocaine”); written statement by Julie Stewart, President, Families Against Mandatory Minimums Foundation, to the U.S. Sentencing Commission, regarding Drug Penalties, March 26, 2002, at 4; Henderson, *supra* note 9, at 7; Kamasaki, *supra* note 10, at 6; written statement by Ronald Weich, American Bar Association, to the U.S. Sentencing Commission, regarding Drug Penalties, Feb. 26, 2002, at 11.

Deputy Attorney General Larry Thompson testified that he was “not aware of any specific information we have regarding the fact that the existing powder penalties are too low.”²²⁴

To the contrary, even though the quantities of powder cocaine required to trigger the mandatory minimum penalties are 100 times greater than the quantities of crack cocaine, powder cocaine penalties create some of the same problematic results. For example, in 2000 the majority of federal powder cocaine offenders – 60 percent – performed relatively low-level trafficking functions (street-level dealers or couriers/mules) much like federal crack cocaine offenders. (See Fig. 4.) Conversely, only 5.8 percent of federal powder cocaine offenders performed trafficking functions (manager, supervisor) that are most consistent with the functions described in the Subcommittee report as warranting a five-year penalty, and only 19.0 percent performed trafficking functions (importer, high-level supplier, organizer, leader, wholesaler) most consistent with the functions described as warranting a ten-year penalty.

Second, the Commission is mindful of the impact an increase in the mandatory minimum penalties for powder cocaine would have on minority populations, particularly Hispanics. One-half of federal powder cocaine offenders in 2000 were Hispanic, and 30.5 percent were black. In addressing certain perceived disparities associated with crack cocaine penalties, Congress and the Commission must be careful not to create new perceptions that could undermine the confidence of some in a restructured federal cocaine sentencing policy.

Third, the Commission believes that an increase in powder cocaine penalties should promote sentencing proportionality to a greater degree than can be accomplished by simply raising the mandatory minimum penalties. Specifically, the Commission proposes that Congress increase powder cocaine penalties by directing the Commission to promulgate the specific sentencing enhancements described in the preceding section. Those enhancements would apply across all drug types, including powder cocaine.

Particularly relevant to powder cocaine, the proposed importation enhancement would affect 17.4 percent of powder cocaine offenses and increase the sentences of those *affected* from 80 months to 99 months.²²⁵ This enhancement would reflect the fact that powder cocaine importers should reasonably foresee that at least some portion of the quantity imported will be converted into crack cocaine, as well as their increased culpability for introducing the illegal substance into the country. The proposed enhancements as a package would increase the average sentence for *all* powder cocaine offenses by ten months, from 74 months to 84 months.²²⁶

²²⁴ Statement of Larry Thompson, Deputy Attorney General, Department of Justice, to the U.S. Sentencing Commission, regarding Drug Penalties, March 19, 2002, at Tr. 71.

²²⁵ See Appendix B, at B2.

²²⁶ See Appendix B, tbl. B2, at B4.

D. CONCLUSION

The Commission hopes that the information contained in this report contributes meaningfully to the ongoing assessment of federal cocaine sentencing policy by Congress and others in the federal criminal justice system. The Commission is eager to continue its work with Congress to develop the most appropriate and effective federal cocaine sentencing policy possible and believes that the recommendations outlined in this chapter and the model sentencing guideline implementation of those recommendations shown in Appendix A represent significant steps toward that end.