

CHAIR
Wm. T. Robinson III
wrobinson@fbtlaw.com

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ABA DAY IN WASHINGTON
PLANNING COMMITTEELaurel G. Bellows, Chair
lbellows@bellowspc.com

March 9, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Senate Russell Building
Washington, DC 20510

Dear Chairman Leahy:

We understand that the Senate Judiciary Committee will soon consider S. 1789, the Fair Sentencing Act of 2009. I write on behalf of the American Bar Association (ABA), with almost 400,000 members nationwide, to express our strong support for this bill. It represents long-overdue and urgently needed reform. Introduced by Senator Dick Durbin (D-IL), S. 1789 would eliminate the cocaine sentencing disparity and recalibrate federal law enforcement priorities to target high-level drug operators instead of users and low-level offenders. By ending the federal cocaine sentencing disparity, Congress will take a singularly significant step to address manifest unfairness in the sentencing process and to reduce racial disparities in the federal justice system. We urge the Committee to act promptly to approve this reform and to reject weakening amendments.

Few issues, and no comparable federal sentencing policies, have been studied more carefully than federal sentencing for cocaine offenses. Since the 1986 statutory enactment and 1988 amendment creating a 100:1 ratio for crack versus powder cocaine drug thresholds triggering federal mandatory minimum sentences, the United States Sentencing Commission (USSC) has tracked sentencing and individual offender characteristics on a yearly basis. The USSC had issued four comprehensive reports to Congress on cocaine sentencing policy, the first in 1995, in which the Commission found that the sentencing disparity in treatment of the two forms of cocaine was resulting in severe sentencing for offenders who were overwhelmingly African American and "low-level offenders," results that are inconsistent with fundamental principles of fair and equal sentencing under the law. It also concluded that the disparity could not be justified by the factual and scientific knowledge we had gained since enactment. Those fundamental failings of the law persist.

GOVERNMENTAL AFFAIRS OFFICE

DIRECTOR
Thomas M. Susman
(202) 662-1765
susmant@staff.abanet.orgDEPUTY DIRECTOR
Denise A. Cardman
cardmand@staff.abanet.orgSENIOR LEGISLATIVE COUNSEL
R. Larson Frisby
frisbyr@staff.abanet.orgLillian B. Gaskin
gaskinl@staff.abanet.orgLEGISLATIVE COUNSEL
Ann Carmichael
carmicha@staff.abanet.orgKristi Gaines
gainesk@staff.abanet.orgKirra L. Jarratt
jarratk@staff.abanet.orgE. Bruce Nicholson
nicholsonb@staff.abanet.orgLEGISLATIVE COUNSEL/DIRECTOR
GRASSROOTS OPERATIONS
Julie M. Strandlie
jstrandlie@staff.abanet.orgLEGISLATIVE COUNSEL/
DIRECTOR OF STATE LEGISLATION
Kenneth J. Goldsmith
goldsmithk@staff.abanet.orgINTELLECTUAL PROPERTY
LAW CONSULTANT
Hayden Gregory
gregoryh@staff.abanet.orgLEGISLATIVE COORDINATOR
Jared D. Hess
hessj@staff.abanet.org

In response to that 1995 USSC report, the ABA House of Delegates adopted a policy recommendation that squarely endorsed the USSC proposal to equalize quantity thresholds for crack and powder offenses and called on Congress to enact legislation to eliminate the sentencing disparity between crack and powder cocaine offenses. In its most recent May 2007 report on federal cocaine sentencing policy, the USSC again called on Congress to reform sentences for crack cocaine offenses. We continue to share the Commission's conclusion that it is urgent that Congress address the unfairness of this law.

The USSC recommendations include:

- raising the crack cocaine quantities that trigger the five-year and ten-year mandatory minimum sentences to focus penalties on serious and major traffickers;
- repealing the mandatory minimum penalty for simple possession of crack cocaine; and
- rejecting legislation that addresses the drug quantity disparity between crack and powder cocaine by lowering the powder cocaine quantities that trigger mandatory minimum sentences.

The enactment of S. 1789 would fully implement the USSC recommendations and the ABA policy reform goals.

The federal sentencing policies enacted by Congress in 1986 and 1988 as part of the Anti-Drug Abuse Acts created a 100-to-1 quantity sentencing disparity between crack and powder cocaine, which are pharmacologically identical drugs. This means that crimes involving just five grams of crack, 10 to 50 doses, receive the same five-year mandatory minimum prison sentence as crimes involving 500 grams of powder cocaine, 2,500 to 5,000 doses. Many myths about crack cocaine were perpetuated in the late 1980s that claimed, for example, that crack cocaine caused violent behavior or that it was instantly addictive. Since then, research and extensive analysis by the USSC and others have revealed that these assertions are not supported by sound evidence and, in retrospect, were exaggerated or simply false.

Although the myths perpetuated in the 1980s about crack cocaine have proved false, the disparate impact of this sentencing policy on the African American community continues to grow. Our 1995 policy, which supports treating crack and powder cocaine offenses similarly, was developed in recognition that the different treatment of these offenses has a “clearly discriminatory effect on minority defendants convicted of crack offenses.” According to the 2007 report by the USSC, African Americans *constituted 82% of those sentenced* under federal crack cocaine laws, although 66% of those who use crack cocaine are Caucasian or Hispanic. This prosecutorial disparity between crack and powder cocaine results in African Americans spending substantially more time in federal prisons for drug offenses than Caucasian offenders. Indeed, the Commission reported that revising the crack cocaine threshold would do more to reduce the sentencing gap between African Americans and Caucasians “than any other single policy change” and would “dramatically improve the fairness of the federal sentencing system.”

We agree with the USSC's careful analysis that the present 100-to-1 quantity ratio is unwarranted and results in penalties that apply too frequently to low-level offenders, overstate the seriousness of the offenses, and produce a large racial disparity in sentencing. Federal cocaine sentencing policy "...continues to come under almost universal criticism from representatives of the judiciary, criminal justice practitioners, academics, and community interest groups," according to the USSC report. "[I]naction in this area is of increasing concern to many, including the Commission." Congress needs to face this problem and take steps to correct the gross unfairness that has been the legacy of the 100-to-1 ratio.

The Committee is expected to consider amendments that would maintain a sentencing disparity for the crack versus powder forms of cocaine on a 20:1 threshold ratio. This proposal would move the current 5-year mandatory minimum sentence threshold up to 5 percent of the powder threshold, maintaining 95% of the existing sentencing disparity. This adjustment would not significantly shift the current unwarranted federal role that diverts limited federal law enforcement resources from prosecutions of high-level traffickers and kingpins to low-level crack cocaine offenders, nor would it likely significantly impact the unjustifiable racial disparities in federal sentencing that result from the disparity.

In addition, we also urge you to vote NO on any amendment offered during mark-up that establishes new mandatory minimum sentences or fails to protect defendants with limited culpability from harsh mandatory minimum sentences. Mandatory minimum sentences strip judges of the ability to exercise discretion based on the individual facts of each case, often resulting in overly harsh punishment for low-level offenders.

It is time for Congress to take action to end this unjust disparity and to restore fairness and a sound foundation to federal sentencing policy regarding cocaine offenses. The ABA urges the Committee to support equalization of crack and powder offenses at the current thresholds for powder cocaine and to reject amendments that would maintain a sentencing disparity for the two forms of the drug. We urge you to approve this important reform so that it may soon be passed by the full Senate and enacted into law.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

cc: Members of the Committee