

April 2018

## Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution

Drew S. Days III

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

### Recommended Citation

Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 Me. L. Rev. 179 (2018).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol48/iss2/2>

This Lecture is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

RACE AND THE FEDERAL CRIMINAL  
JUSTICE SYSTEM: A LOOK AT THE  
ISSUE OF SELECTIVE PROSECUTION

*Drew S. Days III*

I. INTRODUCTION ..... 181

II. SELECTIVE FEDERAL CRIMINAL PROSECUTION BASED  
ON RACE ..... 181

    A. *Prosecution of Crack Offenders* ..... 184

    B. *Federal Sentencing Disparities Between Crack and  
        Powder Cocaine Offenses* ..... 189

    C. *Capital Punishment* ..... 193

III. CONCLUSION..... 195

## RACE AND THE FEDERAL CRIMINAL JUSTICE SYSTEM: A LOOK AT THE ISSUE OF SELECTIVE PROSECUTION

*Drew S. Days III\**

### I. INTRODUCTION

Judge and Mrs. Coffin, Dean Zillman, members of the faculty, staff and student body of the School of Law, other distinguished members of the Maine bench and bar, ladies and gentlemen: It is truly an honor to have been invited to give this year's Coffin Lecture on Law and Public Service. I know that my former colleague at the NAACP Legal Defense Fund, Professor Melvyn Zarr, and my law school classmate, Professor Martin Rogoff, played a significant role in making this visit possible and, for that, I am profoundly grateful.

As most of you are aware, Judge Coffin enjoys a distinction shared by very few other Americans, that of having served in all three branches of the federal government during his outstanding career. I cannot think of anyone who embodies more than he does the ideal of the dedicated, effective, and compassionate public servant. I want to express a more particularized thanks to Judge Coffin, however. As one who has spent many years as an appellate advocate and who now devotes substantial time as Solicitor General to arguing cases before the Supreme Court or supervising a staff of talented lawyers who also appear before the Court on a regular basis, I think that I am in a good position to note Judge Coffin's active interest in the character and quality of oral argument and his thoughtful writings and lectures on appellate advocacy.<sup>1</sup> His efforts in this regard, I can assure you, have had an important and lasting impact on the professional development of thousands of lawyers.

### II. SELECTIVE FEDERAL CRIMINAL PROSECUTION BASED ON RACE

I have selected as the topic for my lecture "Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution" because I want to explore with you one of the most difficult and troubling questions that an important group of public servants, federal prosecutors, face today in carrying out their responsibilities. My credentials are not those of a front-line courtroom prosecutor. Indeed, those familiar with my background as a civil rights lawyer at the NAACP Legal Defense Fund and as Assistant Attorney General for Civil Rights in the Carter Administration may find it diffi-

---

\* Solicitor General of the United States.

1. See, e.g., FRANK M. COFFIN, A LEXICON OF ORAL ADVOCACY (1984).

cult to view me as a prosecutor at all. But, as head of the Civil Rights Division, I authorized and supervised hundreds of prosecutions of law enforcement personnel for constitutional violations, and of private persons for violating the civil rights of others by subjecting them to conditions of peonage or involuntary servitude. With a few exceptions, the Division's prosecutorial authority comes from statutes passed just after the Civil War, with the protection of newly freed slaves in mind.<sup>2</sup>

In my new capacity as Solicitor General, I am much more removed from the prosecutorial process at the trial level but bear ultimate responsibility in the appellate courts for many prosecutorial decisions made at lower levels in the federal criminal enforcement process. I become involved at the Supreme Court stage in determining whether the United States will seek review of adverse lower court rulings, both criminal and civil, and what arguments the government will make in such cases, as well as in response to the numerous filings in the Supreme Court made by those who have lost to the government below. The vast majority of such petitions are from convicted federal defendants. Members of my staff and I argue the government's cases in the Court, as well as participate often in oral argument in non-government cases where we have filed an amicus brief. Each Term, the Solicitor General and his staff argue in about two-thirds of the cases heard by the Court. The Solicitor General also must approve all government appeals (with a few minor exceptions) from the district courts.

In the Supreme Court's recently ended Term, my office was involved in federal criminal cases presenting a range of issues from conspiracy, false statements, sentencing, and obstruction of justice, to Congress's power under the Commerce Clause to criminalize gun possession on school grounds. And we participated in several non-government criminal cases raising questions about the constitutional status of "knock and announce" requirements and the applicability of the exclusionary rule to circumstances where court, rather than police, errors resulted in arguably illegal arrests.

During these years of service in the Justice Department, I have had an opportunity to work with hundreds of dedicated prosecutors—women and men, of all races and creeds, in Main Justice and in the United States Attorneys' offices around the country—who are committed to ensuring that all Americans are afforded the protection of the federal laws and Constitution, and that violators of those laws are subjected to even-handed justice in our courts. As a group, they have shown special concern for the degree to which drug trafficking and attendant violence in recent years have taken a

---

2. See, e.g., Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866); Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871); Civil Rights Act of 1875, 18 Stat. 336 (1875).

disproportionate toll in African-American and other minority communities across the country.

Unless there is vigorous enforcement of the law, swift punishment for predatory criminals irrespective of race, and procedures for making restitution to the victims of crime, it is difficult to imagine how African-American communities, especially in our major urban centers, can serve as viable environments for the normal activities of life, such as education, employment, economic development, and entertainment. Consequently, any suggestion that the enormous power of the government is being used in a selective and discriminatory fashion to prosecute and punish blacks more often or more severely than whites places in doubt the validity of the entire enterprise. It is a charge that we are, in effect, part of the problem rather than part of the solution; that we are contributing not to the improvement of the quality of life in black communities but rather to the destruction of those communities.

Certainly, selective prosecutions on the basis of race, color, or national origin have occurred in our history as a nation. One has only to recall the famous case of *Yick Wo v. Hopkins*<sup>3</sup> in the 1880s, where the Supreme Court found that San Francisco authorities were selectively enforcing against resident Chinese, but almost never against whites, laws prohibiting the location of hand laundries in wooden structures. There, the Court found that the law was being administered "with an evil eye and an unequal hand."<sup>4</sup> *Yick Wo* and other similar cases in the past have taught that to the extent such violations of constitutional rights are not dealt with promptly and firmly, all law enforcement efforts undoubtedly suffer thereafter. Failure to take corrective action will likely result in similar charges being leveled at perfectly sound and legitimate prosecutions, and in the questioning of the overall credibility of the criminal justice system. As has often been noted, the support of the citizens for our judicial system depends not only upon its being fair in fact, but on its appearing to be fair as well. The Department's publicly-available *Principles of Federal Prosecution*, promulgated originally in 1980 by the Carter Administration, captures this point well in the following words:

The availability of this statement of Principles to federal law enforcement officials and to the public serves two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case.<sup>5</sup>

---

3. 118 U.S. 356 (1886).

4. *Id.* at 373-74.

5. UNITED STATES DEP'T OF JUSTICE, REVISED PRINCIPLES OF FEDERAL PROSECUTION 1-2 (1993).

That is why we in the Department of Justice are extremely concerned about charges of selective prosecution on the basis of race in the federal criminal justice system in three specific areas: (1) the prosecution of crack offenders; (2) the imposition of significantly harsher penalties for crack, as opposed to cocaine powder, offenses; and (3) decisions with respect to seeking the death penalty. In each of these areas, the Attorney General and other top Justice Department officials have gone to great lengths to evaluate these claims and have found no basis for believing that they accurately describe the way in which federal prosecutorial decisions are made. Nevertheless, we also believe that federal prosecution practices should be the subject of ongoing research and review to ensure that they are consistent with constitutional norms and the policies of the Clinton Administration.

#### A. *Prosecution of Crack Offenders*

A recent decision by the United States Court of Appeals for the Ninth Circuit in a case called *United States v. Armstrong*<sup>6</sup> has spawned a number of selective prosecution claims by African-American defendants charged with crack cocaine offenses. *Armstrong* presents the question of what degree of evidence a defendant must adduce to justify an order requiring discovery from the government on a claim of selective prosecution. In *Armstrong*, five black defendants indicted in the Central District of California (which includes Los Angeles County) on various crack charges alleged that the U.S. Attorney's Office had determined to prosecute them because of their race.<sup>7</sup> These prosecutions involved more than twice the quantity necessary to trigger ten-year mandatory sentences; there were multiple sales involving multiple defendants, thereby indicating a substantial crack cocaine ring; there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence was extremely strong, including audio and videotapes of the defendants; threats had been made to the arresting officers by one of the defendants; and several of the defendants had criminal histories including narcotics and firearm violations. In support of their motion for discovery, the defendants offered only one item of evidentiary support—an affidavit from a paralegal employed by the Federal Public Defender (FPD) stating that, in 1991, all of the 24 defendants in crack cases closed by the FPD were black.<sup>8</sup> The defendants asserted that this statistic alone lent support to their claim that blacks, but not whites, were being prosecuted federally rather than by the state to ensure that they would be subject to the

---

6. 48 F.3d 1508 (9th Cir. 1995) (en banc), *petition for cert. filed*, 63 U.S.L.W. 2581 (U.S. July 27, 1995) (No. 95-157).

7. *Id.* at 1511.

8. *Id.*

stiffer federal sentences if convicted. The district court found this showing sufficient to justify discovery, a ruling that was upheld by the Ninth Circuit.<sup>9</sup>

In the view of the Justice Department, the Ninth Circuit's ruling in *Armstrong* significantly relaxed the previously-accepted standard that defendants had to meet before they would be entitled to discovery on a selective prosecution claim. In the past, defendants were required to show the existence of similarly situated non-minority defendants who were not prosecuted.<sup>10</sup> Because discovery on these issues is extremely burdensome and time-consuming, and may require the government to disclose internal information typically thought to fall within the wide discretionary berth afforded to prosecutors, *Armstrong* raised an issue of substantial importance to federal law enforcement. As a consequence, I recently authorized a government petition to the Supreme Court to accept the *Armstrong* case for review in hopes of obtaining a reversal of the Ninth Circuit's decision.

In *United States v. Henry*,<sup>11</sup> another recent case from the Central District of California, two defendants charged with crack cocaine trafficking offenses sought an order compelling discovery in connection with their claim that the government had chosen to prosecute them because they were black and Hispanic. The defendants relied primarily on a study purporting to show a statistically significant disparity between the numbers of whites prosecuted for cocaine-based offenses in state court, as opposed to federal court, for the years 1989 through 1991. They also relied on the Federal Public Defender affidavit that had been offered in *Armstrong*. The government filed an extensive response to the motion including numerous affidavits and supporting documentation explaining specifically the basis on which these particular defendants were targeted for prosecution

---

9. *Id.* at 1520.

10. *Wayte v. United States*, 470 U.S. 598, 608-10 (1985). For general discussions of the selective prosecution doctrine, see P.S. Kane, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293 (1993); Ellen S. Podgor & Jeffrey S. Weiner, *Prosecutorial Misconduct: Alive and Well, and Living in Indiana?*, 3 GEO. J. LEGAL ETHICS 657 (1990); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365 (1987); Tobin J. Romero, *Project: Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994*, 83 GEO. L.J. 665, 839 (1995); Gary D. Sarles, *First Amendment and Equal Protection—Selective Service or Prosecution for the "Vocal" Nonregistrants?*, 76 J. CRIM. L. & CRIMINOLOGY 856 (1985); Peter M. Shane, *Equal Protection, Free Speech, and the Selective Prosecution of Draft Nonregistrants*, 72 IOWA L. REV. 359 (1987); William G. Bernhard, Note, *Constitutional Law: The Conflict of First Amendment Rights and the Motive Requirement in Selective Enforcement Cases*, 39 OKLA. L. REV. 498 (1986); Barry Lynn Creech, Note, *And Justice For All: Wayte v. United States and the Defense of Selective Prosecution*, 64 N.C. L. REV. 385 (1986).

11. No. CR 94-628-CBM (C.D. Cal. 1995).

and, more generally, the race-neutral criteria used to determine which offenders will be federally prosecuted. In this case, unlike in *Armstrong*, the district court denied the defendants' motion. *Henry*, however, is an example of the enormous investment of resources required by motions of this nature—roughly 1000 attorney-hours were required to produce the government's response.<sup>12</sup>

The selective prosecution issue raised in *Armstrong* and *Henry* is an important and recurring one. As of July 1995, there were dozens of selective prosecution motions at various stages of litigation in the Ninth Circuit alone.<sup>13</sup> The overwhelming majority of these are either crack cases of the *Armstrong* type or immigration cases involving alien Latino defendants charged with reentering the United States after having been deported in connection with felony convictions.<sup>14</sup> The government's opposing submissions in these cases generally have become significantly more lengthy, and typically include statistical data, information concerning the charging practices of the U.S. Attorney's Office, and affidavits from law enforcement officers involved in the particular prosecution. These developments certainly lend credence to the Supreme Court's observation that criminal defendants "often will transform [their] resentment at being prosecuted into the ascription of improper and malicious actions to the [government's] advocate."<sup>15</sup> We feel confident that the Ninth Circuit's decision in *Armstrong* was wrong and that the trial court's rejection of the selective prosecution claim in *Henry* reinforces that conclusion.

There is no denying, however, that nationwide statistics on federal crack cocaine prosecutions by race are rather stark: Blacks comprise 90% and whites just under 4% of crack defendants.<sup>16</sup> Moreover, there appears to be a significant disparity between the percentage of African-Americans who use illicit drugs in a given year and those arrested for drug crimes who are African-American.<sup>17</sup> And, finally, some have claimed, as did the defendants in *Armstrong* and *Henry*, that crack defendants who are black are more likely to be prosecuted federally (and therefore are subject to

---

12. See Petition for a Writ of Certiorari, *United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995) (No. 95-157) (July 1995), at 23 n.3.

13. *Id.* at 22 n.2, 24 n.4 (citing 34 cases in the Ninth Circuit).

14. *Id.* See also 8 U.S.C. § 1326 (1988).

15. *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976).

16. U.S. SENTENCING COMMISSION, ANNUAL REPORT 107 (1994) [hereinafter ANNUAL REPORT].

17. Compare SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., U.S. DEPT OF HEALTH AND HUMAN SERVICES, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1993 17, 19 (1994) [hereinafter HOUSEHOLD SURVEY] (reporting that approximately 12% of Americans who used illicit drugs in 1993 were African-American) with Federal Bureau of Investigation, *Uniform Crime Reports* (1994) (reporting that approximately 39% of those arrested in a year for drug crimes are African-American).



harsher penalties under the Sentencing Guidelines and mandatory minimums), while whites are more likely to be prosecuted by state law enforcement. Our response to these data and allegations has not been to brush them aside but rather to explore their implications and to develop the most reliable empirical information possible to ensure that the federal government is acting fairly in this regard on a national basis.

On the issue of the disparity between African-American drug use and drug arrest statistics, we think that there may be several reasons to question its significance. To date, there has been no single national study conducted which compares the race of drug users and drug sellers, and it is problematic to compare the results of studies that sample different populations, use different methodologies, and do not control for the same variables. Moreover, race need not be the only explanation for any disparity, because there is empirical data to support the belief that the populations of drug users and sellers are not coextensive, and that the percentages of persons of a particular race who use a drug and who sell the drug may be very different.<sup>18</sup> There is also evidence that, for historical and socioeconomic reasons, members of a particular race may dominate trafficking in particular drugs. For example, of those defendants sentenced federally in 1994, approximately 73% of methamphetamine defendants were white; 93% of LSD defendants were white; and 44% of marijuana defendants were white, 51% Hispanic, and 4% black.<sup>19</sup>

In order to determine whether race plays a part in arrest decisions, it is important to control for variables other than race that may affect a person's risk of arrest. One such factor is the type of drug used. Data provided by the Office of Policy Development (OPD) at the Department of Justice show that cocaine and heroin users are anywhere between four times (at the most conservative estimate) and nine times more likely to be arrested in a given year than are marijuana users. The OPD has found that this differential holds across racial groups; that is, members of all races are more likely to be arrested for cocaine or heroin use. African-Americans account for a disproportionate percentage of users of those drugs that carry the highest risks of arrest.

A second non-race variable that may affect the risk of arrest is the frequency of drug use. Criminologists agree that the more a person uses drugs, the greater the risk of arrest. This is not just a simple arithmetic equivalency either, because frequent drug use correlates with practices that themselves increase the risk of arrest, such as possessing larger amounts of the drug, associating with other users,

---

18. Compare U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 79-83 (1995) [hereinafter SPECIAL REPORT] with HOUSEHOLD SURVEY, *supra* note 17, at 114-15.

19. ANNUAL REPORT, *supra* note 16, at 107.

and committing other crimes to support drug habits. Survey data suggest that African-American drug users are likely to use drugs more frequently than whites.<sup>20</sup> Consequently, the percentage of African-American users probably significantly undercounts the total drug use of that population.

A third variable that may affect arrest rates is the geographic location of drug use. Data provided by the OPD show that the risk of arrest for a drug user living in a Metropolitan Statistical Area (MSA) of over one million is more than twice as high as the risk for a user living in a non-MSA (rural county). Again, this difference holds true across racial groups. The data also show that the African-American population is disproportionately concentrated in large metropolitan areas. More to the point, the African-American *drug user* population is disproportionately concentrated in the large metropolitan areas that carry the highest risks of arrest.

I realize that these realities with respect to the impact of drugs on African-Americans are unpleasant to confront. But ignoring them will not make them go away. The fact is that the African-American community is being ravaged by trafficking in crack cocaine. A 1994 report found, for example, that 71.5% of emergency room admissions for crack-related problems involved blacks.<sup>21</sup> Moreover, blacks comprise over 69% of the admissions for treatment for crack abuse, whereas whites comprise only 24%.<sup>22</sup>

With respect to the federal/state prosecution issue, the data are very incomplete. Although the U.S. Sentencing Commission publishes detailed information about federal defendants sentenced for crack, there is no comparable information available for defendants prosecuted or sentenced for crack at the state level. Relevant state statistics are particularly hard to come by because the majority of states do not distinguish between crack and powder cocaine for penalty or record-keeping purposes. In response to a request by the Sentencing Commission for crack data, only three states were able to provide even a statistic on the total number of crack cases handled in a year.<sup>23</sup>

In view of this dearth of pertinent information, there is a clear need to explore the availability of state data and to assess what would be required to undertake a 50-state study of crack offenders. It will not be adequate, however, simply to compare the number and

---

20. See, e.g., HOUSEHOLD SURVEY, *supra* note 17, at 108-09, 114-15.

21. DRUG ENFORCEMENT AGENCY, INTELLIGENCE DIVISION, CRACK COCAINE INTELLIGENCE REPORT 22 (1994).

22. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., U.S. DEP'T OF HEALTH AND HUM. SERVICES, PERCENT DISTRIBUTION OF ADMISSIONS TO TREATMENT BY SEX, AGE, AND RACE/ETHNICITY (October 1992-September 1993) (unpublished chart, on file with *Maine Law Review*).

23. SPECIAL REPORT, *supra* note 18, at 138 (only South Carolina, Minnesota, and Virginia could provide statistics on the number of crack cocaine cases).

race of crack defendants at the federal and state levels. In order to permit fair comparisons, any study must control for key variables such as criminal history, possession versus distribution, whether a gun was used, and the amount of the drug involved. Those variables may be relevant to any apparent disparities between state and federal prosecutions.

The bottom line of all I have said thus far is that we are making serious and concerted efforts to locate explanations for nation-wide federal prosecution figures that appear, at a superficial level, to be out of line from a racial perspective.

### *B. Federal Sentencing Disparities Between Crack and Powder Cocaine Offenses*

The second area of concern arises with respect to the disparity between penalties under federal law for crack and powder cocaine offenses. The Sentencing Reform Act of 1984<sup>24</sup> was enacted by Congress to promote "the rationalization and lessening of disparity among criminal sentences."<sup>25</sup> Under the prior system of indeterminate sentencing of federal defendants, the only restriction on judges was that they not impose sentences which exceeded the statutory maximum terms of imprisonment. The United States Sentencing Commission was created, as part of that legislation, to promulgate, and periodically to review and revise, determinative sentence guidelines.<sup>26</sup> Under the current federal Sentencing Guidelines, narcotics offenses involving one gram of crack cocaine are punished as severely as equivalent offenses involving 100 grams of powder cocaine.<sup>27</sup> That disparity has been the subject of frequent criticism from various quarters on the ground that the 100-to-1 powder/crack sentencing ratio has an unfair impact on racial minorities.<sup>28</sup> The argument is that because, as a statistical matter, minorities are more

---

24. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3625 and 28 U.S.C. §§ 991-998).

25. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 32 (1988).

26. 28 U.S.C. § 994 (1988). See also *Mistretta v. United States*, 488 U.S. 361, 369 (1989); G. KATZMAN, *INSIDE THE CRIMINAL PROCESS* 358-85 (1991).

27. 18 U.S.S.G. § 2D1.1(c) (Drug Quantity Table).

28. See, e.g., Kimberly Mache Maxwell, *A Disparity That is Worlds Apart: The Federal Sentencing Guidelines Treatment of Crack Cocaine and Powder Cocaine*, RACE & ETHNIC ANCESTRY L. DIG. 21 (Apr. 1995); Henry J. Reske, *Congress Asked to Lower Crack Penalties*, A.B.A. J., July 1995, at 30; Jerome H. Skolnick, *Racial Bias is Built Into the Law*, BALTIMORE SUN, June 21, 1995, at 15A; Ari Armstrong, *Crack Cocaine: Make the Sentencing Fair*, WASH. POST, Aug. 15, 1995, at A17; *Cocaine: Crack and Powder*, WASH. POST, Mar. 10, 1995, at A20; *Facing Up to Crack Injustice*, N.Y. TIMES, Apr. 19, 1995, at A22; Toni Locy, *Panel Plans to Amend Sentencing Disparity for Crack Dealers*, WASH. POST, Mar. 1, 1995, at D3; Bill Rankin, *Crack Cocaine Law Declared Racist, Illegal Harsh Penalties Imposed on Blacks*, ATLANTA J. & CONST., Feb. 19, 1994, at A1.

likely to use and sell crack cocaine, while non-minorities are more likely to use and sell powder cocaine, minorities are punished far more severely for equivalent offenses.

Each of the twelve federal circuit courts that has considered a constitutional challenge to the crack/powder sentencing disparity has held that the disparity does not violate the equal protection component of the Fifth Amendment.<sup>29</sup> Those courts generally have agreed that there is no evidence that Congress acted with discriminatory intent when it enacted the sentencing ratio, and that the distinction has a rational basis grounded, among other reasons, in the differing addictiveness of the two forms of the drug, and the different levels of violence associated with their use.

This is not to suggest that these courts, in finding current federal penalties for crack cocaine constitutional, have wholeheartedly endorsed them as a matter of policy. Indeed, in a recent First Circuit decision, in which Judge Coffin joined, the court observed:

Finally, we note that while "[t]he equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is not an obligation to provide the best governance possible," the absence of a constitutional command is not an invitation to government complacency. Although [the defendant] has not established a constitutional violation, he has raised important questions about the efficacy and fairness of our current sentencing policies for offenses involving cocaine substances. We leave the resolution of these matters to the considered judgment of those with the proper authority and institutional capacity.<sup>30</sup>

Responding at least in part to claims of racial bias in sentencing, the United States Sentencing Commission adopted in April 1995, by a 4-3 vote, amendments to the Guidelines that would treat crack and powder cocaine alike, both for trafficking and for simple posses-

---

29. See *United States v. Then*, 56 F.3d 464 (2d Cir. 1995); *United States v. Williamson*, 53 F.3d 1500 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 218 (1995); *United States v. Cherry*, 50 F.3d 338 (5th Cir. 1995); *United States v. Johnson*, 40 F.3d 436 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1412 (1995); *United States v. Lewis*, 40 F.3d 1325 (1st Cir. 1994); *United States v. Harden*, 37 F.3d 595 (11th Cir. 1994); *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995); *United States v. Coleman*, 24 F.3d 37 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 261 (1994); *United States v. D'Anjou*, 16 F.3d 604 (4th Cir. 1994), *cert. denied*, 114 S. Ct. 2754 (1994); *United States v. Lloyd*, 10 F.3d 1197 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1569 (1994); *United States v. Frazier*, 981 F.2d 92 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1661 (1993); *United States v. Lawrence*, 951 F.2d 751 (7th Cir. 1991).

30. *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 647 (1994) (footnote omitted) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)). See also, *United States v. Then*, 56 F.3d at 466 (Calabresi, J., concurring).

sion offenses.<sup>31</sup> Specifically, the penalties for crack offenses would be lowered to match the current levels for cocaine powder. Those amendments were submitted to Congress on May 1 and will automatically become effective on November 1, 1995, unless Congress specifically disapproves them.<sup>32</sup> The Commission also submitted a legislative proposal to Congress to eliminate the differential treatment of crack and powder in the mandatory minimum sentences currently provided by statute.<sup>33</sup> The Guidelines' amendments are not contingent on amendment of the minimums, however.

The Department of Justice officially opposes equalization of the penalties for crack and powder offenses for *trafficking* offenses.<sup>34</sup> For example, under the proposed amendments, an individual convicted of distributing fifty grams of crack (about 500 doses)—who currently would receive a mandatory minimum sentence of ten years' imprisonment—would face a Guidelines sentence of just twenty-one to twenty-seven months' imprisonment, and could receive as little as four to ten months' imprisonment, if found to have accepted responsibility for the offense and played a minor role in its commission.<sup>35</sup> The Department's position is that crack is a more dangerous substance than powder and that, assuming that quantity and other factors are identical, crack trafficking therefore is the more serious offense.

The following facts support this conclusion: Crack is more psychologically addictive than powder because it can be readily smoked, and results in quicker and more intense effects for the user.<sup>36</sup>

Those who smoke crack reach maximum physiological effects in approximately two minutes and maximum psychotropic effects in just one minute. In contrast, those who snort cocaine powder reach these effects in 40 and 20 minutes, respectively. Crack that is smoked enters the brain in just 19 seconds, compared to five minutes for cocaine powder that is snorted.

---

31. See U.S. SENTENCING COMMISSION, AMENDMENTS TO THE SENTENCING GUIDELINES (May 1, 1995); Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074 (May 10, 1995) (Amendment 5).

32. See 28 U.S.C. § 994(p) (1988).

33. See *The Crack/Cocaine Penalty Ratio: Recommendations to Congress*, 7 FED. SENTENCING REP. 312, 314 (1995) [hereinafter *Crack/Cocaine Recommendations*].

34. See generally *Crack Cocaine Sentencing: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (forthcoming 1996) [hereinafter *House Hearings*] (statement of Jo Ann Harris, Assistant Attorney General, Criminal Division, U.S. Dept. of Justice); *Examining U.S. Sentencing Commission Recommendations for Cocaine Sentencing: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) [hereinafter *Senate Hearings*] (statement of Jo Ann Harris, Assistant Attorney General, Criminal Division, U.S. Dept. of Justice).

35. *Senate Hearings*, *supra* note 34, at 11.

36. *Id.* at 10.

Smoking crack is also a more efficient absorption route than snorting powder. However, the duration of effect for crack is shorter than for cocaine powder when snorted: 30 minutes, compared to 60 minutes. Duration of effect is significant because it is related to dependency; because of the short but intense nature of the euphoria induced by crack, the user is more likely to administer the drug frequently and in binges. In summary, crack is more psychologically addictive than cocaine powder.<sup>37</sup>

Crack can also easily be broken down and packaged into small, inexpensive quantities for distribution; crack's low cost and high risk of addiction make it especially appealing to the poor and the young, and street-based marketing patterns for crack generate high rates of violence and contribute heavily to the deterioration of communities.<sup>38</sup>

Accordingly, the Department has submitted a legislative proposal to Congress to disapprove the Guidelines' amendments that would equalize the penalties for crack and powder trafficking.<sup>39</sup> That legislation was introduced in the House of Representatives on July 24, 1995. The Department's proposal does *not* disapprove equalization of the penalties for simple possession of crack and powder.<sup>40</sup>

The Department agrees, however, that the current 100-to-1 penalty ratio for trafficking offenses merits reconsideration and possible change.<sup>41</sup> Indeed, as one of the dissenting members of the Commission, on which the Attorney General sits as a non-voting ex officio member, aptly remarked:

Despite the Commission's divided vote on Amendment Five, which proposes to reduce the quantity ratio between powder and crack cocaine to one-to-one, our recent report to Congress *unanimously* rejected the pre-existing 100-to-1 quantity ratio between powder and crack cocaine.<sup>42</sup>

Narrowing the differential would, for example, reflect the fact that cocaine powder can easily be transformed into crack. The Department has not, however, endorsed a specific ratio—it only contends that any ratio must continue to account for the systemic harms associated with crack; that individuals who deal in significant quantities of crack must receive certain incarceration regardless of downward

---

37. *Id.* (citations omitted).

38. *Id.*

39. *Id.* at 12. See also *House Hearings*, *supra* note 34, at 8 (Justice Department Proposed Bill); *Crack/Cocaine Recommendations*, *supra* note 33, at 325-27.

40. *House Hearings*, *supra* note 34, at 8 (Justice Department Proposed Bill); *Crack/Cocaine Recommendations*, *supra* note 33, at 325-27.

41. See *Senate Hearings*, *supra* note 34, at 12.

42. *Crack/Cocaine Recommendations*, *supra* note 33, at 322 (View of Commissioner Goldsmith Dissenting, in Part, from Amendment Five and Related Legislative Recommendation).

adjustments under the Guidelines; and that the ratio must provide for sufficiently harsh sentences to motivate defendants to accept responsibility for their actions and cooperate with law enforcement in the prosecution of others. The Department believes that Congress is in the best position to weigh the policy considerations relating to a particular quantity ratio for the sentencing of crack and powder trafficking offenses.

### C. Capital Punishment

The last area I want to address is that of capital punishment.

Congress reinstituted a federal death penalty in the Anti-Drug Abuse Act of 1988<sup>43</sup> for a limited number of crimes. In the Omnibus Crime Bill of 1994,<sup>44</sup> however, Congress expanded the number of federal capital crimes to more than fifty. In response, the Department of Justice developed this year a detailed protocol setting forth the policies and procedures to be followed in all federal cases in which a defendant is charged with an offense subject to the death penalty.<sup>45</sup> Death penalty guidelines never existed previously at the Justice Department. It should be noted that *prior* to the promulgation of the new protocol, pursuant to motions to dismiss capital indictments based upon selective prosecutions, three United States district courts conducted thorough reviews of all Department of Justice files for all pending or completed prosecutions at the time of each review. None of these courts found any evidence of racial bias or the use of impermissible factors in the decision-making process employed by the Department in capital cases.<sup>46</sup>

For example, in a 1993 ruling, the district court for the Northern District of Georgia observed:

It appears to this court that the decision[s] to seek a death penalty in cases presented to the Attorney General were each based on objective circumstances of each particular case [which] were proper and legitimate grounds for the decision. The records indicate that the decision of the prosecutor and that of the Attorney General did not in any way involve the race of the accused.<sup>47</sup>

---

43. Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

44. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1968-1982 (1994).

45. U.S. DEP'T OF JUSTICE, 3a UNITED STATES ATTORNEYS' MANUAL, § 9-10.000 (1995).

46. United States v. Bradley, No. 1: CR-92-200, Memorandum and Order at 2-8 (M.D. Pa. May 27, 1994); United States v. Brown, No. 92-81127, Order (E.D. Mich. May 24, 1994); United States v. Williams, No. 1:92-CR-142-01, Order Quashing Subpoenas at 2 (N.D. Ga. Jan. 21, 1993) (on file with *Maine Law Review*).

47. United States v. Williams, No. 1:92-CR-142-01, Order Quashing Subpoenas at 2.

And in a 1994 decision from the Western District of Pennsylvania, the court stated that the Department's criteria, policies and procedures "actually demonstrate a heightened concern with ensuring that the death penalty is not unfairly imposed because of race or ethnic origin."<sup>48</sup>

But the history of the death penalty raises sufficiently serious concerns about the potential for racially discriminatory imposition that particularly rigorous safeguards against such practices seem warranted. Indeed, only eight years ago, the Supreme Court, in a five to four decision, upheld against charges of racial discrimination Georgia's system for imposing the death penalty in the case of *McCleskey v. Kemp*.<sup>49</sup> And the federal district court in Pennsylvania remarked that:

[t]hough the documents submitted do not suggest any intent [on the federal government's part] to seek, approve or withdraw requests for the death penalty on racially impermissible grounds, it remains troubled by the skewed statistics revealing that most defendants for whom the death penalty has been sought and/or approved have been black, with an additional few being Hispanics and very few being white.<sup>50</sup>

The new policy is an effort to provide even greater assurance that the decision to seek capital punishment is made fairly and consistently, in a manner free from ethnic, racial, or other invidious discrimination.

The federal death penalty may not be sought without the prior written authorization of the Attorney General.<sup>51</sup> In any case in which the U.S. Attorney has charged, or intends to charge, a defendant with an offense subject to the death penalty, *regardless* of whether the U.S. Attorney actually wishes to seek it, the lead Assistant U.S. Attorney (AUSA) must complete a standard "Death Penalty Evaluation" form.<sup>52</sup> That form requires the AUSA to set out: (1) the theory of prosecution; (2) all statutory aggravating factors for the crime(s) charged; (3) all non-statutory aggravating factors; (4) all statutory mitigating factors; and (5) all non-statutory mitigating factors.<sup>53</sup> The protocol directs the AUSA to enumerate only those aggravating factors that can be proved at a sentencing proceeding beyond a reasonable doubt, but to list *all* mitigating factors that are "reasonably raised by the evidence," or which the defendant is likely to be able to prove by a preponderance of the evi-

---

48. *United States v. Bradley*, No. 1: CR-92-200, Memorandum and Order at 3.

49. 481 U.S. 279 (1987).

50. *United States v. Bradley*, No. 1: CR-92-200, Memorandum and Order at 7.

51. U.S. DEP'T OF JUSTICE, 3a UNITED STATES ATTORNEYS' MANUAL, § 9-10.000, 1 (1995).

52. *Id.* at 2.

53. *Id.* at app. A at 1-15.



dence.<sup>54</sup> Finally, the AUSA must set out a *qualitative* analysis that balances the aggravating and mitigating factors, recommends whether to seek the death penalty, and explains the reasons for that recommendation.<sup>55</sup>

The Death Penalty Evaluation, along with any written material from defense counsel, is then forwarded to a review committee appointed by the Attorney General.<sup>56</sup> Counsel for the defendant is offered the opportunity to present to the Review Committee, orally or in writing, the reasons why the death penalty should not be sought. According to the protocol, the Committee must consider all information presented to it, "including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the federal death penalty."<sup>57</sup> The Committee is required to submit a written recommendation to the Attorney General, who then conducts a separate review and makes the final decision in all cases whether the government will seek the death penalty. The death penalty authorization process is designed to promote consistency and fairness, a goal which is served by the fact that ultimate decisional authority is vested in a single individual, the Attorney General, in all cases.

### III. CONCLUSION

In conclusion, I believe that charges of selective prosecution on the basis of race (or on any other invidious grounds, for that matter) must be taken seriously. But I also think that reason, not rhetoric, should guide our consideration of such charges. Where they prove to be true, the federal government has a constitutional duty to take corrective action. Where they are unjustified, we should be candid in saying so, even though it may involve discussing unpleasant realities about race and crime. Moreover, the efforts of the Sentencing Commission to achieve a reduction in the current 100-to-1 ratio of crack cocaine to cocaine powder sentences—which the Justice Department has endorsed in principle, despite its disagreement with the 1-to-1 ratio—reflect that the federal government is not taking "the absence of a constitutional command [as] an invitation to government complacency."<sup>58</sup> Most important, however, is that the federal government must ensure that adequate procedural mechanisms are in place—such as the Department's new Death Penalty Protocol—to guard against racially discriminatory enforcement of the

---

54. *Id.* at app. A at 3, 9, 11, 13, 15.

55. *Id.* at app. A at 16-17.

56. *Id.* at 2.

57. *Id.*

58. *United States v. Singleton*, 29 F.3d, 733, 741 (1st Cir. 1994).

laws. Our oaths of office as prosecutors and the communities we serve demand no less.

Thank you and good evening.