

# GETTING JUSTICE OFF ITS JUNK FOOD DIET

A White Paper on

Getting Tough on Cocaine Traffickers  
and Fixing the Racial Disparity of Crack Prosecutions

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“GETTING JUSTICE OFF ITS JUNK FOOD DIET”  
– GETTING TOUGH ON COCAINE TRAFFICKERS AND  
FIXING THE RACIAL DISPARITY OF CRACK PROSECUTIONS  
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SUMMARY

- The federal anti-drug role must focus on the highest level traffickers – cases that state and local authorities are not able to investigate.
- There are about 10,000 federal cocaine cases per year while states impose about 340,000 drug felony convictions annually.
- The crack cocaine and powder cocaine trigger quantities of 5, 50, 500 and 5000 grams have misdirected the Justice Department to focus mostly on low level offenders.
- **Only 7 percent of federal cocaine cases are directed at high level traffickers.**
- **One third of all federal cocaine cases involve an average of 52 grams – the weight of a candy bar.**
- The number of black federal crack defendants is ten times the number of white defendants.
- Low level offenders are getting longer sentences than high level offenders. **Street level crack dealers are actually punished 300 times more severely than high level cocaine powder traffickers** on a punishment-per-gram basis.
- There were 467,000 crack users in 2004 compared to 484,000 crack users in 1988.
- Crack is so widespread, in part, because the Federal government is failing to dismantle the international trafficking organizations.

Solutions

1. Raise the mandatory minimum quantity triggers in 21 U.S.C. 841 across the board to realistically high levels.
2. Mandate to U.S. Attorneys that high level cases shall be the new norm.
3. Require a nationwide analysis of the importance of drug cases actually prosecuted.
4. If Congress needs these amendments to be “tougher” as well as effective, it could raise the maximum fines, e.g. from \$20 million to \$75 million for major organizations.

## Disrupting Drug Markets

The policies and programs of the *National Drug Control Strategy* are guided by the fundamental insight that the illegal drug trade is a market, and both users and traffickers are affected by market dynamics. By disrupting this market, the **US Government seeks to undermine the ability of drug suppliers** to meet, expand, and profit from drug demand. When drug supply does not fully meet drug demand, changes in drug price and purity support prevention efforts by making initiation to drug use more difficult. They also contribute to treatment efforts by eroding the abilities of users to sustain their habits.”

– National Drug Control Strategy  
Office of National Drug Control Policy  
The White House  
February 2006,<sup>1</sup> emphasis added

The crack cocaine mandatory minimum quantity triggers hurt the critical and unique market disruption and supply reduction component of the federal anti-drug effort. 5 gram and 50 gram crack cocaine offenders who qualify for mandatory minimum prison terms (21 U.S.C. 841(b)(1)(A) & (B)) are not the important international or national level offenders who must be the focus of the U.S. Government’s effort. Those quantities are tiny in the cocaine trade, and persons who are involved in only such quantities are insignificant players. The 5 gram and 50 gram crack cocaine quantity thresholds have sent the wrong message to DEA agents and US Attorneys’ offices about what is important. One-third of federal cocaine cases involve an average weight of 52 grams of crack, the weight of an ordinary candy bar, according to the U.S. Sentencing Commission.<sup>2</sup>

Congress has repeatedly asked the U.S. Sentencing Commission to study and report on the crack cocaine and powder cocaine 100 to 1 quantity ratio for sentencing. The impetus for these requests has been the perception that federal crack cocaine sentencing has led to

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<sup>1</sup> Office of National Drug Control Policy, The White House, 2006 National Drug Control Strategy, page 17, <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs06/ndcs06.pdf>

<sup>2</sup> Unites States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy, May 2002, (hereafter, USSC 2002 Report to Congress), pp. 38 & 45, [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.htm](http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm)

unwarranted incarceration of African-Americans for very long periods. That concern has been affirmed by the Sentencing Commission – “the impact of [the 100 to 1 drug quantity ratio] falls primarily upon black offenders”<sup>3</sup> – but the report has exposed an equally serious, if not more serious problem: *the federal anti-cocaine effort has been misdirected and ineffective.*

### **Misdirected Effort**

The 2002 U.S. Sentencing Commission report shows that 70 percent of the federal cocaine cases have been brought against the lowest level offenders such as street level dealers, couriers, lookouts, etc. **Only 7 percent have been brought against the highest level dealers,** such as organizers, financiers, etc.<sup>4</sup>

**One-third of all federal cocaine cases involve an average weight of 52 grams – the weight of an ordinary candy bar.** The federal law enforcement agencies and the Justice Department have been distracted by Congress’s low quantity cocaine triggers. **“Candy bar crack cases” are the drug enforcement equivalent of junk food. Like a diet heavy in junk food, federal focus on “candy bar crack cases” has resulted in obesity. The federal courts and prisons are gorged with unimportant cases that do not nourish our anti-drug effort. ONDCP’s National Drug Control Strategy, quoted above, is like the Department of Agriculture’s nutrition guidelines – the right advice, but mostly ignored in practice.**

Not fearing substantial risk of detection or prosecution, high level traffickers pour cocaine into the United States in cargo container quantities, almost undiminished after two decades and hundreds of billions of dollars of federal effort. The Voice of America, for example, reported on June 27, 2006, that 1.3 metric tons of cocaine were seized from a cargo container in

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<sup>3</sup> id., p. viii.

<sup>4</sup> id., figure 6, page 39.

Caracas.<sup>5</sup>

Thus many parts of the nation struggle with the consequences of the flood of cocaine from outside the U.S. In May 2006, for example, crack dealing and related violence was reported growing rapidly in West Virginia, a state with historically low violence rates.<sup>6</sup>

### **The Proper Federal Role**

Everyone recognizes that a critical dimension of an integrated national anti-drug effort must be a sustained and intense focus by the federal government on the highest level, international and national level traffickers. This dimension cannot be carried out by state or local drug enforcement agencies – it is uniquely the federal role. Therefore **every** federal case against a street-level or local trafficker – who could be investigated and prosecuted by state and local law enforcement agencies – is a distraction from the critical federal role and a waste of federal resources. All cocaine, all heroin, most methamphetamine, most ecstasy, and much marijuana are brought into the country from abroad. The organizers of this international business are virtually immune from investigation by county sheriffs, municipal police departments, or state narcotics bureaus. If the Department of Justice, the Department of Homeland Security and the Department of the Treasury are not focused primarily on those international and national cases – and they have not been – then those cases are not being brought.

In the Controlled Substances Act of 1970, Congress eliminated mandatory minimum sentences except for the highest level traffickers who operate “continuing criminal enterprises,” the so-called “kingpins” (21 U.S.C. 848). In 1986, Congress created new mandatory minimum

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<sup>5</sup> <http://www.voanews.com/english/2006-06-23-voa11.cfm> . And see, “\$8.4 Million Worth of Cocaine Seized in Shipment of Plywood at Port Everglades,” US Customs Service Press Release, Oct. 10, 2000, <http://www.customs.treas.gov/hot-new/pressrel/2000/1010-01.htm>

<sup>6</sup> “Desperate drug war fought all over West Virginia,” *Pittsburgh Post-Gazette*, May 21, 2006, <http://www.post-gazette.com/pg/06141/691927-85.stm>

sentences to direct “**the Federal government’s most intense focus...on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs.**”<sup>7</sup> A two-category framework was established. Major traffickers would receive a minimum sentence of ten years up to life imprisonment. Not quite so major traffickers would receive a minimum sentence of five years up to forty years. However, Congress made a major mistake in linking those lengthy sentences to quantity thresholds that are much too small, especially for crack cocaine.<sup>8</sup>

### **Low Level Offenders Get Longer Sentences Than High Level Offenders**

In FY 2000, the lowest level offenders, predominantly African-American,<sup>9</sup> received an average sentence of 104 months for a quantity of crack cocaine that averaged 52 grams.<sup>10</sup> In contrast, the highest level traffickers received an average sentence of only 101 months for a quantity of powder cocaine that averaged 16,000 grams.<sup>11</sup> In practice, that is a ratio of **about 300 to 1 of greater punishment per gram for small scale crack offenders compared to high level cocaine importers.**

### **Ineffectiveness Fighting the Drug Traffickers**

Federal anti-cocaine prosecutions – predominantly low level cases – have not substantially diminished cocaine trafficking or cocaine availability in the U.S. There were about as many crack users in 2004 (467,000) as there were in 1988 (484,000) when federal researchers

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<sup>7</sup> House Report 99-845, Part 1, to accompany the Narcotics Penalties and Enforcement Act of 1986, pp. 11-12.

<sup>8</sup> Anti-Drug Abuse Act of 1986, section 1002, P.L. 99-570 (21 U.S.C. 841(b)(1)(A) & (B)).

<sup>9</sup> 2002 USSC Report to Congress, table 3, p.63

<sup>10</sup> *id.*, figures 9 and 10, pp. 43 & 45.

<sup>11</sup> *id.*

first separated crack as a distinct drug in the NHSDA/NSDUH.<sup>12</sup>

As the statement on page one from the White House National Drug Control Strategy regarding “Disrupting Drug Markets” noted, the goal of enforcement is to reduce supply to create market scarcity. When drugs are scarce, drug retailers increase the volume of the “cut” (a filler like a laxative) they add to a package of drugs to reduce purity. The buyer may still pay \$100 for a “gram” package of cocaine, but the goal of drug enforcement is to reduce the amount of cocaine in the package, that is, to reduce the purity. The goal of creating scarcity is to reduce purity and force the price up so high that it is harder for addicts to get high, thus encouraging them to quit or enter treatment.

The best real-world measure of federal anti-drug effectiveness is the year-to-year increase in the price of a pure gram of drugs, and the reduction in the average purity of retail purchases.

In reality the exact opposite has occurred. From 1981 to 2003, the retail price of heroin dropped dramatically, from \$1974 per gram in 1981 to \$362 per gram in 2003. Simultaneously, the average retail purity of heroin rose dramatically, from 12 percent in 1981 to 41 percent in 2002. (In 2003, heroin retail purity dipped sharply to 32 percent. Similar one year dips occurred in 1990 and 1995).<sup>13</sup>

From 1981 to 2003, the retail and dealer prices of cocaine powder have declined very dramatically. At the retail level, the price has plummeted from \$545 per gram in 1981 to \$107 in 2003. Retail purity at the same time increased 75 percent, from an average of 40 percent in 1981

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<sup>12</sup> Office of Applied Studies, Substance Abuse and Mental Health Services Administration, 2004 National Survey on Drug Use and Health, p. 3, <http://oas.samhsa.gov/NSDUH/2k4NSDUH/2k4Overview/2k4Overview.pdf>

<sup>13</sup> 2006 National Drug Control Strategy Data Supplement, table 45, p. 59 [http://www.whitehousedrugpolicy.gov/publications/policy/ndcs06\\_data\\_suppl/ds\\_drg\\_rltd\\_tbls.pdf](http://www.whitehousedrugpolicy.gov/publications/policy/ndcs06_data_suppl/ds_drg_rltd_tbls.pdf)

to 70 percent in 2003.<sup>14</sup> Street level dealer wholesale level prices for powder cocaine dropped even more dramatically than the drop in retail prices, from \$281 per pure gram to \$44 per pure gram, but average purity at this level has not grown as dramatically.<sup>15</sup>

Crack cocaine retail prices and purity trends have not been as terrible as powder cocaine trends. Crack has steadily become cheaper, but not as dramatically as powder cocaine, and the average purity has declined slightly, from 85 percent in 1986 to 74 percent in 2003. Crack purity had been even lower earlier in this decade.<sup>16</sup>

Steadily lower prices and higher quality are what we expect from our most advanced industries, like semi-conductors, computer manufacturers, and cell phone businesses – not from illegal narcotics traffickers under “relentless” attack by federal law enforcement agencies.

**An important reason why powder cocaine and crack cocaine are widespread, very cheap, and of high quality in rural America and on urban streets is because the federal government is not meaningfully focusing on the appropriate federal cases: the truly high level cases.**

#### **Details of “Candy Bar Crack” Enforcement**

There is a consensus that the lowest-level crack cocaine triggers have contributed to racially disparate enforcement practices because they are much too low. **Therefore, at a minimum, the crack triggers of 5 grams and 50 grams should be raised to the same level as the powder cocaine triggers of 500 grams and 5000 grams.** What do these numbers mean?

Some analogies:

- 5 grams is the weight of the tiny amount of powder in five packets of Sweet’N

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<sup>14</sup> 2006 National Drug Control Strategy Data Supplement, table 44, p. 58  
[http://www.whitehousedrugpolicy.gov/publications/policy/ndcs06\\_data\\_supl/ds\\_drg\\_rltd\\_tbls.pdf](http://www.whitehousedrugpolicy.gov/publications/policy/ndcs06_data_supl/ds_drg_rltd_tbls.pdf)

<sup>15</sup> id.

<sup>16</sup> id.

Low ® artificial sweetener.

- 50 grams is the weight of a small bag of M&Ms ® or a common candy bar.
- 500 grams is a little more than a pound – imagine about half the size of a common 2 pound box of sugar – several cups.
- 5000 grams – about twelve pounds – two five pound bags of sugar, plus a two pound box. All of this fits in a large lunch box or a small briefcase.

**Sentencing in drug cases frequently involves the cumulative weight of a number of transactions.**<sup>17</sup> If the **total quantity** the government can prove a defendant was responsible for distributing **only** amounts to 5000 grams, the accused is **obviously not** a significant trafficker.

International traffickers arrange for cocaine to be smuggled into the country by cargo container, fishing boat, airplane, tractor trailer, or platoons of couriers – repeatedly. This might be hundreds of thousands or millions of grams in a single shipment, and tens of millions of grams over time.

In light of the reality of the drug business, the current mandatory minimum triggering quantities are absurdly low. 500 grams or 5000 grams are perfectly reasonable quantities to prosecute for cocaine trafficking **in state courts** around the nation. 5 grams and 50 grams of crack are relatively low level quantities indicative that the defendant is a street-level or neighborhood dealer who may be suitable for drug court.

### **Racially Disparate Enforcement and Consequences**

Only one in four federal drug defendants is white (27.4 percent). The latest data from the U.S. Sentencing Commission (FY 2004) is that 83.1 percent of federal crack defendants are

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<sup>17</sup> U.S. Sentencing Guidelines §2D1.1, application note 6; U.S.S.G §3D1.1; and illustration 3 following U.S.S.G §3D1.5.

black, and only 6.8 percent are white.<sup>18</sup>

Aside from the failure of federal cocaine sentencing to deliver the results that Congress wants and the nation demands, in practice it has generated a widespread belief that the nation's anti-drug effort is racist.<sup>19</sup> The stark evidence of racial disparity in drug sentencing, especially crack cocaine sentencing, has undermined the legitimacy of the federal anti-drug effort in many quarters and is even used as an argument to legalize drugs.

### **How to fix the problem**

#### **Fix Number One:**

**Redirect federal drug enforcement to its proper role in the National Drug Control Strategy – high level, international and national traffickers – by raising across the board all of the drug quantities that trigger mandatory minimum sentences.** This change would fulfill the purpose of Congress in 1986 in creating the mandatory minimums by redirecting DEA, FBI, BATF, and the U.S. Attorneys to concentrate on the highest level offenders. Some doubt Congress will take this approach.

If we want effective federal drug enforcement, then our sentencing scheme must signal, if not direct, the Justice Department to the appropriate, high level targets for federal prosecution. **5 gram and 50 gram triggers – even 500 gram and 5000 gram triggers – for mandatory minimums send the wrong message to federal law enforcement.**

#### **Fix Number Two:**

**Mandate to U.S. Attorneys that high level cases shall be the new norm.** Congress must modify the behavior of investigators and line prosecutors who have flooded the federal

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<sup>18</sup> United States Sentencing Commission, 2003 Sourcebook of Federal Sentencing Statistics, table 34, <http://www.ussc.gov/ANNRPT/2004/SBTOC04.htm>

<sup>19</sup> See Prof. Randall Kennedy, Race, Crime, and the Law, Pantheon, 1997, chapter 10; Prof. David A. Harris, Profiles in Injustice: Why Racial Profiling Cannot Work, New Press, 2002.

courts with low level cases.

The U.S. Sentencing Commission studied all the federal cocaine cases in FY 2000 and the quantities involved. It is clear that the triggers of 50 grams of crack and 5000 grams of powder are the hurdles the government uses in making cases, and that these triggers distract the government from high level cases. For example, the average weight of powder cocaine in a manager or supervisor case is merely 5000 grams of powder. The average weight for a pilot, captain, bodyguard, chemist, cook, broker or steerer is merely 4,900 grams of powder. The average for a courier or mule of powder cocaine is merely 4,900 grams of powder. Even for a wholesaler, the average weight is a mere 2,500 grams of powder.<sup>20</sup> **The fact that the averages are so close to the minimum trigger tells us that the average federal case is a minimal case, not a significant case!**

Of the 4,706 federal crack defendants in 2000<sup>21</sup>, exactly **two-thirds**, 66.5 percent,<sup>22</sup> **were street-level dealers**, and the *average* quantity of crack proven was 52 grams.<sup>23</sup> Congress should be outraged that two-thirds of the federal crack cases involved a quantity of cocaine no greater than the weight of a candy bar!

To assure that line prosecutors make significant *federal* drug cases, Congress should direct that **U.S. Attorneys may not bring cocaine prosecutions with a quantity of less than 50 kilograms of cocaine unless the prosecution is approved by the Assistant Attorney General for the Criminal Division** or his or her designee. Of course, cases that involve less than 50 kilograms that are nationally significant will be speedily approved by Main Justice. State prosecutors will eagerly prosecute the kilogram cases that the U.S. Attorneys decline.

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<sup>20</sup> USSC 2002 Report to Congress, Figure 10, p. 45.

<sup>21</sup> USSC 2002 Report to Congress, figure 1, p. 33, [http://www.ussc.gov/r\\_congress/02crack/Ch4.pdf](http://www.ussc.gov/r_congress/02crack/Ch4.pdf)

<sup>22</sup> *id.*, figure 6, p. 39.

<sup>23</sup> *id.*, figure 10, p. 45.

Another way to view this problem is to consider how much discretion federal employees in the field should have to spend the taxpayers' money. To prosecute a minor quantity drug case that carries a mandatory 10-year sentence is to commit the U.S. taxpayers to spend a quarter million dollars of anti-drug money (10 years at \$25,000 per year) on the imprisonment of one person. **Should an Assistant U.S. Attorney, a few years out of law school, be empowered to spend a quarter million dollars without Main Justice review to incarcerate one person (or organization) who sold a candy bar's weight of crack cocaine?** Greater Main Justice oversight should lead to a much more focused, coordinated effort.

**Fix Number Three:**

**Require an analysis of the significance of the drug cases that are being prosecuted in federal courts around the country.** Comparative measurement is an essential management tool.

Every federal drug case is currently analyzed and tabulated by the U.S. Sentencing Commission.<sup>24</sup> The Commission could be required to include in its annual report to Congress<sup>25</sup> for each judicial district, the number and percentage of cases that are high level and low level according to the criteria that it used for its 2002 report to Congress.<sup>26</sup>

U.S. Attorneys, the Justice Department, the Congressional oversight committees, and the news media could analyze the significance of the drug cases brought in each federal district. Districts that bring large numbers of low-level cases would be subject to management oversight.

Congress took a similar approach in the Combat Methamphetamine Epidemic Act of 2005. It directed the Attorney General to report semiannually on the measures taken "to give

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<sup>24</sup> Required by 28 U.S.C. 994(w)(1).

<sup>25</sup> Required by 28 U.S.C. 994(w)(3).

<sup>26</sup> USSC 2002 Report to Congress, Appendix C, Table C1, [http://www.ussc.gov/r\\_congress/02crack/AppC.pdf](http://www.ussc.gov/r_congress/02crack/AppC.pdf)

priority...[to importation of] substantial quantities of methamphetamine...”<sup>27</sup>

These three measures –

1. raising the mandatory minimum drug quantity triggers;
2. setting a floor for unreviewed drug prosecutions; and
3. publishing comparative enforcement data for each federal district;

will dramatically increase the effectiveness of federal drug enforcement.

### **Political Considerations and Possible Solutions**

Are increased effectiveness of federal anti-drug agencies and proper use of federal anti-drug funds sufficient rationales for an Act of Congress? Or must anti-drug legislation be accompanied by ritually “tougher” sentencing provisions so that the legislation can be called “tougher” than existing tough sentences?

It seems bizarre that finally becoming effective in attacking the international and national-level drug trade would not be considered tough. But if additional “tough” provisions are needed to “toughen” an already tough Controlled Substances Act, what might they be?

**To get “tougher,” we can raise the maximum fines that can be imposed on major drug traffickers.** What is the really significant punishment that can be imposed on the highest level traffickers? A serious financial hit. The cost of living has gone up steadily for the past twenty years, but the fines picked by Congress in 1986 have not changed.

The power to seize the assets of drug traffickers is a very important law enforcement tool. The Department of Justice FY 2007 budget proposes forfeitures of more than a half billion dollars. That is a lot of money, but compared to ONDCP’s most recent estimate of retail sales of illegal drugs, \$64 billion in 2000,<sup>28</sup> that amounts to less than one percent of the criminal revenues

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<sup>27</sup> P.L. 109-177, March 9, 2006, section 736 (120 Statutes At Large 271-272).

<sup>28</sup> 2006 National Drug Control Strategy Data Supplement, table 42, p. 56.  
[http://www.whitehousedrugpolicy.gov/publications/policy/ndcs06\\_data\\_supl/ds\\_drg\\_rltd\\_tbls.pdf](http://www.whitehousedrugpolicy.gov/publications/policy/ndcs06_data_supl/ds_drg_rltd_tbls.pdf)

industry-wide, not much of a hit. For the most sophisticated traffickers who successfully hide their assets and successfully launder the proceeds of their sales, forfeiture may not be a very powerful punishment.

Currently, the maximum fine for a major trafficker (now defined at the ridiculously low levels of 5000 grams of cocaine powder and 50 grams of crack) is \$4 million for a first offense and \$8 million for a subsequent offense.<sup>29</sup> If Congress raises the minimum quantity triggers to reasonable multi-kilo levels, why not raise fines to \$10 million and \$20 million respectively? For an organizational defendant, the fines now are \$10 million first offense and \$20 million for a second offense.<sup>30</sup> Why not raise those fines to \$50 and \$75 million?

For the second level drug trafficker (now triggered by the ridiculously small quantities of 500 grams of cocaine powder and 5 grams of crack), the fine for an individual is \$2 million for the first offense, and \$4 million for a subsequent offense.<sup>31</sup> If Congress raises the minimum quantity triggers to appropriately serious levels, why not raise these fines to \$5 million and \$10 million respectively? And for an organization where the fines are \$5 and \$10 million,<sup>32</sup> raise them to \$25 and \$50 million.

As a penalty for a single count, those would be the harshest fines in all of federal law. The antitrust laws, which forbid conspiracies and monopolies in restraint of trade, carry fines of only \$350,000 for an individual and up to \$10,000,000 for a corporation.<sup>33</sup>

We know that people respond to monetary incentives, and the public understands how harsh such fines would be. Can new “tougher” multi-million dollars fines satisfy the political ritual need to be “tougher” **without increasing prison terms**? Yes, if Congress has the will to

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<sup>29</sup> 21 U.S.C. 841(b)(1)(A).

<sup>30</sup> *id.*

<sup>31</sup> 21 U.S.C. 841(b)(1)(B).

<sup>32</sup> *id.*

<sup>33</sup> 15 U.S.C. §§ 1 - 2.

do so. Is this a package of reforms that makes sense? Definitely.