

**Statement of Ricardo H. Hinojosa
Chair, United States Sentencing Commission
Before the House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security**

June 26, 2007

Chairman Scott, Ranking Member Forbes, and members of the Subcommittee, I appreciate the opportunity to testify before you today on behalf of the United States Sentencing Commission regarding mandatory minimum¹ sentencing generally and federal cocaine sentencing policy specifically.

Part I of my testimony provides a statistical overview of statutory mandatory minimum sentencing, including data both on mandatory minimum sentences and on the statutory mechanisms created to provide relief to certain defendants from application of mandatory minimum provisions. Part II discusses the application of mandatory minimum provisions in the context of crack cocaine offenses, with a specific focus on the Commission's recent activity regarding crack cocaine sentencing.

Because this hearing is about mandatory minimum sentencing, my testimony does not focus on the operation of the federal sentencing guidelines.² It is important to note, however, that the sentencing guidelines must be consistent with all pertinent provisions of federal law.³ Such consistency should not be misunderstood to mean that the sentencing guidelines system and mandatory minimums are one and the same as there are important differences between the two. For example, the federal sentencing guideline system is designed to take into account many more offense and offender characteristics, both aggravating and mitigating, than mandatory minimum provisions typically do.

The Commission firmly believes that the federal sentencing guideline system remains the best mechanism for assuring that the statutory purposes of sentencing, as set forth in 18 U.S.C. § 3553(a), are met. The Sentencing Reform Act of 1984⁴ specifically directed the Commission to develop guidelines that would achieve those statutory purposes and, as the Supreme Court last week recognized, “[t]he result is a set of Guidelines that seek to embody the section 3553(a) considerations, both in principle and in practice.”⁵ The Commission has worked consistently with Congress over the years to identify alternatives within the federal sentencing guideline system in lieu of mandatory

¹ “Mandatory minimums,” “mandatory minimum sentencing provisions” and related terms refer to statutory provisions requiring the imposition of a sentence of at least a specified minimum term of imprisonment when criteria set forth in the relevant statute have been met.

² My testimony also does not focus on any particular case, as the Commission generally does not comment on individual cases, particularly when pending appeal.

³ See 28 U.S.C. § 994(a).

⁴ Title II, Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837 (1984).

⁵ *Rita v. United States*, No. 06-5754, Slip Op. at 6 (S.Ct. June 21, 2007).

minimums. The Commission strongly believes that the guideline system most effectively provides for sentences in a manner consistent with the statutory purposes of sentencing set forth in the Sentencing Reform Act of 1984.

I. Overview of Statutory Mandatory Minimum Sentencing

The Commission has identified at least 171 individual mandatory minimum provisions currently in the federal criminal statutes.⁶ In the Commission's fiscal year 2006 datafile, there were 33,636 counts of conviction that carried a mandatory minimum term of imprisonment.⁷ Because an offender may be sentenced for multiple counts of conviction that carry mandatory minimum penalties, these 33,636 counts of conviction exceed the total number of offenders (20,737 offenders, as reported below) who were convicted of statutes carrying such penalties.

Of these 33,636 counts of conviction, the overwhelming majority (94.4%) were for drug offenses (27,898 counts of conviction, or 82.9%) and firearms offenses (3,864 counts of conviction, or 11.4%). Most of the 171 mandatory minimum provisions rarely if ever were used in fiscal year 2006, with 68 such provisions not used at all.

A. Data on Mandatory Minimum Sentencing

In preparation for this hearing, the Commission reviewed data from its fiscal year 2006 datafile. For that fiscal year, the Commission received documentation for 72,585 cases.⁸ Of these 72,585 cases, the Commission received sufficient documentation in 69,627 cases to determine whether the offender was convicted of a statute carrying a mandatory minimum penalty. Of these 69,627 cases, offenders in 20,737 cases (29.8%) were convicted of a statute carrying a mandatory minimum penalty.⁹ Of these 20,737 offenders, 2,716 (13.1%) received a statutory mandatory minimum sentence that was required to be consecutive to any other sentence imposed.¹⁰

⁶ See Appendix A, listing current mandatory minimum sentencing provisions as defined in footnote 1 of this testimony.

⁷ See Appendix B.

⁸ The Commission is required to receive five sentencing documents from the district courts: the charging document, written plea agreement (if any); the presentence investigation report; the judgment and commitment order; and the statement of reasons form. See 28 U.S.C. § 994(w)(1). The Commission also is required to analyze these documents and to compile data on federal sentencing trends and practices. See 28 U.S.C. §§ 994(w)(3), 995. For fiscal year 2006, the Commission received 98.7% of all such documents. See USSC FY2006 Sourcebook, Table 1.

⁹ For purposes of this analysis, an offender was considered to have been convicted under a statute carrying a mandatory minimum penalty if the court indicated such on the statement of reasons form or other sentencing documentation received by the Commission conclusively established that one or more of the statutes of conviction carried such a penalty.

¹⁰ See, e.g., 18 U.S.C. § 924(c), requiring mandatory consecutive terms of imprisonment for certain firearms offenses.

1. Demographics

Table 1 provides demographic data for all cases in the Commission’s fiscal year 2006 datafile, as well as for those cases in which an offender was convicted of a statute carrying a mandatory minimum penalty.

As Table 1 indicates, of offenders sentenced in fiscal year 2006 for which the relevant sentencing documentation was received, offenders other than those categorized as white offenders comprised 74.0 percent of offenders convicted of a statute carrying a statutory mandatory minimum penalty.¹¹ This is slightly higher than the percentage of offenders other than those categorized as white offenders in the Commission’s overall fiscal year 2006 datafile, which was 70.9 percent. Black offenders are the only racial/ethnic group that comprised a greater percentage of offenders convicted of a statute carrying a mandatory minimum penalty (32.9%) than their percentage in the overall fiscal year 2006 offender population (23.8%).

**Table 1: Demographic Characteristics for All Cases and Mandatory Minimum Cases
Fiscal Year 2006**

	All Cases		All Mandatory Cases	
	N	%	N	%
Race/Ethnicity				
White	20,072	29.1	5,366	26.0
Black	16,399	23.8	6,803	32.9
Hispanic	29,670	43.1	7,906	38.2
Other	2,769	4.0	603	2.9
Total	68,910	100.0	20,678	100.0
Citizenship				
U.S. Citizen	43,696	62.9	15,089	73.2
Non-Citizen	25,816	37.1	5,526	26.8
Total	69,512	100.0	20,615	100.0
Gender				
Male	61,517	86.7	18,794	90.7
Female	9,477	13.3	1,932	9.3
Total	70,994	100.0	20,726	100.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06.

¹¹ Of the 20,737 cases in which the offender was identified as convicted of a statute carrying a mandatory minimum penalty, 20,678 cases had sufficient demographic information regarding the offender’s race or ethnicity for purposes of this analysis.

For purposes of gauging the demographic impact of mandatory minimums, however, it is helpful to extract the federal immigration caseload from the analysis. Immigration offenders, 89.3 percent of whom in fiscal year 2006 were Hispanic, comprise a relatively large percentage of offenders in the overall federal caseload (23.8%, as reported in Table 5, below), but comprise a relatively small percentage of the offenders convicted of a statute carrying a mandatory minimum sentence (0.8%, as reported in Table 5, below). Therefore, inclusion of these offenders may skew the analysis of the impact of mandatory minimums by race and ethnicity. Table 2, accordingly, presents demographic data excluding immigration cases.

Excluding immigration cases, both Hispanic offenders and black offenders comprised a greater percentage of non-immigration offenders convicted of a statute carrying a mandatory minimum penalty than their percentage in the overall fiscal year 2006 offender population. As Table 2 indicates, Hispanic offenders had a higher differential in this regard, comprising 38.1 percent of offenders convicted of a non-immigration statute carrying a mandatory minimum penalty but only 29.7 percent of the overall non-immigration offender population. Black offenders comprised 33 percent of offenders convicted of a non-immigration statute carrying a mandatory minimum penalty but only 29.8 percent of the overall non-immigration offender population.

Table 2: Demographic Characteristics for Non-Immigration Cases and Mandatory Minimum, Non-Immigration Cases
Fiscal Year 2006

	Non-Immigration Cases		Mandatory Minimum Non-Immigration Cases	
	N	%	N	%
Race/Ethnicity				
White	19,098	35.7	5,343	26.0
Black	15,938	29.8	6,775	33.0
Hispanic	15,867	29.7	7,810	38.1
Other	2,550	4.8	589	2.9
Total	53,453	100.0	20,517	100.0
Citizenship				
U.S. Citizen	41,863	78.4	15,045	73.6
Non-Citizen	11,550	21.6	5,407	26.4
Total	53,413	100.0	20,452	100.0
Gender				
Male	46,787	85.1	18,663	90.8
Female	8,218	14.9	1,900	9.2
Total	55,005	100.0	20,563	100.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSC FY2006.

2. Trial Rates

Of the 20,737 offenders convicted under a statute carrying a mandatory minimum penalty, 19,328 offenders (93.2%) pled guilty and 1,409 offenders (6.8%) were convicted after a trial. By comparison, 69,403 offenders (95.7%) in the Commission's fiscal year 2006 datafile pled guilty and 3,107 offenders (4.3%) in the Commission's fiscal year 2006 datafile were convicted after a trial.¹²

¹² See USSC FY2006 Sourcebook, Fig. C, which provides guilty pleas and trial rates for fiscal years 2002-2006.

B. Mechanisms for Relief from Mandatory Minimum Sentences

As a prelude to discussion about the use of mandatory minimums for different types of offenses, it is important to note that Congress has provided two mechanisms by which offenders may be sentenced without regard to the otherwise applicable statutory mandatory minimum provisions: 18 U.S.C. § 3553(e) and 18 U.S.C. § 3553(f). Section 3553(e), commonly referred to as “substantial assistance”, is available upon motion of the Government,¹³ and allows the court to impose “a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” Section 3553(e) may be applied to any qualifying offender, without regard to the type of offense involved.

Section 3553(f), commonly referred to as the “safety valve”, provides an additional mechanism by which only drug offenders¹⁴ may be sentenced without regard to the otherwise applicable drug mandatory minimum provisions. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994,¹⁵ concluding that the “integrity and effectiveness of controlled substance mandatory minimums could in fact be strengthened if a limited ‘safety valve’ from operation of these penalties was created and made applicable to the least culpable offenders.”¹⁶ The Act created section 3553(f)¹⁷ to permit offenders “who are the least culpable participants in drug trafficking

¹³ After the Supreme Court’s 2005 decision in *United States v. Booker*, 542 U.S. 220 (2005), a government motion is still required in order for 18 U.S.C. § 3553(e) to apply. See *United States v. Rivera*, 170 Fed. Appx 209, 211 (2d Cir. 2006) (rejecting defendant’s argument that the government motion requirement be applied as advisory in light of *Booker*); *United States v. Vasquez*, 433 F.3d 666, 670 (8th Cir. 2006) (affirming that, post-*Booker*, district courts cannot review the Government’s refusal to make a § 5K1.1 motion where the defendant does not argue that the refusal was based on an unconstitutional motive or was not rationally related to a legitimate government interest).

¹⁴ For purposes of 18 U.S.C. § 3553(f), the term “drug offenders” means offenders under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. § 841, § 844, or § 846, respectively) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. § 960 or § 963, respectively).

¹⁵ Pub. L. No. 102–322 (1994).

¹⁶ *Id.* As with the statutory substantial assistance provision, after *Booker* courts still are required to apply the statutory safety valve provision when its criteria are met. See *United States v. Barrero*, 425 F.3d 154, 157 (2d Cir. 2005) (because *Booker* did not excise 18 U.S.C. § 3553(f)(1), the district court is still required to apply it when calculating the defendant’s advisory guideline range); *United States v. Cardenas-Juarez*, 469 F.3d 1331, 1334 (9th Cir. 2006); *United States v. Brehm*, 442 F.3d 1291, 1300 (11th Cir. 2006).

¹⁷ 18 U.S.C. § 3553(f) provides:

(f) Limitation on Applicability of Statutory Minimums in Certain Cases.— Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

offenses, to receive strictly regulated reductions in prison sentences for mitigating factors” recognized in the federal sentencing guidelines.¹⁸

1. 18 U.S.C. § 3553(e): Substantial Assistance

Of the 20,737 offenders convicted under a statute carrying a mandatory minimum penalty, the Commission received complete sentencing documentation to determine whether the substantial assistance provision could have applied. Of the 18,987 offenders for whom the Commission received complete information to determine whether the substantial assistance provision could have applied, there were 2,591 offenders (13.6%) for whom 18 U.S.C. § 3553(e) alone was the statutory mechanism by which they were sentenced without regard to and below the statutory mandatory minimum. Although there were 3,736 offenders who were eligible to be sentenced without regard to the statutory mandatory minimum because of substantial assistance, 1,145 of these offenders (30.6%) received a sentence at or above the same level as the mandatory minimum sentence. Table 3 provides information regarding application of the substantial assistance provision for five offense types.

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided

to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

¹⁸ See H. Rep. No. 103-460, 103rd Cong. 2nd Sess. (1994).

Table 3: Application of Substantial Assistance Provision (18 U.S.C. § 3553(e)) by Offense Type

Offenses	Total Number of Offenders ¹⁹	Percentage of Total Federal Caseload ²⁰	Number of Offenders Convicted of Mandatory Minimums	Percent of Offenders Convicted of Mandatory Minimums	Number of Offenders Sentenced without regard to and below Mandatory Minimum Due to § 3553(e) (Substantial Assistance)
Immigration	16,199	23.8%	163	0.8%	34
Fraud	8,431	12.4%	187	0.9%	9
Criminal Sexual Abuse/ Pornography/Prostitution	1,569	2.3%	605	2.9%	13
Firearms	7,038	10.4%	1,130	5.5%	70
Drug Offenses	25,824	38.0%	17,338	84.2%	2,325

2. 18 U.S.C. § 3553(f): The Safety Valve

As Table 4 indicates, of the 20,737 offenders convicted under a statute carrying a mandatory minimum penalty, the Commission received information sufficient to determine the type of offense for 20,582 offenders. Of these 20,582 offenders, 17,338 were drug offenders.²¹ Of these 17,338 drug offenders, there were 16,334 drug offenders for whom the Commission received sufficient sentencing documentation to determine whether 18 U.S.C. § 3553(f) could have applied. Of these 16,334 drug offenders, there were 3,837 drug offenders (23.5%) for whom 18 U.S.C. § 3553(f) alone was the statutory mechanism by which they were sentenced without regard to and below the mandatory minimum penalty. Although there were 4,377 offenders who were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the safety valve provision applied, 540 of these offenders (12.3%) received a sentence at or above the same level as the mandatory minimum sentence.

¹⁹ Of the 72,585 cases sentenced in fiscal year 2006, 67,945 cases had complete sentencing documentation to permit this classification of offenders by the type of offense.

²⁰ Of the 20,737 cases in which the offender was convicted of a statute carrying a mandatory minimum penalty, 20,582 cases had complete sentencing documentation to permit this classification of offenders by the type of offense.

²¹ For purposes of this analysis, the overall number of drug offenders and the number of drug offenders sentenced without regard to a mandatory minimum because of the safety valve provision at 18 U.S.C. § 3553(f) differ from the numbers reported for these groups in Tables 43 and 44 of the Commission's FY2006 Sourcebook because, unlike Tables 43 and 44, the analysis contained herein includes 165 drug offenders who were sentenced under a mandatory minimum provision carrying a minimum term of imprisonment of less than five years and also includes cases lacking sufficient information about the type of drug involved in the offense.

Table 4: Application of Safety Valve and Substantial Assistance for Drug Offenders

Total Number of Drug Offenders ²²	Number of Drug Offenders Convicted of Mandatory Minimums	Number of Drug Offenders Sentenced without regard to and below Mandatory Minimum Due to § 3553(e) (Substantial Assistance)	Number of Drug Offenders Sentenced without regard to and below Mandatory Minimum Due to § 3553(f) (Safety Valve)	Number of Drug Offenders Sentenced without regard to and below Mandatory Minimum Due to Both § 3553(e) (Substantial Assistance) & § 3553(f) (Safety Valve)	Total Number of Drug Offenders Sentenced without regard to and below Mandatory Minimum Due to Substantial Assistance and Safety Valve, Alone or in Combination with One Another
25,824	17,338	2,325	3,837	1,650	7,812

As Table 4 also indicates, in some instances, a drug offender may receive the benefit of both the substantial assistance and safety valve statutory provisions. In the Commission’s fiscal year 2006 datafile, there were 16,334 drug offenders for whom the Commission received sufficient sentencing documentation to determine whether both the substantial assistance provision under 18 U.S.C. § 3553(e) and the safety valve provision under 18 U.S.C. §3553(f) could have applied. Of these 16,334 drug offenders, 1,650 drug offenders (10.1%) were sentenced without regard to and below the mandatory minimum pursuant to the operation of both provisions. Although there were 1,696 offenders who were eligible to be sentenced without regard to the statutory mandatory minimum due to both substantial assistance and the safety valve, 46 of these offenders (2.8%) received a sentence at or above the same level as the mandatory minimum sentence.

As shown in Table 4, the safety valve provision alone applied to 3,837 of these 16,344 drug offenders (23.5%), and the substantial assistance provision alone applied to 2,325 of these 16,344 drug offenders (14.2%). When these offenders are added to 1,650 drug offenders described in the preceding paragraph, 7,812 drug offenders altogether (or 47.8% of the 16,334 drug offenders) were sentenced without regard to and below the mandatory minimum because of the substantial assistance provision and the safety valve provision, either alone or in combination with one another.

C. Distribution of Mandatory Minimum Sentences by Offense Type

Table 5 provides information regarding distribution of mandatory minimum sentences by five major offense types. Of the 20,737 offenders convicted of a statute carrying a mandatory minimum penalty, the Commission received sufficient sentencing documentation to classify the offense type of which the offender was convicted in 20,582 cases. As indicated in Table 5, 19,260 (93.6%) of these 20,582 cases were distributed among four offense categories: drugs, firearms, fraud, and criminal sexual abuse/pornography/prostitution. As previously stated, the overwhelming majority of

²² Of the 72,585 cases sentenced in fiscal year 2006, 67,945 cases had complete sentencing documentation to permit this classification of offenders by the type of offense.

offenders convicted of a statute which carries a mandatory minimum penalty committed a drug trafficking offense (17,338 offenders, or 84.2%) or a firearms offense (1,130 offenders, or 5.5%).²³

Table 5: Distribution of Mandatory Minimum Sentences by Major Types of Offense

Offenses²⁴	Total Number of Offenders²⁵	Percentage of Total Federal Caseload	Number of Offenders Convicted of Mandatory Minimums²⁶	Percentage of Offenders Convicted of Mandatory Minimums
Immigration	16,199	23.8%	163	0.8%
Fraud	8,431	12.4%	187	0.9%
Criminal Sexual Abuse/ Pornography/Prostitution	1,569	2.3%	605	2.9%
Firearms	7,038	10.4%	1,130	5.5%
Drug Offenses	25,824	38.0%	17,338	84.2%

1. Drug Offenses

Drug cases represented a large portion of the federal caseload in fiscal year 2006, accounting for 38.0 percent of the overall caseload in that fiscal year.²⁷ Drug offenders also represented the vast majority of those offenders convicted under a statute carrying a mandatory minimum penalty in fiscal year 2006, with 17,338 (84.2%) of all offenders

²³ For purposes of this analysis, the overall number of firearms offenders and the number of firearms offenders convicted of a statute carrying a mandatory minimum penalty do not include cases that were sentenced under a drug guideline in Chapter Two, Part D of the Guidelines Manual but also contained a count of conviction for a firearms offense, including 1,128 cases in which the defendant was sentenced under a drug guideline but was also convicted under 18 U.S.C. § 924(c).

²⁴ The number of cases in each type of offense differs in this analysis from Table 3 and Figure A of the Commission's FY2006 Sourcebook because in this analysis, the offense classification is based upon the primary guideline used at sentencing (i.e., the guideline controlling the sentence). This differs from the method used in Table 3 and Figure A of the Commission's FY2006 Sourcebook, which bases offense classification on statutory maxima and minima. In the present analysis, the offense classifications are as follows: (A) Immigration offenses include any case with a primary guideline in Chapter Two, Part L of the Guidelines Manual; (B) Fraud offenses include any case with a primary guideline of §§2B1.1, 2B1.4, 2B1.6, or 2F1.1; (C) Criminal Sexual Abuse/Pornography/Prostitution offenses include any case with a primary guideline of §§2A3.1, 2A3.2, 2A3.3, 2A3.4, 2G1.1, 2G1.2, 2G1.3, 2G2.1, 2G2.2, 2G2.3, 2G2.4, 2G2.5, 2G3.1, or 2G3.2; (D) Drug offenses include any case with a primary guideline of §§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.8, or 2D2.1; and (E) Firearms offenses include any case with a primary guideline of §§2K2.1, 2K2.2, 2K2.3, 2K2.4 (including offenses under 18 U.S.C. § 924(c)), 2K2.5, or 2K2.6.

²⁵ Of the 72,585 cases sentenced in fiscal year 2006, 67,945 cases had complete sentencing documentation to permit this classification of offenders by the type of offense.

²⁶ Of the 20,737 cases in which the offender was convicted of a statute carrying a mandatory minimum penalty, 20,582 cases had complete sentencing documentation to permit this classification of offenders by the type of offense.

²⁷ See footnote 24, *supra*.

convicted under such statutes having committed a drug offense as classified by the Commission.

As previously indicated, however, a significant portion (47.8%) of drug offenders convicted under a statute carrying a mandatory minimum penalty were sentenced without regard to and below the mandatory minimum through substantial assistance under 18 U.S.C. § 3553(e), the safety valve under 18 U.S.C. § 3553(f), or a combination of substantial assistance and the safety valve. Of the 16,334 drug offenders convicted under a statute carrying a mandatory minimum penalty and for whom the Commission received sufficient documentation for this analysis, 7,812 drug offenders (47.8%) were sentenced without regard to and below the mandatory minimum. As illustrated above, these 7,812 offenders were sentenced without regard to and below mandatory minimum provisions as follows: substantial assistance applied to 2,325 drug offenders (14.2%), the safety valve applied to 3,837 drug offenders (23.5%), and both substantial assistance and the safety valve applied to an additional 1,650 drug offenders (10.1%).

Table 6 illustrates the demographic characteristics of drug offenders convicted under a statute carrying a mandatory minimum penalty relative to the demographic characteristics of the overall federal drug offender population in fiscal year 2006. As Tables 6 and 7 indicate together, however, the impact of drug mandatory minimum penalties on black drug offenders is largely driven by crack cocaine offenses. As shown in Table 7, if crack cocaine cases are excluded from the analysis, black drug offenders in fiscal year 2006 comprised 14.8 percent of the remaining drug cases and 14.4 percent of the remaining drug cases in which a drug mandatory minimum applied.

**Table 6: Demographics for Drug Cases and Mandatory Minimum Drug Cases
Fiscal Year 2006**

	All Drug Cases		All Mandatory Minimum Drug Cases	
	N	%	N	%
Race/Ethnicity				
White	6,651	25.8	3,957	22.9
Black	7,531	29.2	5,531	32.0
Hispanic	10,757	41.7	7,347	42.4
Other	834	3.2	477	2.8
Total	25,773	100.0	17,312	100.0
Citizenship				
U.S. Citizen	18,403	71.6	12,114	70.2
Non-Citizen	7,287	28.4	5,149	29.8
Total	25,690	100.0	17,263	100.0
Gender				
Male	22,656	87.8	15,599	90.0
Female	3,157	12.2	1,735	10.0
Total	25,813	100.0	17,334	100.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06.

**Table 7: Demographics for Non-Crack Drug Cases and Non-Crack, Mandatory Minimum Drug Cases
Fiscal Year 2006**

	Non-Crack Drug Cases		Mandatory Minimum Non-Crack Drug Cases	
	N	%	N	%
Race/Ethnicity				
White	6,128	30.4	3,615	28.2
Black	2,979	14.8	1,848	14.4
Hispanic	10,273	51.0	6,944	54.1
Other	774	3.8	431	3.4
Total	20,154	100.0	12,838	100.0
Citizenship				
U.S. Citizen	12,989	64.7	7,818	61.1
Non-Citizen	7,084	35.3	4,973	38.9
Total	20,073	100.0	12,791	100.0
Gender				
Male	17,536	86.9	11,459	89.1
Female	2,654	13.2	1,399	10.9
Total	20,190	100.0	12,858	100.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06.

2. Firearms Offenses

As indicated in Table 5, firearms offenses comprised 10.4 percent of the overall federal caseload in fiscal year 2006 and 5.5 percent of cases in which offenders were convicted of a statute carrying a mandatory minimum penalty. In fiscal year 2006, 1,130 firearms offenders were convicted of a statute carrying a mandatory minimum penalty. Of those 1,130 offenders, 70 offenders (6.2%) were sentenced without regard to and below the applicable statutory mandatory minimum penalty due to application of the statutory substantial assistance provision at 18 U.S.C. § 3553(e). Although there were 93 firearms offenders who were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the substantial assistance provision applied, 23 of these offenders (24.7%) received a sentence at or above the same level as the mandatory minimum sentence.

For purposes of this analysis, the overall number of firearms cases and the number of firearms offenders convicted of a statute carrying a mandatory minimum penalty do not include cases that were sentenced under a drug guideline in Chapter Two, Part D of the Guidelines Manual but also contained a count of conviction for a firearms offense. Those cases, including 1,128 cases in which the defendant was sentenced under a drug guideline but was also convicted under 18 U.S.C. § 924(c), were counted as drug offenders for this analysis. The number of firearms offenders considered under this analysis to be convicted of a firearms statute carrying a mandatory minimum penalty would approximately double if such offenders were included in the firearms, rather than the drug, mandatory minimum offender population.

Table 8 shows demographic characteristics of firearms offenders convicted of a statute carrying a mandatory minimum penalty relative to the demographic characteristics of firearms offenders in the overall fiscal year 2006 caseload.

Table 8: Demographic Characteristics for Firearms Cases and Firearms Cases with a Mandatory Minimum
Fiscal Year 2006

	Firearms Cases		Mandatory Minimum Firearms Cases	
	N	%	N	%
Race/Ethnicity				
White	2,513	35.9	371	33.1
Black	3,200	45.7	582	51.9
Hispanic	1,056	15.1	135	12.0
Other	240	3.4	33	2.9
Total	7,009	100.0	1,121	100.0
Citizenship				
U.S. Citizen	6,500	92.8	1,071	95.9
Non-Citizen	504	7.2	46	4.1
Total	7,004	100.0	1,117	100.0
Gender				
Male	6,793	96.7	1,110	98.5
Female	233	3.3	17	1.5
Total	7,026	100.0	1,127	100.0

This table excludes cases missing information for the variables required for analysis. Summary Percentages may not equal 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06.

3. Immigration, Fraud, and Criminal Sexual Abuse/Pornography/Prostitution Offenses

Immigration offenses, fraud offenses, and offenses involving criminal sexual abuse, pornography, and prostitution, combined, accounted for 4.6 percent of the offenders who were convicted of a statute carrying a mandatory minimum penalty in fiscal year 2006. Immigration offenses accounted for 23.8 percent of the overall federal caseload in fiscal year 2006²⁸ but less than one percent of all convictions under mandatory minimum statutes. Only 163 offenders of the 16,199 immigration offenders in fiscal year 2006 were convicted of statutes carrying a mandatory minimum penalty sentence, which represents only 0.8 percent of the 20,582 offenders convicted of a statute carrying a mandatory minimum penalty and only 1 percent of the 16,199 immigration offenders in fiscal year 2006. Of these 163 immigration offenders, 34 offenders (20.9%) were sentenced without regard to and below the statutory mandatory minimum penalty because of a substantial assistance motion by the government under 18 U.S.C. § 3553(e). Although there were 38 immigration offenders who were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the substantial assistance provision applied, 4 of these offenders (10.5%) received a sentence at or above the same level as the mandatory minimum sentence.

Fraud offenses accounted for 12.4 percent of the overall federal caseload in fiscal year 2006.²⁹ Of the 8,431 fraud offenders sentenced in fiscal year 2006, 187 offenders were convicted of statutes carrying a mandatory minimum penalty, which represents less than one percent of the 20,582 offenders convicted under such statutes and only 2.2 percent of the 8,431 fraud offenders in fiscal year 2006. Of these 187 fraud offenders, 9 offenders (4.8%) were sentenced without regard to and below the statutory mandatory minimum penalty because of a substantial assistance motion by the government pursuant to 18 U.S.C. § 3553(e). Although there were 21 fraud offenders who were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the substantial assistance provision applied, 12 of these offenders (57.1%) received a sentence at or above the same level as the mandatory minimum sentence.

Criminal sexual abuse, pornography, and prostitution offenses represent a small percentage of the overall federal caseload. In fiscal year 2006, 605 criminal sexual abuse, pornography, and prostitution offenders were convicted of statutes carrying a mandatory minimum penalty, which represents 2.9 percent of all offenders convicted of such statutes and 38.6 percent of the 1,569 criminal sexual abuse, pornography, and prostitution offenders in fiscal year 2006. Of these 605 offenders, 13 offenders (2.1%) were sentenced without regard to and below the statutory mandatory minimum penalty because of a substantial assistance motion by the government under 18 U.S.C. § 3553(e). Although there were 31 criminal sexual abuse/pornography/prostitution offenders who were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the substantial assistance provision applied, 18 of these offenders

²⁸ See Table 5, *supra*.

²⁹ *Id.*

(58.1%) received a sentence at or above the same level as the mandatory minimum sentence.

II. Federal Cocaine Sentencing Policy

The Anti-Drug Abuse Act of 1986³⁰ established the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties differ for various drugs and, in some cases (including cocaine), for different forms of the same drug.

In establishing the mandatory minimum penalties for cocaine, Congress differentiated between two principal forms of cocaine – cocaine hydrochloride (commonly referred to as “powder cocaine”) and cocaine base (commonly referred to as “crack cocaine”) – and provided significantly higher punishment for crack cocaine offenses. As a result of the 1986 Act, federal law requires a five-year mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the “100-to-1 drug quantity ratio.”

When Congress passed the 1986 Act, the Commission was in the process of developing the initial sentencing guidelines. The Commission responded to the legislation by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. Offenses involving five grams or more of crack cocaine or 500 grams or more of powder cocaine, as well as all other drug offenses carrying a five-year mandatory minimum penalty, were assigned a base offense level of 26, corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I. Similarly, offenses involving 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine, as well as all other drug offenses carrying a 10-year mandatory minimum penalty, were assigned a base offense level of 32, corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I. Crack cocaine and powder cocaine offenses for quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.

³⁰ Pub. L. 99–570, 100 Stat. 3207 (1986), hereinafter “the 1986 Act”.

This past year the Commission undertook an extensive review of the issues associated with federal cocaine sentencing policy. The Commission examined sentencing data from fiscal years 2005 and 2006, conducted two public hearings, received considerable written public comment, and reviewed relevant scientific and medical literature. Comment received in writing and at the public hearings showed that federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups.

The Commission's efforts culminated in the issuance of its fourth report to Congress on the subject in May 2007. Data presented in the report, compiled from the Commission's fiscal year 2006 datafile, indicated that the average sentence length for crack cocaine offenders was approximately 122 months, whereas the average sentence length for powder cocaine offenders was approximately 85 months.³¹ The differences in sentences between powder cocaine offenses and crack cocaine offenses have increased over time. In 1992, crack cocaine sentences were 25.3 percent longer than those for powder cocaine. In 2006, the difference was 43.5 percent.³² Blacks still comprise the majority of crack cocaine offenders, but that is decreasing, from 91.4 percent in 1992 to 81.8 percent in 2006. White offenders now comprise 8.8 percent of crack cocaine offenders, up from 3.2 percent in 1992.³³

Consistent with its prior reports, the Commission in its May 2007 report strongly and unanimously concluded that there is no empirical justification for the current 100-to-1 statutory ratio between crack and powder cocaine penalties. The Commission also concluded, among other things, that the quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine and fail to provide adequate proportionality.

Accordingly, the Commission again unanimously and strongly urged Congress to act promptly on the following recommendations:

- Increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to focus the penalties more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act.
- Repeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.

³¹ See Fig. 2-2, *Report to Congress: Cocaine and Federal Sentencing Policy*, USSC May 2007 (hereinafter "the USSC 2007 Cocaine Report").

³² See Fig. 2-3, USSC 2007 Cocaine Report.

³³ See Table 2-1, USSC 2007 Cocaine Report.

- Reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses, as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.

The Commission further recommended that any legislation implementing these recommendations include emergency amendment authority³⁴ for the Commission to incorporate the statutory changes in the federal sentencing guidelines. Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.

The Commission also concluded that a partial remedy to the unwarranted sentencing disparity for crack cocaine offenders would be to reset the sentencing guideline ranges for these offenders. Accordingly, on May 1, 2007, the Commission submitted to Congress an amendment to the drug trafficking guideline that would move the base offense level for all crack cocaine offenders two levels down the sentencing grid. Under the amendment, an offender convicted of an offense involving between 5 and 20 grams of crack cocaine would receive a base offense level 24, instead of level 26. This move would result in a guideline range sentence of 51-63 months, instead of 63-78 months. In so doing, the Commission was mindful to maintain consistency between the guidelines and the statutory mandatory minimum penalties.

The amendment to the federal sentencing guidelines, which will become effective November 1, 2007, absent congressional action to the contrary, would result in an overall decrease in crack cocaine sentences from an average of about 122 months to an average of about 106 months. This guideline amendment is only a partial remedy to the problem of crack cocaine sentencing disparity. The Commission strongly believes that any comprehensive solution to the problem of federal cocaine sentencing policy must be legislated by Congress. The Commission again encourages Congress to take quick legislative action on this important issue.

³⁴ “Emergency amendment authority” allows the Commission to promulgate amendments outside of the normal amendment cycle described in footnote 3, *supra*.

Conclusion

As stated at the outset, the Commission firmly believes that the federal sentencing guideline system remains the best mechanism for achieving the statutory purposes of sentencing, as set forth in 18 U.S.C. § 3553(a). The Commission stands ready to work with Congress as it continues to study the issue of mandatory minimums and urges Congress to rely on the Commission and the federal guideline system in this regard. The Commission also is committed to working with Congress on other issues of importance to the federal criminal justice community, including federal cocaine sentencing policy, and all other issues related to maintaining just and effective national sentencing policy in a manner that preserves the bipartisan principles of the Sentencing Reform Act of 1984.

Thank you for the opportunity to testify before you today and I look forward to answering your questions.