

July 20, 2021

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Markup on the EQUAL Act (H.R. 1693, S. 79)

Dear Chairman Nadler and Ranking Member Jordan:

On behalf of the undersigned organizations, we write to thank you for holding this important markup and to express our support for legislation now pending to address federal sentencing for crack and powder cocaine. We write specifically to convey our support for passage of the Eliminating a Quantifiably Unjust Application of the Law Act or “EQUAL Act” (H.R. 1693, S. 79).

The EQUAL Act would finally and fully eliminate the sentencing disparity between crack and powder cocaine mandatory minimum sentences at the federal level. Furthermore, the change would be made retroactive to allow those currently serving excessive sentences to petition a court for resentencing. This legislation offers a commonsense solution to a problem derived from a decades-long policy unsubstantiated by science.

The origins of today’s disparity date back to 1986 when Congress passed the Anti-Drug Abuse Act with overwhelming bipartisan support, which established mandatory minimum sentences for specified quantities of drugs.¹ The Act created a 100:1 disparity between crack or “cocaine base” and powder cocaine where only 5 grams of crack would carry the same mandatory minimum as 500 grams of cocaine. This disparity was not based on scientific evidence indicating that one drug had a higher propensity for crime compared to the other. In fact, the ratio was entirely arbitrary as politicians of both parties offered numerous disparities ranging from 20:1, offered by the Reagan Administration, and 50:1, offered by House Democratic leadership, before the 100:1 disparity was ultimately adopted.²

In 2010, Congress, recognizing that the disparity was unjust and too harsh, passed the Fair Sentencing Act, which was signed into law by President Barack Obama. However, the Fair Sentencing Act did not make the necessary change to eliminate the disparity outright. Instead, the disparity was reduced to 18:1 where 28 grams of crack carries a 5-year mandatory minimum sentence.³

The groundbreaking prison and sentencing reform law, the First Step Act of 2018, finally made the change in the sentencing law retroactive.⁴ Since enactment of the First Step Act, over 3,700 individuals have had their motions for retroactive resentencing under the Fair Sentencing Act granted by federal courts.⁵

Perhaps most importantly, there has been no public safety justification for the current disparity, and law enforcement will have sufficient sentencing tools to protect our communities. There is no pharmacological difference between the two substances, and one does not necessarily lead to higher rates of crime compared to the other. One study concludes that “sociodemographic characteristics, psychiatric variables, and non-cocaine substance use disorders” are the likely contributors to criminal activity, “rather than crack itself.”⁶

The long mandatory minimums were designed, in part, to reduce crime by targeting those in management positions of an illegal drug operation. However, the result has seen the vast majority of crack defendants in federal prison incarcerated for minor, or peripheral involvement in the operation.⁷ Furthermore, in Fiscal Year 2020, 90% of crack cocaine defendants did not receive a role adjustment to their sentences, while 4% and 5% of defendants received a role adjustment for a mitigating or aggravated role.⁸

Importantly, this legislation would not hamper a prosecutor’s ability to add sentencing enhancements to meet the requisite public safety requirements. Eliminating the crack-to-powder disparity would still enable prosecutors to seek longer sentences for instances involving a firearm or violence.

The effects of the sentencing disparity on Black and Brown communities were immediate and profound, leading to the incarceration of tens of thousands of Black men at a much higher rate compared to other demographics. An examination of mandatory minimum sentences shortly after the enacted laws in 1986 found that while non-white individuals’ sentences were 11% longer on average than white defendants in 1986, by 1990 the average length of sentences for Black defendants were 49% longer than white defendants.⁹

Specifically, regarding crack offenses, the disparity between who is arrested and charged is even more pronounced. More recent evidence from the U.S. Sentencing Commission found that over 76% of drug trafficking defendants for crack cocaine offenses in Fiscal Year 2020 were Black.¹⁰ This is especially troublesome given similar rates in crack use across racial demographics.¹¹

We are pleased to see the Committee consider this critical bill to make our federal sentencing laws more just. As the 50th anniversary of the declaration on the War on Drugs has come and past, we must re-commit ourselves to achieving a smarter, fairer criminal justice system. National law enforcement organizations, high-ranking policing executives, and prominent conservative groups support the EQUAL Act because this type of drug abuse is a public health problem and not solely a law enforcement matter.

Thank you for your leadership on these issues and for holding this markup. Criminal justice reform remains a bellwether issue for bipartisan cooperation and concord in a hyperpolarized

environment, and we encourage all Members of Congress to reach across the aisle to change laws that will change lives.

Sincerely,

Americans for Prosperity
Americans for Tax Reform
Due Process Institute
Faith & Freedom Coalition
FAMM
FreedomWorks
Justice Action Network
National District Attorneys Association
Prison Fellowship
R Street Institute

CC: Members, U.S. House of Representatives Committee on the Judiciary

¹ Pub. L. No. 99-570, 100 Stat. 3207.

² David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 *Stanford Law Review* 1283 (1995). <https://law.stanford.edu/publications/cocaine-race-and-equal-protection/>.

³ Pub. L. No. 111-220, 124 Stat. 2372.

⁴ Pub. L. No. 115-391, 132 Stat. 5194.

⁵ U.S. Sentencing Commission, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report*, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20210519-First-Step-Act-Retro.pdf>.

⁶ Vaughn MG, Fu Q, Perron BE, Bohnert AS, Howard MO. Is crack cocaine use associated with greater violence than powdered cocaine use? Results from a national sample. *Am J Drug Alcohol Abuse*. 2010 Jul;36(4):181-6. doi: 10.3109/00952990.2010.491877. PMID: 20560836.

⁷ U.S. Sentencing Commission, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, Chapter 8, pg. 203, (2012). https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf.

⁸ U.S. Sentencing Commission, *2020 Annual Report and Sourcebook on Federal Sentencing Statistics*, Table D-9, pg. 117. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf>.

⁹ Barbara S. Meierhoefer, Federal Judicial Center, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed*, 20 (1992). <https://www.fjc.gov/content/general-effect-mandatory-minimum-prison-terms-longitudinal-study-federal-sentences-imposed-0>.

¹⁰ U.S. Sentencing Commission, *Race of Drug Trafficking Offenders, Fiscal Year 2020*, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/TableD2.pdf>

¹¹ Substance Abuse and Mental Health Services Administration, *Results from the 2018 National Survey on Drug Use and Health: Detailed Tables* (2019). <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2018R2/NSDUHDetailedTabs2018.pdf>.