

Examining Federal Sentencing for Crack and Powder Cocaine

Senate Judiciary Committee – Full Committee Hearing
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Testimony of
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Introduction

Chairman Durbin, Ranking Member Grassley, Committee Members:

Thank you for inviting me to testify on the important issue of eliminating the sentencing disparity that remains between sentences for people charged with trafficking of crack versus powder cocaine.

The Biden-Harris Administration strongly supports eliminating the current disparity in sentencing between crack cocaine and powder cocaine. The current disparity is not based on evidence yet has caused significant harm for decades, particularly to individuals, families, and communities of color. The continuation of this sentencing disparity is a significant injustice in our legal system, and it is past time for it to end. Therefore, the Administration urges the swift passage of the “Eliminating a Quantifiably Unjust Application of the Law Act,” or the “EQUAL Act.”

The Biden-Harris Administration is taking an evidence-based approach to drug policy, and eliminating this disparity is in alignment with that approach. I would like to highlight some of the significant evidence to support this position.

Body of Research

First, this sentencing disparity is not based on sound scientific evidence. We currently have a system under which the same offense – distribution of cocaine – results in radically different sentences depending on the form of cocaine, even though both formulations affect the brain in the same way.

Research suggests that the 100:1 sentencing disparity under the Anti-Drug Abuse Act did not result in decreased crack cocaine use.¹ Similarly, the reduction of the mandatory sentencing disparity to 18:1 under the Fair Sentencing Act was not associated with an increase in crack cocaine use.²

However, data published by the United States Sentencing Commission has shown that a higher percentage of Black Americans are convicted in federal court for crack cocaine offenses versus powder cocaine offenses and this sentencing disparity has caused them to receive substantially longer average sentence lengths for comparable offenses.³

To put this into perspective: under the original 100-to-1 sentencing disparity, a five-year mandatory minimum penalty would be triggered by trafficking five grams of crack, whereas the same penalty would only be triggered if someone trafficked 500 grams of powder cocaine.⁴ And under the original law, simple possession of any amount of crack cocaine exceeding five grams incurred a five-year mandatory penalty, but there was no corresponding mandatory penalty for powder cocaine possession.

Under the original sentencing disparity, on average, Black Americans were incarcerated for non-violent offenses for almost the same length of time as white Americans who committed violent offenses.⁵

This sentencing disparity is part of a larger system with separate and unequal tracks for people of color and white people in the United States who use drugs or have substance use disorder. In 2018, the rate of incarceration for Hispanics was three times that of White Americans and the incarceration rate for Black Americans was 5.6 times that of White Americans.⁶

These racial inequities are not limited to criminal justice. When looking at access to substance use treatment, a recent study showed that Black individuals generally enter addiction treatment four to five years later than White individuals, even when controlling for socio-economic status.⁷

And in Hispanic communities, those who need treatment for substance use disorder were less likely to access care than non-Hispanics.⁸

We know that substance use disorders can become chronic conditions over time. Years spent without treatment, and incarceration, can both exacerbate substance use disorder and lead to other societal issues.

Closing

President Biden has emphasized the need to address racial inequities in the criminal justice system. For example, he has been clear that people should not be incarcerated for drug use alone but should be offered treatment instead.⁹ As a Senator in 2007, he introduced legislation to eliminate the sentencing disparity entirely.¹⁰ It is long past time to do this.

As laid out in our first year Drug Policy Priorities, the Administration is committed to a comprehensive approach that prioritizes evidence-based and equitable prevention, harm reduction, treatment, recovery, and supply reduction, to include, among other measures, dismantling drug trafficking networks, to turn the tide on addiction and the overdose epidemic.

ONDCP's charge has always been to reduce drug use and its consequences. For far too long, our Nation's approach to addressing substance use has led to disproportionate consequences for communities of color. If we are to follow the evidence and advance equity, as President Biden has directed our agency to do, we need to eliminate the sentencing disparity.

In closing, the Biden-Harris Administration supports the EQUAL Act and a complete elimination of the unfair sentencing disparity between crack cocaine and powder cocaine, which was based on many incorrect and unsound assumptions and has caused disproportionate harm to our most vulnerable communities.

Thank you for your time, and thank you for holding this important hearing that we hope will lead to real change to advance justice, health, and racial equity.

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¹ Walker, L. S., & Mezuk, B. (2018). Mandatory minimum sentencing policies and cocaine use in the U.S., 1985-2013. *BMC international health and human rights*, 18(1), 43. <https://doi.org/10.1186/s12914-018-0182-2>

² Center for Behavioral Health Statistics and Quality. (2020). "Results from the 2019 National Survey on Drug Use and Health: Detailed tables." Table 7.3B: Types of Illicit Drug, Tobacco Product, and Alcohol Use in Past Month among Persons Aged 12 or Older: Percentages, 2002-2019. <https://www.samhsa.gov/data/report/2019-nsduh-detailed-tables>

³ U.S. Sentencing Commission. "Quick Facts: Crack Cocaine Trafficking Offenses." SOURCE: United States Sentencing Commission, FY 2016 through FY 2020 Datafiles, USSCFY16-USSCFY20.

⁴ U.S. Sentencing Commission. "Mandatory Minimum Penalties for Drug Offenders in the Federal Criminal Justice System." October 2017. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

⁵ American Civil Liberties Union. (n.d.). Fair Sentencing Act. Webpage. Retrieved by ONDCP on March 31, 2021 at <https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act>

⁶ Carson EA. (2020) Prisoners in 2018. April, NCJ 253516. Available at <https://www.bjs.gov/content/pub/pdf/p18.pdf>.

⁷ Lewis, B., Hoffman, L., Garcia, C. C., & Nixon, S. J. (2018). Race and socioeconomic status in substance use progression and treatment entry. *Journal of ethnicity in substance abuse*, 17(2), 150–166. <https://doi.org/10.1080/15332640.2017.1336959>.

⁸<https://www.samhsa.gov/data/sites/default/files/NSDUH117/NSDUH117/NSDUHSR117HispanicTreatmentNeeds2012.htm>

⁹ The White House Office of National Drug Control Policy. "The Biden-Harris Administration's Statement of Drug Policy Priorities for Year One." April 1, 2021. <https://www.whitehouse.gov/wp-content/uploads/2021/03/BidenHarris-Statement-of-Drug-Policy-Priorities-April-1.pdf>

¹⁰ Congress.gov. "Text - S.1711 - 110th Congress (2007-2008): Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007." <https://www.congress.gov/bill/110th-congress/senate-bill/1711/text>