

September 27, 2021

**Vote YES on H.R. 1693,
the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act**

Dear Representative:

On behalf of the American Civil Liberties Union (ACLU) and The Leadership Conference on Civil and Human Rights, we write to express our support for H.R. 1693, the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act, sponsored by Rep. Hakeem Jeffries, D. N.Y., which would eliminate the sentencing disparity between crack and powder cocaine. ***We urge you to vote yes on H.R. 1693, the EQUAL Act. The ACLU and The Leadership Conference plan to include your vote on this legislation in our respective voting scorecards for the 117th Congress.***

Crack and powder cocaine are chemically identical, but in 1986, Congress was eager to react to the media frenzy surrounding the tragic death of Len Bias, a college basketball star who died of a drug overdose.¹ Many assumed, incorrectly, the substance that caused his death was crack, and weeks after his death, Congress established for the first time mandatory minimum sentences triggered by specific quantities of cocaine in the Anti-Drug Abuse Act of 1986.² Among other harmful provisions, this law, as originally enacted, established a 100:1 ratio in the quantities of powder and crack cocaine that resulted in a mandatory five-year prison sentence for offenses involving 500 grams of powder cocaine, while only five grams of crack cocaine triggered the same mandatory prison sentence. Similarly, the 10-year mandatory prison sentence applies if the offense involves five kilograms of powder cocaine, while only 50 grams of crack cocaine resulted in the same mandatory penalty.³ Despite these laws, a wide range of experts have concluded that there is no valid scientific or medical distinction between powder and crack cocaine.⁴

The Fair Sentencing Act of 2010 (FSA) partially addressed the disparity between the mandatory penalties for crack and powder cocaine by reducing the ratio from 100:1 to 18:1. The FSA raised the trigger for mandatory minimum penalties for crack cocaine offenses from five grams to 28 grams for the five-year mandatory minimum, and from 50 grams to 280 grams for the 10-year mandatory minimum. In 2018, the First Step Act made the ratio reduction retroactive. As a result, more than 3,705 people serving unjust

¹ Vagins, Deborah J. & McCurdy, Jesselyn. "Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law." *American Civil Liberties Union*. Pg. 1. <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law>.

² *Ibid*. Bias actually passed away due to a powder cocaine overdose. *Ibid*.

³ Yeh, Brian T. "Federal Cocaine Sentencing Disparity: Sentencing Guidelines, Jurisprudence, and Legislation." *Congressional Research Service*. Aug. 5, 2010. Pg. 2.

https://digital.library.unt.edu/ark:/67531/metadc491298/m1/1/high_res_d/RL33318_2010Aug05.pdf.

⁴ See, e.g., Hatsukami, D.K. & Fischman, M.W. "Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth Or Reality?" 279 *Journal of American Medicine*. Nov. 1996. Pg. 1580.

sentences under the 100:1 sentencing scheme have received reduced sentences, and more than 2,000 people have been released.⁵

The EQUAL Act completes the revisions made by the FSA over a decade ago. It will eliminate the disparity between crack and powder cocaine altogether and make that change retroactive, providing an opportunity for redress to those serving excessively long sentences due to this disparity. We are pleased to support this long overdue legislation.

The disparate ratio has created a harmful and racially discriminatory sentencing scheme that continues to persist today even after the FSA reduced the disparity to 18:1. For example, in 2010, just before passage of the FSA, 7.3 percent of people sentenced under the federal crack cocaine laws were White, while Black people made up 78.5 percent.⁶ Today, post-FSA, 6.3 percent of people sentenced under these laws are White, while 77.1 percent are Black.⁷ This disparity is even more glaring when one considers that White people are more likely than Black people to use crack cocaine in their lifetimes.⁸ Additionally, those convicted of a crack cocaine offense are the least likely to receive relief from mandatory minimums and, among those, Black people convicted of such an offense received relief less often than any other racial group in all drug types, meaning that Black people are subject to longer sentences based solely on the different form of the drug.⁹ This unjust disparity has disproportionately ripped apart Black families and devastated Black communities.

While the EQUAL Act's elimination of the disparity is important, Congress must also take action to end mandatory minimums. Our organizations are categorically opposed to mandatory minimum sentences and have advocated for their abolition for years. The proliferation of the use of mandatory minimum sentences has fueled skyrocketing prison populations.¹⁰ For instance, the federal prison population has increased

⁵ "First Step Act of 2018 Resentencing Provisions Retroactivity Data Report. *U.S. Sentencing Commission*. May 2021. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20210519-First-Step-Act-Retro.pdf>; "First Step Act Implementation Fiscal Year 2020 90-Day Report." *U.S. Department of Justice*. June 2, 2020. <https://www.ojp.gov/pdffiles1/nij/254799.pdf>.

⁶ "2010 Sourcebook of Federal Sentencing Statistics: Table 34." *U.S. Sentencing Commission*. 2010.

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Table34_0.pdf.

⁷ "Quick Facts: Crack Cocaine Trafficking Offenses, FY2020." *U.S. Sentencing Commission*. 2020.

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack_Cocaine_FY20.pdf.

⁸ "Results from the 2018 Nat'l Survey on Drug Use and Health: Detailed Tables." *Substance Abuse and Mental Health Service Administration*. 2018. Table 1.31A. <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2018R2/NSDUHDetailedTabs2018.pdf>.

⁹ "Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System." *United States Sentencing Commission*. Oct. 2017. Pg. 32, 34. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf. Black people are the least likely to receive relief from such sentences in general. *Ibid* at 32.

¹⁰ See, e.g., Samuels, Julie, & La Vigne, Nancy, & Thomson, Chelsea. "Next Steps in Federal Corrections Reform: Implementing and Building on the First Step Act." *Urban Institute*. May 2019.

https://www.urban.org/sites/default/files/publication/100230/next_steps_in_federal_corrections_reform_1.pdf; Travis, Jeremy, & Western, Bruce, & Redburn, Steve. "The Growth of Incarceration in the United States: Exploring Causes and Consequences." *Nat'l Research Council*. 2014. Pg. 336. <http://blogs.law.columbia.edu/praxis1313/files/2019/04/Chapter-13-NAS.pdf>.

from approximately 25,000 in FY 1980 to more than 153,000 today.¹¹ As of 2016, 55 percent of people in federal prison were sentenced under a mandatory minimum provision.¹² While drops in prosecutions and in the severity of sentences for drug-related crime, as well as releases due to the COVID-19 pandemic, have led to a decline in the federal prison population in recent years, by and large these piecemeal changes are insufficient to reverse nearly 40 years of explosive growth.¹³ The Bureau of Prisons' (BOP) budget has grown in tandem: The president's FY 2022 budget request for BOP is \$8 billion, which accounts for nearly a quarter of the Department of Justice's entire budget.¹⁴ The Urban Institute found that increases in expected time served for drug offenses was the largest contributor to growth in the federal prison population between 1998 and 2010.¹⁵ Experts attribute the growth both to the number of people admitted to prison for drug crimes as well as to the increased length of their sentences.¹⁶ Indeed, people convicted of drug offenses currently make up 46.3 percent of the BOP population.¹⁷

Yet, despite the dramatic uptick in incarceration, there is no indication that mandatory minimum sentences deter crime, protect public safety, or decrease drug use or trafficking. Studies of federal drug laws show no significant relationship between drug imprisonment rates and drug use or recidivism.¹⁸

These failed "tough on crime" policies have had a markedly disproportionate impact on communities of color. Today, BOP reports that 38 percent of its current prison population is Black, and 30.2 percent is Hispanic — an enormous disparity given that both groups combined represent only about one third of the nation's population.¹⁹ These disparities are also reflected in mandatory minimum penalties. In 2017, the

¹¹ "Statistics: Total Federal Inmates." *Federal Bureau of Prisons*. Last updated June 10, 2021.

https://www.bop.gov/about/statistics/population_statistics.jsp.

¹² "An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System." *United States Sentencing Commission*. Jul. 2017. Pg. 49. https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

¹³ Ghandnoosh, Nazgol. "U.S. Prison Decline: Insufficient to Undo Mass Incarceration." *The Sentencing Project*. May 19, 2020. <https://www.sentencingproject.org/publications/u-s-prison-decline-insufficient-undo-mass-incarceration/>; "Policy Shifts Reduce Federal Prison Population." *United States Courts*. April 25, 2017.

<https://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population>.

¹⁴ "Federal Prison System (BOP) FY22 Budget Request." *Department of Justice*.

<https://www.justice.gov/jmd/page/file/1398986/download>.

¹⁵ Mallik-Kane, Kamala & Parthasarathy, Barbara & Adams, William. "Examining Growth in the Federal Prison Population, 1998 to 2010." *Urban Institute*. 2012. Pg. 3.

<https://www.urban.org/sites/default/files/publication/26311/412720-Examining-Growth-in-the-Federal-Prison-Population--to--.PDF>.

¹⁶ "Drivers of Growth in the Federal Prison Population." *Charles Colson Task Force on Federal Corrections*. March 2015. <https://www.urban.org/sites/default/files/publication/43681/2000141-Drivers-of-Growth-in-the-Federal-Prison-Population.pdf>.

¹⁷ "Statistics: Inmate Offenses." *Federal Bureau of Prisons*. Updated July 10, 2021.

https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

¹⁸ See, e.g., Luna, Erik. "Mandatory Minimums." *The Academy for Justice*. 2017. Pgs. 127-130.

https://law.asu.edu/sites/default/files/pdf/academy_for_justice/7_Criminal_Justice_Reform_Vol_4_Mandatory-Minimums.pdf; Nat'l Inst. of Justice. "Five Things about Deterrence." May 2016.

<https://www.ojp.gov/pdffiles1/nij/247350.pdf>; "Federal Drug Sentencing Laws Bring High Cost, Low Return." *Pew Charitable Trusts*. Aug. 27, 2015.

<https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>.

¹⁹ "Inmate Statistics." *Federal Bureau of Prisons*. Updated July 10, 2021.

https://www.bop.gov/about/statistics/statistics_inmate_race.jsp. Hispanics make up 18.5% of the U.S. population,

U.S. Sentencing Commission found that Black people in BOP custody were more likely to have been convicted of an offense carrying a mandatory minimum penalty than any other group.²⁰ Hispanic and Black people accounted for a majority of those convicted of an offense carrying a drug mandatory minimum,²¹ despite the fact that White and Black people use illicit substances at roughly the same rate, and Hispanic people use such substances at a lower rate.²² The study also showed that Black people were the least likely to receive relief from mandatory minimum sentences compared to White and Hispanic people.²³ It is clear that mandatory minimums create stark racial disparities in federal sentencing.

We strongly urge Congress to take bold steps to address the damage wrought by mandatory minimum sentencing and transform our criminal-legal system into one that delivers true justice and equality. **Voting yes on the EQUAL Act is a welcome step toward achieving that goal.**

If you have any questions, please contact Sakira Cook, senior director of the Justice Program at The Leadership Conference, at cook@civilrights.org, or Aamra Ahmad, senior policy counsel at the American Civil Liberties Union, at aahmad@aclu.org.

Sincerely,

American Civil Liberties Union
The Leadership Conference on Civil and Human Rights

while Black people make up 13.4%. “United States QuickFacts.” *U.S. Census Bureau*. Last updated July 1, 2019. <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

²⁰ “An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System.” *United States Sentencing Commission*. Jul. 2017. Pg. 53. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

²¹ “Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System.” *United States Sentencing Commission*. Oct. 2017. Pg. 57. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

²² “Results from the 2018 Nat’l Survey on Drug Use and Health: Detailed Tables.” *Substance Abuse and Mental Health Service Administration*. 2018. Table 1.23B. <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2018R2/NSDUHDetailedTabs2018.pdf>.

²³ *Ibid.* at 7.