



October 20, 2009

Dear Senator:

Re: ACLU Urges Senators to Support S. 1789, the Fair Sentencing Act of 2009

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless activists and supporters, and fifty-three affiliates nationwide, we urge you to co-sponsor S. 1789, the Fair Sentencing Act of 2009, recently introduced by Senator Richard Durbin (D-IL). This bill seeks to eliminate the unjust and discriminatory disparity between crack and powder cocaine sentences under federal law.

Heightened penalties for crack cocaine were adopted more than two decades ago, based on assumptions about crack that are now known to be false. The single feature that most distinguishes a crack cocaine arrestee from a powder cocaine arrestee is skin color – with crack arrestees far more likely to be black, notwithstanding that the majority of crack users are white. Despite the absence of evidence that the harms associated with the use of crack are any greater or lesser than for powder, sentences for crack are currently equivalent to the sentences for 100 times the amount of powder cocaine – and the impact falls disproportionately on African Americans.

Currently, the federal crack cocaine law subjects a person who distributes or possesses as little as five grams of crack cocaine to a five-year mandatory minimum sentence – the same sentence that person would face for 500 grams of powder cocaine. A person convicted of distributing 50 grams of crack is subject to a ten-year mandatory minimum. It takes 5,000 grams of powder cocaine to receive the same ten-year mandatory sentence. This is often referred to as the federal 100-to-1 disparity between crack and powder cocaine.

S. 1789 builds upon the bipartisan support for ending this disparity from the 110th Congress. This legislation completely eliminates the 100-to-1 sentencing disparity between crack cocaine and powder cocaine. Under this new proposed law, possession of 500 grams of crack and 500 grams of powder cocaine would trigger a mandatory minimum sentence of five years. Similarly, 5,000 grams of crack or powder would trigger a ten-year sentence. Numerous scientific and medical experts have determined that the pharmacological effects of crack cocaine are no more harmful than powder cocaine. The effect on users is the same regardless of form. Federal law should not make a distinction between sentences for the sale or possession of different forms of the same drug.

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

The federal government's original stated goal in punishing crack cocaine offenses so severely was to target high-level drug traffickers. Today, more than two decades after the original enactment of these laws, the goal of targeting so-called drug "kingpins" has failed. In fact, the very opposite has proven to be the rule as mandatory penalties for crack cocaine offenses have been applied most often to offenders who are low-level participants in the drug trade, yet comprise more than 60 percent of federal crack defendants.¹

Several important recent developments suggest that there is growing support from across the ideological spectrum for addressing the discriminatory impact of crack cocaine sentencing. The United States Sentencing Commission, an independent agency in the judicial branch of government, has issued multiple reports urging congressional action to address the disparity. On December 10, 2007, based primarily on the overwhelming evidence of the inherent unfairness of the sentencing disparity, the United States Supreme Court, in a 7-2 decision, ruled in *Kimbrough v. United States* that federal judges can sentence crack cocaine offenders below the federal sentencing guidelines if they disagree with the 100-to-1 disparity ratio. Before that decision, lower courts generally felt compelled to conform to the disparate sentencing guidelines even if they were presented with evidence of the sentencing scheme's unfairness.

Prior to taking office in 2001, former President George W. Bush signaled support for reform stating in a CNN interview that the crack-powder disparity "ought to be addressed by making sure the powder-cocaine and the crack-cocaine penalties are the same."² In addition, the Obama administration's Department of Justice has repeatedly testified before Congress that the disparity is unjust, unsupported by the facts, and should be completely eliminated under federal law.³

Even with all of these very substantial developments, it is critically important to remember that Congress alone has the authority to put a stop to the imposition of long mandatory minimum sentences that many people, overwhelmingly poor and African American, are serving for crack cocaine offenses. It is also clear that imprisoning crack cocaine offenders for disproportionate, excessive prison stays is in no one's interest. It strains an already overburdened prison system and an increasingly depleted government budget, while eroding communities' faith in the fairness of the system with no benefit to public safety. **Congress must now act to eliminate the disparity between crack and powder cocaine. The ACLU strongly urges you to co-sponsor and support the passage of S. 1789, the Fair Sentencing Act of 2009, in order to end this 23-year injustice.**

¹ U.S. Sentencing Commission, 2005 Drug Sample.

² http://www.chron.com/CDA/archives/archive.mpl?id=2001_3277068

³ Testimony of Assistant Attorney General (Criminal Division) Lanny Breuer before the U.S. Senate Judiciary Subcommittee on Crime and Drugs, "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity," April 29, 2009, available at - <http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf>

Sincerely,

Handwritten signature of Michael W. Macleod-Ball in black ink.

Michael W. Macleod-Ball
Acting Director, Washington Legislative Office

Handwritten signature of Jennifer Bellamy in black ink.

Jennifer Bellamy
Legislative Counsel