

Written Testimony of Americans for Prosperity
Before the Senate Committee on the Judiciary
Examining Federal Sentencing for Crack and Powder Cocaine
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Americans for Prosperity is dedicated to the belief that every person has a unique set of gifts and the ability to contribute to society in their own way, an idea that has inspired progress since our country's founding. At our organization, we engage in broad-based grassroots outreach to advocate for long-term solutions to the country's biggest problems that prevent people from realizing their full potential. This necessarily includes effective reforms to our nation's criminal justice system; one of the greatest existing barriers to realizing the American dream.

Americans for Prosperity believes that our criminal justice system should promote public safety, preserve human dignity, and provide equal justice for all under the law. Accountability is an essential component of justice, but that accountability must be proportional based on the harm caused to a victim or the local community. Differences in the sentences imposed for the same or substantially similar crimes that are not justified by public safety or the harm caused undermine trust and credibility in the law, our courts, and the justice system. These principles and the research summarized below motivate our organization to support ending the federal sentencing disparity between crack and powder cocaine through the EQUAL Act.

A Well-Intentioned Solution

In the early 1980s, crack cocaine went from an almost unknown drug to something that was covered in the media almost every single day.¹ Congress passed the Anti-Drug Abuse Act of 1986 as a bipartisan response to the rise of this drug in hopes that it would reduce the increase of violence in many communities. This law created a 100:1 disparity in the amount of crack versus powder cocaine someone had to possess for them to become subject to strict mandatory minimums at the federal level. After this law, the distribution of only 5 grams of crack cocaine was subject to the same prison sentence as the distribution of 500 grams of powder cocaine by an otherwise similarly situated defendant.²

A decade later, Americans using illicit drugs recreationally and those dealing with a substance use disorder shifted their preferences to other drugs, but crime rates stayed high until they began their unprecedented decline from the late 1990s until today.³ Years of research, evidence, and experience began to raise questions about the justifications for this disparity and Congress has responded by reducing the 100:1 disparity in punishment for these two forms of the same chemical substance. The Fair Sentencing Act and the First Step Act reduced this disparity (and made it retroactive) to 18:1 but its continued existence is not justified by the body of evidence exploring the differences in crack and powder cocaine.⁴

¹ Donna M. Hartman & Andrew Golub, *The Social Construction of the Crack Epidemic in the Print Media*, 31 J. Psychoact. Drugs 423 (2012).

² Anti-Drug Abuse Act of 1986, H.R. 5485, 99th Cong. § 1002 (1986).

³ Federal Bureau of Investigation, *Crime Data Explorer*, U.S. Department of Justice (2021), <https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/crime-trend> (showing that violent and property crime rates have both declined by almost half since their peak in 1991); Lloyd D. Johnston, et al., *Demographic Subgroup Trends Among Young Adults In The Use Of Various Licit And Illicit Drugs: 1988–2019*, Institute for Social Research at The University of Michigan (2020), <https://files.eric.ed.gov/fulltext/ED608244.pdf> (showing that crack use peak in 1987/1988 for all ages and then declined quickly in the 1990s).

⁴ First Step Act of 2018, S. 756, 115th Cong. § 404 (2018); Fair Sentencing Act of 2010, S. 1789, 111th Cong. § 2 (2010).

A Disparity Now Lacking Justification

As noted above, years of research on the differences between crack and powder cocaine have now revealed that America reached an inaccurate conclusion about the need for more severe punishments for crack cocaine. The growing body of evidence clearly suggests this disparity does nothing to advance our country's public safety or public health goals by reducing crime, negative health outcomes, or substance use.

Scientific research has now proven that both forms of cocaine result in comparable “physiological and psychoactive effects” and are nearly chemically identical.⁵ While there are surely many negative health outcomes associated with abusing certain substances and we must be vigilant as a country about working to reduce such use, research looking at negative health outcomes for users of crack cocaine has failed to identify unique negative outcomes when compared to the use of drugs generally.⁶

It should not be surprising then that the previously assumed connection between crack and violence in many communities was not caused by the drug itself but instead the rapid expansion of black markets for all illicit drugs in those communities and a lack of alternative, legal economic opportunities. Researchers have now found that any differences in associated violence between crack and powder cocaine are not related to the drugs themselves and completely disappear when their research controls for other factors.⁷ In fact, both forms of cocaine have been found in some studies to be associated with *less* violence than alcohol.⁸

Lastly, looking at the state level, we can use these “laboratories of democracy” to decipher whether a disparity between crack and powder cocaine sentences had a clear positive impact on public safety or public health over recent decades. More than 40 states either never had or have ended their crack-powder sentencing disparities.⁹ When you dig into data on cocaine use, there is no clear trend or difference among states that do have a disparity and those that do not. States with such sentencing disparities – like New Hampshire and Vermont – are right alongside states like Nevada, New York, and Hawaii among the jurisdictions with the highest rates of cocaine use.¹⁰ States with and without such disparities have also followed the national trend of reduced crime rates since the 1990s showing that a lack of disparity has not inhibited states without disparities from achieving similar gains in public safety.¹¹

⁵ Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 JAMA 1580 (1996).

⁶ Ainslie J Butler, et al., Health outcomes associated with crack-cocaine use: Systematic review and meta-analyses, 180 Drug Alcohol Dep. 401 (2017).

⁷ Michael G Vaughn, et al., Is crack cocaine use associated with greater violence than powdered cocaine use? Results from a national sample, 36 Amer. J. Drug Alcohol Abuse 181 (2010) (finding that demographic factors – age, gender, income, and educational attainment – and mental health or other substance use disorders cause the likelihood of violence associated with crack cocaine use to become “uniformly statistically nonsignificant” when compared to powder cocaine use.); See generally Jeffrey Fagan, Interactions Among Drugs, Alcohol, and Violence, 12 Health Affairs 65 (1993) (“The weight of evidence suggests that substance use provides a provocative context for violence but there is limited evidence that alcohol or drugs directly cause violence.”)

⁸ Margaret E. Leigey & Ronet Bachman, *The Influence of Crack Cocaine on the Likelihood of Incarceration for a Violent Offense: An Examination of a Prison Sample*, 18 Cim. Just. Pol’y Rev. 335 (2007); See also Kim P. C. Kuypers, et al., *Intoxicated aggression: Do alcohol and stimulants cause dose-related aggression? A review*, 30 Eur. Neuropsychopharmacology 114 (2020) (finding causation between alcohol and aggression but noting that no causation has been established yet for cocaine).

⁹ Famm, *Crack-Cocaine Disparity Reform in the States*, Famm (2018), <https://famm.org/wp-content/uploads/Crack-Disparity-in-the-States.pdf>.

¹⁰ Center for Behavioral Health Statistics and Quality, *2018-2019 National Survey on Drug Use and Health National Maps of Prevalence Estimates, by State*, SAMHSA (2020), <https://www.samhsa.gov/data/report/2018-2019-nsduh-national-maps-prevalence-estimates-state>; See also Arthur Hughes, et al., *State Estimates Of Past Year Cocaine Use Among Young Adults: 2014 and 2015*, SAMSHA (2016), https://www.samhsa.gov/data/sites/default/files/report_2736/ShortReport-2736.html (shows that the ten states with crack/powder cocaine disparities are in the first, fourth, and fifth quartiles for young adult cocaine use during 2014 and 2015).

¹¹ Federal Bureau of Investigation, *supra* note 3.

Impact of Past Reforms

Opponents of past reforms noted above have warned that changes to this disparity would result in increased drug use, crime, and recidivism but this simply has not happened in practice. While it is too early to draw credible conclusions about the retroactive reforms included in the First Step Act, the impact of the Fair Sentencing Act and the United States Sentencing Commission's Drugs Minus Two Amendment have been extensively studied to determine their impact. Data on drug use following Fair Sentencing shows there were no increases in crack cocaine use and that use of powder cocaine declined.¹² Reductions in the Guideline's sentencing disparity also did not result in higher recidivism, even though individuals served an average of 37 fewer months in federal prison.¹³ Prosecutors also did not lose their ability to incentivize defendants to cooperate during investigations on account of shorter prison sentences.¹⁴

Potential Impact of Ending Disparity

Not only has this disparity failed to achieve its goals but its continued existence imposes significantly longer prison sentences on individuals who already face arbitrarily worse outcomes in our justice system.¹⁵ ¹⁶ This policy is a classic case of good intentions, bad outcomes and its continued existence does nothing to improve public safety or public health in America.

Our partners at Recidiviz – a nonprofit, data-analytics organization working with state corrections agencies to improve decision making – have completed an impact analysis of the potential impact of a reform ending this sentencing disparity. They have found that full elimination of this disparity can help the federal prison system save up to \$117 million in taxpayer money over the next five years and has the potential to further reduce the federal prison population by another 500 individuals.¹⁷ It will also mitigate more than 3,100 years of

¹² Lauryn Saxe Walker & Briana Mezuk, Mandatory minimum sentencing policies and cocaine use in the U.S., 1985–2013, 18 BMC Int'l Health Hum. Rts. 43 (2018); See also United States Sentencing Commission, *Report to the Congress: Impact of the Fair Sentencing Act of 2010*, United States Sentencing Commission (2015), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf (finding that crack cocaine use declined after the Fair Sentencing Act).

¹³ United States Sentencing Commission, *Retroactivity & Recidivism: The Drugs Minus Two Amendment*, United States Sentencing Commission (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.

¹⁴ United States Sentencing Commission, *supra* note 12 (showing that substantial assistance motion rates did not decline after adoption of the Fair Sentencing Act).

¹⁵ Those convicted of crack cocaine trafficking are subject to sentences 12% longer than those convicted of powder cocaine trafficking. Of those convicted of such offenses, Black individuals make up 77% of crack cocaine trafficking offenders but only 27% of powder cocaine trafficking offenders. See United States Sentencing Commission, *Quick Facts: Crack Cocaine Trafficking Offenses*, United States Sentencing Commission (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack_Cocaine_FY20.pdf; See United States Sentencing Commission, *Quick Facts: Powder Cocaine Trafficking Offenses*, United States Sentencing Commission (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Powder_Cocaine_FY20.pdf.

¹⁶ Even when researchers control for the crimes charged, an individual's criminal record, and other factors, research and data consistently shows that in many communities Black individuals are both more likely to receive a punishment of incarceration over an alternative and receive longer prison sentences for the same crimes. See Ricky Camplain, et al., *Racial/Ethnic Differences in Drug- and Alcohol-Related Arrest Outcomes in a Southwest County From 2009 to 2018*, Am. J. Public Health (2020), <https://ajph.aphapublications.org/doi/ref/10.2105/AJPH.2019.305409>; Traci Burch, *Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing*, 12 J. Empir. Leg. Stud. 395 (2015); Lisa Stolzenberg, et al., *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants*, 3 Race Just. 275 (2013); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 1 Yale L.J. 2 (2013); Stephen Demuth & Darrell Steffensmeier, *Ethnicity Effects on Sentence Outcomes in Large Urban Courts: Comparisons Among White, Black, and Hispanic Defendants*, 85 Soc. Sci. Q. 994 (2004); William J. Sabol, et al., *Trends in Correctional Control by Race and Sex*, Council on Criminal Justice (2019), https://cdn.ymaws.com/counciloncj.org/resource/collection/4683B90A-08CF-493F-89ED-A0D7C4BF7551/Trends_in_Correctional_Control_-_FINAL.pdf; United States Sentencing Commission, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System*, United States Sentencing Commission (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf; Glenn R. Schmitt, et al., *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, United States Sentencing Commission (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

¹⁷ Recidiviz, *Eliminating Disparities between crack and powder cocaine offenses*, Recidiviz (2021), available at <https://www.recidiviz.org/policy/directory>.

prison time, allowing individuals who have made a mistake to return to their families.¹⁸ Many of these individuals simply want a second chance to prove their commitment to living positively in the future and imposing a longer prison sentence unjustified by a public safety rationale only serves to harm our communities and economy.

Conclusion

There are inherent differences in some drugs that justify Congress imposing more or less severe sentences when individuals violate federal law. These different levels of punishment should be proportional and incorporate consideration of how they will impact both public safety and public health. By establishing and continuing to support the United States Sentencing Commission, the Bureau of Justice Statistics, and other federal agencies, Congress has shown a strong preference for evidence-based policies and punishments in our federal criminal justice system. This hearing by the Senate Committee on the Judiciary reflects a continued commitment by our leaders in Congress to provide Americans with the maximum level of public safety in our communities and revise policies that are not helping us achieve that goal. At Americans for Prosperity, we look forward to partnering with Congress to end the unnecessary disparity between crack and powder cocaine sentences in our federal justice system given its lack of contribution to public safety or public health.

¹⁸ Recidiviz, *supra* note 17.