

EXAMINING FEDERAL SENTENCING FOR CRACK AND POWDER COCAINE

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

JUNE 22, 2021

Serial No. J-117-24

Printed for the use of the Committee on the Judiciary



*www.judiciary.senate.gov
www.govinfo.gov*

U.S. GOVERNMENT PUBLISHING OFFICE

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EXAMINING FEDERAL SENTENCING, FOR CRACK AND POWDER COCAINE

TUESDAY, JUNE 22, 2021

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in Room 106, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Feinstein, Whitehouse, Klobuchar, Coons, Blumenthal, Booker, Ossoff, Grassley, Cornyn, Lee, Cruz, Hawley, Tillis, and Blackburn.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. The hearing will come to order. Today the Senate is holding a hearing in this Committee on one of the most indefensible disparities in our system of justice and the bipartisan legislation designed to eliminate it once and for all, The EQUAL Act. To start things off, I'd like to turn to a video about the history of this disparity and the racially disparate impact it's had.

[Video is shown.]

Chair DURBIN. In November 1985, The New York Times ran a front-page story warning of a "new purified form of cocaine" that had emerged on the streets of New York City. The article characterized the drug as the wave of the future and quoted a doctor who claimed that anyone who used it would be addicted almost instantaneously. Over the next year, thousands of articles and hours of breathless news coverage would be devoted to the dangers of crack cocaine, but much of this coverage was predicated on an outright falsehood, such as the notion that crack is more addictive than powder cocaine or that it's more likely to make its users violent.

Today, several decades removed from our mass panic over crack cocaine, we know that powder cocaine and crack are simply two forms of the same drug. Make no mistake, both are addictive and dangerous. Once they reach the brain, they produce similar physiological and psychological effects.

While the scientific consensus on crack has evolved over the years, our Nation's drug sentencing policy has not. At the height of the crack scare in 1986, facts fell victim to fear, and fear inspired misguided and discriminatory policy. In response to a nation in panic, we passed on a bipartisan basis, a law that imposed a 100-to-1 sentencing disparity between crack cocaine and powder cocaine offenses, the Anti-Drug Abuse Act of 1986. To date—to this

date, it is one of the worst votes I ever cast. That legislation derived from a war-on-drugs-era mentality that we could somehow incarcerate our way out of a drug epidemic. That approach did not work with crack cocaine. In fact, it has never worked.

In the 50 years since President Nixon declared our failed war on drugs, drug use and drug availability has increased, our Nation has endured a crack epidemic, a meth epidemic, and currently an opioid epidemic. By now, I hope we all understand that drug addiction is not a choice and just not a moral failing, it is a disease. Instead of meeting the public health crisis of addiction with care and compassion, we've met it with punishment and penalties. The results have been devastating, and when it comes to crack cocaine, we established a sentencing disparity that has directly fueled the crisis of mass incarceration in America.

During the first four decades of the war on drugs, our Federal prison population grew by 700 percent, and the cost of operating Federal prisons exploded by 1,100 percent. Those bloated costs have diverted public safety resources away from where they're needed and have made us less safe. Today, our Nation is home to just 4 percent of the world's population and about 20 percent of the world's prisoners. In America, we pride ourselves as the land of the free, but the sad fact is, we have the highest incarceration rate in the world. Worse yet, the crack-powder disparity has exacerbated the systemic racial inequities in our criminal justice system. We must bring this injustice to an end, and we can begin by eliminating the crack-powder disparity.

I'm confident we can achieve this on a bipartisan basis. Over the years, I've worked with my Republican colleagues like Ranking Member Grassley and even former Attorney General Sessions to reduce the crack-powder disparity. In 2009, I authored the Fair Sentencing Act. The bill I wrote would have fully eliminated the crack-powder disparity, but to get it across the finish line, I agreed to a compromise version with then Senator Jeff Sessions that reduced the disparity from 100-to-1 to 18-to-1. It was a good step forward, but not enough.

This lingering disparity means that a person arrested for 28 grams of crack—do we have that—I guess we don't have the illustration. I'll skip that. As I've said, I'm confident we can come together to finally resolve this injustice, because there are other steps we have taken to address inequities in our criminal justice system on an overwhelmingly bipartisan basis, like the First Step Act. With that legislation, Republicans and Democrats, with President Trump, worked together to improve conditions in our Nation's prisons and shorten mandatory minimum sentences for nonviolent drug offenses.

We made the Fair Sentencing Act retroactive, allowing thousands of people sentenced under the old 100-to-1 disparity to petition for early release, including Matthew Charles, who will speak to us today. Early evidence suggests that retroactive application of the Fair Sentencing Act has worked as intended. Last year, the Department of Justice reported that the recidivism rate for those released under the First Step Act was actually lower than historic recidivism rates.

This much is clear. Our past efforts of reform have been bipartisan, and they're working. The task that now lies before us is finishing the job we've started by eliminating this disparity altogether. It has no basis in science. It's done nothing to make us safer. It serves only to undermine trust in our system of justice, especially among Black Americans, who are six times, six times, more likely to be in prison on drug charges than white Americans, even though the drug use is at a similar rate between them. What's more, legal experts and political leaders of all stripes agree Congress needs to finish this job.

When I chaired a Subcommittee hearing on this issue in 2009, the Department of Justice testified in support of completely eliminating the disparity. Today, 12 years later, the Department of Justice again is calling for Congress to eliminate it, in written testimony. I welcome the Republican Governor of Arkansas, Asa Hutchinson, who testified at our 2009 hearing, again with us today, calling for Congress to pass the EQUAL Act. Thank you, Governor.

Before I hand things off to Ranking Member Grassley, I want to tell a story that is important and very personal. Ranking Member Grassley has been an invaluable and trusted partner in this effort. I know that he feels, as I do, that there are thousands of people who should be seeing justice in this country who are not, because of these guidelines. One person I will never forget is a woman, Eugenia Jennings. She was originally from Alton, Illinois. As a child, she was abandoned and seriously abused. At the age of 15, she started using crack to dull the pain of her life. At 23, she was convicted for trading a small amount of crack for clothing for her kids.

The Federal judge, a personal friend of mine, Patrick Murphy, delivered her sentence, and he said, quote, "This is not a sentence I am happy with. I'm not proud of it. Congress has determined that the best way to handle people who are troublesome is just lock them up." Eugenia Jennings, at the age of 23, was sentenced to 22 years in a Federal prison for a nonviolent offense.

She never gave up hope. While serving her time, she was a model prisoner who did everything asked of her. Years into her sentence, she developed a rare and serious form of cancer, leukemia. I'll never forget the day that I personally met her in the Federal prison in Greenville, Illinois. I sat down with this lady and talked for over an hour. At the end of it, she said, "I don't know how much longer I'm going to live, Senator, but I promise you this. If you can find some way to get me out of this prison to be with my girls, I'll never do anything wrong again in my life."

I sat down and wrote a personal note to a former Senator from Illinois named Barack Obama and asked him to commute Eugenia's sentence. He did, and just in time for Eugenia to see her eldest daughter graduate from high school. She died less than 2 years later, at the age of 36.

As we approach the end of the graduation season this month, I'd like us all to think about Eugenia. When she entered prison, her daughter was 6 years old. The next time she saw her in the outside world, her daughter was a young woman. Eugenia missed her daughter's first day of high school, her prom, and so many other rites of passage, and I want to salute her brother, Cedric Parker, who was on the video, the earlier video. He raised those kids while

Eugenia was in prison, but Eugenia missed them because the mythology surrounding crack cocaine still dictates Federal policy.

Eugenia's gone, but there're still so many people like her, counting on us to finally eliminate this disparity. Let's not wait another day.

I recognize Ranking Member Grassley for his opening statement.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Thank you, Mr. Chairman, for holding this hearing. Before I begin my statement, just a comment. No disagreement with the statistics you use, in regard to 4 percent of our population and 20 percent of—our imprisonment is greater than any other society. Just a question that I don't expect you to answer, and maybe there's no answer to it, but do those figures include the Uighurs, the millions of Uighurs that the Chinese have in prison in their concentration camps?

Chair DURBIN. That's a very good point.

Senator GRASSLEY. I'd like to have—see if we could find an answer to that.

Drug sentencing laws are complex. They must be fair, and they must be just, but prioritizing public safety is very important. As such, they can't be based only on violent crime risks, prevention efforts, or racial justice concerns. They must be comprehensive. This is particularly true as we evaluate today's topic, sentencing laws on crack and powder cocaine.

I've been a partner on this issue in the past. You've recognized that today, and I appreciate that. I've indicated my openness to reevaluating the sentencing disparity between crack and powder cocaine, but I do have some questions about how to best do this. There are discrepancies between crack and powder cocaine, in terms of recidivism rates, addiction, and violent crime. These factors can't be ignored.

I'm hopeful today's testimony will touch on these aspects, but I believe a comprehensive consensus hearing on cocaine certainly would've highlighted these nuanced points. I asked Chairman Durbin for a comprehensive hearing on cocaine, so that we can have a complete understanding of all these issues. I wanted a consensus hearing, meaning that everything was agreed upon and that there were no minority or majority witnesses, but that's not how this hearing unfolded. Today's hearing isn't consensus, nor is it as comprehensive as it should be. Instead, this hearing is focused only on sentencing issues, particularly in deference to the EQUAL Act, and I have told people that I'm willing to look at some sort of reduction in the disparity that exists today.

I'm disappointed that my request for a comprehensive hearing on cocaine was dismissed, particularly since I've supported efforts to review crack and powder cocaine sentencing issues in the past. I Co-Sponsored the Fair Sentencing Act, which changed the 101-to-1 sentencing ratio for crack and powder cocaine to where it is today, 18-to-1. I supported this change being made retroactive in the First Step Act. I joined an amicus brief submitted to the Supreme Court to review the applicability of this provision, and I Co-

Sponsored the First Step Implementation Act, which further allows for retroactive review and application of cocaine sentencing.

We've accomplished a lot in this area already, and maybe there's more that can be done, and I've already indicated my willingness to talk about those things. Today's hearing is likely the first of many steps on cocaine sentencing, because there's still a lot that we need to know. Today's Government panel, for instance, shines a light on the vacuum of information Congress is operating in. The Department of Justice submitted a statement for the record in support of the EQUAL Act.

[The information appears as a submission for the record.]

The Biden Justice Department support for this bill isn't surprising. It's the same position as the Obama administration, but nobody from the Justice Department is here to testify. DOJ's absence makes it hard to fully evaluate and understand the scope and impact of changing the law. While the United States Sentencing Commission has released excellent reports on Federal drug sentencing laws, its most recent comprehensive report on cocaine sentencing was as far back as 2007. Also, the last time the Sentencing Commission testified before the Senate on this issue was way back, 2009. At that time, they stated the sentencing ratio of crack and powder cocaine shouldn't be higher than 20-to-1. It's currently at 18-to-1.

Where does all this leave us now? I'm worried we're barreling down legislation without a complete picture of the issue or the necessary Government witnesses before us today. I'm nonetheless looking forward to hearing this hearing. Learning as much as I can and discussing steps forward. I'd like to be involved in those steps forward. I hope the future of this discussion will highlight a variety of perspectives and be more collaborative as we seek to find a solution together. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Grassley. Our work together is a body of work which I'm most proud of, and I want to continue it. Though we may have had a disagreement about the elements and procedures today, there's no fundamental disagreement between us, and I look forward to working with you to have a complete hearing on all the important issues that face us.

I'll now turn to Senator Booker, the Chair of the Judiciary Subcommittee on Criminal Justice and Counterterrorism, for an opening statement.

**OPENING STATEMENT OF HON. CORY A. BOOKER,
A U.S. SENATOR FROM THE STATE OF NEW JERSEY**

Senator BOOKER. Mr. Chairman, I thank you for the opportunity to speak for a brief time at the top of this hearing. I would like to submit my formal opening remarks for the record.

I want to share with my colleagues, you know, there's guiding principles to this country, where we aspire to the highest ideals of humanity. It's what our Constitution is based upon, by our Founding Fathers, who sought to make our Nation one that best evidenced the ideals not just of humanity but of divine providence. There is a—from the Abrahamic faiths, it's an ideal. Come from Micah, "What do you want, O Lord, from your people?", which is to do justice, to love mercy, and to walk humbly. This is one of

those areas of law where we have created this disparity that, to me, violate those highest ideals in a way that I can't identify as great as this in other areas.

I have had the privilege in my life of living in different types of communities. I lived and grew up in a wealthy community where my family was the only Black family there. In communities of wealth and privilege, I saw drug use and know lots of people who were violating our laws. I've lived for the last 20 years in a low-income, Black and brown community, and I see the same human frailties. The consequences for those lawbreakers is very different. When it comes to crack and powder cocaine, it has been stunning to me to see how this law has so terribly impacted the lives of folks, many of whom—who need help, many of them who need treatment, but devastated their lives with this disproportionate sentencing.

I am trying to live up to those ideals of humility. I've listened very closely to all of the arguments that have been against changing this, and I've been quite satisfied by the data. I appreciate Chairman Grassley talking about the concerns, because both sides of the aisle share the same concern: public safety, public safety. All the data that I can find that from objective sources gives no credence or validity to some of the concerns that I hear most often. For example, in 2014, the Sentencing Commission, looking at the retroactive reduction in crack cocaine guidelines, found that retroactive sentence reductions did not result in higher recidivism rates. The data is very clear.

I've heard concerns expressed about violent crime, that somehow crack cocaine users, unlike powder cocaine users—and, again, there's dramatic racial disparities—that somehow those crack cocaine users were more likely to be engaged in violent crime. I looked, with humility, toward the validity of those arguments, and objective sources say, time and time again, that is not the case.

Again, recent data dispels this notion that crack offenses account for a higher rate of weapons possession than powder cocaine. According to the data from the USSC in FY 2020, more Federal offenders charged with powder cocaine offenses carried weapons—490—than those charged with crack cocaine offenses—468. In fact, it's the opposite. The data shows that powder cocaine folks are more likely to have weapons. For me, there is no substantive reason, from the actual chemical—they are the same substance—all the way to the allegations that somehow this will lead to more violence, will lead to more recidivism. This is just not the case.

What is the case is that this has created within our society deeper schisms along racial lines, where certain people have had their lives devastated by this disparity. This is not justice. This is not those high ideals of humanity that we talk about in our most sacred civic documents, like the ideals of equal justice under the law.

I am so encouraged that this is a bipartisan effort, that there are numerous Republicans in the House, and Senator Portman here, that are working with us in a bipartisan way to end this stain of injustice in our community. I am so happy that the very people who are out there enforcing our laws—from law enforcement organizations, National District Attorneys, the Americans for Prosperity, the Due Process Institute, FreedomWorks, law enforcement

leader after law enforcement leader, are working together. From Right on Crime to the very Sentencing Project are working together to end what is a shameful chapter in our country.

You had Richard Nixon up there. All of us are mountain ranges; I do not vilify anyone. We have all made good contributions and tough contributions. You know, I want to end with these words by Ehrlichman that really were at the beginnings of the war on drugs, that sought to prey upon our prejudices, to somehow deal with Black communities different than others.

Ehrlichman, later in his life, admitted that so much of the source of fear of Black people was a political strategy. "We knew," he says, quoting him, "that we couldn't make it illegal to be either against the war or being Black." He says that these were the two groups that were most likely to be against them. "But by getting the public to associate hippies with marijuana and Blacks with heroin, and then criminalizing both heavily, we could disrupt these communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did."

I live in a community now that, for a generation, has been vilified. That on the evening news, we made people afraid. Where words like "super predators" and others were heaped upon Black communities. We have been devastated, in this country, as a result of the disproportionate incarceration of African Americans, even though there's no difference, no difference in America, in the usage-of-drug rates along racial lines. We need to end this nightmare. It is not just hurting African-American communities; it is a stain upon our highest ideals of humanity. We must, as a Senate, do as Micah commands. Do justice, show mercy, and walk humbly with our Lord. Thank you.

Chair DURBIN. Thank you, Senator Booker. Senator Cotton, as Ranking Member of the Subcommittee on Criminal Justice, will be given an opportunity to submit opening remarks.

In the meantime, we will return to our witnesses in the first panel. We welcome two distinguished witnesses to testify about the continued disparities. Our first witness is Regina LaBelle, the Acting Director of the Office of National Drug Control Policy. Director LaBelle is also a distinguished scholar and program director of the Addiction and Public Policy Initiative at Georgetown Law's O'Neill Institute for National and Global Health Law.

Our second witness is Arkansas Governor Asa Hutchinson, whom I welcome back. Governor Hutchinson has served in his current role, since 2015, as Governor. We see him every Sunday morning on the news. Previously, he served as a U.S. attorney, a U.S. Congressman, and Director of the U.S. Drug Enforcement Agency. I'll lay out the mechanics of today's hearing after we swear in the witnesses on the first panel.

Each witness will have 5 minutes for opening statements, then rounds of questions from the Senators, at 5 minutes each. I ask them to please stick close to 5 minutes, if you can. Following that, we'll switch to our second panel, and Chairman Booker, depending on the votes on the floor and such, may take over that responsi-

bility with 5-minute opening statements and 5 minutes of questions from each.

I'd ask if the witnesses on the first panel would please stand to be sworn.

[Witnesses are sworn in.]

Let the record reflect that the witnesses answered in the affirmative. Director LaBelle, please proceed.

**STATEMENT OF REGINA LABELLE, ACTING
DIRECTOR, OFFICE OF NATIONAL DRUG
CONTROL POLICY, WASHINGTON, DC**

Director LABELLE. Mr. Chairman, Ranking Member, 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 and powder cocaine. The current disparity is not based on evidence. It has caused significant harm for decades, particularly for individuals, families, and communities of color. The continuation of the sentencing disparity is a significant injustice in our legal system, and it's 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'd like to highlight some of the significant evidence to support this position. First, the 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-to-1 sentencing disparity under the Anti-Drug Abuse Act did not result in decreased crack cocaine use. Similarly, the reduction of the mandatory sentencing disparity to 18-to-1, under the Fair Sentencing Act, was not associated with an increase in crack cocaine use. 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 the sentencing disparity has caused them to receive substantially longer average sentence lengths for comparable offenses.

To put this in perspective, under the original 100-to-1 sentencing disparity, a 5-year mandatory minimum penalty would be triggered by trafficking 5 grams of crack, whereas the same penalty would only be triggered if someone trafficked 500 grams of powder cocaine. Under the original law, simple possession of any amount of crack cocaine exceeding 5 grams incurred a 5-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 nonviolent offenses for almost the same length of time as white Americans who committed violent offenses.

In 2010, Congress took the important step to reduce this disparity to 18-to-1. However, in the past two fiscal years, Black Americans accounted for 81 percent and 77 percent of all Federal crack cocaine convictions, respectively. Because of the disparity, these convictions led to prison time far longer than they would have been for equivalent amounts of powder cocaine.

This sentencing disparity is part of a larger system with separate, unequal tracks for people of color and white people in the United States who use drugs or have a substance use disorder. In 2018, the rate of incarceration for Hispanics was 3 times that of white Americans, and the incarceration rate for Black Americans was 5.6 times that of white Americans. 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 treatment 4 to 5 years later than white individuals, even when controlling for socioeconomic status, and in Hispanic communities, those who need treatment for substance use disorder are less likely to access care than non-Hispanics.

We know that substance use disorders can become chronic conditions over time, and years spent without treatment and in incarcerated settings can both exacerbate substance use disorder and lead to other societal issues. President Biden has emphasized the need to address racial inequities in the criminal justice system. For example, he's been clear people should not be incarcerated for drug use alone but should instead be offered treatment. As a Senator, in 2007 he introduced legislation to eliminate the sentencing disparity entirely, and it's long past time to do this.

ONDCP's charge has always been to reduce drug use and its consequences, and for far too long, our Nation's approach to addressing substance use has led to disproportionate consequences for communities of color. If we 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 and powder cocaine. This was based on inaccurate 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.

[The prepared statement of Director LaBelle appears as a submission for the record.]

Chair DURBIN. Thank you very much. Governor Hutchinson.

**STATEMENT OF ASA HUTCHINSON, GOVERNOR,
STATE OF ARKANSAS, LITTLE ROCK, ARKANSAS**

Governor HUTCHINSON. Thank you, Chairman Durbin, for your comments today. Ranking Member Grassley and Members of the Committee. In 2009, I appeared before this Committee, as was noted by the Chairman, and I appeared here on the same subject, expressing my support for reducing or eliminating the disparity of sentencing between crack and powder cocaine cases. As a result of the work of this Committee, in 2010 the sentencing disparity was reduced down to 18-to-1, but as noted, the work is not yet finished,

and I'm honored to be back today to express my continued support for eliminating that disparity and creating a greater sense of fairness in our criminal justice system.

As noted, I've served this country in a variety of law enforcement positions, from a Federal prosecutor to administrator of the DEA, and now, as Governor, I continue to be concerned about, first of all, reducing illegal drug use and reducing the supply, but also—very concerned about fairness in our criminal justice system. From my State perspective—and let me just take a moment.

The presence of crack and powder cocaine is down in Arkansas. Arkansas is part of the Gulf Coast HIDTA, High Intensity Drug Trafficking Area, and the latest drug assessment is that cocaine is ranked as the fifth greatest drug threat and is considered a moderate threat within the Gulf Coast HIDTA region. If you look at the statistics, we've had total pounds of cocaine seized decrease by 42 percent from 2019 to 2020. That's a nationwide statistic. Arkansas has adopted, or at least we have in place, the 1-to-1 ratio for crack versus powder cocaine in our State. I believe that is the right standard that should be set, and let me summarize the need for eliminating the sentencing disparity.

First of all, as been noted by our director of ONDCP, the substances are chemically the same, and therefore they should be treated the same for sentencing purposes. It's a fundamental principle. Second, as noted by Senator Booker and others, there's a disproportionate harm to communities of color. The Sentencing Commission data shows that, in 2019, 81 percent of crack cocaine defendants were Black. In the—2020, it was 76 percent of crack cocaine defendants were Black. Obviously, whenever you sentence them to a higher level of punishment, that is a disproportionate impact on African Americans. What's interesting is that the SAMS data shows that crack cocaine users are predominantly white, and so that adds to the sense of unfairness in our criminal justice system.

That leads to the third reason, which is fundamental, and that is that the sentencing disparity is unfair. Just as importantly, it is perceived as unfair and undermines confidence in our criminal justice system, in which all those in law enforcement understands how critical a sense of fairness is to achieving cooperation, respect, and to reinforce the rule of law. Unfairness erodes cooperation, whether it's the development of informants, to the ability to get cooperation, to the working up the ladder of drug trafficking organizations.

Confidence in equal treatment under the law is the foundation of our rule of law, and it is currently being undermined by that disparity. I know it's been addressed that there is more violence associated with crack cocaine, and there might be some disagreement on the statistics there, but however you conclude that topic, we have to recognize that the sentencing guidelines has factors that will recognize the degree of firearm use, whether there are victims that have been harmed, and the criminal record of the defendant. All of those are factors that can be brought to bear on the ultimate sentence, versus using a much more unreliable indicator for length of sentence, which would be the quantity. The sentencing guidelines have plenty of leeway to account for violent crime might be

associated with crack cocaine use, versus simply utilizing quantity as a chief indicator.

With that, I'm very honored to be here before many colleagues that I respect, and this Committee and the work of it, and I look forward to the question time. Thank you.

[The prepared statement of Governor Hutchinson appears as a submission for the record.]

Chair DURBIN. Thank you, Governor. Acting Director LaBelle, from a scientific perspective, is there any rational justification for reducing the sentencing disparity?

Director LABELLE. There—the scientific basis of both base cocaine, which is crack cocaine, and powder cocaine—they're similar, and they have similar effects on the brain. The issue is how the drug is used. That's been the issue in the past. Really, the drugs themselves, the form of the drug, is essentially the same.

Chair DURBIN. I don't know if this illustration will be effective or not. [Holds up bags of flour.] First, this is flour, and this is an indication of the amount of powder cocaine that would result in the sentencing for this weighted amount of crack cocaine, 100-to-1.

Unidentified Speaker: Eighteen.

Eighteen to one. I'm sorry, 18-to-1, which is an indication that, if there's no science between the difference, the sentencing is dramatically different. I think that is the simple, direct point we're trying to make at this hearing.

Governor Hutchinson, you have seen this war on drugs from so many angles. I can't think of a person who has the kind of experience you do. U.S. Attorney for the Western District of Arkansas, Member of the House, Administrator of the Drug Enforcement Administration, Undersecretary for Border and Transportation Security, and now Governor of Arkansas. I can't tell you how much I appreciate your candor about the impact that this has on respect for the law in some communities, when African Americans disproportionately are penalized for this sentencing disparity; what it must mean to the community. Have you seen this firsthand, as Governor of your State or in your previous assignments?

Governor HUTCHINSON. I have seen it in really all of the assignments that you recited, and there's probably no one that supports our law enforcement more than me. I've been a part of it, I believe in them, I want to encourage them, and in each of the roles that I've seen, unfairness undermines the respect for the law, and that is so important to our law enforcement officers. From a personal perspective, it's been different as Governor, because I've seen clemency and pardon applications come across my desk in which I've seen the unfairness play out in the criminal justice system, and even though we have a 1-to-1 ratio here in Arkansas, you still see the consequences of severe penalties for a simple possession, multiple possessions of drugs. You see the heartache, and you want to do everything you can to eliminate unfairness so that we'll gain respect both for law enforcement and for the system.

Chair DURBIN. I think that's what I tried to allude to in my opening remarks. The personal and family devastation of long sentences and what it—I'm amazed that any of these prisoners can come back, and I've seen so many of them come back after serving long periods of time, to rebuild their families and rebuild their lives, but

it is devastating. I just want to add one other element here. This sentencing disparity is not a creation of law enforcement. It is a creation of legislators. Congressmen, Senators who've come up with these laws on sentencing disparities.

It is no reflection on law enforcement. It's our reflection on us and what we have done in establishing these standards of sentencing, and I think that's why we have such an awesome responsibility. I can't thank you both enough for being here today, your testimony. Senator GRASSLEY.

Senator GRASSLEY. Thank you, Mr. Chairman. I'm going to start out with Director LaBelle. According to the Institute on Drug Abuse, treatment for stimulant addiction, including cocaine abuse, is an under-researched area. Unlike treating opioid abuse, there aren't any approved medications to treat cocaine addiction. The majority of those seeking treatment for cocaine smoke crack and are likely to be polydrug users.

Our Federal drug sentencing laws should avoid creating more victims and addicts in vulnerable communities. However, if we end up legislating on crack and powder cocaine sentencing, we should all be in agreement that deterring drug trafficking is vitally important. First, do you agree, and second, would you—would more research in cocaine dosage amounts, treatment options, prevention tactics, and addictiveness of cocaine be helpful?

Director LABELLE. Thank you, Senator, for that important question. I came here from the Interdiction Committee. ONDCP, as you know, has a wide array of authorities, including drug interdiction, and so we are looking very closely at the efforts that need to be taken to reduce drug trafficking coming into the United States and then inside the United States. Certainly, we agree and appreciate—it's one of our policy priorities, is reducing the supply of drugs coming into the country and then drug trafficking in the country.

Second, in your piece, we totally agree that we need a whole-of-government approach and to look at the continuum of care for people with substance use disorder. Prevention—preventing substance use disorders and substance use from ever occurring is an essential part of our strategy, just as treatment is an essential part of our strategy. As you said, there is no medication for cocaine use disorder, but that doesn't mean there aren't effective treatments. We're looking at the barriers that exist to one of the most effective forms of treatment for cocaine use disorder. Those are things that—we appreciate Congress's investments, significant investments, through the American Rescue Plan and through the President's budget that's been sent to the Hill. There's \$10 billion to be spent on addressing the demand side of the equation, and then also we support money and investments on the supply side. Thank you.

Senator GRASSLEY. Your agency is tasked with making and coordinating our nationwide drug control strategy. Your office released a statement of drug policy priorities earlier this year. It mentioned that we must reduce the supply of illicit drugs. I think an effective way to stop the supply of deadly drugs is to have an effective and consistent drug control laws on the books. This is true for all controlled substances.

I'm confused why your statement on drug policy priorities didn't outline a permanently—how permanently scheduling fentanyl analogs would be essential to reduce their supplies. Do you think permanently scheduling fentanyl-related substances in the United States would reduce the supply of these illicit drugs?

Director LABELLE. You've pointed out an incredibly important issue, which is the fentanyl and fentanyl analogs in the United States. We know that, of the 90,000 overdose deaths from last year, from 2020, that 75 percent of them involved an—a fentanyl or fentanyl analog. What we're doing is working with the interagency to make sure that we can present to Congress a solution on the permanent scheduling or scheduling of fentanyl analogs. We're working with DOJ, DEA, and our partners at HHS to send something to the Hill by the fall.

Senator GRASSLEY. Are you working with Members of Congress to do that? Because I'm committed to working with anybody that wants to work with—on this issue, and working in a bipartisan way with Congress to make sure fentanyl-related substances are permanently scheduled would be very helpful. Are you doing that?

Director LABELLE. Certainly, sir. We're—I know that my staff has met with your staff. We just sent a letter, and we're happy to have ongoing conversations.

Senator GRASSLEY. Quickly, I'm not going to give a lead-in to this question, because I don't have time. Can you agree with me that these kinds of considerations are critical to review, along with racial justice concerns? How can we ensure these factors are considered when reviewing drug sentencing laws?

I realize I couldn't leave out the lead-in. I mentioned in my opening remarks how there are many factors that must be considered when reviewing sentencing laws of crack and powder cocaine. This includes recidivism data, violent crime, addictiveness, and racial issues. According to the Sentencing Commission, crack offenders receive a weapons sentencing enhancement more often than powder traffickers. Also, of all drug trafficking offenders, crack cocaine dealers recidivate at a highest rate. Do I need to repeat my question?

Director LABELLE. I think the main issue that you've raised is one of—that when people leave incarceration, they often recidivate. One of the reasons that happens is because when people are incarcerated, they may not get the treatment that they need for their substance use disorder. That substance use disorder doesn't go away simply because they are incarcerated. If someone has a cocaine use disorder, when they're incarcerated they should be receiving treatment for that cocaine use disorder so that when they leave, they won't recidivate. I think that's one of the issues that ONDCP is taking on in our policy priorities and working on in our drug strategy.

Senator GRASSLEY. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator. Senator Feinstein.

Senator FEINSTEIN. Thanks, Mr. Chairman. Governor Hutchinson, as the former head of DEA under President Bush, the first Undersecretary for Border and Transportation Security at DHS, and a former U.S. attorney, your law enforcement credentials speak for themselves, yet you have repeatedly and publicly advo-

cated for the elimination of the sentencing disparity between crack and powder cocaine. I'm not being critical, but I think your views are really important in this discussion, because you have this extensive background in law enforcement and you have a career in public service. What led you to speak out so much and so eloquently on this issue?

Governor HUTCHINSON. Thank you, Senator Feinstein. Being personally aware of unfairness should call us all to speak out, just as Members of this Committee has. You know, in the 1980's when President Reagan—we started, really, the tough side of the fight against drugs, which was—we—our targets, you know, whenever we had our asset seizures, all of those things toughened our fight against illegal drugs, and it really wasn't until I got to Congress that, working with some of the—my colleagues on the Judiciary Committee, that I saw how the application of those—the disparate sentencing laws impacted our community and the respect for our law, and so I—

Senator FEINSTEIN. Are you—

Governor HUTCHINSON [continuing]. Started speaking out.

Senator FEINSTEIN [continuing]. Referring to the 100-to-1 sentencing disparity?

Governor HUTCHINSON. Yes, I'm referring to—the 100-to-1 sentencing disparity was unconscionable, in my view. It was not based upon good science. It ought to be changed because it was unfair.

Senator FEINSTEIN. We're 35 years later, and do you believe that our understanding of the situation is better?

Governor HUTCHINSON. I do. We understand the science better, we understand the impact, we understand the unfairness of it. It's supported by statistics, and we also, you know, have a good sentencing grid that can address the other issues of violence associated with crime. We do understand it better, and that should lead us to take the final step to eliminate completely that disparity.

Senator FEINSTEIN. Thank you very much. I think that's very powerful testimony. Thanks, Mr. Chairman.

Chair DURBIN. Thank you, Senator Feinstein. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. Ms. LaBelle, I've read over the Biden Administration's Statement of drug policy priorities for year one, and I appreciate your testimony about the importance of follow-on services for people who are released from incarceration, so that they don't repeat their mistakes. To that end, Senator Whitehouse and I recently introduced a bill called the Residential Substance Use Disorder Treatment Act of 2021, which would expand the use of substance—would expand access to substance use treatments in jails and prisons. I'm certainly with you on that and want to continue to support those efforts.

In my State, in Texas, part of what we did on prison reform is give people access to programs when they're in prison and hope they don't recidivate once they get out, but it really required follow-on services. We can't just expect that we're going to let somebody out of prison and then they're not going to go back to the same old neighborhood and be exposed to the same old temptations, perhaps, and the same old associates.

Other than supporting the High Intensity Drug Trafficking Areas program and attempting to work with commercial carriers to inter-

cept synthetic drugs being moved through postal and parcel systems, what do you intend to do in your office to improve domestic drug enforcement?

Director LABELLE. Thank you, Senator, for that question. ONDCP, as you said, has many aspects to it. What we try to do is look at source countries, so, Colombia, Mexico, et cetera, and that's the first step, to keep the drugs from coming into the United States. As you asked about domestic work, we have the High Intensity Drug Trafficking Areas program, and they work extensively with their State and local partners to disrupt drug trafficking. A lot of our work is really focused on working with the HIDTAs, having partnerships with the Drug Enforcement Administration, and making sure that all the pieces are in place to support law enforcement, first of all, to divert people away from the criminal justice system, to support law enforcement, to disrupt drug trafficking networks, and then, last, for people who are involved in criminal justice, as you said, making sure they get the supports they need, both while they're incarcerated and upon re-entry.

Senator CORNYN. Do you recall how many Americans died of drug overdoses in the last year?

Director LABELLE. Certainly, sir. There were 92,000. That's as of October 2020.

Senator CORNYN. Do you agree with me that a lot of those drugs come across our southwestern border?

Director LABELLE. The—what we know is that 75 percent of the 92,000 overdose deaths involved fentanyl, and fentanyl—right now, the most of the fentanyl is coming from Mexico.

Senator CORNYN. Ninety percent of the heroin that comes to this country comes from Mexico, too. Is that—do you agree with that figure?

Director LABELLE. I believe that's the current figure.

Senator CORNYN. Okay. We ought to all be concerned, should we not—shouldn't the Biden administration be concerned about the overwhelming flood of people coming at the border, including unaccompanied children, and diverting the Border Patrol from their law enforcement function, to taking care of these unaccompanied children? Shouldn't that be a matter of concern?

Director LABELLE. What ONDCP is doing—and yesterday, actually, I met with the Mexican Ambassador to the United States—is talking to them about their ports, about the fentanyl coming into their country, to—again, to keep it from even getting to the border, so, disrupting labs in Mexico. Those are many of the high-level dialogs that we're having with Mexican officials.

Senator CORNYN. Do you know how much of Mexico is controlled by the cartels, as opposed to the government?

Director LABELLE. It's significant, sir.

Senator CORNYN. Right. It is significant. It's frightening, in fact. You didn't answer my question about diverting Border Patrol, but we'll move on to something else.

Governor Hutchinson, I have a lot of respect for your public service, and certainly, I've followed it and worked with you off and on over the years. I'm trying to figure out how this disparity issue would apply in other contexts, not just a cocaine—crack versus powder, because if you had the little bags of flour that Senator

Durbin had, that he showed, with the 18-to-1 disparity, and you had heroin in one and you had fentanyl in another, there would be a—fentanyl's a whole lot more powerful, as I understand it, than heroin, and I'm just wondering, across different types of opioid, let's say, for example, prescription drugs, heroin, and fentanyl, do you think this same principle can be applied? I'm just wondering how that would work.

Governor HUTCHINSON. I think that's an excellent question, and I think there is a reason for a broader discussion about our sentencing policy in relation to drugs. They're ultimately set by Congress, and you have to look at the impact. You have to look at the chemical qualities of it. I think we've made a determination based upon science, as to the similarity between crack and powder cocaine, but obviously there's distinctions between fentanyl, which deserves all of the resources and investigation that's possible, because of the harm that is being done. I think those are very good discussions. I do believe, as I said, that quantity is not always the best indicator as to culpability and consequences and punishment. It should be many more factors simply than quantity.

Chair DURBIN. Thank you, Senator Cornyn. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman Durbin, and thank you for your long determination on this issue. It's much appreciated.

I want to just open by echoing Governor Hutchinson's comment that the—many of the factors that have been used to argue for the sentencing disparity actually turn up separately in the sentencing guidelines, and so to the extent that there are dangers associated with certain episodes of crack cocaine dealing, the sentencing guidelines are capable of taking that up, and a judge is capable of ruling on that. I thought that was a very important point and something that I certainly saw in my time as U.S. attorney. Thank you, Governor, for that.

Ms. LaBelle, I want to double down on my friend Senator Cornyn's reference to our Residential Substance Use Disorder Treatment Bill. I hope we can get strong support from the administration for that. As you have said, it's really important to pick people up while they're incarcerated, well before they're discharged, and to make sure that once they're discharged, that treatment continues and that there is follow-through through that entire process. We've seen, in Rhode Island, when you do that, that it improves recidivism and it also dramatically reduced opioid overdose fatalities in the immediate aftermath of discharge. It's a lifesaver, in addition to being the right way to handle this condition, and I appreciate your recognition of that, and I'd love to work with you to make sure this bill gets strong support from the administration.

I would say the same about the CARA 3.0 measure. As you know, Senator Portman and I wrote CARA many years ago, and it passed with huge bipartisan support here in the Senate and passed through Congress and was signed into law, and then we got large chunks of our CARA 2.0 bill put into another measure, and now we're working on CARA 3.0, which provides the kind of comprehensive approach to combating substance use disorder that the General Assembly of the United Nations has recommended when they said evidence-based prevention, treatment, and recovery options to

drug users, engaging those who commit criminal offenses in evidence-based treatment during and following, or in lieu of, incarceration, to prevent relapse and recidivism. We look forward to working with you and hope you'll support both of those efforts.

Chair DURBIN. Thank you, Senator Whitehouse. I'd like—

Senator WHITEHOUSE. She's welcome to say whether she'll support either of those efforts.

Chair DURBIN. Ms. LaBelle.

Director LABELLE. Senator, I wanted to point out, when you talk about the importance of the RSAT program and what happened in Rhode Island, I think this is really significant that it's a—you had a 60 percent decrease in overdose stats among people who had just left incarceration and a 6 percent decrease statewide. What happened in Rhode Island really lit a fire around the country for more states to have treatment behind the walls. Yes, we're happy to meet with you and talk to you about all of this legislation that you mentioned, CARA and RSAT.

Senator WHITEHOUSE. Be sure to thank your new Commerce Secretary, Governor Raimondo—

Director LABELLE. Yes.

Senator WHITEHOUSE [continuing]. Because she played an important role in making sure that our prison administration developed that and imposed it and enforced it and saw those really good results.

Director LABELLE. Yes. Thank you, Senator.

Chair DURBIN. Thank you, Senator. Before I recognize Senator Lee, I would just—I'm glad Senator Cornyn is still here. In FY 2019, Congress appropriated \$570 million for U.S. Customs and Border Protection to deploy nonintrusive inspection systems—I think that's maybe Z Portals and perhaps some others—along the southwest border: technology allowing our border inspectors to X-ray the contents of trucks, cars, buses, and cargo containers.

CBP officials have informed Congress this additional funding will be used to obtain technology to increase the scanning rate of commercial trucks to 72 percent and passenger vehicles to 40 percent by FY 2024. We're still several years removed, but if I recall, this was approved and supported by the Trump administration, to put in this technology, and we have been funding it. I thank you for raising that point.

Senator CORNYN. If I can just reply briefly, I think that's good. That's a good thing, but you have to also recognize that a lot of illegal drugs come between the ports of entry in backpacks, by mules who are carrying drugs for the cartels, and we don't know how many people that our Border Patrol can actually encounter, because you don't know the ones that you don't run into. You can pick up the ones that you do run into and have a hope of interdicting them, but right now, 40 percent of the Border Patrol are taken off the front lines because they're taking care of unaccompanied children, because of the current humanitarian crisis at the border. That leaves an opening, a huge opening for the cartels to run drugs through those gaps in Border Patrol coverage. I think the technical means is helpful, but it certainly doesn't address the concern that I have about the fact that the Biden administration

doesn't appear to have any concerns whatsoever about the current crisis. Thank you.

Chair DURBIN. Senator Lee.

Senator LEE. Thank you, Mr. Chairman. Ms. LaBelle, I'd like to start with you. CBP saw a sharp increase in the number of total enforcement actions from FY 2018 to 2019, with enforcement actions now on track to almost double in FY 2021. These include actions related to inadmissibles to apprehensions and arrests along the border. During that same time, we've witnessed a 73 percent increase in the amount of cocaine seized at the border. Would you agree that these numbers suggest that there's a huge increase in the amount of cocaine entering the United States from the southern border?

Director LABELLE. Thank you, Senator, for that question. We're not seeing—I mean, yes, we've seen some increase in cocaine, but over time, over the last couple years, it's been relatively stable. What we're very concerned about is certainly increased cultivation numbers in Colombia, because I think what we have to do is make sure that it never reaches that stage. The efforts that are being made at the border, most of these come through the ports of entry, through vehicles, and that's where the scanning information, the scanning devices, come through, certainly for fentanyl. What we're seeing over the course of a couple years is that it's relatively stable, but we have to look back at the introduction—interdiction piece in Colombia, and cultivation numbers are up.

Senator LEE. What about these—the increase that we're seeing in FY 2021? Isn't it possible that at least some of those are attributable to the open-border policies of the current administration?

Director LABELLE. Thank you for asking that question, Senator. I think that we, you know—so, flow doesn't always equate to seizures. Some of that maybe have been because we had, actually, earlier this year, during COVID, fewer people coming across the border. Again, you know, we work with CBP very closely to make sure that they have the support they need to prevent cocaine from coming into this country. Again, I want to go back to the interdiction work that we do, that the Coast Guard does, and the work that we do with the country of Colombia, to make sure that the—those drugs never even make it that far.

Senator LEE. Okay. Let's talk about the relationship between sentencing and drug interdictions and drug activity. Setting aside for a minute the disparity issue, just assume categorically that if we started sentencing cocaine, generally, less harshly, wouldn't that have some risk of increasing or at least incentivizing drug trafficking across our southern border?

Director LABELLE. Senator, I want to go back to—what we're looking at right now is—I mean, is the disparity issue, and I think what we're talking about is that 18-to-1. I don't—we haven't seen an increase in crack cocaine use, and, in fact, it's pretty—it's a tiny proportion of people in this country who have substance use disorders who use crack, and for powder cocaine, it's about twice as much. Really, we haven't seen the relation between sentencing guideline and use, or even trafficking, in the country.

Senator LEE. Given the fact that we've got—I mean, let's assume, for sake of argument, that these drugs should be treated the same

way for sentencing purposes and that there shouldn't be this disparity. This still does leave an outstanding issue that I'm not sure the bill we're discussing today addresses. Given how dangerous that both crack cocaine and powder cocaine are, and the current triple increase in the number of cocaine-associated deaths over the last decade, should we—why shouldn't we be concerned about raising the amount of crack cocaine needed in order to trigger the mandatory minimum, rather than lowering the amount of powder cocaine? Do you understand my question?

Director LABELLE. I think so, but I want to—so, cocaine overdose deaths are up; however, what's up, what's causing that increase, is the presence of fentanyl in people who have died. It's not cocaine use solely. Cocaine use is actually somewhat down over the last—

Senator LEE. Yes, but they're still dying because they purchased and used cocaine. I mean—

Director LABELLE. Well—

Senator LEE [continuing]. Yes, it's tainted cocaine, and it's been cut with something that is very deadly, but these are still deaths. They are still cocaine overdose-related deaths. There's another complicating factor, but I'm not sure that negates the sentencing concern I'm talking about. In other words, my question is, do we need to be concerned about—you know, what's the appropriate level to set it? I think there is widespread agreement on this Committee that the disparity is difficult to defend. The question becomes, what do we do about the disparity? Do we raise the threshold for one or reduce the threshold for the other?

Director LABELLE. I think what the bill calls for and what the administration supports is reducing the crack cocaine threshold to make it even with cocaine—with powder cocaine. I don't think we're requesting an increase. I don't think that's related to either cocaine use or overdose deaths.

Senator LEE. Mr. Chairman, my time's expired. Can I ask one follow-up question to—Governor Hutchinson, do you have any response to that question? Do we raise one, lower the other? Do we meet in the middle?

Governor HUTCHINSON. That's a great question. The—my answer to that is, again, I think we're better off addressing the concerns of these substances in terms of increased penalties based upon whether there's a firearm at the time, whether there's other violence, or the victims and the—those—and the prior record. Those are things the sentencing judge can consider, and I think that's preferable. With where we are right now, I believe that the Act, as addressed and as drafted, is a good remedy for it.

Senator LEE. Thank you.

Chair DURBIN. Senator Coons.

Senator COONS. Thank you, Chairman Durbin, and thank you for your years of leadership on this important issue, Ranking Member Grassley, Senator Booker. I just want to thank our witnesses for being here today, as well, and commend the leadership of those on this Committee who are working hard to advance the EQUAL Act and the Biden administration that is calling on all of us to apply evidence-based policy in a way that actually addresses racial inequalities in criminal justice.

To Acting Director LaBelle, I've long worked closely with the ONDCP in my 10 years in local government and as a Chair and Ranking Member of the FSGG Appropriations Subcommittee and look forward to working with you more closely. I think it's a vital office. I'm glad that it has survived unscathed the attempts to restructure it and realign it in recent years, and I had a great series of visits to Delaware of the previous Director and hope that whoever is the next Director will commit to coming to Delaware to visit us, as well.

I just would be interested in hearing from you why the crack cocaine sentencing disparity does more harm than good in our communities and what the Biden administration is calling on this body to do about it and then what the administration will be doing to address drug crime with a whole-of-Government approach.

Director LABELLE. Thank you, Senator. Thanks for your longtime involvement with ONDCP and support for the office. I think what really we're looking at today is to restore trust and faith in our criminal justice system. Also, for drug policy, one of our policy priorities is to advance equity. That's a huge, huge undertaking, but this is one step we can take today after a number of years.

It—our policy priorities, as we sent to the Hill, include—there are seven of them. One of them is racial equity. It also includes supply reduction, so, reducing the supply of drugs that are consumed in this country. That's not only domestic law enforcement. That, as I've said, includes going to source countries. I mean, I would think that half of my time is spent on international issues, and so it's that whole-of-Government approach that we need, to address the issue.

Senator COONS. I look forward to working more closely with you on that, both the transnational issues and the domestic issues.

Governor, if I could, I just am so grateful for your voice and your leadership on this. This isn't a partisan issue, and as the Acting Director said, it's long overdue. My predecessor in this seat, then-Senator Biden, back in 2007, introduced legislation to eliminate this disparity.

Can you speak to how these disparities have damaged communities and why you support rectifying it and, in particular, why the retroactive provisions of the EQUAL Act are important to make a difference to families and communities that have already been harmed by this long-standing sentencing disparity?

Governor HUTCHINSON. Senator, it's fundamental to everything that we believe about our legal system—is that everyone is treated equally under the law. Whenever that fundamental point is undermined, then you have juries that believe in the jury nullification, the community does not want to hold people accountable because they see the entire system unfair, you see a lack of cooperation and respect among the police, and then you have communities that are impacted because of long periods of incarceration that is not included—applicable to other communities. All of those reasons—I think it is one of the most important things we can do, to build confidence in our criminal justice system and with law enforcement, is to equalize that treatment between powder and crack.

Senator COONS. Thank you, Governor. Thank you, Acting Director. I look forward to the swift passage of the EQUAL Act. It be-

longs on the President's desk and it belongs in law, and we have a lot more to do, past that, but this would be a great next step. Thank you. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Coons. I understand she is remote and virtual, but Senator Klobuchar is seeking recognition. Is that true?

Senator KLOBUCHAR. That is correct, Mr. Chair.

Chair DURBIN. Take it away, Senator.

Senator KLOBUCHAR. All right. Thank you, Senator Durbin, for your longtime leadership on addressing this disparity.

Ms. LaBelle, as you described in your testimony, the crack cocaine and powder cocaine sentencing disparity has had a disproportionate impact on communities of color. The impact continues today. Do you agree that eliminating this disparity is a key component, as we look at issues of race disparity in the criminal justice system?

Director LABELLE. Absolutely, Senator. Thank you.

Senator KLOBUCHAR. What more should the Federal Government do to help address the long-term impact that the sentencing disparity had in communities of color?

Director LABELLE. I mean, I think I outlined some of that in my remarks, that we need to make sure, first of all, to restore trust that—in our criminal justice system, in our drug policies. We also need to make sure that we have equity when we are looking to get—to prevent substance use from ever occurring and to treat people, make sure we're getting access to treatment for people in need, regardless of their color. That's another piece in our policy priorities that we're working on.

Senator KLOBUCHAR. Exactly. For me, it's been a lot about—from my old days in my other job as a county attorney, it's been expanding drug court, expanding access to drug court, and making sure they're available to everyone.

Governor HUTCHINSON, many States have taken action to end the disparity in sentencing. In Arkansas, in Minnesota, the criminal code provides the same sentencing guidelines for crack and powder cocaine. What impacts have you observed in States that have moved to equal sentencing for crack and powder cocaine? What lessons have you learned from your State that have led you to be testifying today?

Governor HUTCHINSON. Thank you, Senator. I can't speak for every State, but you start with equal treatment, and that's what a 1-to-1 ratio gives us. You know, in terms of the impact on communities, you can see that many times these cases are brought into Federal court, and while, you know, we have it 1-to-1 at the State level, as everyone knows, through the task forces and through Federal prosecutions, that these cases will wind up in Federal court. While our ratio is good, that difference with the Federal system really, for the person out there who's a defendant, they just see it as one system. We have to really bring that sense of fairness together at the State and Federal level.

Senator KLOBUCHAR. Are you a believer in drug courts? We—I just discussed them with Ms. LaBelle.

Governor HUTCHINSON. Listen, thanks for raising that. I'm a big supporter of it. I supported that while I was head of the DEA, even,

and then carried it out as Governor. We're a very active drug treatment court system, and I've seen them operational across the country. They're one of the most effective tools we can have, that brings accountability but also treatment that goes along with it.

Senator KLOBUCHAR. Thank you. Back to you, Ms. LaBelle. Justice Sotomayor recently noted, in a case called *Terry v. United States*, that there is, and these are her words, "an extensive record of race-based myths about crack cocaine that the media 'branded into the public mind and the minds of legislators.'" I'd like to run through with you a few of these, to make clear why we should take action to continue to eliminate this sentencing disparity.

First, is it true that the science does not support treating these two drugs differently? Yes or no?

Director LABELLE. Yes.

Senator KLOBUCHAR. That the science does not support it?

Director LABELLE. The science does not support treating these two drugs—

Senator KLOBUCHAR. Exactly.

Director LABELLE [continuing]. Differently. Yes.

Senator KLOBUCHAR. Okay. Is it true that both powder and crack cocaine are addictive and pose serious health risks, both of them?

Director LABELLE. Yes.

Senator KLOBUCHAR. Okay. Is—

Director LABELLE. Yes, they're both—

Senator KLOBUCHAR [continuing]. Its true that there is not data to support the claim that crack cocaine causes violent behavior?

Director LABELLE. No. There's no research on that—to support that.

Senator KLOBUCHAR. Okay. Could we go back to the first one on—or the second one, about the addiction and the serious health risks and powder versus crack cocaine, just what the science really shows on that?

Director LABELLE. It's based on what—how you use it, as opposed to the drug itself. Most people use crack cocaine; it's vaporized and it goes into the bloodstream much faster, and it affects your brain in a faster way. However, powder cocaine can be injected, and it has similar properties to, and affects the brain in the same way as, vaporized crack cocaine.

Senator KLOBUCHAR. Then back to the other one on violent behavior, there are—I know there are some incidences involving cocaine, of violent behavior, but what you're saying is there's not actually data on this?

Director LABELLE. The research shows that it's not an individualized issue, that it's really about drug trafficking itself.

Senator KLOBUCHAR. What do you mean by that?

Director LABELLE. It's the trafficking that leads to the violent behavior. As Governor Hutchinson said, you know, there are ways in which our sentencing provides for more violent crimes to increase sentencing based on the act itself, as opposed to the drug.

Senator KLOBUCHAR. Okay. All right. Thank you very much. I appreciate your work. Thank you.

Chair DURBIN. Thanks, Senator Klobuchar. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. Thank you and Senator Booker and others on our Committee for their work on this

issue, and I strongly support this legislation. Governor Hutchinson, you talked in your testimony, and I'm going to quote it, about incarceration, generally. "As a Nation, we should not rely on incarceration as the first, best, and only response to drug offenses." You go on to talk about the costs of incarceration, generally. "The American public understands that we are not reaping the societal benefits that we previously hoped might come with an incarceration-first model, and they are looking to the Nation's State and Federal leaders to adjust their approach and find evidence-based solutions that work."

I served as United States attorney in Connecticut, as well as the State Attorney General. I think both of us, having sought harsh sentences—and I did my share of requests for "throw the book at this defendant," but I've come to see that incarceration, generally, has very, very, very mixed results, often exactly the opposite of what we hoped as prosecutors to achieve. I wonder if you could talk about that issue and, as well, the way that sentencing involves very unjust and unfair disparities, not just in drug offenses, but from the first sentencing I observed, as a law clerk to a district judge—often, personal factors that differ from one judge to another and lead to judges being known as harsh sentencers or lenient sentencers. It just seems like the whole criminal justice system is bedeviled by disparities in sentencing that is a focus here in very dramatic terms but, in one way or another, characterize our criminal justice system.

Governor HUTCHINSON. Thank you, Senator. The disparities in sentencing across the board are always a challenge. The Federal level addressed it through the sentencing guidelines, which I'm supportive of as long as there are some escape clauses for the judge whenever there's unusual factors in it. At the State level, we are not as reliant upon sentencing guidelines. We have those, but there's much more discretion among the prosecutors, as you know, in the sentencing, and so you wind up having differences between jurisdictions, so then you have big differences between those that plead versus those that go to a jury trial. Those are disparities that I struggle with as Governor.

In terms of incarceration, you've got to distinguish—I mean, I believe in incarceration of those violence, those that are a risk to public safety, as I'm sure you do, but we have to distinguish those that have both a criminal problem and an addiction problem. That's what we're trying to identify through our drug treatment courts, the nonviolent offenders that have addiction issues, and they might be selling to support their habit. If we can identify those, then incarceration is not the first answer. There is other options that we should look at.

Senator BLUMENTHAL. I completely agree that incarceration serves a valid, important function when there is a threat to the public, when that threat can be addressed through confinement, but I agree with you also that dealing with substance abuse disorder is certainly a key to making incarceration productive.

Let me ask you, if I may, Ms. LaBelle—I gather your view is that Colombia is now again the source of the major influx of cocaine into this country? It was for a while, and then it abated, and now it is again. Is that correct?

Director LABELLE. It's about 90 percent of U.S. cocaine comes from—is sourced from Colombia.

Senator BLUMENTHAL. Can the same tactics be used as before, to reduce that flow?

Director LABELLE. We have—we're working on a plan to address the issue both from land titling, redevelopment, and so that—all those things are being worked on right now. There will be elements of the previous approach. We have a great relationship with Colombia, and we can build on those relationships to have an effective approach to reducing cultivation in Colombia.

Senator BLUMENTHAL. Thank you very much. Thanks, Mr. Chairman.

Chair DURBIN. Senator Booker.

Senator BOOKER. Thank you very much, Mr. Chairman. Governor, it's just such an honor that you would take time to be here, and I'm just so grateful for your loud voice on rational sentencing. You come at it with a tremendous amount of gravitas because of your service not just as a Governor but really someone who was responsible as a head of the Drug Enforcement Administration.

I just want to ask you, so maybe go into details—like, you said in a recent editorial that—in support of the EQUAL Act, that this is—that our efforts are failing in getting the real high-level drug traffickers. If it's failing in that, who is getting churned into the system? What kind of folks are—if we're not getting the—through the sentencing, if we're not getting the major traffickers, who are we getting?

Governor HUTCHINSON. It's hard to get major traffickers, and that's where I agree totally with our interdiction efforts that the Director referenced. We have to disrupt that supply chain, but it's hard to get the level of cooperation you need to go up the chain. In terms of—but we have to stay after that, first of all.

Second, in terms of who we are prosecuting, you know, we've seen instances at the Federal level where someone is peripherally involved in a drug trafficking organization, but they get hammered under the conspiracy for the major elements of it, and so Congress has addressed some of that, and I applaud them for it. We have to continually to work to separate those that have true addiction problems versus that are in it for the economy, for the money, the profits, and are engaged in the violent activities of it.

I think law enforcement does a terrific job in terms of putting their priorities on the right places, and society has changed. I think we've learned that, you know, if you've got somebody who's genuinely selling, incarceration is necessary, whether it's methamphetamine or whether it's cocaine, but if you've got somebody who has an addiction problem, then—and that's why they're engaged in the minor selling of it, then let's look at alternatives.

Senator BOOKER. That—and that's—two more points. One is, so, that's my concern, and this has been the best area of bipartisan work I've had as a Senator, and the thoughtfulness of people on both sides of the aisle are really good. I thought my friend, Senator Lee, asked a really good question. For a lot of these offenders, for—at sort of that first level, that gets you 5 years, or the second level gets you 10 years, why not just—why is the EQUAL Act the right way to go, of lowering the crack disparity to the cocaine level? Why

not raise the cocaine level that triggers those higher-end sentences, to the crack level? Why is the EQUAL Act the one you're endorsing, of those two strategies, when it comes to public safety and helping people that might be engaged in the usage of small amounts?

Governor HUTCHINSON. That's a great question and one that I wrestled with, because to me the most important thing is to equalize it so it is fair. Where we are right now, it'd be hard to justify increasing the penalties or change, adjust the amounts upwards in terms of the powder cocaine. It's just—I think you get broader support, I think you accomplish the objective, and whenever I look at the concerns about a career criminal, about violence, all of those things, they could be factored in separately, in the sentencing guidelines.

Senator BOOKER. If I may interrupt, you have seen now what's happened when we acted in a bipartisan way to lower sentencing. You've seen when we've given judges more discretion. Has that generally, that trend, been a good thing, or are you concerned, in Arkansas and other places, about public safety?

Governor HUTCHINSON. From what I see in the data—that there's not been an adverse consequence from those changes.

Senator BOOKER. Yes. Okay. Then the last thing I just want to ask you to make a comment on—so, one of my biggest concerns is the faith with which people have in law enforcement, the faith that we, as a society, have in our justice system. Really, our justice system sits on that foundation. Even Judge Learned Hand once said the Constitution is not—is only worth as much as the paper it's written on, unless it's in the hearts of the people.

I would imagine, in your experience right now, you know that there's minority communities who have a lot of cynicism about our criminal justice system that has been bred from bad experiences with feeling like they've witnessed this disparity. In your experience, what would be the effect of leveling this, finally be in the confidence people have in the justice system in general?

Governor HUTCHINSON. It would be a significant step forward in rebuilding confidence in our criminal justice system. I don't necessarily think it ends there. I think we have to continually look at our policies, our incarceration, and to make sure that we have the resources to stop violence in our minority communities, as well as making sure that we have community support and that we have drug treatment courts and those treatment facilities that are available, as well.

Senator BOOKER. Thank you very much. I'm sorry, Ms. LaBelle, I didn't have any questions for you, but you were still amongst my two favorite LaBelles in America.

[Laughter.]

Senator BOOKER. Thanks.

Chair DURBIN. Let me guess the other. Thank you, Senator Booker. We're now going to thank the two witnesses for joining us today, and their testimony was terrific. Appreciate the sacrifice they made, to be here. Thank you very much, Governor. Thank you, Ms. LaBelle.

I'd like to say a few things for the record, here. First, the Department of Justice fully supports the EQUAL Act. A Department wit-

ness would have been here in person to explain that support, but for the fact that he had a previously scheduled family vacation this week. They have sent a statement—I hope you get a copy of that, Senator Grassley—in support of the EQUAL Act, which I'd ask unanimous consent to enter into the record.

[The information appears as a submission for the record.]

Chair DURBIN. I'd like to make a couple points on questions raised during the course of this first panel. The U.S. Sentencing Commission reports that crack cocaine offenses have declined significantly since the sentencing guidelines for crack cocaine offenses were first reduced more than 10 years ago, from merely—from nearly 6,000 cases in 2009 to just over 1,200 cases in FY 2020. The DEA's 2020 National Drug Assessment reports that in 2019, the number of cocaine reports to the DEA's National Forensic Laboratory Information System was the lowest number report in the past 6 years, and those cocaine reports represent less than half the number reported in their peak in 2006. A change in sentencing has not resulted in more cocaine being reported or offenses being reported, as well.

I'd like to ask consent that statements in support of the EQUAL Act by the Major Cities Chiefs, faith leaders, Americans for Prosperity, American Conservative Union, civil rights organizations, law enforcement, and others, including the Marion County attorney from the great State of Iowa, will be entered in the record without objection.

[The information appears as a submission for the record.]

Chair DURBIN. Senator Booker has graciously agreed to come forward for the second panel, and we'd ask them to please come to the table to be sworn in. I hereby authorize Senator Booker as Chairman to swear in the next panel of witnesses.

Senator GRASSLEY. Before you swear them, I would ask permission—I'd like to submit, for the record, a number of letters from the prosecuting and law enforcement community, on cocaine and the sentencing disparity between crack and powder cocaine. These letters highlight a fraction of the issues and opinions, and I hope to create a more complete and robust picture of how to approach the issue.

These letters are from the individual prosecutors, the executive director of HIDTA programs, the Heritage Foundation, the National Narcotics Officers' Associations' Coalition, and the National Association of Police Officers.

[The information appears as a submission for the record.]

Senator BOOKER [Presiding]. Thank you very much to the Ranking Member. I want to thank everybody for their patience. It's so great to see this panel here. I want to introduce the majority witnesses of our second panel, and then I'll return to the Ranking Member Grassley to introduce the minority witnesses.

First, Matthew Charles is joining us today. Thanks to the First Step Act—under the 100-to-1 disparity, Mr. Charles, my friend, was sentenced to 35 years in prison. He was a model inmate. That is not a reflection of his looks but his behavior. A Federal judge ruled, in 2016, that he should be released under the retroactive sentencing guideline reductions that resulted from the first—the Fair Sentencing Act.

After rebuilding his life for almost 2 years, an appellate court ruled that Mr. Charles had been released in error. After the First Step Act passed, Mr. Charles was eligible for resentencing, and thank God, he was released again. He has been extraordinary in his activism, leadership, and service in the community, further tribute to the model citizen he is, as he was a model inmate.

We have also been joined by Mr. Russell Coleman. Mr. Coleman was the U.S. Attorney for the Western District of Kentucky during the Trump administration. He has also previously served as a staffer for the minority leader, Mr. McConnell. I want to thank Mr. Russell publicly for his service to our country, his years of commitment to making this Nation better.

Ranking Member Grassley, would you go ahead and introduce the other two witnesses?

Senator GRASSLEY. I'm not prepared to do that now.

Senator BOOKER. All right.

Senator GRASSLEY. Somebody screwed up here.

Senator BOOKER. That's okay, sir. I will take the blame. Do not—

Senator GRASSLEY. Okay.

Senator BOOKER [continuing]. Put it on your staffer. I'm sure it was me.

Unidentified Speaker. I stood at the wrong moment.

Senator BOOKER. Yes. I do want to just—while we're waiting perhaps for that, I do just want to make sure everybody does know that this is, indeed, flour. I've tested it.

Senator GRASSLEY. What have you got?

Senator BOOKER. I was a little concerned.

Senator GRASSLEY. Where's the other one?

Senator BOOKER. I was—it is not gluten-free flour, though, so it's a dangerous substance.

Senator GRASSLEY. Okay. Obviously, I'm not going to read a whole dissertation, here. Forget it. Just let them introduce themselves.

Senator BOOKER. Gentlemen, you're going to introduce yourselves when you speak. Would the witnesses please stand, to be sworn in?

[Witnesses are sworn in.]

Senator BOOKER. Okay. Thank you all. Mr. Charles, would you please proceed with your opening statement? Mr. Charles, we're going to get your microphone on, one way or the other.

Mr. CHARLES. Okay.

STATEMENT OF MATTHEW CHARLES, JUSTICE REFORM FELLOW, FAMM, NASHVILLE, TENNESSEE

Mr. CHARLES. Thank you, Chairman Durbin, Ranking Member Grassley, Senator Booker, and Members of the Committee. Good morning. My name is Matthew Charles. It's an honor to have this opportunity to speak with you today, just as it was an honor for me to be at the State of the Union address 2 years ago and receive a standing ovation from Members of the House and Senate.

Some of you know my story. As a young man, I was on the wrong path. I grew up in a cramped public housing unit in North Carolina with a father who was both physically and verbally abusive. I was angry and lost, and I began to mimic that behavior I experienced

at home. I share this not as an excuse but to help you understand why I made the bad choices that resulted in my incarceration.

At 18, I tried to escape home life and joined the Army, but I was still angry and mad at the world. For the next decade, I was in a dark place. I sold drugs and spent about 5 years in State prison, but I had not yet hit rock bottom. In 1995, I was arrested for selling 216 grams of crack cocaine to an informant and illegally possessing a firearm. Because of my prior criminal activity and because I sold crack cocaine instead of powder cocaine, I was given a 35-year sentence. If crack and powder were treated the same back then, my sentence could've been only 15 years, not 35, but the 100-to-1 disparity was in place at that time, and I honestly didn't seem like someone who deserved a break.

While in the county jail, I met a guy named Jesus Duran. When he was sentenced and transferring, he left me his possessions. Among those things was a Bible. I read the Bible for the first time in my life, and the hard shell that I had constructed to protect myself began to crack. I gave up the anger and pain that had controlled me. I surrendered my life to the Lord Jesus Christ. That decision changed my attitude toward people.

I went to Federal prison and continued to live out the new life that I had accepted. Doing so allowed me to live a positive lifestyle and afforded me the opportunity to work as a GED tutor, a law clerk, and to mentor some younger people. Over the next 21 years, I didn't receive a single disciplinary infraction.

When Congress passed the Fair Sentencing Act in 2009, I believed I was eligible for a sentence reduction. I was following the debate at the United States Sentencing Commission and in Congress very closely, as were others serving time for crack-related offenses, and we knew that the basis for treating us differently had evaporated. What was clearest of all to us, a fact we saw every day inside prison, was that the stiffer penalties for crack were being applied disproportionately to Black people.

People of color have been adversely affected for decades and have suffered grave injustices and irreparable harm through criminal prosecutions of low-level drug offenders and addicts. We know the harm these excessive sentences caused to our children, our families, and our communities. We had hoped Congress would eliminate the unjustified disparity in 2010, but we saw political compromise reduce it to 18-to-1. The Fair Sentencing Act did not apply retroactively, but the U.S. Sentencing Commission made those changes retroactive.

In 2013, I applied for a sentence modification. At my resentencing hearing, the judge commended my rehabilitation and reduced my sentence. I left prison in 2016. At that time, I moved to Nashville, got a job as a driver, reconnected with family, volunteered weekly at a food pantry called The Little Pantry That Could, and became deeply involved in my church. I was doing everything I could to make my second chance a success, but after a year and a half of freedom, the Obama Administration's Department of Justice okayed the prosecutor to appeal my release, and the appeals court reversed the reduction in sentence.

I was sent back to prison for 7 months, until the passage of the First Step Act. Thanks to many of you, especially Senators Grass-

ley and Senator Durbin, I was spared from spending another decade behind bars. I left prison for good on January 3d, 2019, just 2 weeks after President Trump signed the bill into law.

I've spent the last two and a half years advocating for those left behind. People tell me my story is unique, but I know there are a lot of people like me who are committed to making changes and finding a new path and who do not need to spend decades in prison to learn their lesson. I deserved to go to Federal prison for my crimes, but I didn't need a sentence of 35 years, especially when 20 of those years were due to the fact that I sold one type of crack—one type of cocaine rather than another.

The Fair Sentencing Act might have been the best political compromise Congress could have reached 11 years ago, but the unfairness it sought to address remains. The U.S. Sentencing Commission recently found that Black people made up 77 percent of all Federal crack convictions in 2020, a percentage nearly as high as it was in the years before Congress reduced the disparity to 18-to-1. In other words, we used to see a tremendous amount of racial discrimination; now we see a little less. Even a little less discrimination is too much.

Proverbs 11:1 says, "Dishonest scales are an abomination to the Lord, but a just weight is his delight." The difference in crack and powder drug weights wasn't just in 1986, it wasn't just in 2010, and it isn't just now. It's time to finish the job, and I urge you to pass the EQUAL Act. Thank you for allowing me to testify.

[The prepared statement of Mr. Charles appears as a submission for the record.]

Senator BOOKER. Mr. Charles, thank you very much. I have been somewhat deputized by the Ranking Member. Mr. Garcia, you're going to speak next, but I just want to say, sir, that you serve as the Executive Director of the South Texas High Intensity Drug Trafficking Agency, HIDTA, and you've done that since 2008. That is extraordinary, because the South Texas HIDTA includes part of the southern border that is the highest drug trafficking area, one of the highest drug trafficking area in the United States.

You have been—showed extraordinary commitment to your work in protecting your community and making us a stronger and safer nation. From 2007 to 2008, you were the director of the New Mexico HIDTA, and so you have tremendous experience when it comes to issues of drug trafficking. You've worked your whole life, though, in public safety: 31 years serving as the narcotics deputy commander, narcotics captain, narcotics sergeant, narcotics agent, and a trooper. Sir, it's an honor to have you. Would you please give us your testimony?

**STATEMENT OF ANTONIO GARCIA, EXECUTIVE
DIRECTOR, SOUTH TEXAS HIGH INTENSITY DRUG
TRAFFICKING AREA, SAN ANTONIO, TEXAS**

Mr. GARCIA. Thank you, Senator Booker. Chairman Durbin and Senator Grassley, thank you so much for the opportunity to have a chance to come before you. Senator Grassley has been an instrument of support for law enforcement in general, and in particular when it comes to the use of the National Guard Training Program. Senator, thank you so much for your work and effort.

Senator Booker, when then-Colonel Rick Fuentes and I worked together on the A—IACP Committees, along with Governor Hutchinson, it was something that he came up with, because of your support, something that is now modeled as a National model in drug monitoring initiatives. Thank you, sir, for your efforts. Many of you have helped the law enforcement community out. Senator Feinstein, Senator Cornyn, Senator Cruz, all of you understand the importance behind the law enforcement community, and I think that it's critical today for us to recognize that.

I've been in law enforcement, like you said, Senator, for 45 years. Forty-two of those years I have spent in narcotics enforcement. I have personally witnessed the devastation that drugs cause our community. The international criminal organizations, the drug cartels, the drug trafficking criminal organizations, the drug smugglers, and the local drug dealers are what I consider to be the predators that feed upon the innocence and the gullibility of the most vulnerable citizens of our country. Many of those citizens live in lower socioeconomic areas. These predators, they don't discriminate. They care not what color their victims are, as long as their profits continue to roll in.

No judicial system is perfect, and we applaud you, in the law enforcement community, for working to make it better. We believe that the sentencing guidelines are the consequences used to hold traffickers accountable for their actions. These guidelines are established to act as deterrents to the would-be criminals, and if these are removed, we send the wrong or, at best, a very mixed message.

In the 2-year timeframe, as an example, from 2019 to 2020, the agencies that currently report drug seizures to the National Seizure System at the El Paso Intelligence Center reported the seizure of over 125,000 kilograms of cocaine. For that same timeframe, the HIDTA groups along the United States-Mexico border, in the designated counties, not the entire State—of the 4 States along the border, we reported 68,376 kilograms, combined, of the cocaine. When you combine those at the current market-value price per kilo, that means that we were able to take away from those drug cartels \$5,000,708,965. That's a lot of money, which is why they are in the business. It is for the profit.

According to the Drug Enforcement Administration forensic laboratory, cocaine purity levels continue to be at high levels, at an average of 83 percent. Cutting agents are used to increase the weight and profit for the cartels. In 2016, 60 percent of those 1,500 drug submissions reported the use of fentanyl mixed in with that cocaine. Street-level dealers, like their cartels, fight for control over sales territories, which is one of the things that makes them violent, and the innocent are the ones that suffer. The replacement of a street-level dealer happens almost instantaneously if they are arrested. Any change in our laws that minimizes the consequences of actions by these monsters gives the impression that our society is willing to tolerate the abuse of our public by individuals that care not who they hurt, as long as there is a monetary gain for them.

Narcotics officers will continue to fight to lower the availability of illicit drugs, and a modification in our judicial system has to be made, but not at the expense of those that are already suffering

from the drug use disorders. Thank you, gentlemen, all of you, for your endeavors to make these corrections and for doing your part to protect our citizens. Thank you for the opportunity to testify, and I look forward and welcome your questions.

[The prepared statement of Mr. Garcia appears as a submission for the record.]

Senator BOOKER. Mr. Garcia, we are grateful that you are here. I also have the privilege of assuming a role of Deputy to Chuck Grassley again in just giving a brief introduction to Steven Wasserman. Mr. Wasserman, you come also with a great demonstrated dedication to the country. You are—have been an assistant U.S. attorney in the District of Columbia since 2003.

Today you're appearing in your capacity as a Member of the Board for the—of Directors for the National Association of Assistant U.S. Attorneys. You obviously have distinguished yourself within that organization, because you were vice president of policy for its executive committee from 2018 to 2020. Your legal experience is significant, and previously you were a trial attorney focused on organized crime at the United States Department of Justice from 1996 to 2003.

If you'll allow me, sir, you and I have something in common. We are both—stand in the shadow of siblings that are better than us. Your sister is Debbie Wasserman Schultz, someone who people on both sides of the aisle have a lot of affection for. Thank you very much. Would you please give us your testimony?

**STATEMENT OF STEVEN WASSERMAN, VICE
PRESIDENT FOR POLICY, NATIONAL ASSOCIATION
OF ASSISTANT U.S. ATTORNEYS, WASHINGTON, DC**

Mr. WASSERMAN. Thank you, Chairman Durbin, Ranking Member Grassley, Senator Booker, and Members of the Committee, for the opportunity to appear before you. It's an honor to testify as vice president for policy for the National Association of Assistant U.S. Attorneys. I'm here today solely in my individual capacity with NAAUSA and not on behalf of the Department of Justice or my U.S. attorney's office.

NAAUSA represents our Nation's more than 6,000 Federal prosecutors and civil attorneys across our 94 judicial districts. We stand firm in our oath to protect the innocent and prosecute the guilty. We are guided by the Constitution and will always enforce the laws of Congress equally and fairly. To that end, we're not here today to oppose or support any legislation but rather provide practical insights into our experience in the field and on the front lines of our Nation's justice system.

While the underlying rationale behind the EQUAL Act is that powder cocaine and crack cocaine should be treated the same for purposes of sentencing, make no mistake, powder cocaine and crack cocaine are not equal. There are several reasons that support this reality that I'd like to highlight in my testimony.

First, crack is more addictive than powder and thus more destructive. Second, crack offenders have more troubling criminogenic characteristics. Finally, third, the continued rise in drug dependency in this country counsel caution in moving forward with re-

forms that increase the number of potentially recidivist offenders in communities.

First, the manufacturing process for crack cocaine makes the substance more concentrated. The method of ingestion, smoking, makes the effects shorter lived. Although chemically crack and powder cocaine are similar, the intense, short-term high produced by crack results in increased binge use, chronic use, and greater risk of overdose compared to powder cocaine. The more addictive nature of crack only enhances the risks of death and community harm.

Federal law enforcement efforts are focused on drug trafficking rather than possession. In these cases, there are significant differences in the criminal histories, recidivism rates, and involvement with weapons and violence between those who traffic in powder cocaine and those who traffic in crack. According to a 2017 report from the U.S. Sentencing Commission, federally prosecuted crack offenders typically had a more serious criminal history than federally prosecuted drug trafficking offenders as a whole, including those who sold powder cocaine.

Federal sentencing guidelines outline six criminal history categories. Powder cocaine traffickers are 20 percent more likely to be in the lowest criminal history category than are crack traffickers. Further, 5.8 percent of crack offenders fell within the highest criminal history category, and another 5.1 percent were designated as career offenders. Conversely, only 1.8 percent of powder cocaine traffickers fell within the highest criminal history category, and 3 percent were designated as career offenders.

Crack offenders have the highest recidivism rate of all drug offenders, at 60.8 percent. This is nearly 20 percent higher than the recidivism rate for powder cocaine traffickers. For crack traffickers, assault was the most prevalent and serious recidivist offense, with a rate of 27.4 percent. Drug trafficking offenses represented the second most prevalent and serious offense for crack offenders, at over 17 percent.

Rather than allowing more individuals to re-enter communities earlier, only to re-offend and create additional victims, we encourage Congress to ensure effective methods are in place to prevent recidivism prior to release. While the worst violence associated with the crack cocaine epidemic of the 1980's and 1990's has subsided over the last 25 years, Federal crack offenders continue to possess weapons at a higher rate than powder cocaine traffickers. For example, the U.S. Sentencing Commission reported that, in FY 2020, 39.3 percent of crack offenders had their sentences enhanced for possessing a weapon, 20 percent more often than powder cocaine traffickers. The data further demonstrates that mark—this data further demonstrates the marked differences between Federal crack cocaine offenders and powder cocaine offenders.

As this Committee is likely aware, drug use and overdose deaths are an epidemic deeply damaging our Nation. Cocaine remains one of the most common causes of overdose deaths and is now often mixed with other dangerous drugs. According to the U.S. National Institute on Drug Abuse, between 2012 and 2016, there was a 23-fold increase in the number of deaths involving cocaine in combination with synthetic opioids like fentanyl and fentanyl analogs. Re-

ducing sentences for the most common re-offenders and some of the most violent drug traffickers at a time when drug use is so lethal and prevalent is concerning. Should Congress ultimately determine that action is warranted to equalize the penalties between powder cocaine and crack—and also would encourage Members to consider lowering the quantity thresholds for powder cocaine to match the existing thresholds for crack?

As the Committee moves forward, we urge you to consider the impact of these decisions on communities as a whole and the potential victims of drug trafficking and recidivism. We thank the Committee, Chairman Durbin, Ranking Member Grassley, Senator Booker for providing us the opportunity to speak regarding this important issue, and I look forward to your questions. Thank you.

[The prepared statement of Mr. Wasserman appears as a submission for the record.]

Senator BOOKER. Thank you very much. I would like to turn to the Ranking Member, actually, to start with questions, if possible.

Senator GRASSLEY. I appreciate that privilege very much. Thank you, Senator Booker. To——

Senator BOOKER. Mr. Ranking Member, obviously I am rusty as anything about serving in this role. I skipped over a witness——

Senator GRASSLEY. Well——

Senator BOOKER [continuing]. Who shot me a glance that is illegal in the State of New Jersey, but——

[Laughter.]

—We're in DC, so—can I—may I allow him to speak?

Senator GRASSLEY. Yes.

Senator BOOKER. Thank you very much, Mr. Ranking Member. Mr. Coleman, forgive me. Would you please give your 5 minutes of testimony, which will be followed immediately by the Ranking Member Grassley's question?

**STATEMENT OF RUSSELL COLEMAN, MEMBER,
FROST BROWN TODD, LOUISVILLE, KENTUCKY**

Mr. COLEMAN. Thank you, Mr. Chairman, although I would say I'm quite certain the Ranking Member's questions were much more value-add than what I might bring to the Committee today. It is an extraordinary privilege to sit at this table, in this room, before the Committee. It's also an extraordinary privilege to sit with this particular witness panel. With Mr. Charles, his story of redemption. With Mr. Garcia, who represents an entity—HIDTA is one of those acronyms that matter, in terms of saving lives, in terms of empowering Federal, State, and local aggressive drug task force efforts, and I applaud him for his 30 years of public service.

It's also a real privilege to sit with someone who represents our Nation's assistant United States attorneys. As your former colleague, then-Attorney General Sessions would say, AUSAs are the coin of the realm. They're the coin of the realm in implementing what this Committee and what Congress passes, and they do an amazing job serving our country, and so it's a real privilege, gentlemen.

This room, this beautiful wood-paneled room, is very far from Louisville, Kentucky, and I take you to Louisville, Kentucky in 2020. I take you to Louisville, Kentucky, last year, a city where the

relationship between law enforcement, the relationship between public safety, the rule of law, disappeared. I take you to a place where there was not a window in downtown Louisville that one could look through without seeing a piece of wood. I take you to a place where faith in law enforcement by communities that were also wracked by the highest homicide rate in the history of Louisville—a community where overdose rates were up 5 percent for many of the dangerous substances that we’re talking about here. I take you to a community that was broken.

As Justice Jackson, then-United States Attorney General in 1940, said to a group of U.S. attorneys in his favorite speech, he said, “Humility is the No. 1 characteristic that you need as a U.S. attorney.” I found, in the summer of 2020, in Louisville, that’s going to be the case whether you want it or not, because I take you back to—and I’m so grateful for this Committee, and hopefully there’s no buyer’s remorse. I’m so grateful for this Committee in moving forward my nomination and allowing me to serve as United States attorney in 2017.

After I took that oath, I was under the direction to charge the most serious readily provable offense, and we did that in the Western District of Kentucky. We used every tool in our tool kit. We increased Federal firearms prosecutions 67 percent over a 2-year period. Why did we do that? Because we were looking at a homicide rate that had increased 110 percent. That was the tool we thought we had in our tool kit, and at the end of 2019, after we’d increased our gun prosecutions, we still had almost 100 homicides.

Humility, Mr. Chairman, became the name of the game, as United States attorney, because we increased our engagement with our State and local partners. I have a one-pager, here, we call it, that’s covered by the tools that we’re not talking about: weight-based mandatory minimums, 924(c), 924(e), the recidivist—851 recidivist enhancement, that’s such a—these are powerful tools that aren’t on the table today. These remain, and I wouldn’t be at this chair, Mr. Chairman, if we were removing these powerful tools, but what we’re talking about is building trust and more effectively using resources, because the wheels came off, in terms of trust, in Louisville, Kentucky, in 2020, between law enforcement and the communities that we should serve.

I’m not a Pollyanna, to say that equalizing the disparity, in this particular bill—that that would eliminate the significant challenges between law enforcement and the communities we police. I’m not a Pollyanna in that regard, but this is a significant—this disparity is a significant limiting factor in the relationship between communities of color, those that are primarily impacted by violent crime and overdose death in Louisville, Kentucky, and law enforcement. It is a limiting factor.

You didn’t mention in my—and I’m grateful for the introduction. I served as an FBI Special Agent for a number of years. Information is the name of the game in allowing us to have clearance rates to more significantly impacting and protecting people. The information flow is broken. The jury nullification issue is a significant issue when communities of color, those most significantly impacted, are not engaging with law enforcement. It does not allow us to do

our jobs as effectively as we could. We have to look at different tools. We have to look at trust-building.

This is—this modest proposal is a way of not touching the significant mandatory minimums, frankly, that we need, that I would argue we need in the Federal system, but allows us to build bridges to a community that needs better relationship with law enforcement. I close, other than saying how honored I am to be joined by the National District Attorneys Association, who carry the bulk of prosecutions in this country, by the Major City Chiefs, who attempt to police urban areas that have seen this wrenching of relationship torn apart between those that we're seeking to protect and law enforcement—I close by an eloquent comment from the gentleman who sat here just a moment ago, Governor Hutchinson. He said, "The efficacy of law enforcement is dependent upon the community's confidence and trust in the justice system. It must be fair and equitable."

For us to do our jobs as law enforcement officers, we have to try new approaches. We have to concede with humility where we've failed. This is an effective tool that leaves our most significant weapons in place. It leaves them alone but allows us to tackle those that should be brought into the Federal system and leave the street-level dealers to our National District Attorneys Association colleagues to move forward on.

[The prepared statement of Mr. Coleman appears as a submission for the record.]

Senator BOOKER. Thank you very much for that testimony. I will turn to Chairman Durbin first and then followed directly by Ranking Member Grassley.

Chair DURBIN. Thank you, Mr. Chairman. Mr. Wasserman, I'm going to keep on trying to come up with a bill that the organization you belong to supports, but it's been difficult. NAAUSA opposed the bipartisan First Step Act, which Ranking Member Grassley and I helped to write, and if you had prevailed in that situation, Mr. Charles would still be in prison. I'm glad he's not. Your organization opposes the EQUAL Act, too, which puts you out of step with many major prosecutor and law enforcement organizations, the National District Attorneys Association, Major Cities Chiefs, law enforcement leaders, Association of Prosecuting Attorneys, and Law Enforcement Action Partnership.

I'm trying to reconcile some of your testimony, and it's difficult. I'm not an expert, and I'm not a scientist. I'm a political scientist, whatever that is, and went to law school. It doesn't qualify me as a scientist. When I read your testimony distinguishing crack and powder cocaine, and you refer to "the intense, short-term high produced by crack results in binge use and the rest", and I'm quoting, it would seem to me that you're saying that when you smoke it—cocaine—as opposed to ingesting it, it creates this sensation in your body.

I don't doubt that. It's quite possible. I would like to ask you, couldn't we say the same for marijuana? Would a marijuana brownie have—I don't know; no personal experience. Would a marijuana brownie have less impact than smoking marijuana, for example?

Mr. COLEMAN. I'm having a little trouble with my microphone. Thank you, Chairman, for the question. Let me just correct one thing. It's important to note that my association is not opposing or supporting the bill. I think you mentioned that we are opposing it. We have expressed concerns about it.

With respect to your question about marijuana and its impact depending on how it is ingested, I think there can be differences. I'm not a scientist, so I can't tell you the differences in—at least as it relates to marijuana, how ingesting it may impact the user. What I can say, though, is that with respect to crack cocaine, as a member of the law enforcement community, I can speak to the increased rates of addiction, death, and recidivism that we consistently see with crack compared to powder cocaine.

Drugs, in our society and in our sentencing scheme, are differentiated based upon their perceived harm. Marijuana is penalized significantly less than other drugs like cocaine, crack, heroin, meth—

Chair DURBIN. May I interrupt your—

Mr. COLEMAN [continuing]. Because of the perceived harm.

Chair DURBIN. We do not make a distinction, do we, under the law—marijuana in cigarette form as opposed to marijuana in some other form? It probably is a mistake to use marijuana, because the whole body of law relating to marijuana is changing so dramatically in my State and others, but the point I'm getting to is, marijuana is usually prosecuted by weight, is it not, as opposed to the manner of ingestion?

Mr. COLEMAN. It's prosecuted by weight, as is—as are the other drugs. I would note that crack cocaine is specifically manufactured to be smoked for the effects that it has on the user and because it's cheaper.

Chair DURBIN. I would just say that I have been convinced, or I wouldn't have embarked on this journey, that the science is not on your side, on this. I would also add that the points that you made use a word I've not seen before, "criminogenic." Is that—yes, it is, "criminogenic." When we're dealing with Federal crack offenders with extensive criminal histories or use of firearms, there is no argument in the EQUAL Act that that should be ignored or forgotten. In fact, it is certainly likely to come up in the sentencing proceeding, as it should. Criminal histories, use of firearms, all of those things should be considered, but we have addressed ourselves primarily to nonviolent drug offenses. Senator Grassley and I agreed that would be the standard, the threshold which we'd use.

I'd just like to close, and I only have a few seconds. Thank you to the whole panel. I'm sorry we couldn't get into more detail, but the reason for this effort is Mr. Charles, a man facing 35 years in prison. That is a rare sentence in its severity, thank goodness, but to imagine that he was facing that, based on the mistakes that he made in life, which he readily acknowledges—it is always our first human instinct to believe that raising the penalties on crimes will lead to deterrence. We have clear evidence that did not work when it came to the 100-to-1 disparity in sentencing. We ended up with more addicts and a cheaper product on the street, just the opposite of what we were counting on.

We've got to think anew on this, and I think we are learning that drug addiction is, in fact, a disease that needs to be treated as such. I think we're learning, also, with drug courts, which many people applaud, including the previous panel, that when you sit down with someone who is accused of a drug crime, who is addicted, and deal with them in a more humane and personal way, absent criminogenic elements, absent guns and such, that you get a much better result and make the communities that they're living in much safer. I thank this panel very much.

Senator BOOKER. Thank you, Chairman. I'd like to go to Ranking Member Grassley now.

Senator GRASSLEY. Thank you, Senator Booker. First of all, to Mr. Charles, not a question, but it's great to see you here today, and it's wonderful to have somebody like you, with the experience you've had, to testify about the inequities of our judicial system. I'm grateful for your continued support of the First Step Act and for your voice of being part of the conversation today.

My first question's going to be to Mr. Wasserman and Mr. Coleman. Leading into that question: the vast majority of Federal inmates will one day leave prison, re-enter society. Former inmates should be productive citizens upon release and shouldn't return to a life of crime. The First Step Act encourages successful re-entry through prison programs—re-entry programs. That's why I'm concerned by the Sentencing Commission's data in which—the FY 2020 report showing that those offenders who distribute crack cocaine have higher rates of recidivism than any other drug dealer. To you two, as prosecutors with firsthand knowledge of how these investigations and prosecutions go, is recidivism an important factor that Congress should weigh, in evaluating any change in the sentencing laws for cocaine? Why or why not?

Senator BOOKER. Mr. Wasserman.

Mr. WASSERMAN. Thank you, Ranking Member Grassley. Absolutely, recidivism is an important factor in how the Senate should move forward. As I mentioned, crack offenders recidivate at the highest level of all Federal drug offenders—crack traffickers, I should say. What we're talking about, really, is that these people are going back into their communities and re-victimizing the members of their community. It is, I think, an oversimplification to focus solely on disparate impact based on race, because you have to consider the fact that the disproportionate negative impact of addiction and violence that flows from crack cocaine on primarily the African American community also needs to be considered, and recidivism only magnifies that problem for communities of color.

Mr. COLEMAN. I'd go back to your comment, Senator Grassley, that we must prioritize public safety at all times. Everything must be viewed through the lens of prioritizing public safety. If you look, and we have a tremendous amount of data from those released under the First Step Act—very low recidivism rates, to begin with. Very low recidivism rates. We retain tools when recidivism does occur. We retain enhancements, we retain the ability to return those individuals into custody, if need be, but the reality—and it's an important point that we haven't talked about much here—is the infrequency of seeing crack cocaine now.

I won't presume to say we're—it's not still extant. Certainly, it is, but in the Western District of Kentucky, during the three and a half years I served as United States attorney, it was exceedingly rare to see crack cocaine. It is—it remains a threat. I would not for a moment hesitate in saying that we must treat it as a dangerous substance. We still have the mandatory minimums, if this bill were to go forward, to do that, but we're simply not seeing it at any degree of quantity. The threat is elsewhere now, sir.

Senator GRASSLEY. To Director Garcia, you mentioned in your testimony that the stream of cocaine coming to the U.S. from Mexico is consistent. You also noted that cocaine being mixed with synthetic opioids like fentanyl is a growing problem. Do you think that lowering the sentencing ratio of crack to powder cocaine could make it easier or more appealing for Mexican drug cartels to smuggle cocaine across the border?

Mr. GARCIA. Thank you, Senator. The lowering of the sentencing guidelines for crack cocaine—I don't know that it would make it easier for the drug cartels to bring it in. The drug cartels are not bringing in crack cocaine; they're bringing in cocaine. It is only, as Mr. Wasserman said, then cheaper to sell the crack cocaine, so therefore the street dealer that buys a kilogram of cocaine can break it down into so many smaller pieces that he can make more money of it, and so therefore we believe that the lowering of the sentencing guideline for crack cocaine, in and of itself, would not have that type of effect.

As Senator Lee said earlier and Senator Booker followed up on, the concern is, do we want to lower cocaine sentencing guidelines, or do we want to raise cocaine sentencing guidelines so that there's not that disparity between the two? I think that that's something that this body has to take into consideration.

Chair DURBIN [Presiding]. Thank you, Senator Grassley. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. Mr. Garcia, I want to direct some questions to you. First of all, thank you for being here today, and thanks for your service to the people of Texas and the United States. I think the Southwest Texas High Intensity Drug Trafficking Area program plays a very important role in dealing with the scourge of illegal drugs.

I think what you can offer us is a reality check for how—what conditions are on the ground. One reason why I hope that the Vice President, as the designated individual to help the administration deal with the current border crisis, will actually travel to the border, is that she can do what I try to do every time I go to the border, which is to listen to the experts and understand the circumstances on the ground and what we might be able to do to make them better. Can you explain what effect the current border crisis, this surge of 180,000 people a month on the border—what impact has that had on your work and the work of your colleagues who are trying to stop the flow of this poison across the border into the United States?

Mr. GARCIA. Thank you, Senator. As you discussed earlier with the previous panel, our partners at the Border Patrol are overwhelmed. They are swamped with having to deal with this humanitarian issue. As a result, in the State of Texas, the Governor has

instructed the Texas Department of Public Safety to step up and fill that void. At the same time, our local sheriffs have taken up that responsibility to fill some of that void.

Even with the amount of—even with the reduction of tourism and travel between the two countries, the levels of cocaine seizures that were done in 2020 remain the same as that prior to the COVID situation, so we know that it's still coming in. We understand that our drug trafficking organizations are international criminal organizations. They're taking advantage of the situation. They're finding that loophole. They're finding that ability to come in, and that's exactly what they're doing.

Senator CORNYN. As I mentioned to Ms. LaBelle, in my visits to the border and talking to the Border Patrol, they tell me the very fact that they're having to deal with all these unaccompanied children, for example, has taken a lot of that—lot of Border Patrol off the front lines. Do you believe that's part of the business model or plan or strategy on the part of the cartels, to flood the Border Patrol and the border so that it can open up gaps that they can then exploit?

Mr. GARCIA. On a personal level, yes, sir, I believe so.

Senator CORNYN. Yes.

Mr. GARCIA. I think that they tried it several years ago, when we had the first wave of undocumented children that came in, and we—they saw what they could get away with. I believe that this is just another way for them to do a distraction so that they can move their poison in.

Senator CORNYN. Senator Sinema, from Arizona, another border State Senator, and I, as well as Henry Cuellar, a Congressman from Laredo, and Tony Gonzales, who represents the 23d Congressional District, have introduced a bipartisan, bicameral bill to try to provide additional tools to Border Patrol and those Government officials responsible for dealing with this surge, to try to begin to mitigate some of the pull factors. I realize you're probably not an immigration specialist. You're a law enforcement officer, and you deal with investigating and prosecuting people for crimes. You mentioned the fact that this is not only having an impact on the Border Patrol themselves but also on the border communities, including the local sheriffs and police departments. Are they seeing an increase in crime and other offenses, as a result of the fact that there are not just children coming across; there are actually sex offenders, people who have committed numerous crimes for which they've been convicted, but they mix themselves in with these other migrants who are coming for other reasons? Are those threats to local communities and to the United States, in your opinion?

Mr. GARCIA. There has been an increase that we have noticed in the amount of crime; that has stepped up. Primarily, it's the crimes of theft, burglaries that have occurred because the migrants are coming in or these individuals are coming in, and they are in need of things, and so they go after it. What is most affecting is the destruction of property to the ranches and to the farms that are happening.

The sheriff's departments, again, as I said, are overwhelmed. Their jails are also full. We have no—they have no place to house them. All of those things combined take what I would consider a

snowball effect upon this country and upon the law enforcement officers that are sworn to protect it.

Senator CORNYN. Thank you, Mr. Garcia. Thank you very much, Mr. Chairman.

Chair DURBIN. Thank you, Senator Cornyn. To your point that you've raised twice, now, I hope we can get some data. I think we both want to see it. The best data I can come up with on drug seizures, ports of entry versus between ports of entry, is 2020, FY 2020. It would not reflect the current surge in border activity. Maybe if we can get that information, it would be helpful in understanding this.

Senator CORNYN. Oh, I'm sure Mr. Garcia may be able to enlighten us a little bit, but of course they're coming in both places, both across the ports of entry—and you've made the important point that the ability to scan and detect bulk drugs coming across the ports of entry are—that's important, and it needs to get better, and it sounds like we're on a pathway there, but the cartels are not stupid, and they realize if they can't get the drugs across the ports of entry, they're going to come between the ports of entry. That's why you see reports of people dressed in either camo or all in black, carrying backpacks of drugs across the border, through—between the ports of entry, and of course, as we've pointed out, fentanyl—it doesn't take a lot of fentanyl to kill somebody or to—that you can put a lot of it in the backpack. Let me just put it that way. Thank you.

Chair DURBIN. Thank you very much, Senator Cornyn. I now turn back over to Senator Booker. Musical chairs. Here we are. I'm going to vote on the floor, as he just did.

Senator BOOKER [Presiding]. All right. Do I need to hold—so, this is when the trouble starts, when all my Senior Senators leave the room and leave me alone with the panel.

[Laughter.]

Gentlemen, you should be afraid. I'm grateful, again—let me just get my questions open, here. Mr. Charles, clearly I want to start with you, my friend, because I've gotten to know you quite well over these years, and what I'd like to know, first and foremost, is, what do you think about, in general, about the mandatory minimums, in your own experience—that difference between 10 years and 35 years?

You've been really blunt with me about sort of the people you observed. Can you maybe just say, for the record, sort of, are the longer—decades longer, often—do they make a difference in terms of the impact on individuals? Maybe even just from your own calculations, when you were living a life, as you admit, of crime, were you—were mandatory minimums affecting your thoughts? Were they acting as a deterrent of you, should you have gotten caught?

Mr. CHARLES. Oh, No, the mandatory minimums—I'm dead set against mandatory minimums, the reason being is because I believe that the judge should have discretion to be able to sentence a person based on the particulars of that person: in other words, the past criminal history of that person, their role in the offense, as well as their culpability. I believe that the judge has the discretion to sentence a person to a shorter sentence or a longer sen-

tence, based on that. When it comes to the mandatory minimums, you are bound by the guidelines to impose this sentence.

In my case, when I received 35 years—and the mandatory minimum was invoked because the United States Sentencing Guidelines was mandatory when I was sentenced in 1996, and because of that, I received the 35-year sentence. As I stated earlier in my testimony today, that sentence exceeded by 20 years what a sentence of 1-to-1 would have been, had my offense been powder cocaine. As a matter of fact, the judge that actually released me in 2019, Judge Aleta Trauger, she stated that, because I had satisfied my sentence for the other offenses, that I was entitled to immediate release. I satisfied those other sentences 10 or 12 years ago. It was the crack cocaine that continued to hold me bound.

Senator BOOKER. The weapons possession and all that, you satisfied those, and in many ways you were seeing a longer sentence for yourself than actual violent offenders got for other crimes. That's correct, right?

Mr. CHARLES. That is correct, sir.

Senator BOOKER. You were a nonviolent drug offender, in for a longer period of time than people who showed a propensity toward violence; indeed, were convicted of violence. Thank you very much, Mr.—Mr. Coleman, you heard me, I had a great conversation with Senator Lee, and we were both talking about what the right rectification of this was, whether to lower the crack criminal penalties to equal the powder ones, or to raise the powder ones to equal the crack cocaine penalties. Could you give some thought—I asked Governor Hutchinson about that. I'm curious, from your perspective, what you think.

Mr. COLEMAN. I'm grateful for the opportunity to revisit, because my default reaction was the converse of where we sit today. My default was, as a prosecutor, why should we concede? Why shouldn't we take the alternate route in bringing down those thresholds for powder? As I looked at the bill, and based upon my experience the last few years as a United States attorney and coupling it with the trend that—and that arc of justice with this Committee is toward removing low-level offenders from the Federal system so we can better steward our finite resources.

As much as our NDAA, often times our State partners think we have unlimited resources in the Federal system, we don't. We can always use additional assistant United States attorneys. We can always use new agents. If we could take some of those resources that are being utilized to house low-level offenders or avoid, in this hypothetical, raking in a whole new category of low-level offenders that the State system is uniquely equipped to address, then that would be the preferred route.

Again, my default reaction was just as you suggest, just as Senator Lee raised, to go the other route, but if we're attempting, as this Committee is, and what makes sense on the ground, to better steward limited resources and remove the lower-level offenders—from the Federal system, that is—again, by not—leaving in place—and I know there's disagreement in terms of mandatory minimums, but leaving those powerful tools in place, this route, your route, this bill, coupled with the ability to build that bridge, start building that bridge, addressing the limiting factor that we have between

communities of color and law enforcement—again, this won’t eliminate that, but this matters to communities in Louisville, Kentucky, African-American communities.

I’ve heard it time and time again. They may not know the specific 841 provision, but they know that there’s a disparity there. In terms of whether I’m trying to recruit a source or garner information or affect clearance rates, it’s a limiting factor for law enforcement efficacy.

Senator BOOKER. Mr. Coleman, I have another question for you, but I’m going to use the Chairman’s prerogative and yield to my friend from Texas, Senator Cruz. He’s got, I’m sure, a million things to do; I’m here for the duration. I’m going to yield and let my friend go ahead.

Senator CRUZ. Thank you, Mr. Chairman. We have a drug crisis in America. We have an opioid crisis in America that is taking far too many lives. Unfortunately, this drug crisis is getting worse with the open-border policies of Joe Biden and Kamala Harris. Since 1999, according to the CDC, nearly 850,000 people have died from drug overdoses. One of those 850,000 was my sister Miriam.

This is a crisis that affects everyone in America. The numbers are staggering. In the 12-month period ending in September 2020, over 90,000 people died of an overdose, a nearly 30 percent increase over the previous year. Cocaine overdose deaths are at record highs. Between 2013 and 2019, deaths involving cocaine more than tripled, and in 2020 alone, the CDC estimates that 20,000 Americans died from a drug overdose involving stimulants, including cocaine.

Drugs not only take the lives of the users, but they lead to violence. Criminal dealers, cartels, gangs ruthlessly employ violence. According to the U.S. Sentencing Commission, weapons were involved in 25 percent of all drug trafficking offenses. Strikingly, nearly 40 percent of individuals convicted of trafficking crack cocaine carried a weapon. We’re seeing the consequence in our communities as violent crime is soaring.

Indeed, just today the White House has come out acknowledging the violent crime epidemic that is happening on this administration’s watch. New York, for example, had 45 percent more murders and 97 percent more shootings last year. Chicago had 274 more murders and almost 1,500 more shootings in 2020 than in 2019.

Fentanyl seizures this year are up 264 percent over last year. Cocaine seizures are up 149 percent from last year. According to the CBP, the southwest border is the key entry point for most drugs. Yet this Committee is not debating, “How do we stop this massive flood of drugs that is killing Americans, killing children, killing vulnerable Americans, leading to violence, leading to trafficking, leading to gangs and cartels?” We’re not debating that.

Mr. Garcia, would the bill before this Committee in any way address the problem of Mexican drug cartels smuggling cocaine and other dangerous drugs across the border?

Mr. GARCIA. Not that I can think of, Senator.

Senator CRUZ. When I visited the southern border this past March, the Laredo field office of the CBP told us that fentanyl seizures were up 2,067 percent. Cocaine seizures were up 187 percent over the previous month. Mr. Garcia, do you agree that the current

situation at the border makes it easier for Mexican drug cartels to smuggle illegal drugs like cocaine into the country?

Mr. GARCIA. We believe that the current situation at the border and how it has tied up our partners in the Border Patrol, primarily, has opened the door for those cartels to increase their smuggling of the various type of drugs.

Senator CRUZ. Can you please describe for this Committee the human consequences, the very real human consequences and harms that come from dramatically increased illegal drug traffic that is coming across our southern border right now?

Mr. GARCIA. The illegal drug trafficking trade, Senator, is the fact that it doesn't affect only those citizens here in this country. It affects the citizens from the source countries, to begin with, the transportation and the transnational company—countries that they traverse. At the border, it affects those people that are involved in the smuggling of it.

It—forget the environmental impacts that it might have, but as those drugs reach the United States and they are distributed across this country, we don't know what it is that's being mixed with them. They found out that the use of fentanyl and fentanyl analogs, in addition to marijuana, cocaine, heroin, you name it—they're mixing it in with everything that they can, because the people that they're selling this poison to are getting an effect of it. To answer your question, it is devastating. It continues to devastate.

Senator CRUZ. A final question. If the Biden administration continues its open-border policy and we continue to see more and more illegal drug smuggling into this country, should we expect more and more overdoses, more and more violence, and more and more murders?

Mr. GARCIA. Senator, I speak to you as a law enforcement officer, not as the representative for ONDCP or even the HIDTA program, other than my fellow law enforcement officers. I come to you because you, as this body, have to do something to correct our judicial system. You have to do something to fix this.

I'm providing you my experience and my expertise in law enforcement to tell you, whether it is the Biden administration or whether it's the prior administration or any other administration that comes after, if we don't secure our border and if we don't curtail the amount of drugs that are coming into this country, our citizens will continue to suffer. As a result, we have limited control over the violence, over the deaths, over the other types of crimes that are a result thereof.

Senator CRUZ. Thank you.

Senator BOOKER. Thank you, Mr. Cruz. I would like to turn to Senator Blackburn now for her questioning.

Senator BLACKBURN. Thank you, Mr. Chairman. Mr. Charles, I just want to say I am so delighted to see you here today.

Mr. CHARLES. Thank you.

Senator BLACKBURN. I want to thank you for continuing to be a voice and to speak up. I think it's necessary, and I think you have an important message, and you're an important voice in this entire discussion. Thank you very much for taking the time to be here today. You probably have found it's about as hot here as it is in Nashville.

Mr. CHARLES. Yes, ma'am.

Senator BLACKBURN. Welcome to this muggy weather.

Mr. Garcia, I want to talk with you for just a moment, if I may. You were just talking about the impact of drugs and what you're seeing at the border, and of course you're right there in Texas. In Tennessee, I many times will say, because of the open-border situation that we're facing right now and have for the last several months, every town is becoming a border town and every State a border State. Certainly when I speak with law enforcement, they are living this out every day because of the impact of drugs on our city streets and in our communities.

As I talk to moms, one of the things that they have mentioned to me is fentanyl, and you were just referencing this, so—and the distress that they're seeing with fentanyl now being used in pills that are made to look like prescription pills, fentanyl that is laced into marijuana, fentanyl that is laced into cocaine. These—this is deadly. It is absolutely deadly. If you would speak to the volume that you are seeing come across the border and how that compares to what we have seen in years earlier.

Mr. GARCIA. We're seeing—thank you, Senator Blackburn. We are seeing an increase in the amount of fentanyl coming across the border, not only in the south Texas area but primarily in Arizona and southern California. The fentanyl that is being produced in Mexico is being produced, namely, by the Sinaloa Cartel, as well as the—

Senator BLACKBURN. That is El Chapo's cartel?

Mr. GARCIA. Yes, ma'am.

Senator BLACKBURN. Okay.

Mr. GARCIA. The Cartel Nueva Generacion, the CNJ Cartel, that is also from the western part of the country. Therefore, in south Texas, although we are seeing an increase in fentanyl, we're not seeing it to the degree that our counterparts in Arizona and in southern Florida are.

Senator BLACKBURN. The majority of drugs that are on the street in the country come across the Arizona border, correct?

Mr. GARCIA. I'm sorry?

Senator BLACKBURN. The majority of street drugs that are in the country come across the Arizona border, correct?

Mr. GARCIA. The majority of the street drugs that are in this country come across the entire southwest border.

Senator BLACKBURN. Okay.

Mr. GARCIA. From Brownsville to San Diego, it's—that's where it's coming across.

Senator BLACKBURN. Okay.

Mr. GARCIA. Our fentanyl has increased, like I said, but for us, it is not our No. 1 drug of concern. Our No. 1 drug of concern right now is methamphetamine, but the problem that we face, as you stated earlier, Senator, is the fact that the fentanyl is being mixed with pretty much every other drug.

Senator BLACKBURN. The number of deaths—Mr. Wasserman, I would assume you all are tracking deaths that are related to fentanyl. Have you seen an uptick? What kind of uptick are you seeing?

Mr. WASSERMAN. I mean, the data from the government indicates that—and I believe Director LaBelle testified that 75 percent of the deaths in 2020, of the 90,000 or so, had some opioid—and she may have even said fentanyl, if I heard her correctly—involved in the death. While I work in the District of Columbia, my knowledge is certainly more focused on that area. My understanding of the larger fentanyl problem is, yes, it's a serious epidemic.

Senator BLACKBURN. I will tell you that this is something that moms talk about a lot, and the dangers that are associated with this, and the absolute fear. They look at how this has moved into middle school kids and the concerns that are there; children that do not know what they're coming up against. This is something that is just so deadly. We thank you for the work that you're doing. Mr. Charles, we thank you for your voice in this discussion.

I have some other questions that will be submitted for responses in writing, and I thank you all for taking your time to come before us today. Thank you, Mr. Chairman.

Senator BOOKER. Senator Blackburn, we thank you always for your thoughtful questions. This has been a really constructive hearing. We're going to have to bring it to a close.

I do want to say, on behalf of Senator Durbin, he called the first—12 years ago, the first hearing for the complete elimination of this disparity. He thought it was unjust then, and he's still been leading, in many ways, as my mentor in this effort. The Fair Sentencing Act, the First Step Act have brought us closer to doing away with this wrong, but we can't let another decade go by without addressing this injustice. We need the EQUAL Act, and we need to pass it into law.

I know Senator Durbin pledges himself to this mission. I do, as well, and the great thing is, we have a bipartisan coalition that's growing, and some of my colleagues today have demonstrated their openness, at least, to potentially working with us on that.

I want to put into the record letters of support for the EQUAL Act from the Major City Chiefs Association, from the Due Process Institute, from the National District Attorneys Association, from the Americans for Tax Reform, from R Street, and from the American Conservative Union.

[The information appears as a submission for the record.]

I want to say one more time to the witnesses, thank you for being here. All four of you, as I tried to indicate, and I hope people understand, are living your lives in accordance to the hope that we can make this Nation safer and stronger and better for all.

I do, unfortunately, want to burden you a little bit more, because questions for the record will be open until Tuesday. As my friend Senator Blackburn said, she's going to have some questions for you all for the record. I imagine my team will, as well. The record's going to be open until June 29th, 2021, at 5 p.m., and the record will remain open to letters and similar materials.

Senator BOOKER. With that gentlemen, I apologize; there is a lot going on, on the floor, right now, and I'm going to have to head there, and I won't be able to—Charles, I won't be able to get down there and hug you. I'm going to have to sprint out this way, man. I just try to hug all the bald people I see, brother, and you've got

such a great head on your shoulders. No disrespect to the other gentlemen, but come on.

Thank you, gentlemen. This has been really helpful. With that, this hearing is adjourned.

[Whereupon, at 12:47 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

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Statement of Matthew Charles
 Justice Reform Fellow, FAMM
 Hearing on "Examining Federal Sentencing for Crack and Powder Cocaine"
 Senate Judiciary Committee
 June 22, 2021

Chairman Durbin, Ranking member Grassley, and members of the committee, good morning. My name is Matthew Charles.

It's an honor to have this opportunity to speak with you today, just as it was an honor for me to be at the State of the Union address two years ago and receive a standing ovation from members of the House and Senate.

I am only able to be here because you all came together and passed the First Step Act. I urge you now to come together again and pass the EQUAL Act and to eliminate once and for all the disparity between crack and powder cocaine sentences.

Some of you know my story. As a young man, I was on the wrong path. I grew up in a cramped public housing unit in North Carolina with a father who was both physically and verbally abusive. I was angry and lost - and I began to mimic the behavior I experienced at home. I share this not as an excuse, but to help you understand why I made the bad choices that resulted in my incarceration.

At 18, I tried to escape my home life and join the Army, but I was still angry and mad at the world. For the next decade, I was in a dark place. I sold drugs and spent about five years in state prison. But I had not yet hit rock bottom.

In 1995, I was arrested for selling 216 grams of crack cocaine to an informant and illegally possessing a gun. Because of my prior criminal activity - and because I sold crack cocaine instead of powder cocaine - I was given a 35-year sentence. If crack and powder were treated the same, my sentence could have been 15 years, not 35. But the 100-to-1 disparity was in place at that time, and I honestly didn't seem like someone who deserved a break.

While in the county jail, I met a guy named Jesus Duran. When he was sentenced and transferring, he left me his possessions. Among those things was a bible. I read the Bible for the

first time in my life and the hard shell I had constructed to protect myself began to crack. I gave up the anger and pain that had controlled me. I surrendered my life to the Lord Jesus Christ.

That decision changed my attitude toward other people and the things I faced and continued to face. I went to federal prison and continued to live out the new life that I had accepted. Doing so allowed me to live a positive lifestyle and afforded me the opportunity to work as a GED tutor, a law library clerk, and to be a mentor to some younger people. Over the next 21 years, I didn't receive a single disciplinary infraction.

When Congress passed the Fair Sentencing Act in 2010, I believed I was eligible for a sentence reduction. I was following the debate at the U.S. Sentencing Commission and in Congress very closely, as were others serving time for crack-related charges, and we knew that the bases for treating us differently had evaporated. We knew that the 1986 Anti-Drug Abuse Act was rushed through Congress with little debate or study, and in the middle of a media frenzy about drugs and crime.

What was clearest of all to us – a fact we saw every day inside prison – was that the stiffer penalties for crack were being applied disproportionately to Black people. People of color have been adversely affected for decades and have suffered grave injustices and irreparable harm through criminal prosecutions of low-level drug offenders and addicts. They have been given very extensive sentences, including life or multiple life sentences for nonviolent offenses involving crack cocaine. We know the harm these excessive sentences cause to our children, our families, and our communities.

We had hoped Congress would eliminate this unjustified disparity in 2010, but we saw a political compromise reduce it to 18:1. The Fair Sentencing Act did not apply retroactively, but the U.S. Sentencing Commission made its changes retroactive. In 2013, I applied for a sentence modification. At my resentencing hearing, the judge commended my rehabilitation and reduced my sentence. I left prison in 2016.

At that time, I moved to Nashville, got a job as a driver, reconnected with my family, volunteered weekly at a food pantry called the Little Pantry That Could, and became deeply involved in my church. I was doing everything I could to make my second chance a success.

But after a year and half of freedom, the Obama administration's Justice Department okayed the prosecutor to appeal my release, and the appeals court reversed the reduction in sentence. I was sent back to prison for 7 months until the passage of the First Step Act. Thanks to many of you, especially Senators Grassley and Durbin, I was spared from spending another decade behind bars. I left prison for good on January 3, 2019, just two weeks after President Trump signed the bill into law.

I have spent the past two and a half years advocating for those I left behind. People tell me my story is unique, but I know there are a lot of people like me who're committed to making changes and finding a new path, and who do not need to spend decades in prison to learn their lesson.

I deserved to go to federal prison for my crimes, but I didn't need a sentence of 35 years, especially when 20 of those years were attributable to the fact that I sold one type of cocaine rather than another.

The Fair Sentencing Act might have been the best political compromise Congress could have reached 11 years ago, but the unfairness it sought to address remains. The U.S. Sentencing Commission recently found that Black people made up 77 percent of all federal crack convictions in 2020, a percentage nearly as high as it was in the years before Congress reduced the disparity to 18:1.

In other words, we used to see a tremendous amount of racial discrimination, now we see a little less. But even a little discrimination is too much. Please reject any new political compromises. It's time for Congress to eliminate racial discrimination in sentencing by ending the disparity once and for all.

Proverbs 11:1 says, "Dishonest scales are an abomination to the Lord, but a just weight is his delight." The difference in crack and powder drug weights wasn't just in 1986. It wasn't just in 2010. It isn't just now.

Finally, I urge you to make sure this reform applies retroactively. It took 8 years for Congress to make the Fair Sentencing Act retroactive. There is no reason to require people to serve extra years or decades in prison simply because of when they went to court. We have seen over the past couple of years with implementation of the First Step Act's crack provision that the courts know how to handle reforms when they are made retroactive. More than 3,700 people – 91 percent of whom are Black – have reunited with their families earlier without jeopardizing public safety. You all should be proud of your support for that reform.

It's time to finish the job. I urge you to pass the EQUAL Act.

Thank you for allowing me the opportunity to testify.

**Testimony of Antonio Garcia
Executive Director
South Texas High Intensity Drug Trafficking Area
Before the Senate Judiciary Committee
Examining Federal Sentencing for Crack and Powder Cocaine**

Introduction

Chairman Durbin, Ranking Member Grassley, and Members of the Committee: Thank you for the opportunity to testify on the subject of “Examining Federal Sentencing for Crack and Powder Cocaine”. I am honored to appear before you today to offer my remarks. My testimony is not as a representative of the Office of National Drug Control Policy (ONDCP) or the High Intensity Drug Trafficking Areas (HIDTA) Program, but rather as a member of the law enforcement profession for the past forty-five years and as a member of the National HIDTA Directors Association.

The HIDTA Program is a program funded through the Office of National Drug Control Policy within the Executive Office of the President which provides funding assistance to Federal, state, local and tribal law enforcement agencies operating in areas determined to be critical drug-trafficking regions of the United States. The South Texas HIDTA is an alliance of 87 different law enforcement agencies working in close partnerships to promote and facilitate counterdrug investigations, information sharing, operational coordination and officer safety. It currently encompasses fifteen designated counties along the US/Mexico border and includes the cities of San Antonio in Bexar County and Austin in Travis County. The agencies involved recognize that our goal of “Disrupting the market for illegal drugs by dismantling or disrupting drug trafficking and/or money laundering organizations” is the best approach we can take to reduce the availability drugs to our communities.

I began my career in 1976 upon graduating from the Texas Department of Public Safety training academy. In 1979 I was assigned to the Narcotics Service, in which I served in various positions until my retirement as a Deputy Commander from that agency in 2007. I was then selected as the Executive Director for the New Mexico HIDTA and in the fall of 2008, I was selected as the Executive Director for the South Texas HIDTA. My experience in narcotics enforcement has been a long one, primarily along the US/Mexico border. Pressures that were brought to bear by US law enforcement against Colombian cartels both in Columbia and the Florida Gulf Coast areas drove them to establish partnerships with Mexican Drug Trafficking Organizations. The southwest border became the focal entry point of cocaine into the United States, so much so that in 1989 I was part of an investigation that resulted in the seizure of nine tons of 96% pure cocaine. At that time the street level consumption purity levels were no more than 30%, which meant that those nine tons would have been converted to 27 tons. That amount would have provided 24,516,000 doses of 30% cocaine powder to the citizens of this country.

With the abundance of cocaine availability, “crack” emerged as a new recreational drug at a lesser cost than powder cocaine. Pharmacological studies have shown that cocaine in its base form (crack), provides the user with almost instantaneous effects, but also lasts for a shorter period of time, leaving the user with a desire to search for that “high” again and again. When we in law enforcement first became aware of crack, it was being produced via the use of ethyl ether, which is very flammable.

We were faced with crack conversion sites that were dangerous to us because of their explosive and flammable nature. Soon a safer method of conversion began being used, the use of sodium bicarbonate (baking soda) to convert cocaine hydrochloride to cocaine base became the most common way of conversion.

The Southwest Border remains the source of ingress of cocaine into the United States, in 2019 and 2020, the El Paso Intelligence Center (EPIC) National Seizure System (NSS) reported a total of 125,569 kilograms seized by law enforcement agencies reporting their seizures, namely at the ports of entry, the areas between the ports of entry and the inland Border Patrol checkpoints. For the same timeframe, the HIDTA programs within designated counties in all four US/Mexico border states reported combined seizures of 68,376 kilograms. Many of us in the law enforcement community debate the percentage of drugs that we seize, with some believing we are seizing 10% while others believe we're seizing 20%. The truth of the matter is that "we don't know what we don't know". Suffice it to say that we are certain that not all drugs are being seized. We depend on the production estimates provided to us by the Drug Enforcement Administration (DEA), but they too do not have the complete picture of what is being produced in foreign countries, leaving us with an important intelligence gap.

According to the Drug Enforcement Administration Threat Assessment, Colombia remains the largest producer of cocaine that is exported to the United States. In 2015, Colombia halted the aerial spraying to eradicate coca fields, forcing Colombian authorities to manually eradicate these fields. This process is not only labor intensive, but dangerous and minimizes the overall effectiveness. As a result, production levels remain high. Since 2014 the Mexican military has located and destroyed three coca plantations within the states of Guerrero along the Pacific Coast and Chiapas on the border with Guatemala. The latest in Guerrero was in February, 2021. The yield of these fields would have provided very small amounts of cocaine and law enforcement analysts believe that this may be an indication that Mexican cartels are testing their ability to produce their own cocaine. The continual production of cocaine in Colombia, Peru, Bolivia and now possibly Mexico, increases the amount of cocaine that may be available for importation into the United States.

Unlike other parts of the nation, law enforcement agencies along the border cannot focus on any one single drug threat. Mexican Cartels or Transnational Criminal Organizations have morphed from polydrug traffickers smuggling all kinds of illicit drugs and pharmaceuticals, to poly-commodity criminal enterprises that includes smuggling of people and anything that will produce for them a profit. Several years ago, the Gulf Cartel smuggled stolen Mexican crude oil for sale on the black market in the United States.

Mexican cartels, specifically the Sinaloa Cartel, the Cartel de Jalisco Nueva Generación (CJNG), the Gulf Cartel and others continue to market their cocaine supplies to consumers in the United States. The battles among them for control of various border plazas remain violent, placing citizens on both sides of the border in harms way. Drug traffickers prey on young adults on the border to transport their illicit drugs to areas in the interior of the country.

The Domestic Highway Enforcement Initiative under the National HIDTA Program maintains a representation and partnerships with thousands of interdiction officers assigned to patrol the highways and interstates from the southwest border to other parts of the country. From calendar year 2018 through 2020, the number of yearly traffic stops have remained level at an average of 1,356 incidents

that involved the seizure of cocaine. Our partners in the US Coast Guard have also seen a continual number of cocaine seizures. During fiscal years 2019 and 2020, the Coast Guard seized 353 metric tons of cocaine in the Caribbean and off the Pacific coast from South America to Mexico. Although there is no way to accurately determine how much of those tons were destined for the United States, there is no doubt that many of them were destined to Mexico, which in turn would be smuggled into the US.

Officer safety remains our paramount concern. The increase in violence associated with drug trafficking is evident in some of the seizures that have been made by our interdiction officers across this country. In the years 2019 and 2020, interdiction officers reported the seizure of 3,710 weapons involved in the transportation of illicit drugs. For calendar year 2021, those officers have already reported 887 weapon seizures. Continual training of our officers in subjects such as interdiction, detection of concealed contraband, criminal indicators and crisis de-escalation remains critical in ensuring not only the safety of our officers, but the safety of the citizens that these traffickers prey upon.

Cocaine hydrochloride (HCl) purity in the US continues to remain at high levels, at an average of 83.8%. The remaining percentage is cutting agents that increase the weight and profit for cartels. Law enforcement data reveals that cocaine is increasingly becoming available mixed with fentanyl. In 2016, 60% of more than 1,500 drug submissions to the Drug Enforcement Administration, National Forensic Laboratory Information System involved the combination of fentanyl and cocaine. Of particular concern is the fact that cocaine is the main ingredient in crack cocaine. Fentanyl is stable up to 350°C; far higher than when crack cocaine is cooked at 100°C. We can infer fentanyl should not degrade during crack production.

The chemical properties of fentanyl and fentanyl citrate seem to indicate it is possible to heat up these materials for vaping or smoking; an uncommon but deadly practice. The addictive properties of the combination of fentanyl mixed with cocaine is understudied. It is unclear if the smoking of crack cocaine that was produced with cocaine containing fentanyl will cause the crack cocaine to be more addictive, or if it will increase the danger of overdose and death.

Law enforcement agencies that partner together through the HIDTA program understand that the illness of substance use disorder is one that cannot be curtailed by enforcement actions alone. Law enforcement long ago established partnerships with prevention, treatment, education, and the courts to work together to stem the tide of addiction and overdose. Our law enforcement partners agree that to protect our citizens from access to these illegal substances, we must target the predators that feed upon the innocence and gullibility of the public. Those predators are defined as the transnational criminal organizations, the cartels and the drug trafficking organizations that seek to profit from the sale of their poisons. Any change in our laws that minimizes the consequences of actions by these monsters gives the impression that our society is willing to tolerate the abuse of our public by individuals that care not who they hurt as long as there is a monetary gain for them. As this country continues to battle the opioid crisis, including the increase of synthetic drugs such as fentanyl, we cannot lose sight of the dangers posed by methamphetamine and cocaine.

HIDTA partners across the nation report an average cost of one kilogram of cocaine is \$29,436. Combining the 2019 and 2020 seizure weights reported above would equate to \$16,099,873,020 that law enforcement in the United States deprived the cartels of profits in the sale of cocaine.

The abuse of illicit drugs in the United States remains as one of the most important focal points for law enforcement across the nation. Leaders at all levels of the population must come together to continually advocate for the prevention of drug abuse if we hold to any hopes that our future generations will have the physical, mental and sociological strength to uphold the wellbeing of our great nation.

Thank you for the opportunity to testify before you and I welcome your questions.

Examining Federal Sentencing for Crack and Powder Cocaine

Senate Judiciary Committee – Full Committee Hearing
Tuesday, June 22, 2021

Testimony of
Regina M. LaBelle
Acting Director of the Office of National Drug Control Policy

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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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.

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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/bills/110th-congress/senate-bill/1711/text>

**Statement of The Honorable Asa Hutchinson
Governor of Arkansas**

Before the U.S. Senate Committee on the Judiciary

“Examining Federal Sentencing for Crack and Powder Cocaine”

Tuesday, June 22, 2021

Chairman Durbin, Ranking Member Grassley, and Members of the Committee:

It is a privilege to be asked to testify before this Committee regarding the difference between the ways in which our nation's federal criminal sentencing laws punish crack cocaine offenses versus powder cocaine offenses and whether it is time to change that approach.

I have long supported reducing the non-evidence based sentencing disparity between these two forms of the same drug. In fact, in April of 2009, I appeared before this Committee to testify on this very subject. The following year, Congress passed the Fair Sentencing Act, which reduced but did not eliminate the disparity, in bipartisan fashion. The Fair Sentencing Act was so noncontroversial that it passed the Senate and the House by voice vote. I am here again before this Committee to urgently request that you take the last step necessary to finally create equal justice under the law.

As a former U.S. Attorney appointed under the Reagan Administration, a former Republican Member of Congress, and a former Administrator of the Drug Enforcement Administration appointed by President George W. Bush, I have viewed our criminal justice system through a number of lenses. During those experiences, I was never known as someone who was "soft" on crime. When I served in Congress, I did not shy away from supporting significant punishments for drug-related crimes. And as a prosecutor, I aggressively pursued everyone from drug offenders to violent white supremacists. From all these various vantage points, however, I have come to the same conclusion – this sentencing disparity approach rarely led to the incarceration of drug kingpins as its proponents hoped. Instead, the majority of those incarcerated were mere street-level users and sellers. And in addition to not working to bring a meaningful end to the use or sale of this drug, Congress's disparate approach of treating one type of cocaine more harshly than another type has only led to fundamental unfairness, and it has undermined confidence in our justice system. That erosion in any community's faith in the rule of law makes it more difficult for the hard-working men and women of law enforcement to do their jobs.

I hope that we can all agree that our nation's understanding of crack cocaine has grown significantly since Congress created the original 100-to-1 sentencing disparity in the Anti-Drug Abuse Act of 1986. Back then, the news frightened us each night with images of the harm that this drug – one that many of us had never heard of – was causing to our communities. Congress felt compelled to act and to act quickly to do something to ameliorate this harm. As a result, in 1986, Congress determined that a person convicted of a first offense of possessing five (5) grams of crack cocaine (equal to a few sugar packets) would receive the same mandatory minimum prison sentence as a powder cocaine user who used 100 times that amount of cocaine.

There is nothing in the legislative history of the Anti-Drug Abuse Act to indicate that the 100-to-1 disparity was based on science, because the science does not support punishing these two

drugs differently. These substances are chemically the same. Instead, the sentencing disparity was entirely arbitrary. In recognition of this, in 2010, Congress passed the Fair Sentencing Act to reduce the disparity between crack cocaine and powder cocaine to a lower ratio, and I supported the enactment of such a reform. This landmark law was the product of a bipartisan realization that the sentencing disparity between crack cocaine and powder cocaine was fundamentally unfair and caused disproportionate harm, particularly in communities of color.

The proof of disproportionate harm to communities of color is cemented by data. U.S. Sentencing Commission data show that in FY 2009, 79 percent of defendants in crack cocaine cases were Black,¹ then 78.5 percent in FY 2010,² and 83 percent in FY 2011.³ More recently, in FY 2019⁴ and FY 2020,⁵ 81.1 percent and 76.8 percent of defendants were Black. Yet survey data show that, in fact, crack cocaine users are predominately White.⁶ This mismatch between who uses drugs versus who is incarcerated for their use of drugs leads many to reasonably question this country's commitment to equal protection under the law.

In December of 2018, Congress took a tremendous step forward with the passage of the First Step Act. This generational legislation not only included prison reforms designed to reduce recidivism, but it also included incredibly modest sentencing reforms, including retroactive application of the Fair Sentencing Act. By now, more than 3,300 people have benefitted from this relief under the First Step Act,⁷ 91.6 percent of whom are Black.

Although Congress has taken steps to reduce the disparity and provide some retroactive relief, any sentencing disparity between two substances that are chemically the same weakens the foundation of our system of justice. Congress now has the opportunity to build on the bipartisan

¹ U.S. Sentencing Commission, "Race of Drug Offenders in Each Drug Type, Fiscal Year 2009," available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2009/Table34.pdf>.

² U.S. Sentencing Commission, "Race of Drug Offenders in Each Drug Type, Fiscal Year 2010," available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Table34.pdf>.

³ U.S. Sentencing Commission, "Race of Drug Offenders in Each Drug Type, Fiscal Year 2011," available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table34.pdf>.

⁴ U.S. Sentencing Commission, "Race of Drug Trafficking Offenders, Fiscal Year 2020," available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/TableD2.pdf>.

⁵ U.S. Sentencing Commission, "Race of Drug Trafficking Offenders, Fiscal Year 2020," available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/TableD2.pdf>.

⁶ Substance Abuse and Mental Health Services Administration, "Results from the 2018 National Survey on Drug Use and Health: Detailed Tables," Table 1.31A, June 2020, <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2018R2/NSDUHDetailedTabs2018.pdf>.

⁷ U.S. Sentencing Commission, "First Step Act of 2018 Resentencing Provisions Retroactivity Report," October 2020, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20201019-First-Step-Act-Retro.pdf>.

successes of the Fair Sentencing Act and the First Step Act by eliminating the sentencing disparity between crack cocaine and powder cocaine once and for all. The strength of our justice system is dependent on the perception of fundamental fairness.

One of the main focuses of the recently-enacted First Step Act was the need to reduce recidivism. This has been at the heart of criminal justice reforms I have overseen as Governor of Arkansas. My leading concern is public safety, which is why we have increasingly focused our resources on punishing violent crime and repeat offenses, while addressing low-level, nonviolent crime through diversion programs. Importantly, the U.S. Sentencing Commission has studied recidivism of those individuals who were granted retroactive relief through their Guideline amendment. The study found that the three-year recidivism rate of those granted relief was the same recidivism rate as the control group of crack cocaine offenders who had served their entire sentence.⁸ Of note, the most serious recidivist behavior reported was a court or supervision violation – not an additional serious violent or drug-related crime.

Importantly, few states have instituted a sentencing disparity between crack cocaine and powder cocaine offenses like the federal government has.⁹ Arkansas is one of the many states that does not. In addition, we offer nonviolent drug offenders an opportunity to avoid prison time by breaking their addiction by graduating from our drug court programs. These drug courts, which save our state \$45 million annually, allow us to focus our law enforcement resources on violent crime, where such resources are needed.

One of the concerns expressed by skeptics of equalization of the treatment of these two substances is that there is a greater level of violence associated with crack cocaine. The general concern about violence associated with drug use and sales is justified, but we must recognize that prosecutors have sentencing enhancements and Guideline enhancements at their disposal to address aggravating factors, including violent and recidivist behavior. Moreover, judges are required to take a number of factors into account under federal law when considering whether to resentence someone, including the seriousness of the offense and the need to protect the public from further crimes.

As a nation, we should not rely on incarceration as the first, best, or only response to drug offenses. Incarceration is one of the most severe and most expensive tools at our disposal in the criminal justice system. The American public understands that we are not reaping the societal benefits that we previously hoped might come with an incarceration-first model and they are

⁸ U.S. Sentencing Commission, “Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment,” March 2018, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf.

⁹ FAMM, “Crack Cocaine Disparity Reform in the States,” available at <https://famm.org/wp-content/uploads/Crack-Disparity-in-the-States.pdf>.

looking to this nation's state and federal leaders to adjust their approach and find evidence-based solutions that work.¹⁰

In 2017, I was proud to sign the Criminal Justice Efficiency and Safety Act into law as a part of my state's Justice Reinvestment Initiative.¹¹ The law was designed to reinvest cost savings at the front end of our justice systems by diverting those who have health concerns, such as a mental illness, away from prisons and jails and into treatment services. The same can be done for issues such as addiction, which can lead to increased involvement in the justice system.

My views in support of certain criminal justice reforms are informed by a lifetime of service to the public and my decades long commitment to public safety and the rule of law. During my time as the head of America's Drug Enforcement Administration, I saw firsthand how this current unjust drug sentencing disparity undermined our law enforcement agents' ability to be effective in their anti-drug operations. The efficacy of law enforcement is dependent upon the community's trust and confidence that our justice system is fair and equitable. Yet under the current disparity, the credibility of our entire drug enforcement system is weakened. Especially considering today's climate, we should be taking active steps to strengthen trust between law enforcement and our many communities across this country. The EQUAL Act is a rational and much-needed step in that direction.

I urge the distinguished members of this Committee to support the principles of fairness, justice, compassion, and fiscal responsibility. I appreciate the opportunity to appear before the Committee to offer testimony, and I look forward to answering your questions.

¹⁰ According to the Bureau of Prisons, the average cost of incarceration for one individual in FY 2018 was \$37,449, which is roughly over \$100 per day. 84 FR 63891, available at <https://www.federalregister.gov/documents/2019/11/19/2019-24942/annual-determination-of-average-cost-of-incarceration-fee-coif>.

¹¹ SB 136, "Criminal Justice Efficiency and Safety Act of 2017," 91st General Assembly (2017), available at <https://www.arkleg.state.ar.us/Acts/Document?type=pdf&act=423&ddBienniumSession=2017%2F2017R>.

Statement of Russell Coleman

*Former U.S. Attorney for the Western District of Kentucky
Hearing on "Examining Federal Sentencing for Crack and Powder Cocaine" Senate Judiciary
Committee
June 22, 2021*

Chairman Durbin, Ranking Member Grassley, Honorable Members of the Committee, Governor Hutchinson, Distinguished Guests:

My name is Russell Coleman, and it is my honor and privilege to appear before this committee in support of the bipartisan EQUAL Act. My position on this legislation may come as a surprise to those of you who know me and my law enforcement background, but it is that very experience, which has challenged and humbled me, that has brought me to this hearing today.

I am currently a partner in a private law practice, Frost Brown Todd, in Louisville, Kentucky. Prior to that, I was appointed U.S. Attorney for the Western District of Kentucky by former President Donald Trump, confirmed unanimously by the Senate, and sworn into office September 22, 2017. I served in that role through my resignation on January 20, 2021.

Earlier in my career, I worked here on the Hill among many of you as counsel for your colleague and the senior senator from Kentucky, Republican Leader Mitch McConnell. Prior to that, I served as a Special Agent with the Federal Bureau of Investigation, with a diverse portfolio of national security, white collar, and violent crime cases. While at the FBI, I volunteered for a 2007 temporary duty assignment in support of Operation Iraqi Freedom in Anbar Province, Iraq. I loved working in federal law enforcement, it was my dream job growing up in rural Western Kentucky, and had I not suffered a severe spinal injury, I would still be in that job today. I believe deeply in the rule of law.

That said, my tenure as chief federal law enforcement officer for the 53 counties of my district, which includes Louisville, a city ravaged by violent crime and racial conflict, has led me to seek out new approaches to our community's struggles. During my last year in office, Louisville saw 173 murders and 587 shootings, and unprecedented racial unrest and distrust between police and the Black community.¹ I am haunted by each and every death that occurred on my watch; I am devastated to have left office with Kentucky's largest city so divided along racial and socio-economic lines; and I was disheartened to see Louisville Metro Police Department become the second law enforcement entity in the country to come under investigation for civil rights violations in this new Administration. I have served with many good men and women in that Department who I have come to respect.

Louisville, like many communities across the country, is at a crossroads. We can come together and heal, or we can continue to be torn apart by violence, mistrust, and division. I want to be a part of the healing. I want to lift up, embrace, and help implement common-sense solutions that build trust between law enforcement and the communities we serve, and most importantly, maintain public safety. That is why I supported, and continue to be active in, Group Violence Intervention in Louisville; that is why I joined the board of the Christopher 2X Game Changers

organization focused on reducing violent crime and assisting survivors, particularly our young people; and that is why I support common-sense criminal justice reforms like the EQUAL Act, which will make our justice system fairer and more effective.

In researching the history of the crack/power cocaine disparity, it is worth noting that at the time the original disparity was created by Congress in the Drug Abuse Act of 1986, the Reagan Administration had reportedly proposed a 20-1 disparity.² Congress, understandably panicked about increasing drug use and eager to appear as tough as possible, instead passed a disparity five times more significant.³ Neither the 20:1 nor the 100:1 disparity had a scientific or penological justification. But these decisions did have real consequences.

In 2010, the U.S. Sentencing Commission reported a disturbing racial skew related to crack offenses: 79 percent of 5,669 sentenced crack offenders in 2009 were black, versus 10 percent who were white and 10 percent who were Hispanic. The figures for the 6,020 powder cocaine cases were far less skewed: 17 percent of these offenders were white, 28 percent were black, and 53 percent were Hispanic.⁴ The Commission found a 115-month average imprisonment for crack offenses versus an average of 87 months for cocaine offenses, which resulted in African Americans spending significantly more time in our country's prison system, for an excessive penalty created with no scientific or penological justification.⁵

In response, Democrats and Republicans reached a compromise in passing the Fair Sentencing Act, which took the disparity from 100:1 to 18:1.⁶ It must be noted this legislation was supported by Senator Jeff Sessions (R-AL), who would later become my boss as Attorney General of the United States, and a man no one could ever label as "soft on crime."

At least one Republican, however, did take issue with the arbitrariness of the decrease, and argued Congress should finish the job and eliminate the disparity altogether. Texas Republican Representative Ron Paul, father of Kentucky's junior senator, my friend and your colleague Senator Rand Paul, said at the time, "It's called the Fair Sentencing Act. I'd like to rename it, though. I'd like to call it the 'Slightly Fairer Resentencing Act.'"⁷

Of course, it was the well-respected leaders at the helm of this committee who would take that next step toward fairness. With the First Step Act, their bipartisan prison and sentencing reform legislation signed into law by President Trump at the end of 2018, Senators Durbin and Grassley applied the Fair Sentencing Act's reduced disparity retroactively.⁸

Today, with the EQUAL Act, this committee has the opportunity to make history, and support a bipartisan bill that will finally and fully eliminate this injustice.

I support the EQUAL Act for three reasons:

- 1) The sentencing disparity lacks a scientific basis
 - Crack and powder cocaine are chemically the same drug, with similar health effects, just ingested differently.
 - This disparity sends the erroneous message that one is less dangerous than the other.

- 2) The crack/powdered cocaine disparity is a distraction from the ongoing methamphetamine and opioid crises
 - Evidence shows the overall use of cocaine has largely been on the decline since its peak in the 1980s, according to the National Survey on Drug Use and Health (NSDUH).⁹
 - The Drug Enforcement Administration, in its 2020 National Drug Threat Assessment, found that the number of cocaine-related reports in 2019 was 14% lower than the year prior and less than half the number from 2006.¹⁰
 - When you talk to drug task forces and law enforcement on the ground, they will tell you more resources should be focused on addressing the increase in methamphetamine and opioid overdoses; the U.S. Centers for Disease Control and Prevention reports that from 2011-2016, the number of drug overdose deaths involving meth use more than tripled, from 1,887 to 6,762, with opioid-related overdose deaths increasing at an even greater magnitude.¹¹
- 3) The disproportionate impact on Black people and communities is unjust, and damages the credibility of our justice system
 - While both Blacks and whites use crack cocaine at roughly similar (and low) rates overall nationwide, most crack offenders convicted and sentenced (88%, according to the Bureau of Justice Statistics) are Black, and most powder cocaine offenders convicted and sentenced are white or Hispanic.¹²
 - So it follows that crack-powder disparities create a racially disparate impact in sentencing, resulting in far more egregious sentences for Blacks than for whites or Hispanics, who are using or selling chemically identical drugs.
 - This unjustified sentencing disparity adds to the unprecedented level of distrust in the fairness of our criminal justice system, making it more difficult for law enforcement officials to uphold public safety.

Finally, during my outreach to career federal prosecutors, state and federal narcotics officers at the senior levels, local and state law enforcement leaders, and judges (those on the front lines of battling drug use and violence in our communities), I was met with a near unanimous belief that this is the right legislation at the right time. Had their counsel been different, I would take pause in supporting this legislation, as I would never support a bill that did not maintain the necessary tools and safeguards prosecutors need to ensure public safety is paramount, and punishment fits the crime.

It is worth noting that in instances in which an offender uses a firearm or violence in commission of a crime related to crack or powder cocaine, prosecutors maintain the ability to apply sentencing enhancements that meet the public safety need and ensure that our communities are protected.

Given my background and conservative leaning, Mr. Chairman, I am certain there are many areas where you and I disagree. On the EQUAL Act, I am pleased to say we have found consensus. I am inspired by the example you and Ranking Member Grassley have set by continuing to work together on common-sense reforms that will make our justice system fairer and stronger.

I am honored to stand with Governor Hutchinson, the former DEA Administrator incredibly well-respected within the law-and-order community, the National District Attorneys Association, and the Major Cities Chiefs Association in support of the EQUAL Act, and I urge elimination of a sentencing disparity arbitrarily created, lacking in scientific or penological justification, and disproportionate in its impact on communities of color.

It's been a pleasure to be back on the Hill amongst old friends on both sides of the aisle, and I hope my testimony here today has been a value-add to this committee.

I urge your support for the EQUAL Act.

¹ Louisville Courier Journal, *170-plus killings and few answers: Louisville besieged by record homicides and gun violence*, (2021). <https://www.courier-journal.com/story/news/crime/2021/01/01/louisville-violence-173-homicides-and-few-answers-record-year/6540016002/>.

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. 99-570, 100 Stat. 3207.

⁴ U.S. Sentencing Commission, *Race of Drug Offenders for Each Drug Type*, 2009 Datafile, (2010). <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2009/Table34.pdf>.

⁵ U.S. Sentencing Commission, *Overview of Federal Criminal Cases Fiscal Year 2009*, pg. 6-8 (2010). https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

⁶ Pub. L. No. 111-220, 124 Stat. 2372.

⁷ Congressional Record, Vol. 156, Number 112, Pages H6196-H6204, (Wednesday, July 28, 2010). <https://www.govinfo.gov/content/pkg/CREC-2010-07-28/html/CREC-2010-07-28-pt1-PgH6196.htm>.

⁸ Pub. L. No. 115-391, 132 Stat. 5194.

⁹ 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>.

¹⁰ Drug Enforcement Administration, *2020 Drug Threat Assessment*, pg. 29 (2021). https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf.

¹¹ National Vital Statistics Reports, *Drugs Most Frequently Involved in Drug Overdose Deaths: United States, 2011–2016*, Vol. 67, Number 9. (2018). https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_09-508.pdf.

¹² Bureau of Justice Statistics, *Drug Offenders in Federal Prison: Estimates of Characteristics Based on Linked Data*, (2015). <https://bjs.ojp.gov/content/pub/pdf/dofp12.pdf>.



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**Testimony of Steven B. Wasserman
Vice President for Policy, National Association of Assistant U.S. Attorneys
(NAAUSA)
Before the United States Senate Committee on the Judiciary
‘Examining Federal Sentencing for Crack and Powder Cocaine’
June 22, 2021**

Dear Chairman Durbin, Ranking Member Grassley, and Members of the Committee:

I would like to thank Chairman Durbin, Ranking Member Grassley, and Members of the Committee for the opportunity to appear before you today to speak on this critical matter. It is an honor to testify as the Vice President for Policy for the National Association of Assistant U.S. Attorneys (NAAUSA). I am here today solely in my individual capacity with as a representative of NAAUSA and not on behalf of the Department of Justice or my U.S. Attorney Office. I have worked as a prosecutor for the Department of Justice for 25 years, the last 18 of which have been as an Assistant United States Attorney (AUSA) in the District of Columbia. For the last 12 years I have worked as a federal violent crime and narcotics prosecutor. NAAUSA represents our nations more than 6,000 federal prosecutors and civil attorneys across our 94 judicial districts. We stand firmly in alignment with our oath to protect the innocent and prosecute the guilty. We are guided by the Constitution and will always enforce the laws of Congress equally and fairly. To that end, we are not here today to oppose or support any legislation. But rather, provide practical insights on our experience in the field and on the front lines of our nation’s federal system of justice. It is our desire not to write the laws, but to ensure we are able to enforce them in a manner consistent with the principles of public safety and wellbeing.

While the underlying rationale behind the EQUAL Act (S. 79) is that powder cocaine and crack cocaine should be treated the same for purposes of sentencing, make no mistake, powder cocaine and crack cocaine are not “equal.” There are several reasons that support this reality. First, crack cocaine is more addictive than powder cocaine, and therefore, more destructive to the user than powder cocaine. Of equal concern is the significant differences in criminogenic characteristics of those who traffic in crack cocaine compared to those who sell powder cocaine, including criminal history, recidivism rates, and involvement in weapons possession and violent behavior. NAAUSA has other concerns with the legislation as well, including procedural concerns that the bill risks overburdening already under-resourced U.S. Attorney Offices and detracting from focus on meritorious claims, as well as consideration of this legislation during a time of rising overdose and addiction levels. We urge Congress to move forward with caution in light of the very real impacts crack use and crack trafficking has on communities across the country.

I. Crack cocaine is more addictive than powder cocaine and thus more destructive.

First, the manufacturing process for crack cocaine makes the substance more concentrated. Additionally, the method of ingestion – smoking – makes the effects shorter lived. Although chemically, crack and powder cocaine are similar, the intense, short term high produced by crack results in increased binge use, chronic use, and greater risk of overdose compared to powder cocaine.¹ In 2019, 70,630 Americans died from drug overdoses, with over 15,000 of those drug deaths involving cocaine, according to the National Institute on Drug Abuse.² These numbers are staggering and have been on the rise for at least 10 years, and more recently fueled by fentanyl. This statistic demonstrates the significant danger that *all* cocaine represents to health and safety, and the more addictive nature of crack only enhances the risks of death and community harm.

II. Criminogenic characteristics of crack offenders.

AUSAs rarely engage on possession cases, which are handled by state/local law enforcement. Instead, federal law enforcement efforts are primarily focused on trafficking and high harm drug offenses. In these cases, there are significant differences in the criminal histories, recidivism rates, and involvement with weapons and violence between those who traffic in powder cocaine and those who traffic in crack.

a. Federal crack offenders have more extensive criminal histories.

According a 2017 report from the U.S. Sentencing Commission, federally prosecuted crack offenders typically had a more serious criminal history than federally prosecuted drug trafficking offenders as a whole, including those who sold powder cocaine. Federal sentencing guidelines outline six criminal history categories. Over 56 percent of federally prosecuted powder cocaine traffickers fell within the lowest category. Comparatively, only 32.5 percent of crack offenders fell within the lowest category. 15.1 percent of crack offenders were in the second lowest, and 23.1 were in the third category. Further, 5.8 percent of crack offenders fell within the highest category and another 5.1 percent were designated as career offenders.³ Conversely, only 1.8 percent of powder cocaine traffickers fell within the highest category, and 3 percent were designated as career offenders.

b. Recidivism rates remain higher for crack than all other drug users and sentencing reforms have resulted in no changes.

Crack offenders have the highest recidivism rate of all drug offenders. Federally prosecuted powder cocaine traffickers recidivated at a significantly lower rate – 43.8 percent, than crack offenders, who recidivated at a rate of 60.8 percent. For crack traffickers, assault was the most

¹ [What is Crack Cocaine? Differences Between Crack and Cocaine \(americanaddictioncenters.org\)](https://www.americanaddictioncenters.org/what-is-crack-cocaine/)

² [Overdose Death Rates | National Institute on Drug Abuse \(NIDA\)](https://www.nida.nih.gov/publications/overdose-death-rates)

³ [Recidivism Among Federal Drug Trafficking Offenders \(ussc.gov\)](https://www.ussc.gov/publications/recidivism-among-federal-drug-trafficking-offenders)

prevalent and serious recidivist offense, with a rate of 27.4 percent. Drug trafficking offenses represented the second most prevalent and serious recidivist offense for crack offenders at over 17 percent. By contrast, for powder cocaine traffickers, assault represented the most prevalent and serious recidivist offense at 22 percent, with the second most prevalent and serious recidivist offense being drug trafficking at just over 14 percent.

In a 2014 review of the impact of the 2007 Crack Cocaine Amendment on recidivism, the U.S. Sentencing Commission found that the reforms had no impact on recidivism rates.⁴ Whether a federal crack offender serves their full term or is released early, their chances of returning to their community to reoffend, and therefore revictimize, is the same – and higher than traffickers selling other drugs, including powder cocaine. Rather than allowing more individuals to reenter communities earlier only to revictimize their communities, we encourage Congress to focus efforts on preventing recidivism and revictimization prior to release. For example, in 2017 the U.S. Sentencing Commission found crack offenders who received safety valve sentence reductions – indicating they did not have a significant prior criminal history – recidivated at a substantially lower rate. Rather than adjusting sentences as a whole, seeking limited adjustments based on risk of community harm may present a more targeted approach to reforms.

c. Crack offenders are more closely linked with violence and weapons.

The link between violence and drug trafficking, drug use, and crack in particular is well known to law enforcement personnel, prosecutors, and judges. Former Attorney General Eric Holder echoed this sentiment regarding the link between the drug trade and violence during a briefing in 2000, while he was then the Deputy Attorney General, in which he stated:

....[T]he violence that we saw in the early '90s, the late '80s was fueled by the rise in sale of crack cocaine and the violence that was connected to it. In Washington, D.C., where I was the U.S. Attorney, we attributed about one-half of all the homicides to the drug trade, and I don't think that's atypical. I think that's probably a pretty consistent figure that you'd see around the country. So if we deal effectively with the drug problem and the sale of drugs, the use of drugs, we'll also have a positive impact on the violence problem.⁵

While the worst violence associated with the crack cocaine epidemic of the 1980's and 1990's has subsided over the last 25 years, in part due to the passage of harsher drug sentences and more aggressive enforcement, federal crack offenders continue to possess weapons at a higher rate than powder cocaine offenders. For example, the U.S. Sentencing Commission reported that in fiscal year 2020, 39.3 percent of crack offenders had their sentences enhanced for possessing a weapon,⁶ while only 19.6 percent of powder cocaine traffickers received enhanced sentences for

⁴ [Recidivism Among Offenders Receiving Retroactive Sentence Reductions \(ussc.gov\)](https://www.ussc.gov/publications/recidivism-among-offenders-receiving-retroactive-sentence-reductions)

⁵ [Eric Holder : Wanted Return of Mandatory Minimums and Tougher Pot Penalties - TalkLeft: The Politics Of Crime](https://www.talkleft.com/eric-holder-wanted-return-of-mandatory-minimums-and-tougher-pot-penalties/).

⁶ [Quick Facts on Crack Cocaine Offenses \(ussc.gov\)](https://www.ussc.gov/publications/quick-facts-on-crack-cocaine-offenses)

weapons possession.⁷ This data further demonstrates the marked differences between federal crack cocaine offenders and powder cocaine offenders.

II. The EQUAL Act presents procedural concerns that risk overburdening already under resourced U.S. Attorney Offices and detracting from focus on meritorious claims.

Section 2(c)(2) of the EQUAL Act allows for the retroactive review of cases for resentencing. As currently drafted, this allows defendants who already qualified for and were denied sentence alterations under previous sentencing reform laws to reapply for review. Each time a motion for sentence reduction is made, AUSAs dutifully review the case, pull previous case records, and present arguments to the court. Each time a sentencing reform law is passed, motions for resentencing flood U.S. Attorney Offices and create a demanding workload for AUSAs. The volume of these requests has dramatically increased, particularly since the start of the COVID-19 pandemic which expanded access to compassionate release.

AUSAs dedicate attention to each case to ensure the law is enforced as intended. However, this places real resource constraints on U.S. Attorney Offices and detracts attention from existing and new investigations. We urge the Committee to consider these constraints and their impact on the effective administration of justice.

III. The continued rise in drug dependency and death as well as the frequency of cocaine mixed with dangerous substances like fentanyl counsels caution in moving forward with reforms that increase the number of potentially recidivist offenders in communities.

As this committee is well aware, drug use and overdose deaths are an epidemic deeply damaging to our nation. Cocaine remains one of the most common causes of overdose deaths.⁸ Increasingly, cocaine is being mixed with other dangerous drugs – namely, fentanyl and fentanyl analogues. According to the U.S. National Institute on Drug Abuse, between 2012 and 2016 there was a 23-fold increase in the number of deaths involving cocaine in combination with synthetic opioids.⁹ Counties across the country have been issuing warnings after strings of fatal overdoses due to fentanyl-laced cocaine.¹⁰ It cannot be stated enough that federal law and federal law enforcement prosecute the most significant and dangerous criminal activity – very rarely drug possession, but overwhelmingly criminal drug trafficking. Reducing sentences for the most common reoffenders and some of the most violent drug traffickers at a time when drug use is so lethal and prevalent is concerning.

⁷ [Quick Facts on Powder Cocaine Offenses \(ussc.gov\)](https://www.usdoj.gov/ussc/factsheets/QuickFactsOnPowderCocaineOffenses)

⁸ [Overdose Death Rates | National Institute on Drug Abuse \(NIDA\)](https://www.nida.nih.gov/publications/overdose-attributed-deaths-2019)

⁹ [Fentanyl-Laced Crack Cocaine a Deadly New Threat \(webmd.com\)](https://www.webmd.com/drugs/2017/06/20/fentanyl-laced-crack-cocaine-a-deadly-new-threat)

¹⁰ [Crisis: Surge in cocaine mixed with fentanyl has communities and law enforcement on edge - ABC News \(go.com\)](https://www.abcnews.go.com/US/story?id=58444440)

Should Congress ultimately determine that action is warranted to equalize the penalties between powder cocaine and crack cocaine, NAAUSA would urge members to give strong consideration to lowering the quantity thresholds for powder cocaine to match the existing thresholds for crack cocaine, thereby achieving the goal of equality of punishment across the board.

IV. Conclusion

As the Committee moves forward, we urge you to consider the impact of these decisions on communities as a whole and the possible adverse impact on our citizens, especially those in our minority communities. While those who violate our laws should always be treated fairly and justly, we should never lose sight that our first priority should be to protect and safeguard our law-abiding citizens. We thank the Committee, Chairman Durbin, and Ranking Member Grassley for providing NAAUSA the opportunity to testify about our experience and perspective on crack and powder cocaine as our nation's federal prosecutors.

**Questions for the Record from Senator Charles E. Grassley
U.S. Senate Committee on the Judiciary
“Examining Federal Sentencing for Crack and Powder Cocaine”
Submitted on June 29, 2021**

Acting Director LaBelle

1. The supply of cocaine in the United States originates almost exclusively in Colombia, and primarily Mexican drug cartels smuggle it across the border. Colombia’s cultivation of coca and production of cocaine has risen consistently year after year. Mexican cartels continue to bring cocaine – and other drugs – into our neighborhoods.
 - a. How is the Office of National Drug Control Policy (ONDCP) responding to the increase in coca plant cultivation and steady cocaine importation and trafficking?
 - b. How can we use our domestic laws to deter and stop this constant supply of cocaine?
2. During the Senate Judiciary Committee hearing on June 22, I asked you about ONDCP’s efforts to reduce the supply of illicit drugs in the United States, particularly how scheduling fentanyl and fentanyl related substances (FRS) permanently could be beneficial. In your response, you noted that ONDCP is working with other federal agencies to “present to Congress a solution on the permanent scheduling of fentanyl analogues.” My staff was recently briefed by ONDCP, the Department of Justice (DOJ), and the Department of Health and Human Services (HHS) on the progress that the Interagency Working Group is making towards a permanent solution to schedule FRS. During this briefing, however, it was unclear if the proposed legislation would permanently schedule FRS. It is essential that FRS are permanently scheduled.
 - a. Can you confirm that the legislative proposal by ONDCP and other members of the Interagency Working Group to address FRS will have provisions that permanently schedule these substances?
 - b. Congress needs time to deliberately review any suggested legislative language, and with the DEA’s Emergency Scheduling Order expiring on October 22, 2021, having a draft as early as possible is imperative. Specifically when does ONDCP anticipate sending a draft bill to Congress?
3. About how many individual doses are in 28 grams and 500 grams of crack and powder cocaine?
4. Is it cheaper to buy crack than powder cocaine per dose? Does this have an impact on communities and those who use it?
5. We are in the midst of a polydrug crisis. Those abusing illicit drugs often use various drugs. Drug trafficking organizations are aware of this and are agile in choosing which drugs to traffic to earn the highest profit.
 - a. What role does the polydrug overdose epidemic play in ONDCP’s position on drug sentencing laws?

- b. Historically, what has been successful in deterring the manufacturing and distribution of illicit drugs? Given the ongoing drug overdose crisis, how do the Administration and ONDCP seek to ensure that drug trafficking organizations are adequately deterred from spreading deadly drugs through communities?

Senate Judiciary Committee
“Examining Federal Sentencing for Crack and Powder Cocaine”
Questions for the Record
Senator Amy Klobuchar

For Regina LaBelle, Acting Director at the Office of National Drug Control Policy:

- At the hearing, we discussed several misconceptions about the difference between crack cocaine and powder cocaine. Can you provide additional details about the research that crack cocaine is not more likely to incite violence than powder cocaine?

United States Senator Mike Lee
Questions for the Record – Acting Director Regina LaBelle

1. How many doses are typically in 1 gram of crack cocaine? In 1 gram of powder cocaine? If no precise numbers are available, please use estimates.
2. How do the street prices of crack and powder cocaine in the United States compare?
3. Over the years, the amount of nationwide drug seizures for cocaine has strongly correlated to the total number of enforcement actions by U.S. Customs and Border Patrol at the U.S./Mexico border. Will stronger border policies reduce the amount of cocaine coming into the United States?
4. If there was a reduction in the amount of powder cocaine coming into the United States, would this affect the amount of crack cocaine on the streets?
5. Given that crack cocaine is made from powder cocaine, does it make sense to have harsher penalties and mandatory minimums for powder cocaine?
6. We hear a lot about the negative effects of cocaine in general, and particularly for crack cocaine. How do the negative effects of crack and powder cocaine differ, and how should these differences be addressed?
7. Do harsher mandatory minimums deter criminals from using and dealing cocaine, and does this have a positive impact on recidivism for drug-related crimes in general?
8. As the current mandatory minimums generally target low-level offenders such as street dealers and mules, how can Congress better target high-level offenders?
9. The current mandatory minimums for heroin kick in at 100 g and 1 kg, respectively. Given that heroin and cocaine have about the same amount of deaths per year in the United States (4.7 deaths per 100,000 for heroin and 4.5 for cocaine), does it make sense to treat the two drugs equally for sentencing purposes?
10. Are there properties of crack cocaine that make the user more violent? Or is the violence associated with crack more to do with the drug trade in general?
11. Nearly one-fourth (23.8%) of drug trafficking offenders who recidivated had assault as their most serious new charge. Do mandatory minimums have an impact on recidivism for violent crimes? Or do they have the adverse effect?

12. The lethal dose of cocaine is around 1200 mg, while the lethal dose of heroin is 50 mg. Given this, should all forms of cocaine be treated the same as heroin?
13. How does the ONDCP evaluate the relative “dangerousness” of a particular substance? In other words, what metrics are used to determine whether one substance (e.g., heroin) is more dangerous than another (e.g., cocaine hydrochloride)?
14. Most states do not currently have a crack/powder distinction for criminal mandatory minimums, and instead treat the two equally. Given this, does it make sense for the Federal government to have different mandatory minimums for each? Why or why not?

**Questions for the Record from
Senator Thom Tillis for
Ms. Regina LaBelle**

1. Ms. LaBelle what do you believe is the most pressing issue that should be addressed when it comes crack and powder cocaine?
2. How would changing the ratio for crack and powder cocaine impact enforcement by ONDCP, and what challenges would we face trying to implement this change?
3. Has the Biden Administration taken a position on the *Equal Act*? If so, what is the Administration's position?



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September 8, 2022

**Responses to Questions for the Record from Hon. Senator Charles E. Grassley
 U.S. Senate Committee on the Judiciary,
 “Examining Federal Sentencing for Crack and Powder Cocaine,”
 Held on June 22, 2021**

**Submitted by Russell Coleman, former U.S. Attorney for the Western District of Kentucky,
 September 8, 2022**

1. Under the current law, distributing 28 grams of cocaine base and 500 grams of powder cocaine trigger a 5-year mandatory minimum sentence. A 10-year mandatory minimum sentence can be imposed for trafficking in 280 grams of cocaine base and 5 kilograms of powder cocaine.

a. These laws are intended to target and punish drug traffickers and not those who are addicts or possess drugs, correct?

On June 22, 2021, I testified in support of the EQUAL Act, legislation supported by many well-respected state and national law enforcement leaders. At the conclusion of the Senate Judiciary Committee’s hearing, Senator Cory Booker, Chairman of the Sub-Committee on Crime and Terrorism stated to all participants in the hearing that the record on this matter would stay open for additional questions through 5:00 pm June 29, 2021.

A formal request to complete these questions for the record was sent to me without further explanation on August 25, 2022, well over a year after the hearing record closed. A response was required “no later than **5:00 p.m. on Thursday, September 8, 2022.**”

The legislation before this Committee, the EQUAL Act (“Eliminating a Quantifiably Unjust Application of the Law, S. 79) would eliminate the federal sentencing disparity between crack cocaine crime and powder cocaine crime. In addition to the federal crack/powder cocaine disparity being a distraction from the exigent methamphetamine and opioid crises, it remains a barrier to relationship-building in minority communities most impacted by violence.

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The EQUAL Act has strong support of law enforcement. It is supported by the National District Attorneys Association, Major Cities Chiefs Association, Association of Prosecuting Attorneys, Kentucky Sheriffs' Association, Kentucky Association of Chiefs of Police, and former Acting Attorney General of the United States Matthew Whitaker, among other law enforcement groups.

2. Is it cheaper to buy crack than powder cocaine per dose? Does this have an impact on communities and those who use it?

The anecdotal consensus is that crack cocaine is cheaper to purchase per gram in comparison to powder cocaine. Typically, this is because crack cocaine is mixed with a cutting agent in order to create the rock or crystal form, whereas powder cocaine, the form that is most often being trafficked across our borders and distributed throughout the country, has not gone through this additional process.

3. As a federal prosecutor and in your experience, what amount in grams do those defendants charged and/or sentenced with distributing crack cocaine typically possess? What about powder cocaine?

It depends; it largely comes down to the role in which a defendant has played in a particular drug operation; street-level dealers of either substance carry smaller amounts of cocaine compared to traffickers and distributors.

4. During the Judiciary Committee hearing on June 22, 2021, you mentioned that the mandatory minimum penalties that apply for cocaine traffickers – regardless of powder or crack cocaine – are tools “frankly, that we need.”

a. Do mandatory minimum sentences for drug manufacturers and distributors help protect addicts and vulnerable communities?

Weight-based federal mandatory minimum sentences are a tool that law enforcement needs in order to protect our communities. We rely on these mandatory minimums, as well as other sentencing enhancements related to firearms and recidivism, to ensure that manufacturers and distributors (those who often pose the greatest threat to our communities) are held accountable.

b. If Congress is to reassess at what quantity of cocaine a mandatory minimum attaches, is it safe to say that the current mandatory minimum scheme works well to deter and protect?

The threshold for triggering the mandatory minimum sentence for powder cocaine has not been changed since its enactment in 1986. Currently, I have not seen any evidence warranting an adjustment of the powder cocaine threshold. Looking at the data provided by the U.S. Sentencing Commission, powder cocaine, like crack cocaine, has declined as a share of all federal drug cases,

from 26 percent in 1996 to 16.8 percent in 2021. Powder cocaine, while still present, has been supplanted as an exigent threat by other controlled substances like methamphetamine and opioids. There is not a community in America that has not felt the impact of the opioid crisis, and, despite Congress enacting tougher penalties for methamphetamine in 1998¹ by cutting the quantities that trigger the five- and ten-year mandatory minimum sentences in half, the share of defendants for methamphetamine has increased from 11.4 percent in 1998² to 48.3 percent in 2021.³

We absolutely must focus our attention on curtailing the flow of these deadly drugs through our porous borders and we must have strict penalties for traffickers.

5. The 2020 DEA National Drug Threat Assessment notes that the “[d]omestic availability [of cocaine] is steady, likely driven by high levels of coca cultivation and cocaine production,” and that “deaths from drug poisoning involving cocaine have increased every year since 2013.” However, during the hearing, you testified that “in the Western District of Kentucky, during the three and a half years I served as United States Attorney, it was exceedingly rare to see crack cocaine,” but that it is still a threat.

a. What do you believe is the reason for this disconnect? Is a different illicit drug more pervasive in the Western District of Kentucky? Is this because cocaine is increasingly mixed with other substances, like fentanyl?

Notably, the available public health data, including the Centers for Disease Control and Prevention’s used in the DEA National Drug Threat Assessment, does not delineate between crack and powder cocaine. The data referenced in that report refers to cocaine broadly, including in its powder and crack forms.

This report illustrates just how serious the opioid crisis is across our nation. The leading driver for the increase in overdose deaths in cocaine cases is the presence of what the DEA labels synthetic opioids other than methadone (SOOTM), which includes fentanyl and fentanyl-related substances. In 2013, it was determined that SOOTMs were present in only 245 overdose cases. However, each year since 2013 has seen an increase in the number of SOOTM-related overdoses. As the prevalence of fentanyl and its analogues increased, we saw an explosion in the number overdose deaths involving cocaine. Upon examination of Figure 22 in the DEA Assessment, the majority of overdose deaths involving cocaine in 2017 and 2018 also involved SOOTM. The national trend is reflected in Kentucky as well. In 2019, Kentucky saw 1,316 resident overdose deaths. Fentanyl and fentanyl analogues were present in the majority of cases (759 fentanyl cases or 58 percent of all cases, 544 4-ANPP cases 41 percent of all cases, and 419 Acetyl fentanyl cases or 32 percent of all cases). Methamphetamine was another major contributor with a total of 517 cases (39 percent of all cases). Overdose deaths involving cocaine totaled 181 (14 percent of all cases).

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Fentanyl and its analogues have ravaged our communities and their deadly impact cannot be understated, which is why I believe law enforcement must focus our resources towards curtailing the spread of this deadly drug.⁴

b. Is it important for Congress' approach to drug policy prevention and enforcement to be comprehensive in that it should address polydrug use and trafficking?

It is critical that Congress support efforts by law enforcement at the federal, state, and local levels to curtail the supply of all illegal drugs through interdiction and enforcement. Congress must also provide funding and resources to address the demand side of the equation to expand treatment and services to address addiction for all drug use and take additional steps to secure our all too permeable Southwest Border.

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¹ Pub. Law No: 105-277.

² U.S. Sentencing Commission, 1998 Datafile, USSCFY98, Table 33.
https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1998/table33_0.pdf

³ U.S. Sentencing Commission, 2021 Datafile, USSCFY21, Table D-1.
<https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/TableD1.pdf>

⁴ Drug Enforcement Administration, "2020 National Drug Threat Assessment," Figure 22. Drug Poisoning Deaths Involving: Cocaine and a SOTM: Cocaine without a SOTM, 2010 – 2018 (2021).
https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf

United States Senator Mike Lee
Questions for the Record – Executive Director Tony Garcia

1. Has there been an increase in the amount of drugs (or cocaine in particular) trafficked across the border since November of 2020? January of 2021?

Yes, for the time specified, there were 23,075 kilograms of cocaine seized in the United States as reported to the El Paso Intelligence Center National Seizure System, a 200% increase from the same timeframe in 2019/2020.

2. What connections, if any, are there between the current administration's border enforcement (or nonenforcement) policies and drug trafficking across the United States–Mexico border?

The efforts to address the immigration issue has caused task saturations that preclude proper enforcement at our borders which in turn has increased drug trafficking across the nation.

3. How many doses are typically in 1 gram of crack cocaine? In 1 gram of powder cocaine? If no precise numbers are available, please use estimates.

Crack and Cocaine dosage units are equal. Per the United States Customs and Border Protection Office of Intelligence and Laboratories and Scientific Services, the average dosage unit of cocaine/crack is 173mg. This would equate to approximately 5 doses per gram of cocaine or crack.

4. How do the street prices of crack and powder cocaine in the United States compare?

The price of a gram of cocaine ranges from \$8.00 to \$100.00, depending on the location of the country where it is being sold. The price for a gram of crack ranges from \$56.00 to \$100.00, also depending on location.

5. Over the years, the amount of nationwide drug seizures for cocaine has strongly correlated to the total number of enforcement actions by U.S. Customs and Border Patrol at the U.S./Mexico border. Will stronger border policies reduce the amount of cocaine coming into the United States?

Strong border policies along with the increase in personnel and technology (cameras, sensors, scanning devices) would have a significant impact not only on cocaine but other illicit drugs and contraband as well.

6. If there was a reduction in the amount of powder cocaine coming into the United States, would this affect the amount of crack cocaine on the streets?

Yes sir, as crack cocaine is a product of powder cocaine.

7. Given that crack cocaine is made from powder cocaine, does it make sense to have harsher penalties and mandatory minimums for powder cocaine?

It would, but I believe that the consistent application of the current penalties by prosecutors and judges would serve as an effective deterrent if used.

8. We hear a lot about the negative effects of cocaine in general, and particularly for crack cocaine. How do the negative effects of crack and powder cocaine differ, and how should these differences be addressed?

Both have the potential to be fatal, the primary difference is method of ingestion. Because crack is smoked, it produces a quicker onset of effects and can be considered to increase the risk of addiction.

9. Do harsher mandatory minimums deter criminals from using and dealing cocaine, and does this have a positive impact on recidivism for drug-related crimes in general?

Harsher sentences do not seem to have had any significant effect on the use of cocaine in this country as evidenced by the continued use. A cocaine dealer will continue to sell his product as long as there is a demand for it. I don't know the answer to the recidivism question as much of that is dependent on the individual.

10. As the current mandatory minimums generally target low-level offenders such as street dealers and mules, how can Congress better target high-level offenders?

Focus on the organizations that are producing, importing, and distributing these products and provide more resources for the technology necessary to identify and thoroughly investigate the organizations involved in this trade, especially with the advent of encryption. Congress should consider their continued support to the Drug Enforcement Administration and the HIDTA Task Forces as they already focus on high-level drug trafficking and transnational criminal organizations.

11. The current mandatory minimums for heroin kick in at 100 g and 1 kg, respectively. Given that heroin and cocaine have about the same amount of deaths per year in the United States (4.7 deaths per 100,000 for heroin and 4.5 for cocaine), does it make sense to treat the two drugs equally for sentencing purposes?

No, I believe that the use of a depressant like heroin, has a stronger and quicker propensity for fatality. Although both drugs can be attributed to a like number of deaths, it takes a lessor amount of heroin than of cocaine.

12. Are there properties of crack cocaine that make the user more violent? Or is the violence associated with crack more to do with the drug trade in general?

Substances impact users often times very differently, much like alcohol, some drinkers become passive and others become aggressive. Many other factors could influence this such as medications taken or not taken, mental health issues, adverse reactions to the drug, etc.

13. Nearly one-fourth (23.8%) of drug trafficking offenders who recidivated had assault as their most serious new charge. Do mandatory minimums have an impact on recidivism for violent crimes? Or do they have the adverse effect?

I have no information that would allow me to answer this question.

14. The lethal dose of cocaine is around 1200 mg, while the lethal dose of heroin is 50 mg. Given this, should all forms of cocaine be treated the same as heroin?

All drugs have various amounts of lethal doses, amounts vary between the various substances, the lethal dose of fentanyl is miniscule. I believe that Congress should establish specific penalties for specific drugs, I don't agree that all drugs should be considered equal solely based on their lethality.

15. How does HIDTA evaluate the relative "dangerousness" of a particular substance? In other words, what metrics are used to determine whether one substance (e.g., heroin) is more dangerous than another (e.g., cocaine hydrochloride)?

We look at a variety of outcomes such as overdose deaths, related violent crime and drug related property crimes in ranking the level of danger for each of the drugs we encounter. As an example, CDC reports that 75% of the nearly 92,000 drug overdose deaths in 2020 involved an opioid. Each HIDTA ranks their drugs specific to their area of responsibility.

16. Most states do not currently have a crack/powder distinction for criminal mandatory minimums, and instead treat the two equally. Given this, does it make sense for the Federal government to have different mandatory minimums for each? Why or why not?

Consistency in sentencing throughout the state and federal systems would be more effective, as it makes it perfectly clear to dealers and users alike the consequences they will face. The penalties established should indicate the consequence for the actions/crimes committed. The same would apply for efforts to reduce the consumer demand.

Questions for the Record from
Senator Thom Tillis for
Mr. Antonio Garcia

1. Mr. Garcia, as you know, we have seen a surge of drugs being smuggled into the United States this year.

For fiscal year 2020, just over 58, 000 pounds of cocaine were seized by the CBP. This year, 65,254 pounds have been seized.

What action should Congress or the Biden Administration take to disrupt the influx of drug smuggling into the country?

Our partners at CBP continue to make record drug seizures in spite of the lack of manpower and access to technological equipment. They and the investigative agencies DEA, FBI, HSI, IRS and ATF and others need to have more technology and personnel to pursue and disrupt/dismantle the Transnational Criminal Organizations that continue to profit from the massive influx of drugs and human trafficking. The use of advanced technology would assist CBP at the ports of entry as they deal with such a high volume of inspections. Added technology would help minimize border traffic disruptions that cause delays that affect immigration, tourism and commerce.

Congress and the Administration can assist law enforcement by recommending and supporting the use of national seizure and information databases that are available to the law enforcement community. Since the year 2000, the El Paso Intelligence Center has operated the National Seizure System that is made available to all law enforcement. However, this system is not being populated by all law enforcement agencies. The license plate reader program, that is of tremendous benefit to all law enforcement, does not have one database that can be queried to retrieve information on a vehicle that may have been involved in a child abduction, a murder, a terrorist event, drug trafficking, human trafficking, and a myriad of other crimes.

Efforts should be made to improve communications (radio) systems. When multiple agencies work together, radio communication problems because of lack of common encrypted channels that can be shared by state, local and federal agencies hinder the safety and security of officers and their investigations.

Lastly, efforts need to be made to diminish the customer base in this country. Drugs flow into the US because of demand. Traffickers are increasingly moving away from organically produced drugs to synthetics, fentanyl and methamphetamine are far easier to produce, conceal

and distribute. Overhead costs are minimized when criminal organizations are no longer burdened with the growth and processing of organic drugs such as marihuana, cocaine or heroin.

All Administrations and members of Congress should be at the forefront of a national messaging plan that is sustained over a lengthy period of time. We must reduce the customer base and make it socially unacceptable to use drugs. A weekly or bi-weekly message to the country addressing the evils of drug use is an inexpensive way of impacting at-risk youth and young adults. It can educate parents, teachers and other community leaders and seek the support of business and religious leaders. All Federal agencies as well as state and local agencies that receive federal funding should be mandated to include drug abuse information on their websites and social media pages. These links should lead interested parties to prevention and treatment sites that can help an individual that wants or needs to receive assistance. They can also use these websites to link to law enforcement agencies to report drug trafficking and other related violent crime.

If leaders from all sectors of life were to get involved and publicize the same or like messages, we could spread the word that the use of drugs has a negative impact on our citizens and country and slowly turn the tide and lower the demand. Children, young adults and others at risk should be able to look to their political, civic and business leaders as well as entertainment and sports celebrities for leadership in battling a plague that is destroying this nation.

**Responses to Questions for the Record from Hon. Senator
Charles E. Grassley
U.S. Senate Committee on the Judiciary,
“Examining Federal Sentencing for Crack and Powder Cocaine,”
Held on June 29, 2021
Submitted by Asa Hutchinson
Governor of Arkansas and former Administrator of the Drug
Enforcement Agency, September 22, 2022**

1. During the Senate Judiciary Committee hearing on June 22, you discussed the impact of the 1:1 sentencing ratio between crack and powder cocaine at the state level and the impact that you’ve seen it have on Arkansas.

a. Since Arkansas made the sentencing ratio 1:1, what data has been collected on its impact with respect to recidivism, violence, and addiction? Please provide a copy of this data and other relevant information.

Thank you, Senator Grassley, for your question and for your continued championship of criminal justice reforms, including the First Step Act. The First Step Act is a landmark law enacted by President Trump that has provided second chances for thousands of deserving individuals. I join you in supporting an approach that is both tough on crime and smart on crime that tackles recidivism through incentivizing participation in recidivism reduction programming and other productive activities.

Arkansas, like 36 other states,¹ never created a disparity as the majority of states learned from the failed application of the sentencing disparity at the federal level. Only eight states now have a sentencing disparity as the trend has largely shifted away from establishing harmful sentencing applications in our criminal codes.

¹ U.S. Sentencing Commission, *Report to the Congress: COCAINE AND FEDERAL SENTENCING POLICY*, (May 2007).
https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RIC_Cocaine_Sentencing_Policy.pdf.

For broader recidivism data and statistics, I would like to share two reports: *RECIDIVISM IN ARKANSAS A Roadmap to Reform*, which found that of the 4,155 individuals released in 2017 for a drug-related offense, 654 were returned to prison for a drug-related offense within three years of release (15.7 percent from this cohort);² and *Recidivism of Arkansas Offenders FINDINGS FROM THE 2016 RELEASE COHORT*, which found that 29 percent of individuals released for drug-related offenses in 2016 were returned to prison for a drug-related offense within the first three years after release. This figure is substantially lower than the overall recidivism rate from this cohort, which was 47.5 percent within the three-year period.³

2. Over the past two years, how many drug trafficking prosecutions were completed in Arkansas? Over the past two years, how many drug possession prosecutions (including pretrial diversion, drug court, and other deferred prosecution agreements) were completed in Arkansas?

According to the Arkansas Department of Public Safety's Crime Information Center (data below), the total number of drug-related offenses for 2021 and 2020 were a small, yet significant, percentage of total offenses.⁴ Cocaine, in all its forms, have played a minor role in the number of drug offenses, averaging only 4.4 percent of selling/manufacturing violations and 2.9 percent of possession violations over the past two years. The fact that Arkansas is seeing such low numbers in cocaine offenses underscores why resources should be diverted towards more pervasive and more lethal drugs such as fentanyl and methamphetamine

² Arkansas Department of Corrections, *RECIDIVISM IN ARKANSAS: A Roadmap to Reform*, (2022), https://doc.arkansas.gov/wp-content/uploads/2022/04/Recidivism-in-Arkansas-A-Roadmap-to-Reform-April29-2022-single_BOC_FINAL.pdf.

³ Arkansas Department of Corrections, *Recidivism of Arkansas Offenders: FINDINGS FROM THE 2016 RELEASE COHORT*, (April 29, 2021), <https://doc.arkansas.gov/wp-content/uploads/2021/04/2016-Recidivism-Report-approved-by-BOC-4-29-2021-Final.pdf>.

⁴ See Arkansas Department of Corrections' Crime Information Center website on crime statistics at: <https://www.dps.arkansas.gov/crime-info-support/arkansas-crime-information-center/crime-statistics/>.

- 2020⁵
 - Drug/Narcotics Violations: 19,175 (7.9 percent of total offenses)
 - Drug/Narcotics Equipment Violations: 13,570 (5.6 percent of total offenses)
 - Selling and Manufacturing Violations⁶
 - Crack Cocaine: 51 (1.7 percent of all Selling/Manufacturing Violations)
 - Cocaine not including crack cocaine: 79 (2.6 percent of all Selling/Manufacturing Violations)
 - Possession Violations
 - Crack Cocaine: 218 (1.0 percent of all Possession Violations)
 - Cocaine not including crack cocaine: 401 (1.8 percent of all Possession Violations)
- 2021⁷
 - Drug/Narcotics Violations: 20,564 (8.9 percent of total offenses)
 - Drug/Narcotics Equipment Violations: 13,933 (6.1 percent of total offenses)
 - Selling and Manufacturing Violations⁸
 - Crack Cocaine: 53 (1.7 percent of all Selling/Manufacturing Violations)
 - Cocaine not including crack cocaine: 90 (2.8 percent of all Selling/Manufacturing Violations)
 - Possession Violations
 - Crack Cocaine: 299 (1.3 percent of all Possession Violations)
 - Cocaine not including crack cocaine: 425 (1.8 percent of all Possession Violations)

Thank you for the opportunity to testify and to provide these additional responses.

⁵ Arkansas Department of Corrections, *Crime in Arkansas 2020*. Offenses by Contributor, Crimes Against Society (2020). https://www.dps.arkansas.gov/wp-content/uploads/2021/06/2020-Offense-By-Contributor_-1.pdf.

⁶ Arkansas Department of Corrections, *Crime in Arkansas 2020*. Drugs/Narcotics Assessment by Contributor (2020). https://www.dps.arkansas.gov/wp-content/uploads/2021/07/2020-Narcotic-Arrests-By-Contributor_.pdf.

⁷ Arkansas Department of Corrections, *Crime in Arkansas 2021*. Offenses by Contributor, Crimes Against Society (2020). <https://www.dps.arkansas.gov/wp-content/uploads/2022/06/2021-Offense-By-Contributor.pdf>.

⁸ Arkansas Department of Corrections, *Crime in Arkansas 2020*. Drugs/Narcotics Assessment by Contributor (2021). <https://www.dps.arkansas.gov/wp-content/uploads/2022/06/2021-Drug-Narcotic-Arrests-By-Contributor.pdf>.

**Responses to Questions for the Record from
Hon. Senator Thom Tillis
U.S. Senate Committee on the Judiciary,
“Examining Federal Sentencing for Crack and Powder Cocaine,”
Held on June 22, 2021
Submitted by Asa Hutchinson
Governor of Arkansas and former Administrator of the Drug
Enforcement Agency, September 22, 2022**

1. Governor Hutchinson, I understand you support the *EQUAL Act*. When you were DEA Director, did you also support amending the crack to powder cocaine ratio? If not, what changed your mind on this issue?

I wanted to start by thanking Senator Tillis for his support of criminal justice reforms, including the EQUAL Act. I have supported reducing the sentencing disparity between crack and powder cocaine dating back to my time as DEA Administrator. As I stated in my written testimony, I had the opportunity to testify before the Senate Judiciary Committee in 2009, after my tenure as Administrator, and voiced my support for eliminating the sentencing disparity between the two substances.

2. How did your time as Governor impact your views on the crack and powder cocaine disparity?

My experience as a federal prosecutor and Governor has emphasized to me that the crack-powder disparity undermines confidence in our criminal justice system. This reduced confidence makes it harder to develop informants and cooperating witnesses.

3. What operational challenges would DEA face trying to enforce an adjustment to the crack and powder cocaine ratio?

None, to my knowledge.



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September 8, 2022

Chairman Dick Durbin
Senate Judiciary Committee
224 Dirksen Senate Office Bldg.
Washington, DC 20510

Ranking Member Chuck Grassley
Senate Judiciary Committee
224 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Chairman Durbin, Ranking Member Grassley, and Committee Members:

On behalf of the National Association of Assistant United States Attorneys (NAAUSA), representing the interests of over 6,300 Assistant U.S. Attorneys working in the 94 U.S. Attorney Offices, I write to provide the following answers to Questions for the Record from the June 22, 2021 hearing entitled "Examining Federal Sentencing for Crack and Powder Cocaine."

Questions for the Record from Senator Thom Tillis

1. Do we have sufficient data at both the federal and state levels to track recidivism rates for crack and powder cocaine offenders? If not, what are the barriers to collecting this information?

The U.S. Sentencing Commission regularly issues reports regarding recidivism rates for crack and powder cocaine offenders. These reports repeatedly find higher recidivism rates among crack cocaine offenders. In a February 2017 report¹ analyzing offenders released in 2005, the U.S. Sentencing Commission found the overall recidivism rate among drug offenders to be 50.0%. The recidivism rate for powder cocaine offenders was 43.8%, the lowest of any drug type. Conversely, crack cocaine offenders had the highest recidivism rate among any drug type at 60.8%. This trend continued in a January 2022 report² analyzing offenders released in 2010. This report found the overall recidivism rate among drug offenders to be 47.9%. The recidivism rate for powder cocaine offenders remained the lowest at 41.8%. The recidivism rate for crack cocaine offenders remained the highest at 57.8%.

The U.S. Sentencing Commission's regular reporting on this issue provides consistent and comparable data on the subject.

2. As a prosecutor, what is your view of the efficacy of maintaining the current ratio for crack and powder cocaine? Does it protect public safety or lead to excessive incarceration?

The current ratio protects public safety by acknowledging the destructive impact of crack cocaine and the unique criminogenic characteristics of crack offenders.

First, the manufacturing process for crack cocaine makes the substance more concentrated. Additionally, the method of ingestion – smoking – makes the effects shorter lived. Although chemically, crack and powder cocaine are similar, the intense, short term high produced by crack results in increased binge use, chronic use, and greater risk of overdose compared to powder cocaine.³ The lower threshold quantity required to trigger criminal penalties for crack cocaine reflects the higher level of destruction

Executive Director
Chad Hooper

Washington Reps.
Jason Briefel
Natalia Castro

Counsel
Debra Roth

¹ [Recidivism Among Federal Drug Trafficking Offenders \(ussc.gov\)](https://www.ussc.gov/research-and-statistics/research-reports/recidivism-among-federal-drug-trafficking-offenders)

² [Recidivism of Federal Drug Trafficking Offenders Released in 2010 \(ussc.gov\)](https://www.ussc.gov/research-and-statistics/research-reports/recidivism-of-federal-drug-trafficking-offenders-released-in-2010)

³ [Crack vs Cocaine: What's The Difference Between Crack & Cocaine? \(americanaddictioncenters.org\)](https://www.americanaddictioncenters.org/crack-vs-cocaine)

caused by this drug. Further, it enables prosecutors to seek longer penalties. This is not “excessive incarceration,” it is an approach proven to reduce revictimization. The U.S. Sentencing Commission has confirmed that longer sentences have a deterrent effect that reduces recidivism by 30 to 45 percent.⁴

Second, the ratio properly reflects the criminogenic characteristics of crack offenders at the federal level. Federal prosecutors rarely engage on possession cases, which are handled by state/local law enforcement. Instead, federal law enforcement efforts are primarily focused on trafficking and high harm drug offenses. In these cases, there are significant differences in the criminal histories, recidivism rates, and involvement with weapons and violence between those who traffic in powder cocaine and those who traffic in crack. The January 2022 U.S. Sentencing Commission report⁵ found that crack cocaine offenders had the *lowest* proportion of drug offenders in the *lowest criminal history category* and the *highest* proportion of offenders in the *highest criminal history category*. In 2021, nearly 40% of crack cocaine trafficking offenders had their sentence increased for possessing a weapon.⁶ That is compared to only 21% of powder cocaine offenders in the same year.⁷ Finally, 21.9% of reoffending crack offenders committed assault and 16.4% went back to drug trafficking. Crack cocaine offenders have extensive criminal histories, are more likely to reoffend, and most commonly reoffend by committing violent acts or returning to a life of drug trafficking. Since we know longer sentences deter reoffending, imposing longer sentences on crack cocaine offenders by requiring lower threshold amounts to trigger criminal penalties aligns with the drug’s impacts.

3. Do you agree with the 1-to-1 ratio suggested in the *EQUAL Act*? Or recommend another ratio?

NAAUSA is concerned the 1-to-1 ratio suggested will lead to less convictions of crack cocaine offenders and shorter sentences for those who are convicted. Given that shorter sentences increase the likelihood of reoffending, we are concerned the 1-to-1 ratio will enable crack cocaine offenders to revictimize their communities, particularly in communities of color. Ultimately, NAAUSA feels crack and powder cocaine are not the same and should not be treated the same. However, should Congress ultimately determine that action is warranted to equalize the penalties between powder cocaine and crack cocaine, NAAUSA would urge members to give strong consideration to lowering the quantity thresholds for powder cocaine to match the existing thresholds for crack cocaine, thereby achieving the goal of equality of punishment across the board.

Our nation is experiencing a drug overdose epidemic. Last year, overdose deaths topped 100,000 annually. We continue losing Americans everyday as drug traffickers become increasingly experiential with their drug combinations and pervade our communities. Now is not the time to reduce drug penalties and increase the risk of revictimization.

Questions for the Record from Senator Charles E. Grassley

1. In your written testimony, you wrote, “rather than adjusting sentences as a whole, seeking limited adjustments based on risk of community harm may present a more targeted approach to reforms.”
 - a. Can you expand more on this point and describe how this adjustment could be helpful in examining federal drug sentencing laws?

Research indicates retroactive sentence adjustments for large classes of offenders do not reduce recidivism.⁸ However, in 2017 the U.S. Sentencing Commission found crack offenders who received safety valve sentence reductions – indicating they did not have a significant prior criminal history – recidivated at a substantially lower rate (49% compared to 64.7%). This represents a targeted approach to provide relief for those who do not pose as significant a risk of reoffending. That being said, NAAUSA

⁴ [Length of Incarceration and Recidivism \(ussc.gov\)](#)

⁵ [Recidivism of Federal Drug Trafficking Offenders Released in 2010 \(ussc.gov\)](#)

⁶ [Quick Facts on Crack Cocaine Trafficking Offenses \(ussc.gov\)](#)

⁷ [Quick Facts on Powder Cocaine Trafficking Offenses \(ussc.gov\)](#)

⁸ [Recidivism Among Offenders Receiving Retroactive Sentence Reductions \(ussc.gov\)](#)

supports keeping the safety valve provisions limited and targeted to ensure their effectiveness at preventing recidivism and granting relief to those most appropriate.

Additionally, programs that have substantially and continually proven to reduce recidivism, combat drug addiction, and promote good behavior should be expanded rather than providing blanket sentence adjustments.⁹ Inmates who demonstrate sustained participation and engagement in these programs may be eligible for early release. There are many examples of rehabilitated inmates who received early release and went on to become beacons for ending addiction and drug trafficking in their communities. A targeted approach that provides inmates an opportunity to demonstrate their commitment to living a law-abiding life is far more appropriate than adjusting sentences as a whole for a class of offenders with the highest recidivism rates.¹⁰

2. Under the current federal law, distributing 28 grams of cocaine base and 500 grams of powder cocaine trigger a 5-year mandatory minimum sentence. A 10-year mandatory minimum sentence can be imposed for trafficking in 280 grams of cocaine base and 5 kilograms of powder cocaine.
 - a. These laws are intended to target and punish drug traffickers and not those who are addicts or possess drugs, correct?

Yes. Federal law enforcement focuses our resources on drug trafficking networks and high harm drug offenses. Federal law enforcement rarely prosecutes drug possession cases. State and local law enforcement primarily handle possession cases. A November 2021 Congressional Research Service report found that in 2020, 98.7% of federal drug cases involved drug trafficking.¹¹ NAAUSA feels most conversations about drug possession should occur at the state and local level, not the federal level. Congress must recognize that federal law enforcement focuses our efforts on drug trafficking, which often also involves gun violence, financial crimes, and other organized criminal activity.

3. Is it cheaper to buy crack than powder cocaine per dose? Does this have an impact on communities and those who use it?

While drug prices vary by location, crack cocaine is generally less expensive than powder. Powder cocaine has a street price of \$100 to \$125 per gram. Crack cocaine has a street price of \$5 to \$30 per rock.¹² The lower cost, combined with the shorter duration of the high the drug produces, results in increased chronic and binge use. This makes the drug more addictive and increases the risk of overdose. Because crack cocaine is more addictive and available at a lower cost, it can spread rapidly in low-income communities leaving a lethal trail in its wake.

4. As a federal prosecutor and in your experience, what amount in grams do those defendants charged and/or sentenced with distributing crack cocaine typically possess? What about powder cocaine?

In 2021, the U.S. Sentencing Commission reports the median base offense corresponded with trafficking between 28 and 112 grams of crack cocaine.¹³ The equivalent to 140 to 560 “rocks” – the individual units in which crack is sold. At up to \$30 a rock, the median federal offender may be trafficking up to \$16,800 worth of crack cocaine.¹⁴ In 2021, the Commission reports the median base offense corresponded with trafficking between 5 and 15 kilograms of powder cocaine.¹⁵ The lower quantities thresholds required to trigger criminal penalties for crack cocaine offenses allow law enforcement to combat crack traffickers early.

⁹ [Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010 \(ussc.gov\)](#)

¹⁰ [Recidivism Among Federal Drug Trafficking Offenders \(ussc.gov\)](#)

¹¹ [IF11965 \(congress.gov\)](#)

¹² [Crack vs. Cocaine | Difference Between Crack and Coke \(drugrehab.com\)](#)

¹³ [Quick Facts on Crack Cocaine Trafficking Offenses \(ussc.gov\)](#)

¹⁴ [Crack vs. Cocaine | Difference Between Crack and Coke \(drugrehab.com\)](#) (finding a rock of crack is roughly one fifth of a gram)

¹⁵ [Quick Facts on Powder Cocaine Trafficking Offenses \(ussc.gov\)](#)

Thank you for considering the perspective of NAAUSA. Please do not hesitate to reach out to our Washington representative Natalia Castro (ncastro@shawbransford.com) regarding this matter.

Respectfully,

A handwritten signature in dark ink, appearing to read "Steven Wasserman". The signature is fluid and cursive, with the first name "Steven" and last name "Wasserman" clearly distinguishable.

Steven Wasserman
President



Office of the Special Narcotics Prosecutor for the City of New York

Bridget G. Brennan, Special Narcotics Prosecutor

80 Centre Street, Sixth Floor New York, NY 10013

Phone: 212-815-0400 Fax: 212-815-0440

June 18, 2021

Chairman Dick Durbin
Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Ranking Member Chuck Grassley
Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Hearing on Examining Federal Sentencing for Crack and Powder Cocaine

Dear Chairman Durbin and Ranking Member Grassley:

As you examine federal sentencing laws for crack and powder cocaine, I would like to share my observations on the major drug issues facing us today, a vastly different landscape than when Congress established tougher sentences for crack offenses than for powder cocaine crimes more than three decades ago. As the Special Narcotics Prosecutor for the City of New York for 22 years, and having been a Manhattan Assistant District Attorney who prosecuted homicides, sex crimes and violent offense during the crack epidemic in the late 1980s, I believe I can offer a unique perspective.

The Office of the Special Narcotics Prosecutor (SNP) was established by the New York State Legislature in 1971 to coordinate narcotics prosecutions in the five counties that comprise New York City. Under New York State law, narcotics includes cocaine, heroin, fentanyl, addictive opioid medications, and derivative substances. Because New York City is center for commerce, finance, and transportation, it has also become a major importation and distribution hub for narcotic drugs. Our office works with federal prosecutors locally and across the nation, and with the U.S. Drug Enforcement Administration (DEA), New York Drug Enforcement Task Force, New York City Police Department (NYPD), and other federal, state, and local enforcement.

The worst drug scourge facing New York City and most of the nation today is fentanyl, which is pouring into our city from clandestine laboratories in Central America at a faster pace than we have ever seen before. In the first three months of 2021, SNP cases resulted in the seizure of more fentanyl than in all of 2020 and over 70 percent of the total amount we seized in 2019. U.S. Customs and Border Protection has reported a similar spike in fentanyl seizures at the U.S.-Mexico border.

Our investigations are often in partnership with DEA New York Division and the NYPD. NYPD labs reported that 80% of heroin seized in the last quarter of 2020 contained fentanyl. Every five hours, someone in the city fatally overdoses. Most of these deaths are linked to fentanyl.

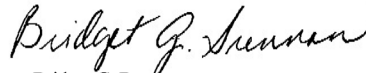
The fentanyl issues are not confined to New York City or endangering only those seeking opiate drugs. We are assisting in an investigation in rural New York State involving fentanyl sold by a New York City based distributor to customers who believed they were purchasing cocaine. Two died and a dozen more overdosed. We have also seen a proliferation of fentanyl pressed into counterfeit pills and sold as black-market pharmaceuticals. Most overdoses involve more than one substance. While cocaine is present in many fatal overdoses, opioids are largely responsible for increased death rates.

In addition, the distribution tactics in New York City have shifted since the terrible violence associated with crack cocaine trade in the 1980s and early 90s. I was a homicide prosecutor during that time, and handled many cases where low-level crack sellers were armed and used violence to control street corners. Vials of crack sold for \$3, \$5 or \$10 each, so they needed a high number of buyers to turn a profit. New York State never enhanced penalties based on any distinction between powder and crack cocaine. In the past two decades, there have been substantial reductions in sentences for nearly all drug crimes. These changes did not result in a resurgence of the widespread violence associated with the crack epidemic.

Unfortunately, there are still a significant number of narcotics related shootings, especially at the lowest level of the drug trade. However, the increase in weapons possessions that my office is observing is associated with higher-level distributors of fentanyl, heroin and cocaine. It should also be noted that low-level distributors now have the ability to set up sales using cell phones. Cell phones, which were unavailable thirty-five years ago, enable them to arrange transactions with buyers without hawking their product openly. They are less vulnerable to violent robberies and there appear to be fewer retaliatory shootings and battles over turf than during the late 1980s and early 90s.

I share these observations with you, because I recognize that the committee is seeking to determine the appropriate punishment for federal crack offenses. Based on my 35 years of handling serious felony cases, and my experience overseeing an office investigating major narcotics cases for the past 22 years, at the present time, I do not believe that the possession, sale and distribution of crack cocaine is more dangerous than crimes involving other narcotic substances.

Respectfully,



Bridget G. Brennan
Special Narcotics Prosecutor
for the City of New York



NATIONAL NARCOTIC OFFICERS' ASSOCIATIONS' COALITION

455 Massachusetts Avenue NW, Box 112, Washington, DC 20001

www.nnoac.com

June 21, 2021

I am Bob Bushman, President of the National Narcotic Officers' Associations' Coalition, representing our nation's narcotic officers and their professional associations as well as several other law enforcement partners and their organizations. On behalf of the NNOAC, please accept my testimony for today's hearing. Our NNOAC members are the ones on the front lines of our nation's drug enforcement efforts, and the NNOAC's Mission is to research, monitor and support legislative initiatives that are designed to increase the effectiveness of our nation's drug policies and drug law enforcement. It is our goal to protect our citizens and our communities from the devastating consequences caused by drug abuse, drug trafficking and violent crime.

2020 was a year of unprecedented tragedy and turmoil. The COVID pandemic, economic uncertainty, a tumultuous political season, civil unrest, and dramatic increases in violent crime have fueled media headlines for over a year now. Yet, another tragedy that is unfolding right in front of the eyes of our country has received little mention - the loss of over 90,000 Americans to drug abuse. The NNOAC believes that many of those deaths are preventable.

Each day, NNOAC members, their law enforcement partners, and first responders answer calls to attend to more drug-fueled deaths, as well as to hundreds of medical emergencies involving individuals who are being poisoned by drugs. While heroin and synthetic opioids are often cited as the cause of those deaths and poisonings, most law enforcement officers can tell you sad tales of others whose lives have been ruined by marijuana, methamphetamine, cocaine, and other synthetic and prescription drugs. Just last week, I was in Senator Grassley's home state of Iowa at the Iowa Narcotic Officers Association training conference. I spoke with many of the 250 attendees and, as a Midwesterner myself, it was heartbreaking to hear their reports of the deaths, overdoses and violent crime that drug trafficking and drug abuse has brought to America's Heartland.

As we are here to discuss and contemplate S. 79, the Equal Act, regarding the elimination of increased penalties for cocaine offenses where the cocaine involved is cocaine base, I have some information and testimony to offer.

Powder cocaine is the pure and original form of the illegal drug, derived from the coca plant and it is frequently smuggled and trafficked throughout the world in bulk quantities. Many Drug Trafficking Organizations (DTO's) facilitate the movement of large volumes of cocaine just as they do other illegal drugs like heroin, marijuana, methamphetamine and various synthetic opiates. Cocaine is frequently sold from multiple kilogram quantities all the way down to single and partial gram quantities on the street. Cocaine traffickers and dealers are frequently involved in selling other types of illegal drugs, too. Recent reports from NNOAC members around the United States indicate that cocaine supplies and seizures in our Country are increasing dramatically.

Powder cocaine is easily transformed into crack cocaine (cocaine base), which is highly concentrated and addictive. Crack cocaine is rarely transported in large volumes like other drugs and is most frequently encountered in much smaller quantities, often just partial grams or even single doses. Crack cocaine dealers make repeated and smaller transactions with their cocaine source of supply based on their immediate demand. Crack cocaine dealers rarely transport or possess large amounts of crack cocaine due to many inherent risks, one of which is the severity of criminal penalties if caught.

Cocaine powder is commonly ingested through the nose, which allows for more time to pass before the body feels the greatest impact resulting in a longer lasting, but less intense, high. On the other hand, crack cocaine is smoked which results in an almost immediate and euphoric, but short-lived, high. The brief sense of complete euphoria leaves crack cocaine users constantly craving and chasing that same high which quickly leads to dependence. That intense craving is the catalyst for the crack cocaine epidemic that many communities have suffered for many years, and it was the driver for much of the violent crime and gang violence in the 1980s and 1990s that led to Congress passing legislation that included mandatory minimum sentences for crack cocaine traffickers, which I remind you have already been the subject of sentencing guidelines reductions in recent years.

Furthermore, many drug traffickers, including crack cocaine dealers, often employ firearms and violence to protect their drugs, their money, and their illegal businesses. Adversaries frequently make attempts to rob established drug dealers of their drugs and money, or to overtake territory to establish their own distribution hub. While drug dealing is an inherently dangerous and risky trade, selling crack cocaine has proven to be extremely volatile. Most recently on a local level, law enforcement agents in Des Moines, Iowa searched 43 residences in November 2020 near the end of a lengthy crack cocaine investigation and recovered an astonishing 37 firearms.

Succinctly, federal and state legislative initiatives to decrease drug sentences, decisions by prosecutors to decline prosecutions, and policies that have depressed the enforcement of our

drug laws have only resulted in dramatic increases in drug abuse and drug-related deaths, violent crimes, and homicides. Simply put, attempts by Congress and our legislatures to reform our criminal justice system, and to mitigate perceived biases and discrimination by decreasing enforcement and accountability, have only served to benefit the criminals that choose to violate our laws, not our good citizens. It is time to hold the line on providing more leniency for drug traffickers and violent criminals, and to hold them fully accountable for their crimes. Further reductions to penalties for those who peddle poisons, like crack and cocaine powder, will only result in putting more American lives at risk.

I believe that we have the opportunity for a win-win situation here. Rather than reducing penalties for crack cocaine, passing legislation that will make the sentencing guidelines and penalties for powder cocaine commensurate with the current crack cocaine sentencing guidelines and penalties will even the unfairness of the perceived crack/powder disparity. And such a move will also improve public safety by ensuring that those who engage in the drug trafficking and violence that are addicting and killing so many Americans will be held accountable for the misery that they peddle.

In closing, I hope that Congress, like our dedicated NNOAC members and law enforcement partners, will make the safety of our hardworking, law-abiding citizens and their communities the priority with this legislation.

Respectfully Submitted,



Bob Bushman
President
National Narcotic Officers' Associations' Coalition



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LEGISLATIVE TESTIMONY

“Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform”

Testimony before the Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
U.S. House of Representatives
June 17, 2021

John G. Malcolm
Vice President, Institute for Constitutional Government
Director and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow, Edwin Meese
III Center for Legal and Judicial Studies
The Heritage Foundation

Chairwoman Lee, Vice Chair Bush, Ranking Member Biggs, and distinguished Members of Congress:

Thank you for the opportunity to appear before you today to discuss some of the various criminal justice reform proposals that you are currently considering. My name is John Malcolm. I am the Vice President of the Institute for Constitutional Government and the Director and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.¹ I have also spent a good deal of my career involved in the criminal justice system—as an Assistant United States Attorney, an Associate Independent Counsel, a Deputy Assistant Attorney General in the Criminal Division at the U.S. Justice Department, and a criminal defense attorney.

A lot of my scholarship has focused on various aspects of our criminal justice system.² In 2013, I had the privilege of testifying before the House Judiciary Committee’s Over-Criminalization Task Force,³ and I was an outspoken supporter of the First Step Act⁴ and other criminal justice reform proposals. Although I spent much of my career as a federal prosecutor and am a scholar at a prominent conservative think tank, I recognize that our criminal justice system is far from perfect and that, when it comes to creating new crimes or increasing sentences for new and old crimes, sometimes the pendulum can swing too far.

I am aware that you are currently considering a number of criminal justice reform proposals including the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act,⁵ the Reforming Alternatives to Incarceration and Sentencing to Establish a Better Path for Youth (RAISE) Act,⁶ the Community-Based Sentencing Alternatives for Caretakers Act,⁷ the First Step Implementation Act,⁸ and the Prohibiting Punishment of Acquitted Conduct Act,⁹ among others. Even though I have concerns about some of these proposals, I applaud you for debating these issues. All of you care about public safety, although I recognize that there may be disagreements among you about whether some of these proposals will enhance or hurt public safety in the long run.

These are particularly difficult issues in relation to the “war on drugs,” a phrase first used by President Richard Nixon in 1971 at a press conference where he identified drug abuse as “public enemy number one in the United States.” There is no question that this effort has entailed a high social and economic cost.

A complicating factor in any discussion about drug offenses is that while many consider drug dealing to be a nonviolent offense, there are others, myself included, who are uncomfortable with this label “since drug dealing is often carried out by gangs, and almost invariably involves the actual or threatened use of violence and the inherent risk of overdose.”¹⁰ It seems clear, though, based on recent efforts in many states to decriminalize or legalize the possession of certain drugs that are still prohibited under federal law, that many members of the public believe that we need to recalibrate how we tackle the drug problems that continue to plague our country, as evidenced, for example, by the current opioid epidemic.¹¹ Many states have instituted drug courts¹² and other specialized courts. Sentencing reform at both the state and federal levels is, of course, part of that ongoing discussion.

The following are my thoughts on a couple of the proposals that you are considering.

...

The EQUAL Act

In 1986, Congress passed the Anti-Drug Abuse Act, which established many mandatory minimum penalties for drug offenses, including amending 21 U.S.C. § 841 to provide a 100-to-1 ratio in the quantities of powder cocaine and crack cocaine that would trigger a mandatory minimum penalty. For example, the law established a five-year mandatory minimum term of imprisonment for offenses involving 500 grams of powder cocaine or five grams of crack cocaine, and a 10-year mandatory minimum penalty for offenses involving five kilograms of powder cocaine or 50 grams of crack cocaine. In 2010, through the Fair Sentencing Act, Congress lowered the disparity to 18-to-1—an arbitrary number to be sure—so that the amount of crack cocaine was raised to 28 grams to trigger a five-year mandatory minimum penalty and 280 grams to trigger a 10-year mandatory minimum penalty while the amounts for powder cocaine remained unchanged. While the Fair Sentencing Act implemented this change on a prospective basis only, Section 404 of the First Step Act of 2018 made those changes retroactive, enabling many offenders who had been sentenced under the old 100-to-1 regime to petition a court for a reduction in sentence. While courts retain the discretion to grant or deny such relief, many offenders have in fact had their sentences reduced as a result of this change in the law.¹³ The EQUAL Act would eliminate the disparity altogether and apply this change retroactively.

From a pharmacological perspective, there is really no difference between powder and crack cocaine.

Cocaine is a hydrochloride salt in its powdered form, while crack cocaine is derived from powdered cocaine by combining it with water and another substance, usually baking soda (sodium bicarbonate). After cocaine and baking soda are combined, the mixture is boiled, and a solid forms. Once it's cooled and broken into smaller pieces, these pieces are sold as crack.¹⁴

According to pharmacologists, the major differences are how the drug is administered and its effects on the user. Although it can be injected, powder cocaine is usually snorted, while crack cocaine can only be smoked. When cocaine is injected or smoked, the drug takes effect more quickly, resulting in a more intense high of shorter duration.¹⁵ For this reason, as well as the fact that crack cocaine is much cheaper than powder cocaine, many believe that crack cocaine users are more likely to become addicted than powder cocaine users are. Moreover, while some believe that crack users are more prone to violent reactions than powder cocaine users are, others dispute this.¹⁶

Additionally, regardless of the intent behind these laws, as has been pointed out many times, it is clear that the largest impact, both in terms of the devastation that drugs have wrought and in terms of the imposition of extremely long sentences on offenders, has been felt most keenly in communities of color.¹⁷ I further note that the vast majority of states do not treat crack cocaine any differently from powder cocaine in terms of sentencing¹⁸ and that this bill has

attracted bipartisan support¹⁹ as well as support from major prosecutorial and law enforcement organizations.²⁰ While I do not have a settled view on whether it makes sense to completely eliminate the differential when it comes to sentencing, the current disparity between how crack cocaine offenders are treated compared to powder cocaine offenders does strike me as being excessive.

Retroactivity

Let me say a few words about retroactivity. Both the First Step Implementation Act and the EQUAL Act have retroactivity provisions that might enable offenders who committed their offenses prior to passage of these Acts to take advantage of some of the changes that these laws, if enacted, would bring about, leaving it to the court's discretion whether to grant or deny a petition for relief.

There are many who object to the retroactive application of changes in sentencing laws. In addition to those who did not support the change in the first place, others object because it runs counter to the general principle of desiring finality in criminal cases,²¹ which can be particularly unsettling to victims and their families. Some have mentioned the need to conserve judicial resources and the burden that would be placed on judges who would be tasked with reconsidering sentences that were imposed long ago at the expense of attending to other matters.²² Others have noted that the original sentence that was imposed may have been the result of a plea bargain in which other, more serious charges were dismissed; enabling an offender to petition a court for a reduction in sentence could upset the "benefit of the bargain," at least from the prosecutor's perspective. One might also object that retroactivity is a one-way ratchet, in that an offender can petition a court for resentencing when a penalty is reduced by subsequent legislation, but a prosecutor cannot petition a court to resentence a defendant when a penalty is increased by subsequent legislation.²³

While I recognize the legitimacy of all of these arguments, I come down on the side that if society has made a judgment, as reflected through legislation passed by its elected representatives, that certain punishments are simply too harsh and therefore unjust, then the current sentiment presumably is that they were too harsh and unjust when they were originally imposed, at least theoretically. Enabling a judge to reconsider a sentence, taking into account all factors including the nature of the crime that was committed, the views of the prosecutor and any victim, and the offender's record while incarcerated, as well as an assessment of the likelihood that the offender will recidivate upon release, is a smaller price to pay than allowing offenders to languish in prison for a period of time that society now deems to be excessive.

Conclusion

The work you do, most especially in the area of criminal justice, has a dramatic impact on the lives of real people—both the victims and perpetrators of crime and their families—and helps to shape how people view our criminal justice system in terms of its effectiveness and its fairness. Over the years, I have dealt with many people of goodwill from across the political and ideological spectrum who approach these issues from different perspectives. Some believe the system should be changed because of systemic racism; others believe that we incarcerate too

many people—often referring to this as “mass incarceration”—and that the economic and noneconomic costs associated with this are too high relative to any resulting public safety benefits; still others believe that we do not place enough emphasis and focus on rehabilitation and that we underestimate the capacity of those who violate our criminal laws to redeem themselves.

Though I do not agree with all of these perspectives, I acknowledge that the people who espouse these divergent viewpoints believe them passionately and sincerely. In speaking to these thought leaders, I have often been struck by how much agreement there is on many of the measures that *ought* to be taken to improve our criminal justice system, even if there is broad disagreement about *why* those measures are warranted. Sadly, I have also often been struck by the fact that such measures fail to get enacted either because people get caught up in the latter and don’t focus on the former or because they insist on an all-or-nothing approach with respect to the specific proposals they support. As you continue your deliberations on these important issues, I would urge you to focus on your areas of agreement and not let the perfect be the enemy of the good.

I thank you for inviting me here to testify today and would be happy to answer any questions you might have.

Endnotes

¹ The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2017, it had hundreds of thousands of individuals, foundation, and corporate supporters representing every state in the U.S. Its 2017 income came from the following sources: Individuals 71%, Foundations 9%, Corporations 4%, Program revenue and other income 16%. The top five corporate givers provided The Heritage Foundation with 3.0% of its 2017 income. The Heritage Foundation’s books are audited annually by the national accounting firm of RSM US, LLP.

² John G. Malcolm, *Do We Have a Mass Incarceration Problem? Compared to What?*, CATO UNBOUND, July 16, 2020, available at <https://www.cato-unbound.org/2020/07/16/john-malcolm/do-we-have-mass-incarceration-problem-compared-what>; John G. Malcolm and Cully Stimson, *Reform of Policing: What Makes Sense—and What Doesn’t*, DAILY SIGNAL, June 11, 2020, available at <https://www.dailysignal.com/2020/06/11/reform-of-policing-what-makes-sense-and-what-doesnt/>; John G. Malcolm and Brett Tolman, *A Bill to Give Former Inmates a Second Chance*, DAILY SIGNAL, Aug. 26, 2019, available at <https://www.dailysignal.com/2019/08/26/a-bill-to-give-former-inmates-a-second-chance/>; John G. Malcolm and Brett Tolman, *Why It’s Not “Soft On Crime” to Support Criminal Justice Reform*, DAILY SIGNAL, Aug. 20, 2018, available at <https://www.dailysignal.com/2018/08/20/why-its-not-soft-on-crime-to-support-criminal-justice-reform/>; John G. Malcolm, *Criminal Justice Reform a Big Part of Orrin Hatch’s Legacy*, DAILY SIGNAL, June 25, 2018, available at <https://www.dailysignal.com/2018/06/25/criminal-justice-reform-a-big-part-of-orrin-hatches-legacy/>; John G. Malcolm and John-Michael Seibler, *House-Passed Prison Reforms Would Help Strengthen Families and Communities*, DAILY SIGNAL, May 23, 2018, available at <https://www.dailysignal.com/2018/05/23/house-passed-prison-reforms-would-help-strengthen-families-and-communities/>; John G. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, FEDERALIST SOC’Y REV., Jan. 29, 2018, available at <https://fedsoc.org/commentary/publications/the-problem-with-the-proliferation-of-collateral-consequences>; John G. Malcolm, *Morally Innocent, Legally Guilty: The Case for Mens*

Rea Reform, FEDERALIST SOC'Y REV., Sept. 7, 2017, available at <https://fedsoc.org/commentary/publications/morally-innocent-legally-guilty-the-case-for-mens-rea-reform>; John G. Malcolm and Hon. Michael Mukasey, *Criminal Law and the Administrative State: How the Proliferation of Regulatory Offenses Undermines the Moral Authority of Our Criminal Laws*, in LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 283 (Dean Reuter & John Yoo eds., Encounter Books 2016); John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. LAW & POL. 249 (2016), available at https://static1.squarespace.com/static/57cd857d3e00bed93bb34aea/t/57cd9d09725e25df3efd2203/1473092875109/FINAL-FORMAT-Malcolm_Website-1.pdf; John G. Malcolm and Hon. Michael Mukasey, *The Importance of Meaningful Mens Rea Reform*, HERITAGE FOUND., Feb. 17, 2016, available at <https://www.heritage.org/crime-and-justice/commentary/the-importance-meaningful-mens-rea-reform>; John G. Malcolm, *The Pressing Need for Mens Rea Reform*, HERITAGE FOUND., Sept. 1, 2015, available at <https://www.heritage.org/crime-and-justice/report/the-pressing-need-mens-rea-reform>; John G. Malcolm and Paul Larkin, *Obama Is Right That We Need to Reform the Criminal Justice System*, DAILY SIGNAL, Jan. 20, 2015, available at <https://www.dailysignal.com/2015/01/20/obama-got-right-wrong-state-union/#headline4>; John G. Malcolm, *Criminal Law and the Administrative State: The Problems with Criminal Regulations*, HERITAGE FOUND., Aug. 6, 2014, available at <https://www.heritage.org/crime-and-justice/report/criminal-law-and-the-administrative-state-the-problem-criminal-regulations>; John G. Malcolm, *The Case for the Smarter Sentencing Act*, HERITAGE FOUND., July 28, 2014, available at <https://www.heritage.org/crime-and-justice/commentary/the-case-the-smarter-sentencing-act>; John G. Malcolm, *Over-Criminalization Undermines Respect for Legal System*, HERITAGE FOUND., Dec. 11, 2013, available at <https://www.heritage.org/crime-and-justice/commentary/over-criminalization-undermines-respect-legal-system>.

³ *Defining the Problem and Scope of Over-Criminalization and Over-Federalization—Testimony before the Committee on the Judiciary Over-criminalization Task Force, U.S. House of Representatives on June 14, 2013*, HERITAGE FOUND., available at <https://www.heritage.org/testimony/defining-the-problem-and-scope-over-criminalization-and-over-federalization>.

⁴ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, untitled (congress.gov).

⁵ EQUAL Act, H.R. 1693, 117th Cong. (2021), BILLS-117hr1693ih.pdf (congress.gov). A companion bill, S. 79, has been introduced in the Senate.

⁶ RAISE Act of 2021, H.R. 128, 117th Cong. (2021), BILLS-117hr128ih.pdf (congress.gov).

⁷ Community-Based Sentencing Alternatives for Caretakers Act of 2021, H.R. 2277, 117th Cong. (2021), BILLS-117hr2277ih.pdf (congress.gov).

⁸ First Step Implementation Act of 2021, S. 1014, 117th Cong. (2021), BILLS-117s1014is.pdf (congress.gov).

⁹ Prohibiting Punishment of Acquitted Conduct Act of 2021, H.R. 1621 & S. 601 (as amended by the Senate Judiciary Committee), 117th Cong. (2021), BILLS-117s601is.pdf (congress.gov).

¹⁰ John G. Malcolm and Jason Snead, *As Justice Department Ramps Up Fight Against Violent and Drug Crime, Property Owners Put at Risk*, DAILY SIGNAL, July 21, 2017, available at <https://www.heritage.org/crime-and-justice/commentary/justice-department-ramps-fight-against-violent-and-drug-crime-property>.

¹¹ According to the National Institute on Drug Abuse (internal footnotes omitted): "In 2019, nearly 50,000 people in the United States died from opioid-involved overdoses. The misuse of and addiction to opioids—including prescription pain relievers, heroin, and synthetic opioids such as fentanyl—is a serious national crisis that affects public health as well as social and economic welfare. The Centers for Disease Control and Prevention estimates that the total 'economic burden' of prescription opioid misuse alone in the United States is \$78.5 billion a year, including the costs of healthcare, lost productivity, addiction treatment, and criminal justice involvement." *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis> (last visited June 14, 2021).

¹² See, e.g., *What Are Drug Courts?*, NAT'L. DRUG CT. RES. CTR., available at <https://ndcrc.org/what-are-drug-courts/> (last visited June 14, 2021).

¹³ See U.S. SENT'G COMM'N, *THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION*, August 2020 ("Since authorized by the First Step Act, 2,387 offenders received a reduction in sentence as a result of retroactive application of the Fair Sentencing Act of 2010."), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf.

¹⁴ *What Is Crack? Differences Between Crack and Cocaine?*, AM. ADDICTION CTRS., available at <https://americanaddictioncenters.org/cocaine-treatment/differences-with-crack> (last visited June 14, 2021).

¹⁵ *Id.* ("The intensity and duration of the high largely relate to how the drug is taken, per the National Institute on Drug Abuse. Generally, when cocaine is injected or smoked, the drug takes effect more quickly, resulting in a more intense but shorter high. When cocaine is snorted, it takes longer to feel its effects but the resulting high lasts longer. According to a clinical pharmacist, cocaine and crack produce very different effects in the body, largely related to how they are usually administered. When cocaine is snorted, its effects occur in about 1–5 minutes; they peak within 20–30 minutes; and they dissipate within 1–2 hours. The effects of crack take hold in under a minute, peak in 3–5 minutes, and last 30–60 minutes. If cocaine is injected, however, the effects begin, peak, and for about as long as crack. While injection is not the most common method of cocaine consumption, it is used by some people.").

¹⁶ See, e.g., Michael G. Vaughn, Qiang Fu, Brian E. Perron, Amy S. B. Bohnert, Matthew O. Howard, *Is Crack Cocaine Use Associated with Greater Violence than Powdered Cocaine Use? Results from a National Sample*, AM. J. OF DRUG AND ALCOHOL ABUSE, 36: 181–186 (2010).

¹⁷ See, e.g., USSC, *Quick Facts: Crack Cocaine Trafficking Offenses*, The United States Sentencing Commission (June 2020), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Crack_Cocaine_FY19.pdf (reporting that in FY2019, 80.9 percent of defendants convicted of federal crack cocaine distribution charges were black).

¹⁸ FAMM, *CRACK COCAINE DISPARITY IN THE STATES*, available at <https://famm.org/wp-content/uploads/Crack-Disparity-in-the-States.pdf> (last visited June 14, 2021).

¹⁹ In addition to the fact that the EQUAL Act was introduced by a bipartisan group of Congressmen—Reps. Hakeem Jeffries (D-NY), Bobby Scott (D-VA), Kelly Armstrong (R-ND), and Don Bacon (R-NE)—and has a bipartisan list of co-sponsors, see <https://www.govtrack.us/congress/bills/117/hr1693/details>, Arkansas Governor Asa Hutchinson, a Republican and former director of the Drug Enforcement Administration under President George W. Bush, recently voiced his support for the bill. Gov. Asa Hutchinson, *It's Time to Fix an Old Wrong and End the Disparity Between Crack and Cocaine Offenses*, FOX NEWS, June 8, 2021, available at <https://www.foxnews.com/opinion/end-crack-cocaine-offenses-gov-asa-hutchinson>.

²⁰ See, e.g., Letter of support from the Major Cities Chiefs Association to Sen. Booker and Rep. Jeffries (April 26, 2021), available at https://majorcitieschiefs.com/wp-content/uploads/2021/05/2021.04.26-S.-79_H.R.-1693-EQUAL-Act-Endorsement.pdf; Press Release, National District Attorneys Association, *Nation's Largest Prosecutor Organization Endorses Ending the Disparity in Sentencing Between Crack and Powder Cocaine* (Feb. 24, 2021), available at <https://ndaa.org/wp-content/uploads/NDAA-Press-Release-on-EQUAL-Act.pdf>.

²¹ See *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgment in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."); *Sanders v. United States*, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting) ("Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community."); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963) (stating that a lack of finality can undermine the functions of criminal law).

²² *See, e.g.*, *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment) (cited by the Teague plurality in support of claim that retroactivity overburdens judicial resources); *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part) (arguing that finality conserves judicial resources).

²³ U.S. CONST. art. I, § 9, cl. 3 provides: “No...ex post facto Law shall be passed.” The phrase “ex post facto,” Latin for “after the fact,” refers to laws that apply retroactively. Ever since *Calder v. Bull*, 3 U.S. 386 (1798), in which Justice Samuel Chase stated that the Ex Post Facto Clause applies to any law that renders criminal an action that was legal when it was taken, aggravates the severity of a crime, increases the resulting punishment, or alters the applicable rules of evidence after the crime was committed, courts have applied the Clause to penal laws. *See, e.g.*, *Lindsey v. Washington*, 301 U.S. 397 (1937); *Weaver v. Graham*, 450 U.S. 24 (1981); *Lynce v. Mathis*, 519 U.S. 433 (1997).



NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.

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EXECUTIVE OFFICERS

June 17, 2021

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Police Benevolent Association of New York City

The Honorable Richard Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20515

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
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MARK YOUNG
Vice President, Associate Members
Detroit Police Lieutenants & Sergeants Association

JAMES PALMER
Parliamentarian
Wisconsin Professional Police Association

WILLIAM J. JOHNSON, CAE
Executive Director and General Counsel

Dear Chairman Durbin and Ranking Member Grassley:

On behalf of the National Association of Police Organizations (NAPO), representing 241,000 rank-and-file law enforcement officers from across the United States, I would like to advise you of our opposition to the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act. This legislation ignores the concerns raised by NAPO and the law enforcement community that crack cocaine has proven to be more accessible on the streets and thus presents a greater danger to our nation's communities and law enforcement.

As crack is usually sold in much smaller quantities than powder cocaine, NAPO believes that tinkering with the current sentencing structure will negatively affect the work law enforcement has done to protect our nation's communities from the crime and violence associated with crack cocaine. It is turning a blind eye to the fact that crack cocaine has had, and continues to inflict, an absolutely devastating effect upon our communities.

The reduction of crack cocaine penalties will only accelerate the destruction brought to our neighborhoods by those convicted of federal crack offenses. This reduced sentencing will lead to a cyclical pattern of abuse, apprehension, and release. It will do nothing to abate the plague of crack cocaine upon individuals, families, and communities.

As the Committee examines federal sentencing for criminal offenses involving crack cocaine, NAPO respectfully urges you consider our serious concerns with the EQUAL Act to ensure just sentencing and the protection of our communities. If you have any questions, please feel free to contact me at (703) 549-0775.

Sincerely,

William J. Johnson
Executive Director



Ernesto Limon
Special Agent in Charge
California Department of Justice

Timothy J. Barelli
Captain
U. S. Coast Guard

The Honorable Randy Grossman
Acting U.S. Attorney
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**The Honorable
Summer Stephan**
District Attorney
San Diego County

San Diego Imperial Valley HIDTA

Southwest Border High Intensity Drug Trafficking Area

June 20, 2021

Chairman Dick Durbin
Ranking Member Chuck Grassley
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Durbin and Ranking Member Grassley:

As a retired peace officer in the State of California with over 28 years in the field of drug law enforcement, and a current member of the National HIDTA Directors Association (NHDA), I write to convey an overview of the significant cocaine trafficking threat confronted by the San Diego Imperial Valley HIDTA, which I direct.

As noted in DEA's 2021 Drug Threat Assessment, production, trafficking, and abuse of cocaine consistently pose a threat to the safety and security of citizens and law enforcement, from the production zones in South America to transportation and distribution networks in the U.S. Because Mexico is the primary intermediate source of supply for South American-origin cocaine smuggled into the United States, California had the second largest amount of cocaine seized in 2019, exceeded only by Florida.

In the Southern District of California, cocaine trafficking is a growing law enforcement problem, resulting in several recent seizures and arrests:

- Last year in a single tunnel takedown, agents seized \$29.6 million worth of illegal drugs, including 1,300 pounds of cocaine, in a border tunnel so sophisticated that it had ventilation, lighting and an underground rail system.
- Another recent seizure involved three quarters of a ton of cocaine, as well \$3.5 million in cash, fentanyl, and large-caliber ammunition.
- In February, 2021, Coast Guard and Navy personnel offloaded approximately 11,400 pounds of cocaine worth more than \$200 million from seizures in international waters of the Eastern Pacific Ocean.
- Earlier this month, federal charges were filed against Cartel de Jalisco Nueva Generacion, or CJNG, a violent group of enforcers for what is considered the most well-armed cartel in Mexico. CJNG is alleged to have trafficked in cocaine, fentanyl and other drugs. Six months of surveillance of CJNG revealed plans for more than 150 murders, the majority of which happened in Tijuana, including the murders of two Chula Vista teens.

While strong law enforcement partnerships have successfully worked to disrupt the cocaine supply, invariably loads reach the market. I have extensive experience conducting complex investigations targeting transnational criminal organizations (TCO's) that distribute bulk quantities of cocaine from the Southwest Border (SWB) Region to highly lucrative markets in Los Angeles, Phoenix, Chicago and New York. The TCO's utilize maritime routes, overland routes between ports of entry, tunnels and highways to smuggle multi-kilogram quantities of cocaine to their intended destinations across the United States.

The TCO's sophisticated criminal networks enable wide scale distribution of cocaine and increases the likelihood of securing billions in illicit profits. Some of the powder cocaine successfully smuggled into the U.S. via the SWB Region is ultimately converted to highly addictive cocaine base and distributed in communities by armed members of criminal street gangs who prey upon people who use drugs (PWUD).

Drug traffickers will often times resort to violence to protect their lucrative product and control of street level distribution. In the past year, violent crime rates showed a disturbing increase, with murder, aggravated assault, and other violent crimes on the rise. Cocaine trafficking significantly contributes to local gun crimes and other violent incidents, domestic violence, child abuse and endangering neighborhood safety and law enforcement.

A recent briefing by high level federal law enforcement officials here in the Southern District of California revealed that untraceable "ghost guns" are increasingly being seized in connection with drug trafficking and California, one the largest drug transshipment points on the Southwest Border, leads the nation in "ghost gun" seizures.

It should be mentioned that the cocaine trade also fuels corruption in Mexico and Central America, worsening the humanitarian crisis experienced by refugees from Guatemala, Honduras, and El Salvador.

While cocaine trafficking is a serious law enforcement concern, the public health consequences are also deeply troubling. Due to polydrug overdoses, cocaine is playing a larger role in the national overdose epidemic. Deaths from drug poisoning involving cocaine have increased every year since 2013. In 2018 alone, there were 14,666 deaths from drug poisoning involving cocaine in U.S. states and the District of Columbia, according to CDC estimates. 2018 is the third year in a row that such deaths exceeded 10,000. Deaths from drug poisoning involving cocaine have increased about 251 percent from 2010 to 2018.

In the Southern District of California, polydrug cocaine combinations, particularly cocaine with synthetic opioids such as fentanyl, are a growing problem. This trend is seen nationwide, with drug poisoning deaths involving cocaine and opioids increasing from 167 deaths in 2010, to 8,659 deaths in 2018 -- a staggering 5,085 percent increase. Provisional data from the Centers for Disease Control and Prevention show that there were [90,237](#) drug-overdose deaths in the 12 months ending in September 2020, a leading indicator that implies a substantial increase over 2019's total of [70,630](#), when final figures for all of 2020 are in. **That equates to more than 240 people each day, and a nearly 30 increase from the prior year.**

As **Nora Volkow**, Director of the National Institute on Drug Abuse, **recently noted**: *"Although we often talk about individual drugs and drug use disorders in isolation, the reality is that many people use drugs in combination and also die from them in combination. Although deaths from opioids continue to command the public's attention, an alarming increase in deaths involving the stimulant drugs methamphetamine and cocaine are a stark illustration that we no longer face just an opioid crisis. We face a complex and ever-evolving addiction and overdose crisis characterized by shifting use and availability of different substances and use of multiple drugs (and drug classes) together."*

Given the increasing public health, law enforcement and humanitarian challenges associated with the cocaine trade, and the undeniable fact that the United States is facing an overdose and addiction epidemic, I question the wisdom of reducing cocaine-related drug trafficking sentences at this time.

Sincerely,



David L. King, Executive Director