

The Honorable Charles E. Schumer
United States Senate
Washington, D.C. 20510

November 17, 2021

RE: Brennan Center Support for the EQUAL Act

Dear Majority Leader Schumer:

We write on behalf of the Brennan Center for Justice to share the Center's strong support for the EQUAL Act, and to encourage the Senate to advance the Act using any legislative vehicle at its disposal. As you know, the EQUAL Act would end the sentencing disparity between crack and powder cocaine once and for all.¹ Passing the Act would be a major step toward reducing racial disparities in the federal criminal legal system, and it would show that such reforms can be both transformative *and* bipartisan. We urge you to seize this opportunity while the moment lasts.

Today, federal drug mandatory minimums begin to apply at the 28-gram level for crack cocaine, but at the 500-gram level for powder cocaine, creating a roughly 18:1 sentencing disparity.² Before the Fair Sentencing Act of 2010, the gap was even starker — 100:1 — despite the fact that crack and powder cocaine are all but identical in their effects.³ There is no justification in policy or science for either sentencing disparity; indeed, as Justice Sonia Sotomayor recently wrote in *Terry v. United States*, there never was.⁴ Yet such disparate sentencing has persisted for a quarter-century, helping drive the disproportionate incarceration of Black men and women in the federal system.⁵ According to one study, between 1991 to 2016, Black individuals were sentenced to federal prison for crack cocaine offenses seven times more often than whites, even though “most crack users were and still are white.”⁶

For years the Brennan Center has advocated for reforms that close the crack/powder sentencing disparity and provide relief to those affected by it.⁷ Now the time has come to end the disparity altogether. Judging from the overwhelming 361-66 vote by which the EQUAL Act passed the House of Representatives, lawmakers in both parties appear to agree.⁸ Yet we also understand the challenges of legislating in a closely divided Senate, even on issues that enjoy bipartisan support, such as this one.

We therefore encourage you to use all tools at your disposal to ensure this vital reform reaches the President's desk. Specifically, we ask that you consider including the

EQUAL Act in must-pass legislation, such as the National Defense Authorization Act.⁹ Such a move would not be without precedent. Indeed, less than a year ago the Senate restored Pell Grant eligibility for people in prison — a bipartisan reform also years in the making — as part of a “year-end spending deal.”¹⁰ We are aware of no reason that the EQUAL Act could not be passed by a similar method.

Sending the EQUAL Act to President Biden for his signature would amount to a legacy-defining accomplishment for the Administration and the Senate majority alike. It would vindicate the President’s pledge to lead on this specific issue, and on federal criminal legal reform in general.¹¹ And, most importantly, it would make federal sentencing fairer while reducing the enduring harms of discredited “drug war” policies.

We urge you to take this once-in-a-generation opportunity, and ensure that the EQUAL Act passes the Senate before the new year.

Sincerely,

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Endnotes

¹ EQUAL Act, S. 79, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/79>.

² 21 U.S.C. § 841(b)(1)(B)(ii), (iii).

³ American Civil Liberties Union, *Crack in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, 2006, 5, https://www.aclu.org/sites/default/files/field_document/cracksinsystem_20061025.pdf; Dorothy K. Hatsukami and Marian W. Fischman, “Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?,” *Journal of the American Medical Association* 276, no. 19 (1996): 1580.

⁴ See *Terry v. United States*, 593 U.S. ___, 141 S. Ct. 1858, 1865 (2021) (Sotomayor, J., concurring); Rachel Barkow, “Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing,” *Harvard Law Review* 133 (2019): 215, <https://harvardlawreview.org/2019/11/the-flawed-framework-of-the-armed-career-criminal-act-and-mandatory-minimum-sentencing/> (“Instead of researching the issue or seeking expert guidance — for example, by asking the newly created Sentencing Commission to address the topic — Congress set policy based on nothing more than its assumptions drawn from media accounts.”).

⁵ Barkow, “Categorical Mistakes,” at 213–14 (describing the 100:1 disparity’s origin in the Anti-Drug Abuse Act of 1986); Paul J. Hofer, “Federal Sentencing after Booker,” *Crime and Justice Volume 48* (2019): 173, <https://www.journals.uchicago.edu/doi/abs/10.1086/701712> (collecting research on racial disparities).

⁶ Shannon Mullen et al., “Crack vs. Heroin: An Unfair System Arrested Millions of Blacks, Urged Compassion for Whites,” *Asbury Park Press*, 2019, <https://www.app.com/in-depth/news/local/public-safety/2019/12/02/crack-heroin-race-arrests-blacks-whites/2524961002/>; United States Sentencing Commission, “Quick Facts on Crack Cocaine Trafficking Offenses,” 2019, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack_Cocaine_FY19.pdf.

⁷ Brennan Center for Justice, Letter to Senator Charles E. Schumer and Senator Mitch McConnell, September 30, 2021, <https://www.brennancenter.org/our-work/research-reports/brennan-center-letter-expressing-support-bipartisan-sentencing-reform>; Ames Grawert, “What is the First Step Act — And What’s Happening With it?,” *Brennan Center for Justice*, June 23, 2020, <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>.

⁸ See C.J. Ciaramella, “House Passes EQUAL Act to Erase Sentencing Disparity Between Crack and Powder Cocaine,” *Reason*, September 28, 2021, <https://reason.com/2021/09/28/house-passes-equal-act-to-erase-sentencing-disparity-between-crack-and-powder-cocaine/> (noting the bill’s passage by a “wide bipartisan vote” of 361-66).

⁹ Teagane Finn, Frank Thorp V, and Julie Tsirkin, “Schumer Tees up Timeline for Senate Through the End of the Year,” *NBC News*, November 14, 2021, <https://www.nbcnews.com/politics/congress/schumer-tees-timeline-senate-end-year-n1283861>.

¹⁰ Michael Stratford, “Congress Clinches Deal to Restore Pell Grants for Prisoners 26 Years after Ban,” *Politico*, December 20, 2020, <https://www.politico.com/news/2020/12/20/congress-pell-grant-prisoners-449364>.

¹¹ “The Biden Plan for Strengthening America’s Commitment to Justice,” accessed November 15, 2021, <https://perma.cc/6NHM-7FHM>.