

FAIRNESS IN COCAINE SENTENCING ACT OF 2009

DECEMBER 1, 2010.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 3245]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3245) to amend the Controlled Substances Act and the Controlled Substances Import and Export Act regarding penalties for cocaine offenses, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 3245, the “Fairness in Cocaine Sentencing Act of 2009,” sponsored by Rep. Scott (D-VA) repeals the reference to cocaine base from 21 U.S.C. §§ 841, 844, 960. This bill also eliminates the 5-year mandatory minimum sentence for simple possession of cocaine base.¹

BACKGROUND AND NEED FOR THE LEGISLATION

Crack cocaine, also known as cocaine base, is a method of packaging powder cocaine, produced by heating a mixture of powder cocaine (cocaine hydrochloride), baking soda (sodium bicarbonate), and water. The chemical interaction between these ingredients creates a hard material similar to a rock.² By 1986, crack cocaine was widely available and relatively inexpensive in large U.S. cities. The availability of crack cocaine accordingly revolutionized inner-city drug markets.³

The growth of the inner-city crack cocaine market gave rise to dramatic claims about the effects of crack cocaine on users and communities. Many believed that crack was more addictive than powder cocaine⁴ and that it was associated with greater levels of violence. In addition, public attention on children who had been exposed to crack in utero, or “crack babies,”⁵ gave rise to the perception that in-utero exposure to crack cocaine caused more pronounced developmental difficulties in children than in-utero exposure to powder cocaine.⁶ In June 1986, public concern intensified as a result of the high-profile death of Len Bias, a popular Washington area college basketball star. Bias’s death, on the evening he was celebrating being drafted by the Boston Celtics of the National Basketball Association, was believed to be related to crack cocaine. Ironically, Len Bias’s death was later shown to have been from a powder cocaine overdose—not a crack cocaine overdose as initially believed.

Following the intense public reaction to Bias’s death, Congress passed the Anti-Drug Abuse Act of 1986, establishing mandatory minimum sentences triggered by specific quantities of cocaine and crack cocaine.⁷ Because many lawmakers at the time believed crack cocaine was more dangerous than the powder form of the drug, the 1986 Act imposed stricter penalties for crimes involving even small amounts of crack cocaine. The Act accordingly provided for a 5 year mandatory minimum sentence for convictions of crimes

¹ Subsequent to the Committee’s ordering H.R. 3245 favorably reported, the Senate passed similar legislation, S. 1789, which, instead of eliminating the disparity in sentencing between crack and powder cocaine entirely, reduced the disparity from 100-to-1 down to 18-to-1. S. 1789 was agreed to by the House, and became Public Law No. 111–220. The Committee submits this report as a faithful description of the legislation approved by the Committee, as a contribution to the legislative history.

² Craig Reinerman & Harry G. Levine, *Crack in Context: America’s Latest Drug Demon*, in *Crack in America: Demon Drug, and Social Justice* 6–7 (Craig Reinerman & Harry G. Levine Eds., 1997).

³ *Id.* at 6–7.

⁴ United States Sentencing Comm’n [hereinafter, “USSC”], 2002 Report to the Congress: Cocaine and Federal Sentencing Policy (May 2002) 93.

⁵ John P. Morgan and Lynn Zimmer, *Social Pharmacology of Smokeable Cocaine*, in *Crack in America: Demon Drug, and Social Justice* 149, 151–152 (Craig Reinerman & Harry G. Levine Eds., 1997).

⁶ USSC, 2002 Report to the Congress: Cocaine and Federal Sentencing Policy (May 2002) 94.

⁷ Pub. L. No. 99–570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 et. seq. (2000)) [hereinafter “1986 Act”].

involving just 5 grams of crack cocaine, as compared to the same 5 year mandatory minimum for 500 grams of powder cocaine.⁸ In addition, a 10 year mandatory minimum sentence was established for individuals convicted of crimes involving just 50 grams of crack cocaine or 5000 grams of powder cocaine.⁹ The Omnibus Anti-Drug Abuse Act of 1988 further widened the disparity in drug sentencing, by specifying that simple possession of 5 grams or more of crack cocaine is subject to a 5-year mandatory minimum sentence, up to a 20-year maximum.¹⁰ In contrast, the maximum penalty for simple possession of any other illegal drug, including powder cocaine, remains at 1 year incarceration.

Over the last 20 years, the assumptions about the more severe effects of crack cocaine compared to powder cocaine have been proven unfounded. In particular, the violence associated with crack, similar to violence associated with the trafficking of other drugs, has been shown to be related to the illegal drug market, rather than any physiological effects of the drug itself.¹¹ The notable rise in violence in the mid-to-late 1980's, when crack cocaine began to infiltrate cities across the country, was associated with the growing drug market and the resulting territorial disputes between low-level street corner drug dealers.¹² Moreover, recent data indicates that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2005: 1) 57.3% of overall crack offenses did not involve weapons with regard to any participant; 2) 67.6 % of crack offenders had no personal weapons involvement; and 3) only 2.9% of crack offenders actively used a weapon.¹³

Scientific and medical research has also found that crack and powder cocaine have essentially the same pharmacological and physiological effects on a person. In 2002, Dr. Ira J. Chasnoff, President of the Children's Research Triangle, testified before the United States Sentencing Commission that "since crack and powder cocaine are essentially the same drug, the effects on the fetal brain are the same whether the mother used crack cocaine or powder cocaine."¹⁴ In November 2006, Dr. Nora Volkow, Director of the National Institute on Drug Abuse of the National Institute of Health testimony before the United States Sentencing Commission concluded the following:

Research consistently shows that the crucial variables at play are the immediacy, duration, and magnitude of cocaine's effects, as well as the frequency and amount of cocaine used rather than the form. In other words, the physiological and psychoactive effects of cocaine are similar re-

⁸ 21 U.S.C. 841(b)(1)(B)(ii) and (iii).

⁹ 21 U.S.C. 841(b)(1)(A)(ii) and (iii).

¹⁰ 21 U.S.C. 844(a).

¹¹ Paul J. Goldstein et al., Crack and Homicides in New York City: a Case Study in the Epidemiology of Violence, in *Crack in America: Demon Drug, and Social Justice* 120(craig Reinerman & Harry G. Levine Eds., 1997) [Hereinafter "Crack and Homicides in New York City"].

¹² *Id.* At 119–120.

¹³ USSC, 2007 Report to the Congress: Cocaine and Federal Sentencing Policy (2007) 32–33.

¹⁴ USSC, 2002 Report to the Congress: Cocaine and Federal Sentencing Policy (May 2002) E–4.

ardless of whether it is in the form of cocaine hydrochloride (powder) or crack cocaine.¹⁵

While many of the dangers and consequences thought to be associated with crack cocaine did not materialize, the crack cocaine law and other Federal drug laws have resulted in staggering increases in the number of Federal drug offenders in prison. For example, since 1980 offenders in Federal prisons for drug offenses has increased from 4,900 then to 99,047 in 2009.¹⁶ In 2009, drug offenders represent 52% of all Federal prison inmates.¹⁷ African Americans serve almost as much time in Federal prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months), largely due to sentencing laws such as the 100-to-1 crack-powder cocaine disparity.¹⁸

Government data demonstrate that drug use rates are similar among all racial and ethnic groups. For crack cocaine, two-thirds of users in the U.S. are white or Hispanic.¹⁹ Furthermore, research on drug market patterns demonstrates that drug users generally purchase drugs from sellers of the same racial or ethnic background.²⁰ Despite these facts, people of color are disproportionately subject to the penalties for both types of cocaine. Indeed, 81.8 percent of crack cocaine defendants in 2006 were African American.²¹

Four reports issued by the U.S. Sentencing Commission to Congress on the Federal cocaine sentencing policy, in 1995, 1997, 2002 and 2007, have all urged Congress to change the current Federal crack cocaine law.²² The Commission report in 2007 reiterated its 2002 findings that the current severity of crack cocaine penalties mostly impacts minorities, overstates the harmfulness of crack cocaine in comparison with powder cocaine, and overstates the seriousness of most crack cocaine offenses.²³ In order to address these findings, the Commission recommended that Congress repeal the mandatory minimum penalty for simple possession of crack cocaine under 21 U.S.C. 844, reduce the 100-to-1 disparity, and increase the threshold quantities for crack cocaine offenses that result in 5- and 10-year mandatory minimum sentences in order to concentrate on more major traffickers.²⁴

¹⁵ Testimony of Nora D. Volkow, M.D. before the U.S. Sentencing Commission (November 14, 2006).

¹⁶ Marc Mauer and Ryan S. King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, The Sentencing Project, 11 (September 2007) update with 2009 statistics.

¹⁷ *Id.*

¹⁸ *Id.* at 23.

¹⁹ Substance Abuse and Mental Health Services Administration, *Results from the 2005 National Survey on Drug Use and Health: Detailed Table J* (Washington, DC: Sept. 2006), Table 1.43a.

²⁰ Dorothy Lockwood, Anne E. Pottieger, and James A. Inciardi, "Crack Use, Crime by Crack Users, and Ethnicity," in Darnell F. Hawkins, ed., *Ethnicity, Race and Crime*. New York: State University of New York Press, 1995, p. 21.

²¹ USSC, 2007 Report to the Congress: Cocaine and Federal Sentencing Policy (2007) 15.

²² United States Sentencing Commission [hereinafter, "USSC"], 2007 Report to the Congress: Cocaine and Federal Sentencing Policy (May 2007); USSC, 2002 Report to the Congress: Cocaine and Federal Sentencing Policy (May 2002); USSC, 1997 Special Report to the Congress: Cocaine and Federal Sentencing Policy (As Directed by Section 2 of Pub. L. No. 104-38) (April 1997); USSC, 1995 Special Report to the Congress: Cocaine and Federal Sentencing Policy (As Directed by Section 280006 of Pub. L. No. 103-322) (February 1995).

²³ USSC, 2007 Report to the Congress: Cocaine and Federal Sentencing Policy 7-8 (2007).

²⁴ *Id.*

HEARINGS

The Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security held a day of hearings on May 21, 2009 on legislation addressing this issue, including H.R. 1459, the "Fairness in Cocaine Sentencing Act of 2009"; H.R. 2178, the "Crack Cocaine Equitable Sentencing Act of 2009"; H.R. 265, "Drug Sentencing Reform and Kingpin Trafficking Act of 2009"; H.R. 1466, the "Major Drug Trafficking Prosecution Act of 2009"; and H.R. 18, the "Powder-Crack Cocaine Equalization Act of 2009." Testimony was received from four Congressional Members, including Rep. Charles B. Rangel (D-NY); Rep. Sheila Jackson Lee (D-TX); Rep. Roscoe G. Bartlett (R-MD); and Rep. Maxine Waters, (D-CA).

Testimony was also received from the Honorable Lanny A. Breuer, Assistant U.S. Attorney General for the Criminal Division of the Department of Justice; The Honorable Ricardo H. Hinojosa, Acting Chairman of the United States Sentencing Commission; Willie Mays Aikens, former Kansas City Royal and Federal drug offender; Marc Mauer, Executive Director of The Sentencing Project; Veronica Coleman Davis, President and CEO of the National Institute of Law and Equity (NILE); Scott Patterson, District Attorney, Easton, Maryland, on behalf of Joseph I. Cassilly, President of the National District Attorneys' Association; and Bob Bushman, Vice President, National Narcotics Officers Association. Additional materials were submitted by Families Against Mandatory Minimums, the American Bar Association, Harvard Law Professor Charles Ogletree, and the Justice Roundtable Coalition.

H.R. 3245 was introduced by Crime Subcommittee Chairman Scott on July 16, 2009, in light of the May 21 hearings.

COMMITTEE CONSIDERATION

On July 22, 2009, the Subcommittee on Crime, Terrorism, and Homeland Security met in open session and ordered the bill H.R. 3245 favorably reported without amendment, by voice vote, a quorum being present. On July 29, 2009, the Committee met in open session and ordered the bill H.R. 3245 favorably reported without amendment, by a rollcall vote of 16 to 9, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 3245:

1. A motion by Rep. Issa to table the appeal of the Chair's ruling that an amendment offered by Rep. Darrell Issa was non-germane. Agreed to 14 to 13.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt	X		
Mr. Wexler	X		
Mr. Cohen	X		
Mr. Johnson			
Mr. Pierluisi	X		
Mr. Quigley			
Mr. Gutierrez			
Mr. Sherman			
Ms. Baldwin			
Mr. Gonzalez			
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz	X		
Mr. Maffei			
Mr. Smith, Ranking Member		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Issa		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Rooney		X	
Mr. Harper		X	
Total	14	13	

2. Motion to report H.R. 3245 favorably. Passed 16 to 9.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Mr. Gutierrez			
Mr. Sherman	X		
Ms. Baldwin			
Mr. Gonzalez			
Mr. Weiner	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Schiff	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz	X		
Mr. Maffei			
Mr. Smith, Ranking Member		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Issa		X	
Mr. Forbes		X	
Mr. King			
Mr. Franks			
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz			
Mr. Rooney		X	
Mr. Harper			
Total	16	9	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3245, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 1, 2009.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3245, the “Fairness in Cocaine Sentencing Act of 2009.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 3245—Fairness in Cocaine Sentencing Act of 2009.

CBO estimates that implementing H.R. 3245 would lead to reduced spending by the Federal prison system of \$3 million over the 2010–2014 period. Enacting the bill could affect direct spending and revenues, but CBO estimates that any such effects would not be significant.

H.R. 3245 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

Under current law, persons convicted of offenses involving crack cocaine or powder cocaine are subject to mandatory minimum prison sentences, but the drug quantity necessary to trigger the minimum sentence is lower for crack cocaine. H.R. 3245 would eliminate this disparity and provide equal punishment for all cocaine offenses. In doing so, the bill would decrease prison sentences and potential fines for crack cocaine offenders.

The U.S. Sentencing Commission analyzed the bill’s impact on the Federal prison population. Based on this analysis, CBO estimates that the shorter sentences required under the bill would decrease the prison population by about 250 person-years over the 2010–2014 period. According to the Bureau of Prisons, a decrease in the Federal prison population of this magnitude would save about \$10,000 a year for each prisoner. CBO estimates that the savings from implementing H.R. 3245 would total \$3 million over the 2010–2014 period.

Because those prosecuted and convicted for offenses involving cocaine could be subject to criminal fines, the Federal Government might collect smaller fines if H.R. 3245 is enacted. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent. CBO estimates that any such effects would have negligible net costs over the 2009–2014 and 2009–2019 periods.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3245, eliminates the distinction between crack cocaine (i.e. cocaine base) and powder cocaine in Federal law, as well as the mandatory minimum Federal sentence for cocaine base.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 1 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3245 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the “Fairness in Cocaine Sentencing Act of 2009.”

Sec. 2. Elimination of increased penalties for cocaine offenses where the cocaine involved is cocaine base. Section 2 eliminates distinction in penalties as between cocaine and cocaine base. Subsection (a) eliminates the distinction with respect to penalties for manufacturing, distributing, or dispensing, including the mandatory minimum sentence for simple possession of cocaine base. Subsection (b) eliminates the distinction with respect to importing and exporting.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CONTROLLED SUBSTANCES ACT

* * * * *

PART D—OFFENSES AND PENALTIES

PROHIBITED ACTS A—PENALTIES

SEC. 401. (a) * * *

(b) Except as otherwise provided in section 409, 418, 419, or 420 any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) * * *

* * * * *

[(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;]

* * * * *

(B) In the case of a violation of subsection (a) of this section involving—

(i) * * *

* * * * *

[(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;]

* * * * *

PENALTY FOR SIMPLE POSSESSION

SEC. 404. (a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 303 of this title or section 1008 of title III if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropranolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than 1 year, and be fined a minimum of \$1,000, or both, except that if he commits such offense after a prior conviction under this title or title III, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of \$2,500, except, further, that if he commits such offense after two or more prior convictions under this title or title III, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of \$5,000. [Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of \$1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram.] Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or

both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, United States Code, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

* * * * *

**SECTION 1010 OF THE CONTROLLED SUBSTANCES
IMPORT AND EXPORT ACT**

PROHIBITED ACTS A—PENALTIES

SEC. 1010. (a) * * *

(b)(1) In the case of a violation of subsection (a) of this section involving—

(A) * * *

* * * * *

[(C) 50 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;]

* * * * *

(2) In the case of a violation of subsection (a) of this section involving—

(A) * * *

* * * * *

[(C) 5 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;]

* * * * *

ADDITIONAL VIEWS

As part of the Anti-Drug Abuse Act of 1986, Congress enacted statutory mandatory minimum sentences for various illegal drugs, including a 5-year mandatory minimum sentence for trafficking 5 grams of crack cocaine and 500 grams of powder, and a 10-year mandatory minimum sentence for trafficking 50 grams of crack cocaine and 5 kilograms of powder cocaine, creating the 100 to 1 disparity that exists today.

Based upon the information available at the time, it was believed that crack and powder cocaine were different substances and that they did in fact have a different impact. We know now, however, that as far as substances are concerned, they are basically the same. Crack and powder cocaine have identical effects. There is some evidence that suggests that crack is slightly more addictive because it is smoked rather than snorted. Smoking the drug causes it to reach the brain faster, and it also wears off more quickly. This makes users want to smoke it more often, but that hardly justifies imposing the same mandatory minimum sentence for possession of 5 grams of crack as is imposed for 500 grams of powder. Both the Supreme Court and the U.S. Sentencing Commission have recognized the unfairness in this disparity and have acted to reduce it, but only Congress is able to eliminate the disparity altogether.

Passed at a time when a crack cocaine epidemic was ravaging inner cities and fueling gang violence, the law was intended to target the kingpins at the top of the crack trade. According to a 2002 report by the U.S. Sentencing Commission, it has swept up mostly small-time, street-level dealers. When low-level crack dealers are punished more harshly than wholesale suppliers of powder cocaine, a necessary ingredient to make crack, it undermines people's confidence in the criminal justice system. In order for a law to be respected, it has to be consistent, and it has to make sense.

Instead of reducing drug addiction and crime, our current drug policy has contributed to the swelling of the inmate population in our prisons. The United States currently has more than 2.3 million people behind bars, which is the most prisoners of any country and the highest per capita rate of prisoners in the world. One in 31 Americans is currently in prison, on parole, or on probation, and over 50% of these inmates are imprisoned for drug crimes. Expanded use of prison sentences for drug crimes has caused a dramatic increase in state and Federal corrections costs. Since the enactment of mandatory minimum sentencing for drug users, the Federal Bureau of Prisons' budget increased from \$220 million in 1986 to \$5.4 billion in 2008.

Since enactment, it has become apparent that the incidence of this sentencing differential falls disproportionately on African-American defendants. While African Americans comprise only 12.3 percent of the U.S. population in general, they make up 81.8 percent of crack cocaine offenders. They are incarcerated at nearly six times the rate of whites.

Criminal sentencing should be uniform between similarly situated offenders and proportional to the crime, but mandatory sentences for crack cocaine have resulted in excessively severe sentences. Because crack offenses carry longer sentences than equivalent powder cocaine offenses, African-American defendants sen-

tenced for cocaine offenses wind up serving prison terms that are greater than those served by other cocaine defendants. Statutes that provide for the mandatory minimum sentences for crack cocaine and the Federal sentencing guidelines have in effect violated the equal protection component of the Fifth Amendment due process clause. The Equal Protection Clause commands that "all persons similarly circumstanced shall be treated alike." Due process demands that the law shall not be unreasonable, arbitrary, or capricious, and the means selected shall have a real and substantial relation to the object.

Cocaine has a devastating effect on our society, but we cannot address the problem through law enforcement alone. Many inmates struggle with drug addiction, and not all inmates get the treatment they need. According to the Bureau of Justice Statistics, less than 15 percent of Federal offenders with drug problems receive treatment while in prison. Funding shortages for addiction recovery programs, a lack of in-prison treatment, and inadequate rehabilitation options create a bleak reentry situation for drug offenders.

Treatment interventions for substance abuse are far more cost-effective than a continued reliance on our overburdened prison system. A series of studies in recent years have demonstrated that drug treatment both within and outside of the criminal justice system is more cost effective in controlling drug abuse and crime. A study by the R.A.N.D. Corporation concluded that spending one million dollars to expand the use of mandatory sentencing for drug offenders would reduce drug consumption nationally by 13 kilograms, but spending the same amount on treatment would reduce consumption by almost eight times that number. The bottom line is that inmates who receive treatment are less likely to revert back to drugs than those who do not. The best solution is one that combines tough enforcement with robust prevention and treatment efforts.

There is growing concern that there should not be a 100:1 ratio in the amounts of powder and crack cocaine that trigger mandatory minimum sentences. In 2007, the U.S. Sentencing Commission, which sets the advisory guideline range that Federal judges use when sentencing defendants, unanimously voted to reduce lengthy sentences for people convicted of crack cocaine related offenses. It was intended as a step toward reducing some of the unwarranted disparity. The amendment went unchallenged by Congress and went into effect on November 1, 2007. In December of the same year, the Commission made the guideline change retroactive to persons sentenced prior to November 1st. Retroactivity of the crack cocaine amendment became effective on March 3, 2008. Not every crack cocaine offender will be eligible for a lower sentence under the decision. A Federal sentencing judge will make the final determination of whether an offender is eligible for a lower sentence and how much that sentence should be lowered.

The Sentencing Commission addressed the sentencing policy on its own, and the Supreme Court has taken a similar approach. On January 12, 2005, a momentous Supreme Court decision in *United States v. Booker* changed the terrain of Federal sentencing. The decision essentially made room for reform within the Federal system by changing the sentencing guidelines from mandatory to advisory, returning discretion to the sentencing judge.

In late 2007, in *United States v. Kimbrough*, the Supreme Court made a fundamental change in how Federal judges apply sentencing guidelines regarding cocaine. The *Kimbrough* decision extended the *Booker* principle to the issue of crack cocaine. The Court ruled that a Federal judge hearing a crack cocaine case may consider the disparity between the treatment of crack and powder offenses, allowing Federal judges to sentence outside the sentencing guidelines range and impose more reasonable prison sentences for persons convicted of offenses involving crack cocaine. This decision clarified that both the Sentencing Guidelines and the crack to powder ratio are considerations for the district court to take into consideration when sentencing a defendant.

H.R. 3245, the Fairness in Cocaine Sentencing Act of 2009 would eliminate the current 100-to-1 sentencing disparity between crack and powder cocaine sentences. The bill would remove references to "cocaine base" from the U.S. Code, effectively treating all cocaine, including crack, the same for sentencing purposes. It is important to note that the possession and sale of any amount of either drug is still a felony. The bill only addresses the trigger levels for mandatory minimum sentencing, not whether or not it is a felony. All cocaine, in whatever form, will be punished at the current level of powder cocaine. This ensures that those individuals who have violated the law will be punished fairly relative to the punishment. I fully support efforts to address the disparity in crack and powder cocaine sentencing and hope the full House takes this up as soon as possible.

DANIEL MAFFEI.

DISSENTING VIEWS

We oppose H.R. 3245, which effectively removes crack cocaine from the Federal drug laws, and, by doing so, eliminates any distinction between penalties for crack and powder cocaine trafficking offenses. This legislation sends the wrong message to drug dealers: that Congress does not take drug-trafficking crimes seriously.

Twenty-five years ago, crack cocaine trafficking strangled many communities—especially inner-city communities—where residents lived in fear of dealers who controlled the street-corners. In 1986, the Democratic-controlled Congress responded to this epidemic of drug-dealing and its attendant violence by rightly enacting tough Federal drug sentencing policies, including different penalties for crack and powder cocaine trafficking. And these drug-sentencing policies have reduced drug-related violence in our cities.

Crack and powder cocaine use has dropped by almost two-thirds in the last 20 years, from 5.8 million users in 1985 to 2.1 million users in 2007.¹ The substantial increase in violence in the mid and late 1980s was attributed to the introduction of crack cocaine in 1985. Today, crime rates—particularly for violent crime—are at their lowest in more than thirty years, thanks in large part to the enactment of tough penalties for drug trafficking and other offenses.

Section 401 of the Controlled Substances Act (21 U.S.C. § 841) imposes penalties for trafficking various illegal drugs based upon threshold amounts that are specific and unique to each drug. While 1000 kilograms are required to trigger penalties for major traffickers of marijuana, only 1 kilogram is required for heroin. The same is true for crack cocaine. It would be imprudent for Congress to eliminate thresholds specific to crack cocaine from the Federal drug statutes. To do so ignores the distinction between crack and powder cocaine consumption and distribution.

That is why organizations on the front lines in keeping our communities safe, including the Fraternal Order of Police, the National Sheriff's Association, the International Association of Chiefs of Police, the National Narcotics Officers Association Coalition, and the National District Attorneys Association, all oppose eliminating the sentencing ratio between crack and powder cocaine.

REPEATING HISTORY: THE CRACK EPIDEMIC OF THE 1980'S

In the 1980s, cocaine was primarily shipped to the United States through the Bahamas. A large supply of cocaine powder in these islands caused the price to drop by 80 percent. Faced with plummeting prices, drug dealers made the shrewd decision to convert the powder to “crack”—a smokeable form of cocaine. Crack was cheaper than powder cocaine, simple to produce and highly profitable. As early as 1981, crack appeared in Los Angeles, San Diego, Houston, and in the Caribbean.²

Powder cocaine was sold on the street for \$100 per gram but with only 55 percent purity. In contrast, crack had 80 percent or higher purity and could be bought in some major cities for as little

¹See *infra* note 2; see also *infra* note 7.

²*The Crack Epidemic, DEA History, 1985–1990*, DRUG ENFORCEMENT ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE, available at <http://www.justice.gov/dea/pubs/history/1985-1990.html>.

as \$2.50 per dose. Crack produced an instant high that caused its users to become addicted in a very short time.³

The number of Americans addicted to cocaine dramatically increased thanks to the escalation in crack use. In 1985, 5.8 million Americans admitted to using cocaine on a routine basis, according to the Department of Health and Human Service's National Household Survey. According to DAWN statistics, cocaine-related hospital emergencies rose by 12 percent in 1985, from 23,500 to 26,300. Hospital emergencies increased by 110 percent in 1986, from 26,300 to 55,200. From 1984 and 1987, cocaine incidents increased fourfold.⁴

In 1986, crack distribution skyrocketed and was now available in 28 states and the District of Columbia. According to the 1985–1986 National Narcotics Intelligence Consumers Committee Report, crack was available in Atlanta, Boston, Detroit, Kansas City, Miami, New York City, Newark, San Francisco, Seattle, St. Louis, Dallas, Denver, Minneapolis, and Phoenix.⁵

By the late 1980s, more than 10,000 gang members were dealing drugs in some 50 cities across the country. The crack epidemic had spawned a dramatic increase in violence and crack-related murders in many large cities skyrocketed. For example, a 1988 study by the Bureau of Justice Statistics found that in New York City crack use was tied to 32% of all homicides and 60% of drug-related homicides.⁶

CRACK AFFECTS ITS USERS DIFFERENTLY THAN POWDER COCAINE

The National Institute on Drug Abuse (NIDA) reported in 2008 on the effects of cocaine on the human body.

Abusing cocaine has a variety of adverse effects on the body. For example, cocaine constricts blood vessels, dilates pupils, and increases body temperature, heart rate, and blood pressure. It can also cause headaches and gastrointestinal complications such as abdominal pain and nausea. Because cocaine tends to decrease appetite, chronic users can become malnourished as well. Different methods of taking cocaine can produce different adverse effects. Regularly snorting cocaine, for example, can lead to loss of the sense of smell, nosebleeds, problems with swallowing, coarseness, and a chronically runny nose. Ingesting cocaine can cause severe bowel gangrene as a result of reduced blood flow. Injecting cocaine can bring about severe allergic reactions and increased risk for contracting HIV and other blood-borne diseases. Binge patterns of use may lead to irritability, restlessness, anxiety, and paranoia. Cocaine abusers can suffer a temporary state of full-blown paranoid psychosis, in which they lose touch with reality and experience auditory hallucinations. Regardless of how or how frequently cocaine is used, a user can experience acute cardiovascular or cerebro-vascular emergencies, such as a heart attack or stroke, which may cause sudden death. Cocaine-related deaths are

³*Id.*

⁴*Id.*

⁵*Id.*

⁶*Id.*

often a result of cardiac arrest or seizure followed by respiratory arrest.⁷

Although cocaine's physiological effects on the body may be the same when one ingests it in either powder or crack form, research shows that crack results in a faster and shorter high, resulting in more frequent use. According to NIDA:

The intensity and duration of cocaine's effects, which include increased energy, reduced fatigue, and mental alertness, depend on the route of drug administration. The faster cocaine is absorbed into the bloodstream and delivered to the brain, the more intense the high. Injecting or smoking cocaine produces a quicker, stronger high than snorting. On the other hand, faster absorption usually means shorter duration of action. The high from snorting cocaine may last 15 to 30 minutes, but the high from smoking may last only 5 to 10 minutes. In order to sustain the high, a cocaine abuser has to administer the drug again. For this reason, cocaine is sometimes abused in binges—taken repeatedly within a relatively short period of time, at increasingly high doses.

A study by the University of Minnesota entitled “Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?” found that:

The physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride or crack cocaine (cocaine base). However, evidence exists showing a greater abuse liability, greater propensity for dependence, and more severe consequences when cocaine is smoked (cocaine-base) . . . compared with intranasal use (cocaine hydrochloride). The crucial variables appear to be the immediacy, duration, and magnitude of cocaine's effect, as well as the frequency and amount of cocaine used rather than the form of the cocaine.⁸

When smoked, cocaine (i.e. crack) results in a quicker onset and faster penetration. “Generally, smoked cocaine reaches the brain within 20 seconds; the effects last for about 30 minutes, at which time the user, to avoid the effects of a ‘crash,’ re-uses.”⁹ The Drug Enforcement Administration (DEA) reports that a crack user will consume between 3.3 to 16.5 grams of crack a week, which translates to an average of 13.2 grams to 66 grams per month.¹⁰ Crack has a higher purity and is therefore more potent than powder cocaine. While powder cocaine is between 47.6 and 53.1% pure, crack's purity is as high as 60 to 63.5%.

When powder cocaine is snorted, it has a slower onset. Psychological effects on the user from snorting cocaine peak within 20 minutes and the physical effects will manifest themselves within 40 minutes. Ultimately, the effects from snorting cocaine typically

⁷*NIDA InfoFacts: Cocaine*, NATIONAL INSTITUTE ON DRUG ABUSE, Aug. 2008, available at <http://www.nida.nih.gov/pdf/infofacts/Cocaine08.pdf>.

⁸D. K. Hatsukami and M. W. Fischman, Department of Psychiatry, Division of Neurosciences, University of Minnesota, Minneapolis (1996).

⁹*Statement of Joseph I. Cassilly*, President-Elect, NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, before the House Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security, Feb. 26, 2008.

¹⁰*Id.*

last for as long as an hour beyond when the user's high peaks.¹¹ "A typical user snorts between two and three lines at a time and consumes about 2 grams per month. Using these amounts, the cost per user per month for crack cocaine is between \$1,300 and \$6,600 as compared to a cost for powder cocaine of \$200 per month; a 6.5:1 to 33:1 ratio in cost."¹²

CRACK OFFENSES ARE MORE-OFTEN ASSOCIATED WITH OTHER
AGGRAVATING FACTORS

While cocaine base—crack—and cocaine hydrochloride—cocaine powder—are chemically similar, there are significant differences in the predominant way the two substances are ingested and marketed. Because crack is distributed in such relatively small amounts in transactions that often occur on street corners, control of small geographic areas by traffickers takes on great importance. As a result, crack offenders are more likely to possess a weapon, and crack is often associated with serious crime related to its marketing and distribution, especially violent street crime connected with gangs, guns, serious injury and death.

Cocaine trafficking patterns, moreover, lead to high rates of violence associated with both powder and crack cocaine trafficking, but especially with crack trafficking. Although crack trafficking methods vary widely, generally, they are conducted at three broad levels, namely, wholesale trafficking, mid-level distribution, and retail selling. Wholesale crack traffickers purchase cocaine in kilogram or multi-kilogram allotments from traditional cocaine sources.

Sentencing Commission data show that crack cocaine is associated with violence to a greater degree than most other controlled substances. In fiscal year 2008 28.1% of all federal crack offenders either received a weapons enhancement under the sentencing guidelines or were convicted of a separate weapons charge.¹³ In fiscal year 2008, only 16.9% of powder cocaine offenders either received a weapons enhancement or were convicted of a weapons charge.¹⁴ In addition, in fiscal years 2007 and 2008, the average criminal history category for crack cocaine offenders was Category IV, compared to Category II for powder cocaine offenders.¹⁵

Much of the crack cocaine violence is associated with gang activity, and drug gang violence has increased in recent years. Many drug gangs that traffic in crack cocaine include very young members who carry and use guns to promote their drug trafficking. Crack cocaine is associated more with street level gang violence than is cocaine powder, although gangs also deal in methamphetamine, PCP, and many other controlled substances.

National Drug Intelligence Center (NDIC) National Drug Threat Survey (NDTS) data for 2007 show that 40.1 percent of state and local law enforcement agencies report cocaine or crack cocaine as the greatest drug threat in their area—higher than for any other

¹¹*Id.*

¹²*Id.*

¹³*Statement of Ricardo H. Hinojosa*, Acting Chair, UNITED STATES SENTENCING COMMISSION, before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, May 21, 2009, at 10.

¹⁴*Id.*

¹⁵*Id.* at 11.

drug.¹⁶ Moreover, NDTS data show that nationally, the percentage of state and local agencies that identified cocaine [powder or crack] as the drug that most contributed to violent crime (46.9%) and property crime (40.9%) was much higher than for any other drug. Compounding the problem posed to the nation by cocaine-related crime is the relatively high number of cocaine abusers.

National Survey on Drug Use and Health (NSDUH) data for 2006 show that more than six million individuals aged 12 and older used cocaine within the past year, similar to 2005 (5.5 million users) and at a rate higher than for all other illegal drugs except marijuana.¹⁷

CONCLUSION

H.R. 3245 threatens to return America to the days when crack cocaine decimated a generation and destroyed communities. We cannot support legislation that ignores the violent and devastating crack cocaine epidemic of the past and the horrible effects of crack cocaine on our neighborhoods and communities nationwide.

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¹⁶ *National Drug Threat Assessment 2008*, NATIONAL DRUG INTELLIGENCE CENTER, U.S. DEPARTMENT OF JUSTICE, available at <http://www.usdoj.gov/ndic/pubs25/25921/25921p.pdf>.

¹⁷ *Id.*