



**House Committee on the Judiciary
United States House of Representatives**

**Statement for the Record
American Civil Liberties Union**

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

June 17, 2021

We thank the United States House of Representatives’ Committee on the Judiciary for holding this hearing to recognize the 50th anniversary of the war on drugs and the need for sentencing reform.

For 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to everyone in this country. Through advocacy and litigation, the ACLU has been seeking an end to the failed war on drugs and our costly addiction to incarceration for decades.

The war on drugs has sent millions of people to prison and seriously eroded our civil liberties and civil rights while costing taxpayers billions of dollars every year. Fifty years later we have nothing to show for these sacrifices except our status as the world’s largest incarcerator. As you know, those we incarcerate, including in federal prisons, are disproportionately Black and brown. The drug war has deepened racial injustice, shattered neighborhoods, and separated families, all without evidence that it has improved public safety. This anniversary is a shameful one and it is long past time for Congress to recognize the failure of this approach and begin down a radically different path.

From the beginning, the war on drugs was intended to decimate the Black community. John Ehrlichman, the Watergate co-conspirator and President Nixon’s domestic affairs aide, [told a reporter](#) decades after Nixon declared the war on drugs: “We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin and then criminalizing both heavily, we could disrupt those communities.” Ehrlichman continued: “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.”



The drug war has achieved only the harmful purposes President Nixon intended—disrupting, vilifying, and oppressing communities of color.

On this 50th anniversary of the drug war, Congress must take immediate actions to repair the harms the drug war has inflicted on people and communities—especially people and communities of color. Congress must also begin building a new comprehensive drug policy system that prioritizes health and harm reduction over criminalization and incarceration.

Here are 10 things Congress can and must do now to stop the drug war and begin to heal the damage it has wrought:

- 1. End mandatory minimum sentencing laws.** Perhaps the single most impactful action Congress can take to reduce mass incarceration is to repeal all existing mandatory minimum sentencing laws and cease passing new ones. Between 1980 and 2013, the federal prison population grew by [750 percent](#), and that growth is due to lengthy drug sentences. Indeed, [nearly half](#) of the people in federal prison are there for drug offenses. Congress must end all mandatory minimum sentencing, beginning with the drug mandatory minimums, by passing measures like the Mandatory Minimum Reform Act, which repeals the drug mandatory minimums. It must also pass legislation to end all mandatory minimum sentencing laws, including the Justice Safety Valve Act, which allows courts to sentence below the mandatory minimum for any offense.
- 2. Ensure retroactive relief for people previously sentenced under the mandatory minimum regime of the drug war.** Congress enacted meaningful sentencing reforms in the FIRST STEP Act of 2018, but people who were sentenced before the law was passed did not benefit. No person should continue serving a sentence Congress has since deemed excessive and unjust. Congress should pass legislation to fix sentencing disparities and not create new ones. Congress must pass the First Step Implementation Act (H.R. 3510/S. 1014), which will make the FIRST STEP sentencing reforms retroactive. Any additional sentencing reforms Congress passes should include retroactive application of the new law. The EQUAL Act (H.R. 1693/S. 79), for example, eliminates the crack/powder disparity and ensures its sentencing reform is made retroactive.
- 3. Remove marijuana from the Controlled Substances Act.** Both public opinion and sage public policy have called for an end to marijuana prohibition. In fact, 17 states have legalized adult use of marijuana and 36 states and the District of Columbia have legalized the use of medical



marijuana. Yet, at the federal level, marijuana remains a Schedule I substance, subjecting people involved in marijuana activities to harsh penalties and preventing a range of scientific research that could upend decades of propagandized misinformation driven by racism and fear. The consequences of criminalization are felt most harshly by people of color. Though marijuana use is roughly equal among Blacks and whites, Blacks are [3.73 times](#) as likely to be arrested for marijuana possession. The enforcement of these laws burdens individuals with conviction records that harm their ability to work, find housing, and provide for their families and their future. Congress must pass the Marijuana Opportunity, Reinvestment, and Expungement (MORE) Act (H.R. 3617), which will decriminalize marijuana at the federal level while enabling states to set their own regulatory policies without threat of federal interference. Significantly, the bill also addresses the collateral consequences of federal marijuana criminalization and takes steps to ensure the legal marketplace is diverse and inclusive of individuals most adversely affected by prohibition.

4. **End penalties for simple drug possession.** Simply possessing drugs for personal use must be decriminalized by repealing the federal simple possession statute, 21 U.S.C. § 844. In addition, simple possession of a controlled substance and positive drug tests must not be permissible grounds for incarceration when a person is under federal supervision, including pretrial supervision and supervised release. Accordingly, Congress must pass [the Drug Policy Reform Act of 2021](#) to end criminal penalties for personal use drug possession, and pass legislation to end penalties for personal use while under court supervision.
5. **End the presumptions against pretrial release, including the presumption in alleged drug felony cases.** Current federal law turns the presumption of innocence on its head for people awaiting trial on felony drug charges, among other offenses. Under the Bail Reform Act of 1984, courts must adhere to the presumption that people are not safe for release if they are charged with most any felony drug offense. As a result, the federal pretrial detention rate is an appalling [75 percent](#). In fact, [over one-third](#) of people sitting in federal lock-up were denied bond based on the presumption in drug cases. Congress must pass the Smarter Pretrial Detention for Drug Charges Act (S. 309) to end this presumption in drug cases and pass similar legislation to end pretrial detention presumptions in all cases.
6. **Lift the ban on second chances.** After Congress abolished federal parole in the Sentencing Reform Act of 1984, people serving a federal sentence lost any possibility of a second chance, regardless of how strong the evidence is



that they are prepared to return to the community. That, coupled with a policy of imposing longer prison sentences, resulted in a [280 percent](#) increase, between 1999 to 2016, in the number of people 55 or older in state and federal prisons. Research shows incarcerating the elderly does not make us safer, since people [age out of crime](#) and long sentences [do little to deter](#) crime. Congress must pass measures to review lengthy sentences, including the Second Look Act, which gives people who have served 10 or more years of their sentence the opportunity to file a motion in court and present their case for a lower sentence.

- 7. End collateral consequences and support successful reentry.** People with criminal records face numerous barriers when they return to the community, particularly when seeking employment, housing, and public benefits. To address these barriers, Congress should pass the Workforce Justice Act (H.R. 1598) to encourage states to adopt “ban the box” policies for private employers; the Medicaid Reentry Act (H.R. 955/S. 285) to allow an individual leaving prison to resume Medicaid and prepare reentry services in the last 30 days of incarceration; and the Fair Chance at Housing Act to lower barriers to housing for people with a criminal record. Congress should also aid reentry efforts by passing measures contained in the NEXT STEP Act that will reinstate the right to vote in federal elections for formerly incarcerated individuals; allow a path to seal records of nonviolent drug offenses and automatically seal or expunge juvenile records; remove the lifetime ban on federal TANF and SNAP benefits for people with nonviolent drug offenses; remove barriers that prevent people with criminal convictions from receiving occupational licenses for jobs such as hairdressers and taxi drivers; and ensure that anyone released from federal prison receives a photo identification, birth certificate, and Social Security card.
- 8. End civil asset forfeiture.** Civil asset forfeiture, which allows law enforcement to take property from someone who has not been convicted of a crime, has long been used to carry out the war on drugs and has the same disproportionate impact on people of color. The practice is driven by the billions of dollars it generates annually for law enforcement at all levels because law enforcement is permitted to keep the assets it forfeits. Civil asset forfeiture also contributes to militarized policing because law enforcement departments use profits from forfeitures to purchase military weapons and equipment with little oversight or accountability. For example, between 2008 and 2014, police departments spent [\\$2.5 billion](#) from federal civil forfeiture seizures, with over \$177 million of that spent on weapons. In 2018, the DOJ Asset Forfeiture fund amassed a net balance of about [\\$1.5 billion](#). Moreover, property owners who challenge a seizure bear the burden and the costs of



demonstrating a property's "innocence" and are not entitled to a lawyer. Congress must act by passing the Fifth Amendment Integrity Restoration (FAIR) Act (H.R. 2857), to end federal and state/local partnerships known as "equitable sharing" that have been used to circumvent state civil forfeiture reforms; increase the burden of proof in civil forfeiture proceedings from a "preponderance of evidence" to "clear and convincing evidence" before the government can take someone's property; and provide property owners the right to counsel in all civil forfeiture proceedings.

- 9. End penalties for exercising the Sixth Amendment right to trial.** The trial penalty—the enhanced sentence used to penalize people who exercise their right to have a trial instead of pleading guilty—undermines the Constitutional right to a jury trial that is the core of our judicial process. As a result of the trial penalty, only about [2 percent](#) of federal cases go to trial. And those who do, face a higher sentence. Congress should pass legislation that amends the United States Sentencing Guidelines to remove penalties imposed on individuals who exercise their right to trial and right to testify in their own defense. Congress should also ensure that accused people receive all exculpatory evidence prior to entering a guilty plea. Congress should also pass the Prohibiting Punishment of Acquitted Conduct Act (S. 601) so courts will no longer be able to sentence a person based on acquitted conduct.
- 10. Ensure the United States Sentencing Commission is a balanced body that considers the interests of people charged with drug crimes.** The United States Sentencing Commission is an independent commission in the judicial branch that establishes sentencing policies for the federal criminal justice system. The Commission is responsible for promulgating the U.S. Sentencing Guidelines which, though not binding on judges, exert enormous influence in determining how long someone will be incarcerated when convicted of a federal crime. In addition to its seven voting members, the Attorney General or the Attorney General's designee serves as a nonvoting member of the Commission. This nonvoting membership gives the prosecution an important opportunity to influence the Commission's work. Current law, however, does not give any comparable influence to the individuals who are the very subject of the Commission's sentencing policies. There is no justification for this one-sidedness. Congress must fix this imbalance by passing measures like the Federal Defender Ex Officio Act, which adds a nonvoting member from the Federal Public Defenders to the Commission so that this important body can consider the interests and perspective of the people who must bear the consequences of its policies.



This Committee's hearing comes at a historic moment: we have spent half a century fighting and losing the war on drugs. This approach was corrupt and racist from the outset and it has not made us safer or reduced the harms drugs can cause. We must stop waging this war on our own communities. Congress should seize on this moment to take bold action that will end this failed experiment. We urge the Committee to exercise its powers accordingly, and appreciate the leadership the Committee has shown in convening this hearing.