

# Drugs on the Docket Podcast

## Season 1.5 Episode 1.5 – Attorney General Memos and the Resurrection of the Equal Act

### TRANSCRIPT:

**Hannah Miller:** From the Drug Enforcement and Policy Center at The Ohio State University, this is Drugs on the Docket. Each episode will tell the story of how U.S. court decisions impact drug law and policy and continue to shape the War on Drugs. I'm your host, Hannah Miller.

In this update to season 1 episode 1 of Drug on the Docket, I talk with co-host Doug Berman about the continued struggle to eliminate the crack powder ratio disparity, Department of Justice memos to United States Attorneys, and the effect those memos can have on the federal criminal justice system.

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While we're working hard to bring you more content, Doug and I thought it would be fun to provide some updates and additional commentary on the topics we covered in season one. If you haven't had the chance to listen to season one of Drugs on the Docket visit [go.osu.edu/drugsonthedocket](http://go.osu.edu/drugsonthedocket) to catch up on the series. First up on our tour of all things interesting and oftentimes bewildering about drug policy is episode one, Federal Drug Sentencing and the Evolution of the Crack to Powder Cocaine Ratio with Mark Osler. As a summary, in that episode we unraveled the resulting sentencing disparities that early iterations of the sentencing guidelines and federal laws cause and continue to cause because the guidelines aren't perfect and to this day federal law still treats powder cocaine and crack cocaine differently even though the ratio has been reduced significantly from 100 to 1 to 18 to 1. What has happened since we spoke with Mark Osler?

**Douglas Berman:** Basically as the Equal Act was generating momentum even on the GOP side in the Senate, and of course it had already been passed in the House, there were a handful of key Senators who were like nope we don't want to do one to one but we could do two and a half to one, as kind of the of next wave of reform. And there were plenty of Equal Act supporters who were like no way, no how, what are you talking about. We got a lot of people who want the Equal Act. But the problem is those GOP senators were powerful enough that they could make sure one to one wouldn't get to the finish line and then my understanding is all of that broke down because a different development from a different branch kind of came out of the blue.

On December 16, 2022 Attorney General Garland instructed federal prosecutors to essentially equalize. Now prosecutors can't formally do that but what this memo was saying is treat crack cases as if they're powder cases. Charge them based on the weight and the ratio under the statutes as if it was a powder case even if it was a crack case. And then literally as those directives were coming out Senate negotiators were working on could we do like a two to one or some variation that's still not one to one but we at least get something in this Congress, with everybody at that point we're in lame duck, we know that the House is going to be controlled by Republicans and maybe they'd be against anything at that stage. And that then broke down once word got out that Garland was doing this you know essentially by prosecutorial fiat.

**Hannah Miller:** Prosecutorial discretion. That's a legit strategy?

**Douglas Berman:** The general norm, and this is why this is so challenging to sort of answer a simple question of like is this legit, everybody recognizes that's completely legit on a case-by-case basis right? So you pick up, whether it's a low-level marijuana offender or let's imagine uh a crack offender in the federal system who has a very margin role in a much broader conspiracy, but technically they're involved and technically it involves crack and technically the amount of crack involved would trigger very high penalties if that was charged to its fullest, everybody would recognize and again these memos that that attorney general Garland put out with his General guidance said you know every

case is different and you should do justice in each individual case. And so it's very well established that prosecutors have broad discretion and should feel emboldened to use that discretion to do justice in the individual case.

The really hard question, the hard question that many people would criticize Attorney General Garland, criticize other prosecutors in other settings is, all right, that discretion is powerful and important to use case by case, but that's not a way, that's not supposed to be a way, to do general policy. That's for a legislature to do. That's for Congress. It shouldn't be the role of a prosecutor of the executive branch that's supposed to execute the law laws that are enacted by the legislature to kind of make its own rules up categorically. And that's often the distinction that is drawn. Even very big supporters of case-by-case prosecutorial discretion will say, it's a violation of the prosecutorial role to have these categorical rules that say we're not going to prosecute this type of case, or we're never going to seek this type of sentence in this situation, because that's in a sense legislating rather than prosecuting.

**Hannah Miller:** If what they're doing is problematic in that they are essentially legislating through these memos why do Attorney Generals issue directives that depart from the law as written?

**Douglas Berman:** Attorney General Garland and other supporters of these kinds of policies might say, especially in the crack powder setting, I'm not supposed to be doing something that I think is unconstitutional or at least deeply legally suspect, right? I have a role to execute the laws not without any attentiveness to my own vision of what the Constitution demands and what I think the law appropriately calls for. And so when I say in this setting particularly we should treat crack cases like powder cases there's still severe punishment, there's still opportunities in case-by-case settings to go more severe for the really bad crack dealer if need be, but I'm troubled whether it's the racial disparity, whether it's other aspects of the way the mandatory minimums work, I just think as a matter of sound executive branch authority, executing the laws, it's not a good use of our resources to try to put people in prison for twice as long when it just so happens it's crack rather than powder.

And so, in that sort of push pull of what's legit here, there are pretty strong arguments on both sides, and clearly Attorney General Garland, when he issued these memos, felt comfortable, particularly when it comes to crack powder, to say, individual prosecutors, I want you to approach this as an equalization matter, though he has some some language in the memo that says of course if it's a really bad crack case go for a long sentence, just don't have that be based on this disparity which has been widely criticized and is suspect across a number of dimensions, and again a reminder that the House of Representatives in the last Congress voted to change by an overwhelming margin. So you know he could also say I think Congress is sort of getting there on these issues, I'm just eager to get a little bit ahead of them because it's my job to enforce the law and I don't think this law should be enforced this way.

**Hannah Miller:** And do you think that the memos will have the intended effect of eliminating sentencing disparities? I mean is it too short of a window before the guard changes or might change if you will?

**Douglas Berman:** The evidence has shown over the years that these guidance memos make a little difference, but they don't radically change how cases sort of move through. Probably it makes the biggest difference in the charging of mandatory minimums. So for individual defendants who are like on the cusp and could be subject to a mandatory minimum and because it's a cusp case they may have some mitigating factors, if prosecutors are comfortable not charging that as a mandatory minimum that gives judges then at sentencing a lot more leeway to consider the full range of mitigating factors to lower sentences. It's unlikely for other kinds of cases.

Here's where there's an important role in data collection by the Sentencing Commission. I think it's going to take a year or two maybe but I'm hopeful. I've actually written an article encouraging the sentencing commission to be tracking exactly how the Attorney General's memo about the treatment of crack cases is changing the dynamics of prosecuting, plea bargaining and sentencing in crack cases. Among the things that's interesting and it's part of the backstory here is we used to have 5,000, 6,000, 8,000, crack cases a year being sentenced now we only have about a thousand. It will be interesting to see if we see distinctive patterns in how many of those crack cases have mandatory minimums that are applicable because of the crack amounts, how severe the sentences are, again historically crack sentences have been a couple years longer than comparable powder sentences because of this disparity in the law, will we see a reduction in that shift. And in particular, and of course we talked about this at length in episode one, um it's the racial skew that you know 90% plus many years of who gets prosecuted for crack cases are African-American defendants uh whereas for powder cases it's a much more uh mixed racial profile. And so it's not just do we see crack cases have reduced sentencing outcomes and change plea and charging Dynamics after this Garland memo, but also you know how does racial disparity get impacted by those sets of Dynamics.

**Hannah Miller:** Has this happened before where an attorney general has issued a memo and it has impacted the way that prosecutors bring charges against drug offenders?

**Douglas Berman:** Yes, and so we see these memos from just about every new Administration, but their impact is hard to identify and quantify with precision over time and as individual offices apply this general guidance different ways. But probably most tangibly and most historically, Attorney General Eric Holder, serving during the Obama Administration, issued a kind of a similar type of memo about the charging of drug mandatory minimums. Basically saying that we know they can be particularly severe and that individual prosecutors, if they identified a number of mitigating circumstances, should feel comfortable not charging these severe mandatory minimums in every case that they might be applicable. And the Commission studied and years later determined that we saw a pretty significant decrease. I say pretty significant because we're talking about a 10% difference, but for uh a case load of 20,000 federal defendants, that can mean 2,000 cases a year of folks not getting charged with the mandatory minimum, when in the past they would have.

Many folks I think rightly concluded that shift was a product of new Attorney General guidance saying, hey prosecutors, our norm isn't to be quite so tough. And in a similar kind of way I would expect we'll see some echo effects uh from the Attorney General Garland memo about crack and powder, though again how much of an effect, where we can determine that's making a big difference, is something that that only the sophisticated data that the Sentencing Commission collects will be able to queue us into and it may take a number of years before we know the full story.

**Hannah Miller:** I just find it interesting that even though there have been hearings where people testify that there's no pharmacological difference between crack and powder cocaine, they're clinging to the idea that crack cocaine is more dangerous, is more problematic, than powder cocaine. And I don't understand that. I don't understand why that's the case.

**Douglas Berman:** You're right to highlight that there's very little evidence and there's very little scientific basis to support the idea certainly that crack is a lot more dangerous or really is a different drug than powder cocaine. And here I'm always inclined to go with kind of hopefully familiar alcohol parallels here, right? And so uh I certainly think one would be hard pressed even if they're not a wine connoisseur to say, oh, champagne is a very different and more dangerous drug than regular white wine, right? They're kind of the same thing and they, you know, may have slightly different alcohol levels or they might be used in slightly different environments at slightly different times, but it's really the same drug, and whatever rules we have about the sale and regulation of regular wine we ought to have for sparkling wine, champagne. But by the same token, and I think this may be where both biases and kind of a well-meaning folk understanding may end up shaping how some people think about this, and I use the champagne example as sort of a counterpoint, nobody kind of worries about champagne because culturally we think that's something you have at a party or on New Year's Eve and that's not really super dangerous and all of that. But some people sell wine by the box. Now I don't know if many people worry about people selling wine by the box, but I do know that the way historically certain drugs, and again this is where we get to bias, that certain communities are using certain drugs in certain ways, distributing in certain ways, have access to it, have had problems with it in certain ways. That's a history that you know is long-standing.

And and especially for folks old like me, the crack hysteria, I would even be included to say to say, of the 1980s, this idea that a single use of crack gets you addicted when, you know, powder cocaine is kind of what the Wall Street got guys use and use well to be better at what they do. The idea of a crack house, right, we even some think of some of our language and terminology we don't talk about powder cocaine houses right? But this idea that there could be a place that's really dangerous, that's distributing this drug. Those are a set of instincts and views that even if a bunch of effective academics and scientists can say, you know, it's the same drug, it's still possible, and this is what we still hear to support some of the disparity, yeah maybe the same drug but the distribution channels, the way in which some of these different drugs are used, even if they're the same drugs, that alone can justify treating them differently at sentencing.

**Hannah Miller:** Besides reducing the ratio from 18 to 1 to 1 to 1, are there any other aspects of the Equal Act worth mentioning?

**Douglas Berman:** My understanding, at least the last time I looked at it, is the Equal Act is basically gets crack out of the story, right? So, it's not just like we're going to treat crack like powdered cocaine. We're just going to say there's cocaine law. But I think it's worth thinking about like, is that a good or bad policy for drug enforcement more generally?

Is it a good thing to treat all drugs more similarly for sentencing purposes than others, or is it right the way we have it now, though often with controversy, that we see certain drugs as much more dangerous and much more deserving of more severe punishment than others?

**Hannah Miller:** I just wonder, is reducing the ratio enough or are there other systemic things that need to be addressed in order to truly change our cultural and systems response to the just the use of of drugs?

**Douglas Berman:** If you go looking for suspect drug activity, you can find it anywhere. Whether that's what law enforcement should be doing, whether those are particularly worrisome ways in which we're prioritizing enforcement over public health, right? I think that's really, especially in the opioid story, where we would hope doctors are focused on helping the public be healthier. And so to really bring law enforcement there is one where there's a unique kind of risk that we're not only not using our law enforcement resources well, but we might be undermining public health rather than advancing it if we're enforcing drug laws too severely in that context.

**Hannah Miller:** Or, on the flip side, we see drugs as more medicinal, or as a social status, or as an enlightening tool, or means of therapy.

**Douglas Berman:** Right. Should these all be public health stories? And every drug is the same in the sense that they all present a certain risk to public health but also might have potential as a medicine or as some other sort of valuable public health intervention. And and I bring up that particularly because I think one of the most profound and pernicious aspects of the crack uh concerns of the 80s was this conversation about crack babies, right? That the idea that a person, pregnant, who used crack, would have particularly adverse impact on their child. And again that's a very valid public health concern about in utero children and beyond, but then the medical science developed an awareness, nope, this really isn't a unique problem to crack, it's not even clear that it's as big a problem as some other drugs including alcohol, including other legal intoxicants. And so, gee, we ought not have special punishments based on this sort of iffy science. And that's where your comments, Hannah, are a good reminder that one of the things that the crack powder story highlights that really is fundamental to broader thinking about better drug policy is how much are we even attending to science as opposed to just reacting to what we think we see on the streets in terms of people struggling with drug addiction or otherwise having problems with drug use. And again why aren't we letting the scientists rather than the cops and the prosecutors help define what our public policy response is. I want to remain hopeful, but you know, to the extent that we're even talking about drugs on the docket and it's a criminal story, it is itself a function of our historical reality of always using criminal justice tools to respond to drug issues and then it's about how do we do that, how do we make sure that that's attentive to what's really going on and what really the government can effectively address through our laws and justice processes. And again, the crack powder example is one that nobody should be proud of our history here. Let's hope we can continue to move forward in a better way.

**Hannah Miller:** Drugs on the Docket is a production of the Moritz College of Law Drug Enforcement and Policy Center. This episode is produced by me, Hannah Miller, and Holly Griffin. Doug Berman is our editorial adviser. The music is composed by Joe DeWitt.