1-1-2007

FEDERAL DRUG SENTENCING—WHAT WAS CONGRESS SMOKING? THE UNCERTAIN DISTINCTION BETWEEN "COCAINE" AND "COCAINE BASE" IN THE ANTI-DRUG ABUSE ACT OF 1986

Spencer A. Stone

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.
FEDERAL DRUG SENTENCING—WHAT WAS CONGRESS SMOKING? THE UNCERTAIN DISTINCTION BETWEEN "COCAINE" AND "COCAINE BASE" IN THE ANTI-DRUG ABUSE ACT OF 1986

INTRODUCTION

Amid a flurry of media attention, the topic of federal crack cocaine sentencing has recently been the subject of major policy changes.1 In May 2007, the U.S. Sentencing Commission issued a report, encouraging Congress to lessen the disparity between the statutory mandatory minimum sentences for “crack” and powder cocaine.2 In the same month, the Commission promulgated an amendment to the U.S. Sentencing Guidelines, reducing the sentence length for crack cocaine offenses.3 In addition, on December 10, 2007, the Supreme Court held that a “judge may consider the disparity between the Guidelines’ treatment of crack and powder cocaine offenses” in reaching sentencing decisions.4 Despite all of this activity and despite pressure on Congress,5 the statute upon which all of these recent developments are based has remained unchanged since its passage in 1986.6 This Note discusses a circuit split involving the definition of key terms in that statute.


In 1970, Congress enacted legislation prohibiting the distribution of, and possession with the intent to distribute, controlled substances. The penalties and mandatory minimum sentences for this offense are enumerated in the Anti-Drug Abuse Act of 1986 (1986 Act), and vary depending on the quantity and type of substance.

7. Id. § 841(a).
8. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. The pertinent portion of the Anti-Drug Abuse Act of 1986 is contained within Subtitle A of Title 1, which is entitled Narcotics Penalties and Enforcement Act of 1986, 100 Stat. 3207, 3207-2. The section of the Act under discussion throughout this Note is section 1002, which is codified at 21 U.S.C. § 841(b). The pertinent text of § 841 reads:

(a) Unlawful acts

... [I]t shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

... . . .

(b) Penalties

... [A]ny person who violates subsection (a) of this section shall be sentenced as follows:

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

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves . . . ;
(II) cocaine, its salts, optical and geometric isomers, and salts of isomers; [or]
(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

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

... . . .

[S]uch a person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . .

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

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves . . . ;
(II) cocaine, its salts, optical and geometric isomers, and salts of isomers; [or]
(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

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

... . . .

[S]uch a person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . .

involved.\textsuperscript{9} For a violation involving five or more grams of "cocaine base," an offender is subject to the same five-year mandatory minimum as a person convicted of a similar offense involving five hundred grams of "cocaine" or "its salts."\textsuperscript{10} Similarly, an offense involving fifty grams of a substance containing "cocaine base" has the same ten-year mandatory minimum as that for five thousand grams of "cocaine" or "its salts."\textsuperscript{11} As such, under the federal sentencing regime, sentences for "cocaine base" offenses average three to eight times longer than for a similar quantity of powder cocaine.\textsuperscript{12}

Cocaine is a substance derived from the coca plant,\textsuperscript{13} which produces both euphoric and stimulant effects in humans.\textsuperscript{14} In its naturally occurring form, cocaine is chemically basic,\textsuperscript{15} and consequently there is no scientific or chemical difference between "co-

---

\begin{itemize}
\item \textsuperscript{9} 21 U.S.C. § 841(b).
\item \textsuperscript{10} Id. § 841(b)(1)(B).
\item \textsuperscript{11} Id. § 841(b)(1)(A).
\item \textsuperscript{12} U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 145 (1995) [hereinafter USSC 1995 REP.], available at http://www.ussc.gov/crack/EXEC.HTM. Until November 2007, it took one hundred times more powder cocaine than cocaine base to incur a similar sentence length. This ratio does not indicate, however, that the average sentence for cocaine base is 100 times longer than that for a powder cocaine offense. \textit{Id.}; see also U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at iv-v (2002) [hereinafter USSC 2002 REP.], available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf ("In 2000 the average sentence for a crack cocaine offense was 44 months longer than the average sentence for a powder cocaine offense."). The U.S. Sentencing Commission recently amended the Sentencing Guidelines to lessen the sentences for "cocaine base" offenses, effective November 1, 2007. Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28,558, 28,571-73 (May 21, 2007) (amending USSG § 2D1.1). Under the new amendment, "cocaine base" offenses are punished by a term of imprisonment of approximately two to five times longer than that for a similar amount of powder cocaine. \textit{Id.}; see also Kimbrough v. United States, 128 S. Ct. 558, 569 (2007). Consequently, the average sentence length for such offenses is sure to change. In addition, the Commission recently determined that the new amendment is to be applied retroactively, thereby giving previously sentenced offenders the opportunity to move for a reduction in prison term. Sentencing Guidelines for United States Courts, 73 Fed. Reg. 217, 219 (Jan. 2, 2008) (amending USSG § 1B1.10); see also Sentencing Guidelines for United States Courts, 72 Fed. Reg. 58,345, 58,345-46 (Oct. 15, 2007); Harlan Protass, Op-Ed., \textit{Closing Crack's 100-1 Ratio}, L.A. TIMES, Nov. 2, 2007, at 29, available at 2007 WLNR 21638045 (Westlaw). Note, however, that the amendment does not affect the statutory mandatory minimum sentences.
\item \textsuperscript{13} PAUL M. GAHLINGER, ILLEGAL DRUGS: A COMPLETE GUIDE TO THEIR HISTORY, CHEMISTRY, USE, AND ABUSE 241 (2004).
\item \textsuperscript{14} Id. at 253.
\item \textsuperscript{15} The term "basic" is used throughout this work as an adjective describing a substance that exhibits the chemical properties of a base (as opposed to meaning simple or primitive). \textit{WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE} 181 (Philip Babcock Gove et al. eds., unabr. ed. 1976) (defining basic as
caine” and “cocaine base.”16 If, “[t]o a scientist, ‘cocaine’ and ‘cocaine base’ are synonymous,”17 what then is the distinction Congress intended between the two terms in 21 U.S.C. § 841?18 This is the question that this Note will seek to answer.

The federal courts of appeals are split as to the appropriate resolution to this issue. The First, Second, Third, Fifth, and Tenth Circuits take a plain-meaning approach, holding that “cocaine base” is any substance containing the basic form of chemical cocaine.19 On the other hand, the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits hold that Congress intended the term “cocaine base” to mean only crack cocaine.20 Finally, the Ninth and D.C. Circuits take a hybrid approach, holding that “cocaine base” means anything made of cocaine that exhibits basic properties and can be smoked.21

The case of Louis Humberto Barbosa22 will help to illustrate the implications of the circuit split: In July 1998, Mr. Barbosa swallowed 882 grams of plastic-wrapped pellets in Aruba.23 He then

“of, relating to, or characteristic of a base . . . containing or involving the use of alkaline material”); see infra Part 1.B (discussing the chemical properties of cocaine).


17. Id.

18. A similar issue exists in the interpretation of 21 U.S.C. § 844(a) for simple possession of a controlled substance (i.e., possession without the intent to distribute), which provides that, “a person convicted . . . 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,” if the quantity of the substance is greater than five grams for a first conviction, three grams for a second conviction, and one gram for a third or subsequent conviction. However, because the vast majority of federal controlled substance prosecutions are commenced under § 841, and because the same terminology is used in both § 844 and § 841, § 844 is only mentioned briefly here. Cf. Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2004, at 61 tbl.4.1 (2004), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs04.pdf (showing that, in 2004, there were 28,472 defendants charged in federal court with drug “trafficking” and only 1997 with “possession”).

19. See, e.g., United States v. Medina, 427 F.3d 88 (1st Cir. 2005), aff’d, 219 F. App’x 20 (1st Cir. 2007), cert. denied, No. 06-12032, 2007 WL 1833562 (U.S. Oct. 1, 2007); United States v. Barbosa (Barbosa II), 271 F.3d 438 (3d Cir. 2001); United States v. Palacio, 4 F.3d 150 (2d Cir. 1993); United States v. Butler, 988 F.2d 537 (5th Cir. 1993); United States v. Easter, 981 F.2d 1549 (10th Cir. 1992).

20. See, e.g., United States v. Edwards, 397 F.3d 570 (7th Cir. 2005); United States v. Crawford, 83 F.3d 964 (8th Cir. 1996); United States v. Fisher, 58 F.3d 96 (4th Cir. 1995); United States v. Munoz-ReaIpe, 21 F.3d 375 (11th Cir. 1994); United States v. Levy, 904 F.2d 1026 (6th Cir. 1990).


23. Id. at 444.
traveled to a hotel in Philadelphia where he "expelled" the pellets.\textsuperscript{24} Drug Enforcement Agency (DEA) officers arrested him for possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a).\textsuperscript{25} The pellets that he swallowed were composed of eighty-five percent cocaine.\textsuperscript{26} Mr. Barbosa was indicted for possession of more than fifty grams of cocaine base with intent to distribute under 21 U.S.C. § 841(b)(1)(A)(iii).\textsuperscript{27} It is clear from the facts adduced at trial that Mr. Barbosa was not in possession of crack cocaine,\textsuperscript{28} but rather a less concentrated form of cocaine.\textsuperscript{29}

This set of facts illustrates why this issue is practically important. If "cocaine base" under the statute is defined exclusively as crack, as this Note argues, Mr. Barbosa would be subject to the five-year mandatory minimum for possession of more than five hundred grams (but less than five kilograms) of "cocaine" under 21 U.S.C. § 841(b)(1)(B)(ii).\textsuperscript{30} On the other hand, if "cocaine base" means any form of cocaine that exhibits basic properties, as the court found in Barbosa's case,\textsuperscript{31} he would be subject to the ten-year mandatory minimum for possession of more than fifty grams of "cocaine base" under § 841(b)(1)(A)(iii).\textsuperscript{32} Thus, an offense carrying a

\begin{itemize}
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id. Unbeknownst to Mr. Barbosa, the person to whom he was to deliver the pellets in Philadelphia was an undercover informant for the DEA. \textit{Id.} at 446-47; see also United States v. Barbosa (\textit{Barbosa I}), 51 F. Supp. 2d 597, 599-600 (E.D. Pa. 1999) (mem.) (describing the factual setting in more detail), \textit{aff'd}, 271 F.3d 438 (3d Cir. 2001).
\item \textsuperscript{26} \textit{Barbosa II}, 271 F.3d at 460.
\item \textsuperscript{27} \textit{Id.} at 447-48.
\item \textsuperscript{28} \textit{Barbosa I}, 51 F. Supp. 2d at 602.
\item \textsuperscript{29} \textit{Id.}; cf. \textit{GAHLINGER}, supra note 13, at 250 (crack contains ninety-five percent cocaine, powder cocaine contains ninety percent cocaine, and coca paste contains twenty to eighty-five percent cocaine).
\item \textsuperscript{30} See, e.g., United States v. Edwards, 397 F.3d 570 (7th Cir. 2005); United States v. Crawford, 83 F.3d 964 (8th Cir. 1996); United States v. Fisher, 58 F.3d 96 (4th Cir. 1995); United States v. Munoz-Realpe, 21 F.3d 375 (11th Cir. 1994); United States v. Levy, 904 F.2d 1026 (6th Cir. 1990).
\item \textsuperscript{31} \textit{Barbosa II}, 271 F.3d at 467.
\item \textsuperscript{32} See, e.g., United States v. Medina, 427 F.3d 88 (1st Cir. 2005), \textit{aff'd}, 219 F. App'x 20 (1st Cir. 2007), \textit{cert. denied}, No. 06-12032, 2007 WL 1833562 (U.S. Oct. 1, 2007); \textit{Barbosa II}, 271 F.3d at 438; United States v. Palacio, 4 F.3d 150 (2d Cir. 1993); United States v. Butler, 988 F.2d 537 (5th Cir. 1993); United States v. Easter, 981 F.2d 1549 (10th Cir. 1992). This explanation does not consider the potential sentencing increases, which are beyond the scope of this Note. For example, a second violation involving greater than five grams of "cocaine base" or five hundred grams of cocaine or its salts is punishable by a minimum term of ten years imprisonment; for subsequent offenses, or if death or serious injury results, the minimum term is increased to twenty years. 21 U.S.C. § 841(b)(1)(B) (2000). Similarly, a second violation involving greater than fifty grams of "cocaine base" or five kilograms of cocaine or its salts is punishable
five-year sentence in the Third Circuit may be punished by only probation or a short prison sentence in the Seventh Circuit.  

As can be seen from Mr. Barbosa's case, the proper definition of "cocaine base" is of practical import to the criminal justice system, and has direct implications for any number of federal judges, attorneys, and drug offenders. As such, this Note will attempt to provide a workable solution to the problem, arguing that the term "cocaine base" in 21 U.S.C. § 841(b) should be defined as crack cocaine, and only crack cocaine. As will be made clear, this is the only interpretation that respects the intent of Congress, the text of the statute, and the established tenets of statutory interpretation.

In order to reach this conclusion, it is important to understand the history and chemistry of cocaine. Therefore, Part I of this Note will explore how cocaine travels from the fields of South America to consumers in the United States. It will also discuss the chemical properties and pharmacology of cocaine and crack. Part II will give some background on the Anti-Drug Abuse Act of 1986, including its legislative history and the general atmosphere in which it was passed. Part III will explore the circuit split, outlining more fact patterns in which the issue arises and the reasoning of the different courts. Finally, Part IV will analyze the legislative history of the 1986 Act and the different arguments expounded by the circuits. This section will argue that the courts holding that "cocaine base" means any basic form of cocaine reach the incorrect conclusion. Additionally, Part IV will show why the reasoning of the courts using the "smokeability" test is likewise flawed. Finally, this Note will illustrate that a definition of "cocaine base" as meaning only crack cocaine is the best approach because it achieves what Congress intended and respects the text of the statute.  

by a minimum term of twenty years imprisonment; for subsequent offenses, the minimum term is increased to a “mandatory term of life imprisonment.” Id. § 841(b)(1)(A).  

33. See supra note 19 and accompanying text. Similarly, an offense carrying a ten-year prison sentence in the Third Circuit may only carry a five-year sentence, or shorter, in the Seventh Circuit. See supra note 20 and accompanying text. Additional implications of this issue are discussed in Part IV, infra.  

34. For opposing views, see generally Andrew C. MacNally, Comment, A Functionalist Approach to the Definition of "Cocaine Base" in § 841, 74 U. CHI. L. REV. 711 (2007), and Amanda D. Cary, Comment, Cocaine Base: Not All It's Cracked Up to Be, 40 U.C. DAVIS L. REV. 531 (2006).
I. Cocaine and Crack

Cocaine has been in use in different parts of the world for hundreds of years. Its history, manufacturing process, and effects on the human body are the focus of a large body of scholarly work, and a general knowledge of these subjects is integral to understanding the relevant portions of the Anti-Drug Abuse Act of 1986. Consequently, this Note begins with a discussion of the drug—cocaine.

A. History of Cocaine

The Native Americans of the Andes region believed that coca was a gift from the gods brought to earth by the first Incan emperor to help them cope with hardships of living in the cold, high altitude of the Andean plains. Incas living during the Middle Ages chewed the leaves of the coca plant together with ground-up seashells to ward off hunger, combat fatigue, and produce a mild high, similar to the way modern Americans use caffeine.

However, it was not until the mid-1800s that the virtues of cocaine became widely known outside of South America, thanks to the efforts of botanist and president of England’s Royal Society, Sir Joseph Banks. Soon after bringing the coca plant to England, cocaine became prized as a medical miracle by the most respected individuals of the time, including statesmen, popes, and physicians. Over the years, cocaine has been used in all types of products including red wines, cigarettes, pharmaceuticals, and Coca-Cola. It was prescribed as an anesthetic and to combat everything

35. To avoid potential confusion, precise terminology will be used throughout the remainder of this Note to refer to the different forms of cocaine. “Cocaine base” will only be used in referring to the statutory text; “cocaine” will be used only to refer all forms of cocaine (including, but not limited to, cocaine paste, powder cocaine, and crack); when referring to a specific type of cocaine, such as crack or powder cocaine, the precise term will be used.
36. GAHLINGER, supra note 13, at 37.
38. GAHLINGER, supra note 13, at 37-38.
39. Id.
40. Id. at 251.
41. KARCH, supra note 37, at 11-12.
42. GAHLINGER, supra note 13, at 39. These individuals included Thomas Edison, Ulysses S. Grant, Pope Leo XIII, and Sigmund Freud. Id.
43. Id. at 39-40.
from allergies, to prostate enlargement, and ironically, morphine addiction.44

By the end of the nineteenth century, cocaine's addictive qualities and adverse health effects were starting to be realized.45 This resulted in the passage of the 1906 Pure Food and Drug Act, requiring accurate labeling of the contents of remedies and limiting the distribution of cocaine.46 Finally, in 1914 Congress banned non-medical use of cocaine with the Harrison Act, which required all persons or entities engaged in the sale or importation of cocaine to register with the federal government.47

Cocaine is currently classified as a Schedule II controlled substance.48 This classification indicates that while it has a high potential for abuse and addiction, cocaine also has legitimate medical uses, and is therefore not entirely outlawed in the United States.49 Today, the primary medical use for cocaine is as a local anesthesia in nasal procedures.50

---

44. KARCH, supra note 37, at 40. See generally FREUD, supra note 37.
45. See Dangers of Cocaine, supra note 37. The article notes:

The recent death of a patient in a physician's operating room from the effects of cocaine again calls attention to the dangers attending the use of this drug. . . .

. . .

We feel at this time that a note of warning is needed regarding the use of cocaine. It should never be prescribed or used by any but qualified medical practitioners.

Id.

46. 1906 Pure Food and Drug Act, ch. 3915, 34 Stat. 768; see also GAHLINGER, supra note 13, at 42-43.
47. Harrison Act, ch. 1, 38 Stat. 785 (1914). The Act also prohibited dispensing cocaine without either a prescription or permission of the Commissioner of Internal Revenue. Id.
49. Id. § 812(b)(2).
50. Robert L. Martensen, From Papal Endorsement to Southern Vice, 276 JAMA 1615, 1615 (1996). Additional legal medical uses of cocaine include use as a topical anesthetic for children (as it is less frightening and painful than an injection) and to control chronic pain in terminal illness. GAHLINGER, supra note 13, at 246-47. Because crack cocaine is a modern invention, its history is shorter and involves mostly the evolution of cocaine's manufacturing process. STEVEN R. BELENKO, CRACK AND THE EVOLUTION OF ANTI-DRUG POLICY 6 (1993). As such, a discussion of the history of crack in particular, will be left to the explanation of chemistry and manufacturing. See infra Part I.B.
WHAT WAS CONGRESS SMOKING?

B. Chemistry and Manufacturing

Cocaine is a naturally occurring substance with a chemical formula of \(C_{17}H_{21}NO_4\).\(^{51}\) It is derived from the coca plant, which is primarily grown in the Andes Mountains,\(^{52}\) the leaves of which contain less than two percent cocaine.\(^{53}\) In this natural form, cocaine is chemically basic,\(^{54}\) meaning that it has a pH level greater than seven,\(^{55}\) and when combined with an acid, it creates a salt.\(^{56}\) To extract the cocaine from the coca leaves, they are dried and then ground together with an alkali (such as lime), an organic solvent (usually kerosene), and water.\(^{57}\) This process creates what is known as "coca paste" or "cocaine paste."\(^{58}\)

Before exportation, the coca paste is usually converted into cocaine hydrochloride, a salt.\(^{59}\) This is accomplished by dissolving the coca paste in hydrochloric acid and water.\(^{60}\) Unbeknownst to many users of "cocaine," the substance they are snorting is not pure cocaine; rather, it is cocaine hydrochloride, a salt more commonly known as powder cocaine, with the chemical formula of \(C_{17}H_{21}NO_4\)HCl.\(^{61}\) While the most common illegal use of cocaine


54. United States v. Booker, 70 F.3d 488, 490 (7th Cir. 1995); *The Merck Index, supra* note 51, § 2580, at 2481.


56. *Id.* at 117.

57. Booker, 70 F.3d at 490; Gaiblinger, *supra* note 13, at 249.

58. Gaiblinger, *supra* note 13, at 249. At this point the substance is still basic. *Id.* While coca paste is used as a narcotic in other parts of the world, this is generally not the case in the United States. Belenko, *supra* note 50, at 5.

59. At this point it is no longer a base. Brown *et al.*, *supra* note 51, at 117.

60. Booker, 70 F.3d at 490; Gaiblinger, *supra* note 13, at 249-50.

61. *The Merck Index, supra* note 51, § 2480, at 430; see also *Booker*, 70 F.3d at 490. This chemical formula is the same as that of cocaine, *see supra* note 51 and accompanying text, with the addition of an atom of hydrogen and one of chlorine. See Brown *et al.*, *supra* note 51, at 10, 47 (describing how to read a chemical formula). The addition of these atoms converts the substance from a base into a pH-neutral salt. *Id.* at 117.
hydrochloride is intranasal administration (i.e., snorting), it can also be ingested orally or injected intravenously.62

Cocaine hydrochloride, however, cannot be smoked.63 This is because the chemical decomposes and breaks down at a temperature lower than that required to vaporize it.64 In other words, when cocaine hydrochloride is heated, it is no longer cocaine by the time it becomes a vapor.65 Thus, in order to smoke cocaine, it must be converted back into a base, which can be vaporized without decomposing.66 There are two primary ways to accomplish this task. In the 1970s, it was generally done by heating cocaine hydrochloride in water and adding ammonia.67 Ether was then added, and the solution shaken.68 The pure cocaine would combine with the ether and separate out from the rest of the mixture.69 This method of creating what has become known as "freebase" is very dangerous. Because ether is highly flammable, any attempt to smoke the mixture can literally blowup in one's face.70

However, thanks to the illegal drug industry's ingenuity, a new method to create freebase cocaine was discovered in the early 1980s.71 By this new process, powder cocaine hydrochloride is dissolved in water and baking soda and then boiled.72 When all the water evaporates, the residue is broken into rocks, each represent-

63. Hatsukami & Fischman, supra note 62, at 1582.
64. Id.
65. Id. Smoking cocaine hydrochloride would be like trying to eat an apple after two months in a compost heap; it simply would no longer be an apple.
66. Id. The base must be freed from the salt, from whence comes the term "freebase cocaine." Crack is one type of freebase cocaine. Booker, 70 F.3d at 491.
67. GAHLINGER, supra note 13, at 243.
68. Id.
69. Id. 243-44.
ing a single, smokeable dose.\textsuperscript{73} The new process is easier, safer, and substantially cheaper than the old method of creating freebase cocaine, and results in a substance that has become known as “crack.”\textsuperscript{74} Using this method, one gram of powder cocaine will result in 0.89 grams of crack, almost a one-to-one relationship.\textsuperscript{75} Regardless of the method used to free the base, either process results in the creation of a basic substance with a chemical formula of $\text{C}_{17}\text{H}_{21}\text{N}_{4}$.\textsuperscript{76}

C. \textit{Supply Chain, Patterns of Abuse, and Effects}

Grown along the west coast of South America, approximately two-thirds of the world’s supply of cocaine comes from Columbia, with virtually all of the remainder originating in Bolivia and Peru.\textsuperscript{77} “[C]artels control the movement of coca leaf and paste from the jungles of Bolivia and Peru to the... laboratories in southern Colombia,” where it is ultimately converted into powder cocaine.\textsuperscript{78} Cocaine is generally imported into the United States as cocaine hydrochloride through the Caribbean Islands and Mexico.\textsuperscript{79} If desired, the powder is then converted into crack cocaine in the United States.\textsuperscript{80}

In 2000, roughly equal numbers of federal cocaine cases involved cocaine hydrochloride and crack cocaine,\textsuperscript{81} and federal cocaine cases (both powder and “cocaine base”) have consistently represented about half of all federal drug cases.\textsuperscript{82} Cocaine is highly

\textsuperscript{73} \textit{Id.} A dose of crack cocaine generally weighs from one-tenth to one-half gram. \textit{Id.}

\textsuperscript{74} \textit{Gahlinger, supra} note 13, at 245. The term “crack” is derived from the popping sound made when the rocks are heated. \textit{Id.} at 244.

\textsuperscript{75} \textit{USSC 2002 Rep., supra} note 12, at 16-17. The dosages of powder cocaine and crack are likewise similar: one gram of powder cocaine yields five to ten doses, and one gram of crack cocaine yields between two and ten doses. \textit{Id.} at 17.

\textsuperscript{76} This is the chemical formula of pure cocaine. See \textit{supra} note 51.


\textsuperscript{78} \textit{Gahlinger, supra} note 13, at 248.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Cf. Belenko, supra} note 50, at 109 (“[C]rack-dealing organizations arose by purchasing quantities of powdered cocaine from dealers and then producing and selling crack.”).

\textsuperscript{81} \textit{USSC 2002 Rep., supra} note 12, at 32-33. It should also be noted that crack cocaine offenses have been steadily increasing each year, while powder cocaine offenses have been decreasing. \textit{Id.}

\textsuperscript{82} \textit{Id.} at 32. The vast majority of crack cocaine offenders have consistently been black: 91.4% in 1992 and 84.7% in 2000, whereas white offenders accounted for only 3.2% in 1992 and 5.6% in 2000. \textit{Id.} at 63. On the other hand, in 1992, 32.3% of powder
addictive in any form, but studies show that injecting cocaine hydrochloride and smoking freebase cocaine (including crack) result in higher potential for abuse than intranasal administration. This is primarily because smoking and intravenous injection allow the chemical to reach the brain more rapidly than snorting. Users of all forms of cocaine are likely to abuse other drugs, but crack cocaine users are more likely to abuse a wider variety of illegal drugs than users of powder cocaine. In addition, using cocaine in any form is more likely to result in a trip to the hospital than any other illicit drug, but more cocaine-related deaths are associated with injection of cocaine hydrochloride than with smoking crack cocaine. While it is unlikely for violence to directly result from the pharmacological effects of any form of cocaine, violence does result from social and economic factors involved in the cocaine trade and culture. These factors are more prevalent in populations using crack cocaine, and therefore crack users are often more likely to participate in violence than users of other drugs, including users of powder cocaine.

cocaine offenders were white, 27.2% were black, and 39.8% were Hispanic; and in 2000, 17.8% of powder cocaine offenders were white, 30.5% were black, and 50.8% were Hispanic. In 2000, 90.1% of crack cocaine offenders were male, and 86.2% of powder cocaine offenders were male; the average crack offender was twenty-nine years old, and the average powder cocaine offender was thirty-four.

84. Hatsukami & Fischman, supra note 62, at 1583.
85. Id. at 1584.
87. Hatsukami & Fischman, supra note 62, at 1584. However, several studies have “show[n] a higher percentage of crack-cocaine smokers needing hospitalization than users of cocaine hydrochloride.” Id. Users of smoked freebase cocaine also generally suffer from more psychiatric disorders than those who use cocaine hydrochloride (either nasally or by injection). Id.
88. Id. at 1585.
89. These factors include systemic violence, directly resulting from the cocaine trade and territorial disputes between dealers, Fagan & Chin, supra note 71, at 12, and economically-induced violence, resulting from attempts to make money for the purchase of drugs (through muggings and property-related crimes). Steven L. Brody, Violence Associated with Acute Cocaine Use in Patients Admitted to a Medical Emergency Department, in Drugs and Violence, supra note 71, at 44, 44.
90. Hatsukami & Fischman, supra note 62, 1585.
To summarize, the data show that both powder and crack forms of cocaine are the cause of great problems for American society and its justice system. Crack cocaine may more often lead to injury, violence, and addiction, but the studies appear to be somewhat lacking in proving these statistics. While there are differences between the physical, mental, and societal effects of the different forms of cocaine, these differences may not be as significant as commonly believed.

II. COCAINE, CRACK, AND THE ANTI-DRUG ABUSE ACT OF 1986

In order to address the problems associated with drug use and abuse in the United States, Congress enacted “the most far-reaching drug law ever passed.” The Anti-Drug Abuse Act of 1986 was an omnibus bill of 192 pages, and fifteen individual titles, dealing with a wide variety of drug-related topics, including the minimum penalties for federal cocaine offenses.

A. Setting the Stage

President Richard Nixon officially initiated the “war on drugs” shortly after taking office in 1969. Soon thereafter, Congress passed the Comprehensive Drug Abuse Prevention and Control...
Act of 1970, Title II of which was entitled the Controlled Substances Act. The Controlled Substances Act is the source of the five schedules currently in use to define federally regulated drugs. It also created 21 U.S.C. § 841(a), making it unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Prior to the enactment of the 1986 Act, the Controlled Substances Act punished all cocaine violations with "not more than 15 years" of imprisonment.

In 1982, President Reagan intensified the war, noting, "[d]rugs are bad, and we're going after them. As I've said before, we've taken down the surrender flag and run up the battle flag. And we're going to win the war on drugs." By 1984, over four million Americans were using cocaine. As a result, the Reagan administration published the 1984 National Strategy for the Prevention of Drug Abuse and Drug Trafficking, in which Reagan set a national goal "to conquer drug abuse and ensure a safe and productive future for our children and our nation."

---

100. Id. § 202, 84 Stat. at 1247 (codified as amended at 21 U.S.C. § 812). These schedules divide federally controlled substances into five groups for use by reference in other sections of the Controlled Substances Act (and later acts). E.g., id. § 303, 84 Stat. at 1253-55 (codified as amended at 21 U.S.C. § 823) ("The Attorney General shall register an applicant to manufacture controlled substances in schedule I or II if he determines that such registration is consistent with the public interest . . . ."). The Controlled Substances Act also gave the Attorney General the ability to add and remove drugs from these schedules through administrative rulemaking. Id. § 201, 84 Stat. at 1245-47 (codified as amended at 21 U.S.C. § 811). The revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21.
102. Id. § 401(b)(1)(A), 84 Stat. at 1261. Under the 1986 Act, this scheme was changed to provide individualized penalties for different quantities and types of cocaine. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to -4 (codified at 21 U.S.C. § 841(b)). In so doing, Congress's goal was to differentiate between "serious" and "major" drug traffickers. USSC 2002 Rep., supra note 12, at 5-7.
105. Id. at unnumbered first page. This strategy focused on five elements in order to stop drug distribution and abuse: prevention, law enforcement, international cooperation, medical treatment, and research. Id. at 7.
As noted above, crack cocaine became prevalent in the mid-1980s. It hit the national scene in 1985, and became widely popular in inner cities in 1986. The media played a large role in creating public and congressional awareness of crack. The first mention of crack cocaine in the media was by the Los Angeles Times on November 25, 1984. However, a turning point in the media’s coverage of and the public’s response to crack abuse took place on June 19, 1986, the day after Len Bias was picked second in the NBA draft. Bias, a University of Maryland basketball star, apparently “smoked free-based cocaine in the seconds before he collapsed and died” from cocaine-related heart failure. Bias’s death was a watershed in the media’s coverage of crack cocaine, and reports about the new drug began increasing exponentially. In the months leading up to the passage of the 1986 Act, NBC

106. Belenko, supra note 50, at 9 (“Crack cocaine trickled into the American consciousness in late 1985, but by early spring 1986 a virtual flood of media attention assured that this drug would command close scrutiny by politicians and anti-drug crusaders.”).


110. Id. at 122. Andy Furillo, South-Central Cocaine Sales Explode into $25 'Rocks', L.A. Times, Nov. 25, 1984, pt. II, at 1. It should be noted that this article did not use the term “crack” (which had yet to come into common use), but rather referred to a cocaine “rock.” Id.


112. Bias Died While Free-Basing, Says Medical Examiner, L.A. Times, July 9, 1986, available at 1986 WLNR 1298125 (Westlaw). It should be pointed out that at the trial of the individual accused of selling the drugs to Bias, it was revealed that Bias did not smoke crack, but actually spent four hours snorting cocaine hydrochloride. USSC 1995 Rep., supra note 12, at 122-23. However, this is not important to the circumstances surrounding the passage of the 1986 Act, as it was widely believed that Bias died from crack cocaine through the time of its passage. Id.; see also Spade, supra note 108, at 1249-51 (summarizing the facts of Bias’s death and its effects on the 1986 Act).


114. The months leading up to the passage of the 1986 Act happened to be the same as those leading up to the 1986 national elections. The Anti-Drug Abuse Act of
News ran four hundred reports on crack, totaling fifteen hours of airtime, and *Time Magazine* named crack the “Issue of the Year.”

**B. Legislative History**

Thanks in large part to media coverage of cocaine in the second half of 1986, Congress began to take note of the increasing crack cocaine problem. Congressman Robert Garcia noted that “it is most important to make our citizens aware of the dangers of crack and cocaine.”

Congress began to take action with the introduction of House Joint Resolution 678 and Senate Resolution 464, designating October as “Crack/Cocaine Awareness Month.” During the Ninety-ninth Congress, several bills were introduced relating to the control and sentencing of controlled substances, and of cocaine and crack in particular.

With growing public concern over the national drug problem and several bills before Congress, the Subcommittee on Crime of the House Judiciary Committee held hearings on August 7, 1986, to discuss the problems of drug abuse in the United States. On August 12, 1986, as a direct result of these hearings, Congressman William J. Hughes (the subcommittee’s chairman) and Congressman Bill McCollum introduced the Narcotics Penalties and Enforcement Act of 1986 as House Bill 5394. This proposed Act took what the subcommittee considered the best aspects of the previously introduced bills, and combined them to form the first comprehensive draft of what later became the Narcotics Penalties and Enforcement Act of 1986, which is found in Subtitle A of Title I of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 3207-192; Statement by President Ronald Reagan upon Signing H.R. 5484, 1986, as reprinted in U.S.C.C.A.N. 5394 (Oct. 27, 1986).

---

117. See id.
118. See id. at 20,551.
119. This was the Congress spanning from 1985 to 1986.
the 1986 Act. On September 19, 1986, about one month after the subcommittee’s draft and introduction of House Bill 5394, the full House Judiciary Committee issued its version of the bill.

While the House Judiciary Committee was working on House Bill 5394, the Reagan administration was working on its own anti-drug legislation. On September 14, 1986, President and Mrs. Reagan announced a new anti-drug initiative intended to (1) ensure a drug-free workplace, (2) work toward drug-free schools, (3) protect the public and provide drug treatment, (4) expand international cooperation, (5) strengthen law enforcement, and (6) expand public awareness and prevention. The next day, the President transmitted the Drug Free America Act of 1986 to Congress, much of which was eventually passed as part of the Anti-Drug Abuse Act of 1986. The document accompanying the proposed act began with a message from the President, declaring his intent to “turn the tide against illegal drugs.” He called it “one of the most important, and one of the most critically needed, pieces of legislation that [his] Administration ha[d] proposed.”

The President’s bill contained language remarkably similar to both the Judiciary Committee’s bill and to what eventually became section 1002 of the 1986 Act, but it differed in several ways. First, the President’s version of the bill was less severe in its treatment of “cocaine base,” requiring twenty-five grams to trigger the five-year mandatory minimum sentence instead of the five grams

125. There is no indication in the legislative history that the administration’s bill was related to the House Judiciary Committee’s. However, the remarkably similar language of the two bills leads to the conclusion that President Reagan was working in concert with Congress. Compare THE DRUG FREE AMERICA ACT OF 1986: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 99-266, at 103-05 (1986), with NARCOTICS PENALTIES AND ENFORCEMENT ACT OF 1986, H.R. REP. NO. 99-845, pt. 1, at 1-3.
128. Id. at 1.
129. Id.
130. See id. § 502, at 103-04.
eventually chosen. Second, it did not have a two-tiered penalty structure, and therefore applied the same maximum and minimum sentences to any amount of "cocaine" over five hundred grams, and any amount of "cocaine base" over twenty-five grams. It did, however, use the term "cocaine base," as opposed to the House Bill's use of the term "cocaine freebase." Additionally, the President's version did not explicitly except "cocaine base" from the definition of cocaine, as did the House Bill.

Two weeks after the President introduced his Drug Free America Act, a third bill was introduced in the Senate, Senate Bill 2878, the Anti-Drug Abuse Act of 1986. Unfortunately, because the bill that was eventually enacted was House Bill 5484, there is little legislative history available on the Senate version prior to its introduction on the floor on September 25, 1986. However, it is the Senate's language that was eventually used in the final version of the section 1002 of the 1986 Act. With both chambers of Congress and the Reagan administration pushing for new anti-drug legislation, the stage was set for the passage of sweeping controlled substance reform.

C. The Bill Becomes a Law

On September 11, 1986, a new bill, the Omnibus Drug Enforcement, Education, and Control Act of 1986, House Bill 5484, was read before the House of Representatives for the first time. This omnibus bill combined many earlier bills into one larger, comprehensive piece of anti-drug legislation. Subtitle C of this bill

131. Id. § 502(1)(A)(iii), at 103-04.
132. Id. § 502.
133. Id.
134. Id.
135. S. 2878, 99th Cong. § 1002 (1986); see also 132 CONG. REC. 26,179 (1986). Senate Bill 2878 was very similar to both the President's and the House's proposed bills. In addition, the Senate was responsible for the short title, the Anti-Drug Abuse Act, and the use of the term "cocaine base" that were eventually passed. S. 2878, § 1002; see United States v. Shaw, 936 F.2d 412, 415 (9th Cir. 1991).
136. See S. 2978, at 1 (noting that the Senate Bill was introduced on September 25, 1986).
was entitled the Narcotics Penalties and Enforcement Act of 1986, and was virtually verbatim the Judiciary Committee's Narcotics Penalties and Enforcement Act of 1986, House Bill 5394. The pertinent portions were also similar to President Reagan's Drug Free America Act of 1986.

However, on September 26, while the House's legislation was being considered by the Senate, Senator Bob Dole offered an amendment to House Bill 5484, entirely replacing the portions relating to mandatory minimum sentences for cocaine trafficking offenses with those from Senate Bill 2878. This amendment was the last change made to section 1002, and by the time the omnibus bill passed the Senate for the first time on October 6, 1986, it contained the language, penalties, and substance quantities that that were eventually enacted into law.

Through September and October of 1986, there was substantial floor debate in both chambers on House Bill 5484. There were never any committee hearings or reports (other than by the House Rules Committee), as most portions of House Bill 5484 were taken from smaller pieces of proposed legislation (such as the Narcotics Penalties and Enforcement Act), on which hearings had already been held. The Bill went back and forth between the

---


140. Note that the Judiciary Committee's version did not come out of committee until September 19, eight days after it was read to the House. How the bill made it to the House floor before it came out of committee is unclear, but Congress works in mysterious ways.

141. 132 Cong. Rec. 26,542 (1986) (“Mr. Dole . . . proposed an amendment to the bill (H.R. 5484) . . . (The text of [the] amendment . . . is identical to the text of the Senate drug legislation S. 2878) . . .”). It has been argued that because House Bill 5484 originally used the term “freebase,” and was later changed to “cocaine base,” Congress's use of the broader term should be evidence that it intended to broaden the definition. See Cary, supra note 34, at 551-52. However, because the subtitle was replaced in its entirety by an independently-drafted version of the legislation, this argument appears to have little support.


146. USSC 2002 Rep., supra note 12, at 5-6; see also supra notes 120-123 and accompanying text.
House and Senate several times, but on October 17, 1986, both the House and Senate passed House Bill 5484, the Anti-Drug Abuse Act of 1986. A few days later, President Ronald Reagan signed the bill into law.

Congress passed the 1986 Act with great haste. The Subcommittee on Crime of the House Judiciary Committee introduced the Narcotics Penalties and Enforcement Act, House Bill 5394, on August 12, 1986, and President Reagan transmitted his Drug Free America Act to Congress on September 15, 1986. It was only a few short months from these events to the signing of the 1986 Act. The relevant portions remain entirely unchanged since its passage, and the areas dealing with "cocaine" and "cocaine base" of 21 U.S.C. § 841(b) remain identical to section 1002 of the 1986 Act. The speed with which Congress passed the statute may be at least partly responsible for the confusion in the text and the legislative history of the Act.

III. THE CIRCUIT SPLIT AND RELEVANT CASES

Section 1002 of the 1986 Act leaves the terms "cocaine" and "cocaine base" undefined, which has given rise to a split among the federal courts of appeals as to the proper definition of those terms. As noted above, these courts have adopted three different holdings as to the definition of "cocaine base" and the appropri-
ate resolution of this issue. The First,\textsuperscript{155} Second,\textsuperscript{156} Third,\textsuperscript{157} Fifth,\textsuperscript{158} and Tenth\textsuperscript{159} Circuits define “cocaine base” as any substance that contains the chemical formula C\textsubscript{17}H\textsubscript{21}NO\textsubscript{4}.\textsuperscript{160} The Fourth,\textsuperscript{161} Sixth,\textsuperscript{162} Seventh,\textsuperscript{163} Eighth,\textsuperscript{164} and Eleventh\textsuperscript{165} Circuits hold that the term refers only to crack cocaine. Finally, the Ninth\textsuperscript{166} and D.C.\textsuperscript{167} Circuits use the smokeability test, where “cocaine base” means any form of cocaine that can be smoked while retaining its chemically basic formula.

A. \textit{Plain Meaning: “Cocaine Base” Means Basic Cocaine}

As noted above, the First, Second, Third, Fifth, and Tenth Circuits all take the approach that any substance that tests positive for the chemical formula C\textsubscript{17}H\textsubscript{21}NO\textsubscript{4}, falls within the definition of “cocaine base.”\textsuperscript{168} These circuits generally reason that the term “co-


\textsuperscript{156} United States v. Palacio, 4 F.3d 150 (2d Cir. 1993); United States v. Jackson, 968 F.2d 158 (2d Cir. 1995).

\textsuperscript{157} United States v. Barbosa (Barbosa II), 271 F.3d 438 (3d Cir. 2001); \textit{see also} United States v. James, 78 F.3d 851 (3d Cir. 1996) (leaning in the direction of but not explicitly holding that the statutory term “cocaine base” is defined by the chemical composition of the substance involved).

\textsuperscript{158} United States v. Butler, 988 F.2d 537 (5th Cir. 1993).

\textsuperscript{159} United States v. Easter, 981 F.2d 1549 (10th Cir. 1992).

\textsuperscript{160} \textit{See supra} note 51 and accompanying text (describing C\textsubscript{17}H\textsubscript{21}NO\textsubscript{4} as the formula for cocaine and its meaning).


\textsuperscript{162} United States v. Levy, 904 F.2d 1026 (6th Cir. 1990).

\textsuperscript{163} United States v. Edwards, 397 F.3d 570 (7th Cir. 2005); United States v. Adams, 125 F.3d 586 (7th Cir. 1997); United States v. Booker, 70 F.3d 488 (7th Cir. 1995).

\textsuperscript{164} United States v. Crawford, 83 F.3d 964 (8th Cir. 1996).


\textsuperscript{166} United States v. Shaw, 936 F.2d 412 (9th Cir. 1991).

\textsuperscript{167} United States v. Brisbane, 367 F.3d 910 (D.C. Cir. 2004). \textit{But see infra} note 191.

\textsuperscript{168} United States v. Medina, 427 F.3d 88 (1st Cir. 2005), \textit{aff’d}, 219 F. App’x 20 (1st Cir. 2007), \textit{cert. denied}, No. 06-12032, 2007 WL 1833562 (U.S. Oct. 1, 2007); United States v. Barbosa (Barbosa II), 271 F.3d 438 (3d Cir. 2001); United States v. Richardson, 225 F.3d 46 (1st Cir. 2000); United States v. Palacio, 4 F.3d 150 (2d Cir. 1993); United States v. Butler, 988 F.2d 537 (5th Cir. 1993); United States v. Jackson, 968 F.2d 158 (2d Cir. 1992), \textit{aff’d}, 59 F.3d 1421 (2d Cir. 1995); United States v. Easter, 981 F.2d...
caine base" is clear on its face, and therefore means anything that is both cocaine and a base.169

An example of a case that falls into this category is United States v. Butler.170 On August 1, 1991, Los Angeles Police Department narcotics detectives observed a suspicious individual board a plane in California bound for Dallas.171 Having been contacted by these Los Angeles detectives, the Dallas/Fort Worth DEA Task Force interrogated the individual, Roland Butler, when his plane landed in Texas.172 A DEA officer brought in a dog to sniff Butler's luggage, and the dog gave "a positive alert that the garment bag contained narcotics."173 A later search revealed two substances in Mr. Butler's bag, both of which tested positive for some form of cocaine.174 Mr. Butler was charged with possession of 988.1 grams of "cocaine" under 21 U.S.C. § 841(b)(1)(B) and with possession of 948.4 grams of "cocaine base" under § 841(b)(1)(A).175 The jury found him guilty of both counts.176

On appeal, Mr. Butler argued that no evidence was presented that the substance he was convicted of possessing in the second count was smokeable.177 He also argued that the substance was not "rock-like, but was soft, mushy, and a bit wet."178 Essentially, Butler's primary argument was that since the substance he was convicted of possessing was not crack cocaine, he could not be found guilty of possession of "cocaine base."179 The court rejected Butler's argument based primarily on the testimony of the chemist who had analyzed the substance.180 After outlining the different forms of cocaine, this chemist testified that the mushy substance found in Mr. Butler's bag would have become crack cocaine if it had been given the opportunity to dry.181 The court found that the

1549 (10th Cir. 1992); United States v. Lopez-Gil, 695 F.2d 1124, 1133 (1st Cir. 1992) (per curiam on petition for rehearing); United States v. Perry, 389 F. Supp. 2d 278 (D.R.I. 2005).
169. E.g., Barbosa II, 271 F.3d at 467.
170. Butler, 988 F.2d 537.
171. Id. at 539.
172. Id.
173. Id.
174. Id. at 539-40.
175. Id. at 540.
176. Id.
177. Id. at 542.
178. Id.
179. Id.
180. Id. at 542-43.
181. Id. at 542.
meaning of "cocaine base" under § 841(b) did not depend on the form or manufacturing process of the substance, but rather its chemical properties, and that the substance in Mr. Butler's possession fit that definition. 182

B. Bright-Line Approach: "Cocaine Base" Means Crack Cocaine

The Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits all hold that "cocaine base" is defined as only crack cocaine. 183 They reason that this definition is more in line with congressional intent as evidenced by both the legislative history of the 1986 Act and by Congress's subsequent ratification of the 1993 Federal Sentencing Guidelines amendment, defining "cocaine base" as crack for the purposes of the Guidelines. 184

A clear-cut example of this holding is found in United States v. Edwards. 185 Edwards pled guilty to two counts of possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a), but challenged the government's contention that the substance was "cocaine base," and therefore subject to the ten-year mandatory minimum sentence under § 841(b)(1)(A). 186 At the hearing to determine the composition of the substance, the defense expert testified that while "the substances were cocaine base in the chemical sense... they did not constitute crack." 187 The trial court accepted the defense expert's explanation as fact, but held that "cocaine base" is not limited only to crack, and consequently sentenced Edwards as having been in possession of more than fifty grams of "cocaine base." 188 On appeal, the Court of Appeals for the Seventh Circuit reversed, holding that "cocaine base" can only mean crack cocaine. 189 It reasoned that "[i]f any form of cocaine base
(not just crack) qualifies for the enhanced penalties in the statute, then subsection (iii) swallows subsection (ii), because ‘cocaine base’ (subsection (iii)) is chemically the same as ‘cocaine’ (subsection (ii)).”

C. Hybrid Approach: The Smokeability Test

The third and final approach is that taken by the Ninth and D.C. Circuits. These jurisdictions hold that “cocaine base” is any substance composed of cocaine that exhibits basic properties and can be smoked. Their reasoning is similar to that of the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits, but insists that Congress did not intend to exclude other forms of cocaine that are inexpensive and smokeable.

The most easily explained example of an applicable case from these circuits is that of United States v. Shaw. The trial court found that because the government could not distinguish between “cocaine” and “cocaine base,” the defendants could only be found guilty of the lesser included offense of possession with intent to distribute cocaine. On appeal, the court vacated, holding that “Congress and the Commission must have intended the term ‘cocaine base’ . . . to mean cocaine that can be smoked,” and remanded for a determination of whether the substance in the defendants’ possession fit that definition.

These three cases are but a sampling of those that embody the disagreement among the federal circuits regarding the definition of “cocaine base” as used in the Anti-Drug Abuse Act of 1986. While

190. Id.
191. United States v. Brisbane, 367 F.3d 910 (D.C. Cir. 2004); United States v. Shaw, 936 F.2d 412 (9th Cir. 1991). The D.C. Circuit is generally grouped with the Ninth Circuit as using the smokeability test and certainly does not take the approach of the Second, Third, Fifth, and Tenth Circuits. See, e.g., Edwards, 397 F.3d at 576 (grouping the Ninth and D.C. Circuits together). However, the D.C. Circuit has not been directly confronted with the issue. The leading case from that Circuit, United States v. Brisbane, 367 F.3d 910, dealt with a prosecution that did not meet the burden of proof under either the crack test or the smokeability test, so the court of appeals was not required to explicitly decide between the two. Id. at 914 (“[W]e need not choose between the two options because both lead to the same result. Here the government did not prove that the substance distributed was smokeable and it did not prove that it was crack.”).
192. See, e.g., United States v. Shaw, 936 F.2d 412 (9th Cir. 1991); see also infra note 301 (quoting Representative Traficant, explaining why price is a consideration).
193. Shaw, 936 F.2d 412. This case is unusual because it was the government that appealed, rather than the defendants. Id. at 413.
194. Id.
195. Id. at 416.
the circuit split has existed since the early 1990s,\textsuperscript{196} the recent change in federal sentencing law has altered the way in which mandatory minimum sentences must be determined.

D. The Caveat: Booker/Fanfan

To fully appreciate the issue, it is important to understand the recent Supreme Court case of \textit{United States v. Booker (Booker/Fanfan)}\textsuperscript{197} and its relationship to the U.S. Sentencing Guidelines. The U.S. Sentencing Guidelines Manual provides formulas to determine the appropriate sentence for a guilty criminal defendant.\textsuperscript{198} In keeping with the spirit of 21 U.S.C. § 841(b), the Guidelines, until recently, generally provided that crack cocaine offenses were to be punished by the same amount of time in prison as cocaine offenses involving one hundred times more controlled substance by weight.\textsuperscript{199} They also explicitly state that ""[c]ocaine base," for the purposes of this guideline, means 'crack.'""\textsuperscript{200} Until January 2005, the Guidelines were mandatory with little room for departure by federal judges. However, \textit{Booker/Fanfan} changed the mandatory nature of the Guidelines.\textsuperscript{201}

Freddie Booker was charged with possession of fifty or more grams of ""cocaine base"" with intent to distribute in violation of 21 U.S.C. § 841(b)(1)(A)(iii).\textsuperscript{202} At a post-trial sentencing hearing, the trial judge determined that Mr. Booker's crime merited an in-

\textsuperscript{196} E.g., \textit{United States v. Lopez-Gil}, 965 F.2d 1124, 1133 (1st Cir. 1992) (per curiam on petition for rehearing); \textit{Shaw}, 936 F.2d 412; \textit{United States v. Levy}, 904 F.2d 1026 (6th Cir. 1990).

\textsuperscript{197} \textit{United States v. Booker (Booker/Fanfan)}, 543 U.S. 220 (2005). This case has been thoroughly analyzed by numerous legal commentators, so only a brief description will be given here. For a more detailed discussion, see for example, Symposium, \textit{Sentencing and Punishment}, 38 \textit{ARIZ. ST. L.J.} 367 (2006). Please note that this case is procedurally unrelated to the Seventh Circuit's leading case on the definition of cocaine base, \textit{United States v. Booker}, 70 F.3d 488 (7th Cir. 1995), (despite the similarity of their facts), which is also referenced throughout this Note. As such, the 2005 Supreme Court case will be referred to as ""\textit{Booker/Fanfan}," as \textit{United States v. Fanian} was decided in the same Supreme Court opinion as \textit{United States v. Booker}. See \textit{Booker/Fanfan}, 543 U.S. at 220 n.*.

\textsuperscript{198} See generally USSG, supra note 3.

\textsuperscript{199} Id. § 2D1.1(c). But see supra note 12 (discussing recent changes to the Guidelines).

\textsuperscript{200} Id. § 2D1.1(c).

\textsuperscript{201} \textit{Booker/Fanfan}, 543 U.S. at 245 (Breyer, J., delivering the opinion of the Court in part).

\textsuperscript{202} Id. at 227 (Stevens, J., delivering the opinion of the Court in part). Note that despite the nature of the charges against Mr. Booker and their similarity to the fact patterns outlined above, see \textit{supra} Parts III.A-C the definition of ""cocaine base"" was not at issue in \textit{Booker/Fanfan}. 
creased sentence under the Guidelines based on facts not proven to
the jury.203 The Supreme Court held under the Sixth Amendment’s
right to a jury trial, that “[a]ny fact (other than a prior conviction)
which is necessary to support a sentence exceeding the maximum
authorized by the facts established . . . must be admitted by the
defendant or proved to the jury beyond a reasonable doubt.”204
Thus, because the Guidelines are applied judicially at sentencing
without the aid of the trier of fact, the Court found that the provi­
sion of 18 U.S.C. § 3553(b)(1), making the Guidelines mandatory,
was unconstitutional.205 Since this decision, the Guidelines have
been “effectively advisory,”206 and judges are now free to sentence
defendants as they see fit, bounded only by a review of the “reason­
ableness” of the sentence.207

Booker/Fanfan has three primary implications for the issue
under discussion. First, because it makes the Guidelines advisory,
their definition of “cocaine base” as crack is also advisory and does
not have the force of law.208 Second, the ruling requires the ques­
tion of whether a substance is “cocaine base” to be presented to a

203. Id.
204. Id. at 244 (Stevens, J., delivering the opinion of the Court in part). This
holding is an outgrowth of the Court’s decisions in Apprendi v. New Jersey, 530 U.S. 466
(2000) and Blakely v. Washington, 542 U.S. 296 (2004), which reached similar conclu­
sions for states’ sentencing practices based on the Fourteenth Amendment’s Due Pro­
cess Clause. Apprendi, 530 U.S. at 490; Blakely, 542 U.S. at 301, 313-14. For a more in­
depth discussion of Apprendi, see for example, Symposium, 38 AM. CRIM. L. REV. 241
205. Booker/Fanfan, 543 U.S. at 245 (Breyer, J., delivering the opinion of the
Court in part).
206. Id. at 246.
207. Id. at 260-61. The Supreme Court recently reversed a Fourth Circuit deci­
ion, which held that “a sentence that is outside the guidelines range is per se unreason­
able when it is based on a disagreement with the sentencing disparity for crack and
powder cocaine offenses.” United States v. Kimbrough, 174 F. App’x 798, 799 (4th Cir.
2006) (per curiam), rev’d, 128 S. Ct. 558 (2007). Basing its decision on Booker/Fanfan,
the Court held that a “judge may consider the disparity between the Guidelines’ treat­
ment of crack and powder cocaine offenses” in determining an appropriate sentence.
Kimbrough, 128 S. Ct. at 564.
208. Booker/Fanfan, 543 U.S. at 245-46 (Breyer, J., delivering the opinion of the
Court in part). Note however that even prior to Booker/Fanfan, some jurisdictions re­
fused to accept the Guidelines’ definition of “cocaine base” for the purposes of deter­
mining mandatory minimum sentences. See, e.g., United States v. Barbosa (Barbosa II), 271 F.3d 438, 467 (3d Cir. 2001) (“[W]hile the term ‘cocaine base’ means only crack
when a sentence is imposed under the Sentencing Guidelines, ‘cocaine base’ encom­
passes all forms of cocaine base with the same chemical formula when the mandatory
minimum sentences under 21 U.S.C. § 841(b)(1) are implicated.”).
Finally, because federal judges are now freer to impose lower sentences, the statutory minimums are more likely to come into play, as the Guidelines generally provide for higher sentences than the statutory mandatory minimum.\footnote{210}

The cases and holdings described above frame the issue: \textit{What is the definition of “cocaine base” in 21 U.S.C. § 841(b)?} The different definitions of terms in this three-way circuit split cause defendants convicted of the same offense to be sentenced in radically different ways based only upon the federal circuit in which the crime was committed. The discussion of the different forms of cocaine and its history and pharmacology\footnote{211} has laid a foundation, allowing an analysis of the terms used for cocaine in the 1986 Act. The discussion of legislative history\footnote{212} has provided a framework for analyzing the intent of Congress in drafting the 1986 Act. Finally, the summary of the circuit split\footnote{213} provides the means to determine which courts have the soundest holding. In order to resolve this conflict, this Note analyzes the various holdings and arguments in order to demonstrate that a bright-line holding whereby “cocaine base” means only crack cocaine makes the most logical sense and comports with the intent of Congress.

\section*{IV. Analysis}

The Anti-Drug Abuse Act of 1986 punishes possession with the intent to distribute five hundred grams or more of “a mixture or substance containing a detectable amount of coca leaves, … co-
caine, [or] its salts" with "a term of imprisonment which may not be less than 5 years and not more than 40 years." It also pun­ishes possession with the intent to distribute "5 grams or more of a mixture or substance described . . . which contains cocaine base," with the same "term of imprisonment." Similarly, possession with the intent to distribute five kilograms of a mixture or sub­stance containing coca leaves, cocaine, or its salts, carries the same minimum sentence of ten years incarceration as possession with in­tent to distribute fifty grams of substance containing "cocaine base."

The problem with these statutory provisions is that "cocaine" and "cocaine base" mean the same thing. While the term "co­caine" may be more inclusive than "cocaine base," the statute de­lineates different types of cocaine, namely its "salts, optical and geometric isomers, . . . salts of isomers[,] ecgonine, [and] its deriva­tives," as separate from cocaine. If the courts accept the rule of statutory construction that each word in a statute must have a dis­tinct meaning, this list makes it clear that neither the definition of "cocaine" nor that of "cocaine base" includes salts, isomers, and so forth. Thus, what is meant by the use of two different terms in § 841(b)?

The issue primarily revolves around the definition of the terms in 21 U.S.C. § 841(b), namely, "cocaine," "its salts," and "cocaine base." As the table below illustrates, there are four primary ways that the federal appellate courts have resolved this question: The first option is to define "its salts" as cocaine hydrochloride, "co­caine base" as crack cocaine, and "cocaine" as a catch-all for anything made from a cocaine derivative that the statute may have missed, including coca paste. This is the approach taken by the

---

215. Id. § 841(b)(1)(B).
216. Id. § 841(b)(1)(B)(iii).
217. Id. § 841(b)(1)(B).
218. Id. § 841(b)(1)(A).
219. See supra notes 15-18 and accompanying text.
220. 21 U.S.C. §§ 841(b)(1)(A)(ii)(IV), 841(b)(a)(B)(ii)(IV). This list is all inclu­sive of the controlled forms cocaine under this section. Id.
222. Note that while earlier portions of this Note discuss the three-way circuit split, this only refers to the three possible ways in which to define "cocaine base." Of the four possible holdings, "cocaine base" is only defined in three ways. See infra table 1.
Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits. The second possibility is to define “its salts” as cocaine hydrochloride, “cocaine base” as freebase cocaine, and “cocaine” again as a catch-all. This is essentially the approach taken by the Ninth Circuit’s smokeability test. Third, “cocaine” could be defined as powder cocaine, and “cocaine base” would be the catch-all term. However, this approach leaves the term “its salts” extraneous, because powder cocaine is the most prevalent form of cocaine salt. This is the approach taken by the Second, Third, and Fifth Circuits. Finally, “its salts” could be defined as cocaine hydrochloride and “cocaine base” as anything containing the basic form of the chemical cocaine. However, these two definitions are all-inclusive, leaving “cocaine” to mean essentially nothing. This is the approach taken by the First and Tenth Circuits. This Note argues that having this

223. United States v. Crawford, 83 F.3d 964, 965 (8th Cir. 1996) (adopting the holding of the Seventh Circuit in United States v. Booker, 70 F.3d 488 (11th Cir. 1995)); United States v. Fisher, 58 F.3d 96, 99 (4th Cir. 1995) (“[T]he only rational interpretation that we can give this statute as a whole is to conclude that clause (ii) addresses cocaine powder and other forms of cocaine identified therein, except for ‘crack’ cocaine which is expressly separately addressed in clause (iii).”); United States v. Booker, 70 F.3d 488, 491 n.17, 493 (7th Cir. 1995) (holding that cocaine hydrochloride falls into the definition of “salts,” and “cocaine base” means exclusively crack); United States v. Munoz-Rea, 21 F.3d 375, 377-78 (11th Cir. 1994) (holding that crack is the only substance falling into the definition of “cocaine base”); United States v. Levy, 904 F.2d 1026, 1033 (6th Cir. 1990) (indicating that crack alone falls into the definition of “cocaine base”). These circuits, defining “cocaine base” as crack cocaine, are generally less explicit with regard to the other terms in the statute. This is likely because the other forms of cocaine receive sentences based on similar weight, so there is little cause to differentiate between them. See generally 21 U.S.C. §§ 841(b)(1)(A)(ii), 841(b)(1)(B)(ii) (2000).

224. See United States v. Shaw, 936 F.2d 412 (9th Cir. 1991); supra note 195 and accompanying text. Note however that the Ninth and D.C. Circuits’ holdings are not exactly equivalent to a freebase definition because they include coca paste in their definition (a non-freebase form of chemically basic cocaine), because it is smokeable. United States v. Brisbane, 367 F.3d 910, 914 (D.C. Cir. 2004) (“In addition to crack, [cocaine base] includes in the definition ‘traditional’ freebase cocaine and cocaine paste.”); cf. Beilenko, supra note 50, at 5 (“[In the early 1980s], there was increasing popularity of coca paste smoking . . . in South America and the Caribbean.”).

225. United States v. Butler, 988 F.2d 537, 542-43 (5th Cir. 1993) (noting that “cocaine hydrochloride” is another term for “cocaine,” and that “cocaine base” is any substance that exhibits basic properties); United States v. Jackson, 968 F.2d 158, 161 (2d Cir. 1992) (“[T]he chemical formula for cocaine base is C₁₇H₂₁NO₄; the formula for cocaine hydrochloride—a chemical term for cocaine—is C₁₇H₂₃NO₄HCl.” (emphasis added)), aff’d, 59 F.3d 1421 (2d Cir. 1995); see also United States v. Barbosa (Barbosa II), 271 F.3d 438, 466 (3d Cir. 2001) (adopting the holding and reasoning of the Jackson court).

226. United States v. Robinson, 144 F.3d 104, 108 (1st Cir. 1998) (defining “cocaine base” as anything with the chemical formula C₁₇H₂₃NO₄ and cocaine “salts” as cocaine hydrochloride); United States v. Easter, 981 F.2d 1549, 1558 (10th Cir. 1992).
single definition for two different terms in a statute is unworkable, and thus an incorrect construction of the 1986 Act. It further argues that the smokeability test contains valid reasoning, but reaches the incorrect result.227 Congress intended the term “cocaine base” to mean exclusively crack. Consequently, this is the definition that the federal courts should adopt.

Table 1: How the Federal Courts Define Terms in 21 U.S.C. § 841(b)(1)

<table>
<thead>
<tr>
<th></th>
<th>Cocaine</th>
<th>Cocaine Base</th>
<th>Cocaine Salts</th>
</tr>
</thead>
<tbody>
<tr>
<td>4th, 6th, 7th, 8th &amp; 11th Circuits</td>
<td>Coca Paste, Freebase</td>
<td>Crack</td>
<td>Powder Cocaine</td>
</tr>
<tr>
<td>Freebase Test (Similar to 9th &amp; D.C. Circuits)</td>
<td>Coca Paste</td>
<td>Freebase, Crack</td>
<td>Powder Cocaine</td>
</tr>
<tr>
<td>2nd, 3rd &amp; 5th Circuits</td>
<td>Powder Cocaine</td>
<td>Freebase, Crack, Coca Paste</td>
<td>Nothing</td>
</tr>
<tr>
<td>1st &amp; 10th Circuits</td>
<td>Nothing</td>
<td>Freebase, Crack, Coca Paste</td>
<td>Powder Cocaine</td>
</tr>
</tbody>
</table>

The most easily understood implication of the issue involves a situation where an individual is found in possession of a form of cocaine that is neither cocaine hydrochloride nor crack cocaine.228 However the issue has ramifications in other areas. For example, the resolution of the question will determine the evidence that must be proven at trial in a “cocaine base” case. If “cocaine base” is defined as crack, a prosecutor must prove to the trier of fact beyond a reasonable doubt that the substance not only has a particular chemical formula, but also that it was manufactured in a particular way.229 This creates a problem as to the proof needed at trial, as it is very difficult to prove that a substance was manufactured in a

---

227. Like the Ninth and D.C. Circuits, this Note primarily uses the intent and understanding of Congress as the basis of decision. However, these Circuits include freebase cocaine and coca paste in their definition of “cocaine base,” whereas the thesis herein does not. See Brisbane, 367 U.S. at 913-15; Shaw, 936 F.2d at 415-16; see also supra note 224 (explaining that the Ninth and D.C. Circuits do not strictly adhere to the freebase definition).

228. See supra text accompanying notes 22-33.

229. As noted in supra Part I.B, crack cocaine is defined in part by its manufacturing process.
certain way that is unrelated to its chemical properties.\textsuperscript{230} Additionally, the issue affects jury instructions and deliberations. It may be easier for the average American to understand crack than to understand "cocaine base." However, it may be more difficult to get twelve people to agree that a substance is crack cocaine rather than any basic form of cocaine.\textsuperscript{231}

Having outlined the issue and its implications, the remainder of this Part is dedicated to analyzing the language and legislative history of 21 U.S.C. § 841(b). Subpart A discusses the plain-meaning approach and how it both falls short of creating a workable solution to the problem, and is inapplicable because of the statute's lack of "plain meaning." Subpart B analyzes the history and congressional intent behind the statute in order to show that Congress meant for "cocaine base" to refer exclusively to crack cocaine. Finally, Subpart C further bolsters the proposition that Congress intended this result by discussing the effect of the Sentencing Guidelines' definition of "cocaine base" as crack cocaine.

A. The Plain-Meaning Approach

1. Reasoning Behind the Plain-Meaning Approach

The federal courts holding that "cocaine base" means any form of basic cocaine generally purport to base their holdings on the "plain language of 21 U.S.C. § 841(b)(1)."\textsuperscript{232} They reason that the plain meaning of the term "cocaine base" is any substance that is a base and contains cocaine.\textsuperscript{233} This interpretation, they argue, com-

\textsuperscript{230} But see Robinson, 144 F.3d at 109 (holding that the testimony of a police officer as to his professional opinion that a substance was crack, is sufficient to prove that it was, in fact, crack).

\textsuperscript{231} It should be noted, however, that there is no question in any federal circuit that crack cocaine falls within the definition of "cocaine base" and that powder cocaine does not. This general understanding frames minimum requirements for defining the terms in § 841(b): "cocaine base" must include crack within its definition and must exclude powder cocaine.

\textsuperscript{232} United States v. Barbosa (Barbosa II), 271 F.3d 438, 446 (3d Cir. 2001); see also United States v. Jackson, 968 F.2d 158, 161-62 (2d Cir. 1992) ("'cocaine base' has a precise definition," which is the chemical formula $C_{17}H_{21}NO_4$, aff'd, 59 F.3d 1421 (2d Cir. 1995). Arguably, however, the fact that learned federal appellate judges disagree as to the definition of terms in the statute, makes its meaning per se not plain. Cf. Marathon LeTourneau Co. v. NLRB, 414 F. Supp. 1074, 1080 (S.D. Miss. 1976) (disparity among reported opinions interpreting the Freedom of Information Act is evidence that its language is neither clear nor unambiguous).

ports with the first rule of statutory construction: that Congress "says in a statute what it means and means in a statute what it says there,"234 and "where . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"235

However, even among the circuits that take the plain-meaning approach, there is disagreement as to the definition of terms.236 The First Circuit, for example, defines cocaine salts as including cocaine hydrochloride and "cocaine base" as any basic form of cocaine.237 This combination of definitions leaves "cocaine" superfluous. The Second Circuit, on the other hand, defines "cocaine" to include cocaine hydrochloride.238 By holding that cocaine hydrochloride fits into the definition of "cocaine," it merely switches the redundancy, making the phrase "its salts" superfluous.

The Second Circuit's definition of "cocaine" as a layman's term for cocaine hydrochloride239 is patently incorrect and illogical: It states that "cocaine base" is a scientific term with a particular scientific meaning that should be adopted by the courts; but, the court notes only two sentences earlier that Congress used the term "cocaine" as a colloquialism for a different scientific term: cocaine hydrochloride.240 This makes little sense: The scientific community defines "cocaine" as an "alkaline"241 substance derived from coca leaves with the chemical formula C_{17}H_{21}N_{0}4,242 and cocaine hydrochloride as a salt with a "slightly bitter taste," taking the form of "crystals, granules, or powder," and having a chemical formula of

---

236. See supra table 1.
238. United States v. Jackson, 968 F.2d 158, 161 (2d Cir. 1992) ("[T]he chemical formula for cocaine base is C_{17}H_{21}NO_{4}; the formula for cocaine hydrochloride—a chemical term for cocaine—is C_{17}H_{21}NO_{4}HCl." (emphasis added)), aff'd, 59 F.3d 1421 (2d Cir. 1995); see also United States v. Barbosa (Barbosa II), 271 F. 3d 438, 466 (3d Cir. 2001) (adopting the holding and reasoning of the Jackson court).
239. Jackson, 968 F.2d at 161.
240. Id. at 161-62 ("[T]he formula for cocaine hydrochloride—a chemical term for cocaine—is C_{17}H_{21}NO_{4}HCl . . . . [C]ocaine base has a precise definition in the scientific community." (emphasis added)).
241. Alkaline means basic. Webster's Third, supra note 15, at 54 (defining alkaline as "of, relating to, or having the properties of an alkali . . . having a pH of more than 7 . . . see BASIC"); see supra note 15 and accompanying text.
242. The Merck Index, supra note 51, § 2480, at 429.
C_{17}H_{21}NO_{4}HCl. In other words, the scientific meanings of cocaine and "cocaine base" are identical. Therefore, if the argument is that the scientific definition of terms should apply, it is very clear that the terms are redundant.

Using either set of definitions causes two of the terms in the statute to refer to the same substance, making the statute's meaning far from "plain." As noted above, the courts taking the so-called "plain-meaning" approach reach a nonsensical conclusion that the term "cocaine" has no distinct meaning, or at least the same meaning as either "cocaine base" or "its salts."

While the plain-meaning rule assumes that a statute will be interpreted by the plain meaning of its terms if such an interpretation is workable, there are exceptions to this rule. Foremost among these is the requirement that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. " When the plain-meaning rule comes into conflict with this canon, it is entirely appropriate to consider additional evidence as to the intended meaning of the terms. "This is because the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" Therefore, the fact that the statute makes grammatical sense does not preclude the consideration of legislative history and other evi-

243. Id. § 2480, at 430.

244. TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)). This principle has been expounded throughout much of U.S. history, and is consequently one of the best understood and most important rules in the art of statutory interpretation. See, e.g., id.; Duncan, 533 U.S. at 174; Williams v. Taylor, 529 U.S. 362, 404 (2000); Ratzlaf v. United States, 510 U.S. 135, 140 (1994); Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988); United States v. Menasche, 348 U.S. 528, 538-39 (1955); Montclair v. Ramsdell, 107 U.S. 147, 152 (1883); Mkt. Co. v. Hoffman, 101 U.S. 112, 115 (1879); see also 2A Singer, supra note 235, § 46:06, at 181-94 (summarizing this rule and describing its precedent). This rule appears to create a presumption that Congress does not insert words into statutes simply to confuse the courts or to create ambiguities. Thus, it must be assumed that Congress intended each term in the statute to have distinct meaning. The definition of "cocaine base" as crack has been the only one suggested that would leave the law without redundancy.

245. Cf. 2A Singer, supra note 235, § 46:07, at 194-97 ("[I]t is clear that if the literal import of the text of an act is inconsistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be modified to agree with the intention of the legislature." (citations omitted)).

dence that tend to show that the “plain-meaning” interpretation used in the circuits is incorrect.

2. Plain Meaning Cuts the Other Way

In addition to containing a superfluous term in the text (when a plain-meaning approach is used), § 841(b) is also ambiguous because the phrase “cocaine base” may have more than one reasonable meaning. While the scientific meaning of “cocaine base” may be any basic form of cocaine, there is also a widely accepted vernacular definition of “cocaine base,” meaning crack. Therefore, there is even disagreement as to the plain meaning of the term “cocaine base.” In United States v. Booker, the court noted that “[t]he sentencing schemes in § 841(b) . . . are widely considered to establish two tiers of penalties for offenses involving cocaine: higher penalties for ‘crack’ cocaine and lesser penalties for powder cocaine.” In Edwards v. United States, the Supreme Court noted that “[t]he government charged petitioners with violating [21 U.S.C. §§ 841 and 846] by conspiring to ‘possess with intent to distribute . . . mixtures containing’ two controlled substances, namely, ‘cocaine . . . and cocaine base’ (i.e. ‘crack’).” Similarly, in the Booker/Fanfan decision, the Supreme Court again noted that “[r]espondent . . . was charged with possession with intent to distribute at least 50 grams of cocaine base (crack).” These quotations indicate that a majority of the Supreme Court understands the term “cocaine base” to mean crack.

247. See, e.g., Ark. Dep’t of Human Servs. v. Collier, 95 S.W.3d 772, 778 (Ark. 2003) (“A statute is ambiguous only where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning.”); State ex rel. Angela M.W. v. Kruzicki, 561 N.W.2d 729, 734 (Wis. 1997) (“Statutory language is ambiguous if reasonable minds could differ as to its meaning.”); 2A SINGER, supra note 235, § 46:06, at 145-46 (“A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses.”).

248. Cf Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 317 (1899) (noting that words, be they in a contract, statute, dictionary, etc., generally have different possible meanings, and that courts must look to external evidence to determine the intent of the parties as to the intended meaning).

249. United States v. Booker, 70 F.3d 488, 491 (7th Cir. 1995) (emphasis added).

250. Edwards v. United States, 523 U.S. 511, 512-13 (1998) (emphasis added). Despite the similarity of facts and origin in the same district court, note that this case is procedurally unrelated to United States v. Edwards, 397 F.3d 570 (7th Cir. 2005), which is discussed throughout this Note.


252. In neither of these cases was the definition of “cocaine base” an issue before the Court, and both of these quotations come from the sections of these opinions
Even the U.S. Attorney's Office for Massachusetts, a First Circuit jurisdiction,\(^{253}\) has defined "cocaine base" as crack, stating in a press release that "[o]n August 2, 2006, [defendant] pleaded guilty to one count of possession of cocaine base, commonly known as 'Crack', with intent to distribute."\(^{254}\) In addition, the mainstream media generally equates "cocaine base" with crack.\(^{255}\) For example, a Springfield, Massachusetts, newspaper stated that "[a] former Springfield and Holyoke resident was sentenced Friday at U.S. District Court to 37 months imprisonment and five years of supervised release for trafficking in cocaine and cocaine base (crack cocaine)."\(^{256}\) Similarly, the Associated Press issued a report of an Alaskan case where "[a] federal jury has convicted a Fairbanks man of possession of cocaine base—also known as crack cocaine—with intent to distribute."\(^{257}\) These are just some of the many examples of the media's general understanding of the term "cocaine base" as being the synonym of crack.

---

\(^{253}\) The District of Massachusetts is in the First Circuit, which purportedly takes the plain-meaning approach. See supra notes 155, 168 and accompanying text.


\(^{255}\) While a media or vernacular definition does not necessarily equate with a legal definition, where a term is not defined in the statute, the popular meaning is often used. FDIC v. Meyer, 510 U.S. 471, 476 (1994) (citing Smith v. United States 508 U.S. 223, 228 (1993)); Maillard v. Lawrence, 57 U.S. (16 How.) 251, 261 (1853) ("The popular or received import of words furnishes the general rule for the interpretation of public laws . . . ."). But see Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974) (noting that, absent evidence of legislative intent to the contrary, where a technical term is used, it should be given its technical meaning (citing Greenleaf v. Goodrich, 101 U.S. 278, 284 (1880))).

\(^{256}\) Cocaine Case, REPUBLICAN (Springfield, Mass.), Nov. 2, 2006, at B3 (emphasis added), available at 2006 WLNR 19121645 (Westlaw).

Legal literature also takes for granted that "cocaine base" means crack, often using the terms interchangeably or noting that § 841(b) creates a sentencing disparity between crack and powder cocaine, without mentioning "cocaine base." For example, the Western New England Law Review published an article discussing the sentencing disparity between powder cocaine and crack cocaine.\(^{258}\) In another article, William Spade, Jr. indicated that "[t]he 1986 Act created the federal criminal law distinction between powder cocaine and crack cocaine."\(^{259}\) These sources show the legal community's general understanding that the hundred-to-one quantity ratio applies to powder cocaine and crack cocaine, and that the term "cocaine base" in § 841(b) is specifically referring to crack. While this vernacular understanding of legal scholars does not prove the statutory definition of "cocaine base," it is further evidence of the statute's ambiguity and provides a different plain definition of "cocaine base" than that used by the "plain-meaning" jurisdictions.

In addition, assuming that Congress did want the higher penalties applied to crack alone, it may have had few choices as to the appropriate terminology it could use in the statute. During the summer of 1986 when the bill was working its way through Congress, crack cocaine was a relatively new invention, and an even newer fad.\(^{260}\) While the term "crack" had been used prior to that time, it is unlikely that it was part of the common vernacular. What is now known as crack was first mentioned in the media less than one year prior to the passage of the 1986 Act.\(^{261}\) This first mention did not use the term "crack" at all, but rather referred to the substance as a "rock" form of cocaine.\(^{262}\) In June of 1986, while the various proposed drug-related measures were just starting to be


\(^{260}\) BeLenko, *supra* note 50, at 6, 9.


\(^{262}\) Id.; Furillo, *supra* note 110.
taken up in the House of Representatives, the South Florida Sun-Sentinel published an article on the dangers of “rock cocaine.”

Apparently unable to find a suitable name for the substance, the author felt the need to define the drug at the beginning of the article as being “[k]nown on the street as ‘rock,’ ‘crack,’ ‘base,’ or ‘Roxanne,'” and constantly switched between the terms throughout the piece.

These articles are but two examples showing confusion as to the name of what has become known as crack cocaine. The use of the terms “rock,” “crack,” and “Roxanne” may have been jargon or fad. The term “crack” as referring to a form of cocaine was not yet a part of the English language, and Congress may have merely used “cocaine base” as the only reasonable synonym available to it.

The foregoing demonstrates that the relevant language in section 1002 of the 1986 Act is repetitive, ambiguous, or both. As such, it is appropriate to look at other evidence to determine what the terms mean in the context of the statute. The jurisdictions taking the “plain-meaning” approach argue that the legislative history of the 1986 Act shows no intent to limit the meaning of “cocaine base” to crack. However, the history shows that Congress was thinking of nothing other than crack cocaine when drafting and adopting the language.


264. Id. (emphasis added).

265. Compare WEBSTER’S THIRD, supra note 15, at 527-28 (no definition of “crack” as a narcotic), with MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 290 (Frederick C. Mish et al. eds., 11th ed. 2005) (defining crack as “a potent form of cocaine . . . called also crack cocaine”). The Oxford English Dictionary notes that the word “crack” as meaning a “crystalline form of cocaine,” is a slang term that was first used in December of 1985. 3 OXFORD ENGLISH DICTIONARY 1097 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (citing S.F. CHRON., Dec. 6, 1985, with no further bibliographic information given).

266. Cf. United States v. Levy, 904 F.2d 1026, 1033 (6th Cir. 1990) (stating, somewhat sarcastically, “we are not clear whether Levy believes that Congress should have defined ‘cocaine base’ in extensive and definitive chemical notation, or whether it should have filled the statute with the slang names of drugs it intended to target, or both”).


268. E.g., United States v. Jackson, 968 F.2d 158, 162 (2d Cir. 1992) (“While we believe that Congress contemplated that ‘cocaine base’ would include cocaine in the form commonly referred to as ‘crack’ or ‘rock’ cocaine, Congress neither limited the term to that form in the plain language of the statute nor demonstrated an intent to do so in the statute’s legislative history.”), aff’d, 59 F.3d 1421 (2d Cir. 1995).
B. Intent of the Drafters

Looking for a statement in the Congressional Record to the effect of—*we intend the clause “cocaine base” to be limited to crack cocaine*—would be futile. This is not because Congress wanted to include substances other than crack in the definition, but instead is due to the haste with which the bill was passed. Furthermore, it was unlikely to have occurred to the members of Congress that “cocaine base” could include anything other than crack. On the other hand, the Congressional Record, committee reports, and news media quoting members of Congress, are replete with references to crack as being the only drug worthy of heightened penalties and control.

The circuits holding that “cocaine base” is defined as crack do so with an eye toward the intent of Congress at the time of the Act’s passage in 1986. The Seventh Circuit—the jurisdiction with the most in-depth appellate case law on the subject—has held repeatedly that “Congress intended the enhanced penalties to apply to crack cocaine and the lesser penalties to apply to all other forms of cocaine.” In addition, the Seventh Circuit has found that while cocaine and “cocaine base” may be the same substance in scientific terms, “the legislative history of § 841(b) demonstrates that Congress intended the terms to have different meanings.” If it is true that these terms are intended to have different meanings, it is necessary to inquire into what those meanings are.

1. Theories for Determining the Intent of Congress

Statutes have the force of law because they are drafted and adopted by the people’s representatives in Congress. Therefore, they should be applied “in a manner consistent with the expectations of their authors.” Common law systems of jurisprudence often look to the “intent of the legislature” in attempting to con-

---

269. However, the statements of Senator Chiles come very close. See infra notes 305-306 and accompanying text.
270. Kerr, supra note 153 (noting that several members of Congress regretted the speed with which the 1986 Act was passed).
271. See infra Part IV.B.2.
272. See, e.g., United States v. Booker, 70 F.3d 488, 492-93 (7th Cir. 1995).
273. Id.; accord United States v. Edwards, 397 F.3d 570, 575 (7th Cir. 2005).
274. Booker, 70 F.3d at 492.
275. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 221-22 (2d ed. 2006).
276. Id. at 222.
strue a statute. The task of determining the authors' expectations is easier said than done: Because intent is a subjective mental state of an individual, the task of discovering the collective intent of 535 individuals in the U.S. Congress would be practically impossible.

However, lawyers and judges constantly attempt to discover this intent, and so, three primary theories of statutory construction have developed to probe into congressional intent. The first of these theories is that of general intent or purposivism. The goal of this method is to determine the overall purpose of the legislation and interpret the language with an eye toward meeting that purpose. It asks why the statute was passed and what Congress wanted to accomplish by the statute's passage.

The second theory is specific intent, or the "legislators' understanding of how laws they adopt would be applied to particular cases." This is essentially an effort to determine the sense within Congress as to how the law should and would be applied. The third and final theory used to interpret the intent of Congress is imaginative reconstruction, which attempts to determine "what the legislators would have decided had they thought about" the specific problem. While none of these theories eliminates the need or the impossibility of having to get into the heads of legislators, they do create a framework to evaluate the evidence of congressional intent.

---

277. 2A SINGER, supra note 235, § 45:05, at 25-34; see ESKRIDGE ET AL., supra note 275, at 221.
278. 2A SINGER, supra note 235, § 45:06, at 35.
279. Id. (citing Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 869 (1930)).
280. See ESKRIDGE ET AL., supra note 275, at 221-30.
281. Id. at 228-30.
282. Id.; see 2A SINGER, supra note 235, § 45:09, at 49-55; see also In re Falstaff Brewing Corp., 637 A.2d 1047, 1050 (R.I. 1994) ("[O]ur primary task in construing a statute is to attribute to the enactment the meaning most consistent with its policies and with the obvious purposes of the Legislature, by viewing the statute in light of circumstances that motivated its passage." (citations omitted)).
283. See, e.g., Falstaff Brewing Corp., 637 A.2d at 1050.
285. Id.
286. ESKRIDGE ET AL., supra note 275, at 222. This theory is more metaphysical than the others, as it requires the individual interpreting the statute to inquire how Congress would have answered if presented with the specific problem under consideration. Id.
In applying any or all of these theories of interpretation, it is appropriate to consider "background information about circumstances which led to the enactment of a statute, events surrounding enactment, and developments pertinent to subsequent operation," which may be gleaned from legislative history or "executive, judicial, or nongovernmental sources." In other words, in order to determine the intent of Congress in passing a statute, it is proper to consider almost any source that can provide guidance on the subject. Consequently, the history of the 1986 Act must be analyzed in order to apply the theories of determining legislative intent.

2. General Intent

Every circuit holding that "cocaine base" means exclusively crack, reached that conclusion, at least in part, by analyzing the history of the 1986 Act. The legislative history is replete with discussions of the dangers of crack cocaine, with no mention of any other drug being worthy of stricter penalties or enforcement.

Before taking a closer look at the Congressional Record, it is important to remember and understand the atmosphere in the country while the Act was making its way through Congress. Len Bias had recently died from what was thought to be a crack overdose, the news media was covering the crack epidemic with vigor and members of Congress were looking toward the November elections, having done little to curb the drug problem that had quickly become a "clear and present danger to America's na-

---

287. 2A Singer, supra note 235, § 48:01, at 109-10.
289. See infra notes 297-305 and accompanying text.
291. See supra notes 111-113 and accompanying text.
292. See supra notes 113-115 and accompanying text.
tional security.”  

“Drug abuse in general, and crack cocaine in particular, had become in public opinion and in members’ minds a problem of overwhelming dimensions.”

It is therefore no surprise that the Act was rushed through Congress before the new year and in time for the 1986 national elections. It is also not surprising that there are few statements specifically equating “coca­ine base” with crack, as the 1986 Act was passed quickly and in an atmosphere where it went without saying that crack was worthy of higher regulation and penalties.

a. Debate in the House of Representatives

In the deliberations surrounding the passage of the 1986 Act, many members of Congress expressed concern over the dangers of the increasing use of crack cocaine, and an understanding that the Act would punish crack more harshly than other forms of cocaine. For example, Representative Mario Biaggi stated that “[d]uring the last year, our Nation’s already severe drug problem has scaled new and even more frightening heights, and the reason is crack, the coca­ine-based drug that is killing our kids, and sending violent crime statistics sky high.” This statement indicates, at least to Representative Biaggi, that crack cocaine was more troublesome than any other drug regulated by the Controlled Substances Act or the Anti-Drug Abuse Act of 1986 under consideration at the time of his statement.

Similarly, Representative Joseph DioGuardi was even more adamant about the dangers of crack and his belief that it required higher penalties than any other drug. He noted that his constituents saw the emergence of crack cocaine as an issue of great importance and in need of greater federal regulation. His comments are indicative of the general sense within the House of Represen-
tives—that the rise in popularity of crack cocaine was the worst narcotics epidemic in history, and required swift and severe government action.\textsuperscript{301}

While these words spoken on the floor of the House of Representatives do not specifically address the application or interpretation of the 1986 Act's provisions dealing with "cocaine base," they do show intent among the members to pay particular attention to the problems associated with crack cocaine. While they are merely the personal understanding and feelings of the individual representatives, they indicate the general sentiment within the House during

\textit{Id.} at 22,321. Representative Benjamin Gilman noted that "drug trafficking \ldots and abuse has infected every city, town, and school district in our Nation and that we are inundated by increasing amounts of heroin, cocaine —and now the newly highly addictive crack cocaine." \textit{Id.} at 22,321. Representative James Traficant stated:

Cocaine is no longer a drug of the affluent. A new form of freebase cocaine called crack is now becoming a major problem in many cities. Crack can be obtained for as little as $10 which makes it accessible to anyone. Crack is reported by many medical experts to be the most addictive narcotic drug known to man. The widespread use of crack in New York City is said by many law enforcement officials in that city to have caused a rise in violent crimes last year. Most disturbingly, crack is being used by a growing number of school children. I am relieved that provisions I coauthored in H.R. 5394 [the Narcotics Penalties and Enforcement Act of 1986 which was incorporated into the 1986 Act] to create new stiff penalties for dealing crack as well as stiffer penalties for those who deal drugs to schoolchildren and teens have been included in title VI of H.R. 5484.

\textit{Id.} at 22,667. Representative John Rowland indicated that "we are finding that young people are easily taking up the fad of crack, and we are finding that more and more people are getting addicted, especially after the first or second use." \textit{Id.} at 22,717. In a final example, Representative Byron Dorgan expressed his concerns:

Perhaps even more alarming is the growing popularity of crack or cheap cocaine. Because it causes a speedy rush of exhilaration [sic], it may spawn addiction in even greater numbers than other forms of cocaine. The director of the National Cocaine Hotline refers to crack as \ldots ‘the dealer’s [sic] dream and the user’s nightmare’ because of its relatively low cost and quick effect.

Police report that increased crack use has also engendered increased crime in several cities. Users become so deranged from its psychotic effects that they may perpetrate brutal crimes.

\textit{Id.} at 22,991.
the 1986 Act’s deliberations—that crack cocaine was the largest problem within the field of narcotics control.\textsuperscript{302}

b. *Debate in the Senate*

The Senate also sought to target crack cocaine in particular, and the Congressional Record shows the intent of its members to punish crack more harshly than other forms of cocaine. For example, New York’s Senator Daniel Moynihan indicated

that 80 percent of all the lethal derivative of cocaine, crack, available in the United States, originates in New York City. It is all too apparent that New York City is badly in need of additional funding to disrupt the production and distribution of crack and other illicit drugs; it is not alone. Stopping cocaine and crack addiction must become a priority for all of us. A civilized society cannot ignore these cries for help.\textsuperscript{303}

Moynihan’s sentiments are indicative of the feeling within the Senate that crack, more than any other drug, was a problem that must be addressed by the 1986 Act.\textsuperscript{304}

In addition, the statements of Senator Lawton Chiles, Jr., go the farthest toward indicating congressional intent regarding the relevant portions of the 1986 Act. He noted that he was “very

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{302} In addition, Representatives Biaggi and DioGuardi had authored bills that were eventually incorporated into the 1986 Act, and thus they may be seen as particularly knowledgeable on, and invested in the subject. \textit{See supra} note 120.
\item \textsuperscript{304} Senator Moynihan’s comments are representative of the general sense within the Senate. A small sampling of other statements include the following:
\begin{quote}
I wish to point out to my colleagues that the escalation of drug abuse is shown not only by the number of this scourge’s victims, but may also be measured in the potency and availability of today’s illicit drugs. The purified form of cocaine known as “crack,” for example, has lead to a number of drug-related deaths.
\end{quote}
\begin{quote}
[C]ocaine use—perhaps the most dangerous of [marijuana, heroin, and cocaine] because of its addictive potential—increased by 12 percent nationwide. The recent introduction of “crack” cocaine, an even more potent and dangerous substance, into the drug market has allowed that percentage to spiral upward. It is estimated that there are 4 to 5 million cocaine users in the country and 1 out of every 6 high school seniors has tried cocaine at least once. The majority of cocaine users is turning to this new, more potent form of cocaine, which is now widely available in at least 17 of this country’s largest cities.
\end{quote}
\textit{Id.} at 27,185 (statement of Sen. Dale Bumpers).
\end{itemize}
\end{footnotesize}
pleased that the Senate bill recognizes *crack as a distinct and separate drug from cocaine hydrochloride* with specified amounts of 5 grams and 50 grams for enhanced penalties.\(^{305}\) These words also come as close as any statement in the Congressional Record to indicating a specific intent to punish crack cocaine more harshly than cocaine hydrochloride through the language of § 841(b). He also stated that "[w]e are attempting to touch the problem of eradication in the bill. We have enhanced the penalties for drugs, but especially for crack cocaine."\(^{306}\) Not only do these statements by Senator Chiles show his indignation with the crack epidemic, but also imply his understanding that "cocaine base" is equivalent to crack cocaine and therefore different from other forms of cocaine.

The 1986 Act was passed with a "sense of urgency,"\(^{307}\) resulting in the passage of a statute "without such normal deliberative processes as committee hearings and reports."\(^{308}\) Thus, more specific statements as to the intent of the Act and the purpose of Congress in its enactment are unavailable. However, the foregoing is sufficient to show what the members of Congress were thinking when they voted in favor of the enhanced "cocaine base" penalties\(^{309}\) in section 1002 of the 1986 Act—that crack in particular is

---

305. *Id.* at 27,180 (emphasis added).
306. *Id.* at 26,435. Senator Chiles went on to say:

   The whole Nation now knows about crack cocaine. They know it can be brought for the price of a cassette tape, and make people into slaves. It can turn promising young people into robbers and thieves, stealing anything they can to get the money to feed their habit.

   This [bill] will help our law enforcement officials by strengthening criminal penalties for drugs like crack cocaine. This is an absolutely essential first first [sic] step. Current law makes it very difficult to arrest and convict crack dealers and traffickers. . . .

   This legislation will provide enhanced penalties for drug offenses. It will decrease the amount necessary for the stiffest penalties to apply. Those who possess 5 or more grams of cocaine freebase will be treated as serious offenders. Those apprehended with 50 or more grams of cocaine freebase will be treated as major offenders. Such treatment is absolutely essential because of the especially lethal characteristics of this form of cocaine. Five grams can produce 100 hits of crack. Those who possess such an amount should have the book thrown at them. The damage 100 hits can inflict upon users more than warrants this treatment.

*Id.* at 26,447.
309. The section under discussion was only one in a bill of 192 pages that went from introduction to passage in about three months. *See supra* note 150 and accompanying text. Consequently, relatively little time was spent discussing this issue. However, there do not appear to be any statements in the Congressional Record that are
dangerous, scary, and unwelcome within the borders of the United States. While Congress was obviously concerned with all forms of cocaine, and illicit drugs in general, it is clear from the Congressional Record that Congress believed crack alone to be deserving of this harsher level of treatment.

c. *Other sources*

In addition to the floor debates, there are several other sources that may shed some light on Congress's intent in passing the 1986 Act. For example, President Reagan stated in a nationally televised address that "[t]oday there's a new epidemic: smokeable cocaine, otherwise known as crack. It is an explosively destructive and often lethal substance which is crushing its users. It is an uncontrolled fire."310 Additionally, the explanation of the President's Drug Free America Act of 1986, much of which was incorporated into the Anti-Drug Abuse Act of 1986,311 noted that the new version of 21 U.S.C. § 841(b)(1)(A) would have a lower weight threshold for persons trafficking in "crack" than for other drugs.312 While not a legislator, the President was pushing hard for an anti-drug bill,313 Consequently, it is very likely that his opinion influenced Congress in its consideration of the 1986 Act.314

Finally, the U.S. Sentencing Commission noted in its 2002 report to Congress that "[i]n 1993, the Commission narrowed the definition [of 'cocaine base'] for purposes of guideline application to focus on crack cocaine, which the Commission believed was Congress's primary concern."315 These extrinsic sources simply bolster the conclusions drawn from the legislative history: that Congress...
was attempting to single out crack cocaine for the harshest
treatment.

The passages quoted from the Congressional Record show that
the legislature's purpose in passing the 1986 Act was to effectuate a
change in the way that the U.S. government dealt with illicit
drugs. They also show that crack cocaine, in particular, was of
great concern. From these quoted passages, it is clear that the gen­
eral intent of Congress was to make crack cocaine the priority in the
war on drugs. Therefore, using a general intent approach, “cocaine
base” should be defined exclusively as crack cocaine because Con­
gress acted with a purpose to deal more severely with crack than
other drugs. This is the approach taken by those circuits defining
“cocaine base” as crack. They see the ambiguity in the terms of
the statute and look to why the clause in question was enacted in
the first place. There can be little doubt that those sections dealing
with “cocaine base” in the 1986 Act were included specifically to
deal with crack cocaine, and therefore, under a general intent ap­
proach, crack is the sole substance to which they should apply.

3. Specific Intent

In using the term “cocaine base” in the 1986 Act, the specific intent of Congress was unquestionably to punish crack offenses more harshly than offenses involving cocaine hydrochloride. This is evidenced by both the legislative history and by the universal agreement among the federal circuits that crack cocaine falls into the definition of “cocaine base.” However, this does not in­

dicate whether Congress meant the term to apply only to crack.

Congress may have been motivated by the perceived heightened harmfulness
of crack cocaine to prescribe mandatory minimum penalties for crack cocaine
based on the harm such quantities could cause . . . .

. . . [T]he legislative history does suggest that Congress concluded that

crack cocaine was more dangerous than powder cocaine and therefore war­
ranted higher penalties . . . .

Id. at 8-9.


317. See, e.g., United States v. Booker, 70 F.3d 488, 494 (7th Cir. 1995) ("Congress . . . intended 'cocaine base' to mean crack cocaine."); United States v. Fisher, 58 F.3d 96, 99 (4th Cir. 1995) ("Congress intended . . . to penalize more severely violations involving crack cocaine.").

318. See supra note 284 and accompanying text (describing specific intent).

319. See supra notes 297-301, 303-306 and accompanying text (statements of members of Congress regarding crack cocaine during the deliberation of the 1986 Act).

320. See supra Part IV.B.1.

321. See supra note 231 (noting that all circuits agree that crack falls within the
definition of “cocaine base”).
The specific intent on the subject is somewhat murky. The Congressional Record is largely silent as to how Congress envisioned the relevant portions of the 1986 Act would be applied to forms of cocaine other than powder and crack. Other than the statements of President Reagan\(^{322}\) and Senator Chiles\(^{323}\) regarding the Act's treatment of crack as distinct from other forms of cocaine, there is little indication as to how Congress envisioned the treatment of other forms of cocaine under the statute.

The most that can be gleaned from the Congressional Record regarding the specific intent of Congress is that there is no indication that it meant for the phrase "cocaine base" to apply to anything other than crack. The circuits taking the plain-meaning approach use this to justify their holdings, arguing that the explicit goal of Congress to deal harshly with crack does not preclude harsh treatment of other drugs.\(^{324}\) Despite evidence to the contrary, they defend their holding by noting that the meaning of "cocaine base" is plain,\(^{325}\) and that because Congress did not explicitly state that "cocaine base" was to be defined as exclusively crack, this definition should not be read into the statute. However, looking merely to the specific intent of Congress, these courts disregard the general intent of Congress.

4. Imaginative Reconstruction

The nature of the imaginative reconstruction approach makes an analysis more difficult than determining specific intent. It requires looking at the representatives of the Ninety-ninth Congress's collective thinking to see what they would have decided if presented with the particular issues raised by the ambiguity in the statute.\(^{326}\) If this is the standard, the Ninth Circuit's smokeability test may have the analysis correct. The evidence suggests that if presented with a defendant who was discovered to be in possession of a basic form of cocaine that was smokeable, widely available, and

---

322. See supra notes 310-312 and accompanying text.
323. See supra notes 305-306 and accompanying text.
324. See, e.g., United States v. Barbosa (Barbosa II), 271 F.3d 438, 463 (3d Cir. 2001); United States v. Jackson, 968 F.2d 158, 162 (2d Cir. 1992) ("Congress neither limited the term . . . in the plain language of the statute nor demonstrated an intent to do so in the statute's legislative history."); aff'd, 59 F.3d 1421 (2d Cir. 1995); United States v. Lopez-Gil, 965 F.2d 1124, 1133 (1st Cir. 1992) (per curiam on petition for rehearing).
325. See supra Part IV.A (discussing indications that the terms of the statute are redundant and that "cocaine base" may have more than one acceptable definition).
326. See supra note 286 (discussing the imaginative reconstruction approach).
inexpensive, Congress may have said, *yes—we want the higher penalties to apply.* However, using imaginative reconstruction as the sole method of determining congressional intent creates an unworkable solution.

If the imaginative reconstruction of Congress's intent leads to a bright-line rule that any smokeable form of cocaine falls within the definition of "cocaine base," it results in the same conclusion as the "plain-meaning" approach. All forms of basic cocaine are smokeable because they do not decompose before they are vaporized. In addition, "it includes in the definition, 'traditional' freebase cocaine, which is neither cheap nor widely available." Therefore, while the Ninth Circuit justifies its definition on the grounds of the intent of Congress, and calls its test by a different name, it reaches the same, incorrect conclusion as the circuits taking the "plain-meaning" approach.

On the other hand, if imaginative reconstruction leads to the conclusion that the definition of "cocaine base" revolves around how the substance is intended to be used, it becomes almost impossible to have a definition that carries any precedential weight. It is clear that Congress was concerned with crack, primarily because it was cheap, smokeable, widely available, and highly addictive. It could easily be argued under an imaginative reconstruction approach, that Congress would ask the questions: *What was the substance in question going to be used for; why was it in the defendant's possession; and what was the intended method of ingestion?* In addition, asking these questions would be the only way to avoid a bright-line rule that would make another term within the statute superfluous. Therefore, this result of the imaginative reconstruc-

327. See infra notes 330-333 (quoting various members of Congress).
331. See, e.g., id. at 22,717 (statement of Rep. John Rowland) ("[I]t is OK, it is socially acceptable, to get involved in marijuana. Now the deadly line has been crossed that with the use of the cocaine as crack and you take the perception of smoking marijuana and combine those two, we are now lulling our young people into a sense of false security.").
332. See, e.g., id. at 22,667 (statement of Rep. James Traficant) ("Crack can be obtained for as little as $10 which makes it accessible to anyone.").
333. See, e.g., id. at 22,321 (statement of Rep. Benjamin Gilman) (lamenting the emergence of "the newly highly addictive crack cocaine").
tion theory would have the court determine in each case the intended use, price, and manufacturing process.

This method would require the prosecution in every "cocaine base" case to prove that the substance in question was intended to be used in a way to satisfy these elements beyond a reasonable doubt. 334 It would appear that there is no way that Congress could have intended to impose such a complicated and practically impossible burden without explicitly making these criteria elements of the offense. 335 This test would also be so fact-specific that no case would be of any value, also creating a problem of inadequate notice as to what actions and substances are covered by the enhanced penalties. 336 For these reasons, neither the smokeability test nor the imaginative reconstruction approach makes logical or practical sense.

The foregoing analysis indicates that the specific intent of Congress in passing section 1002 of the 1986 Act is unclear. An imaginative reconstruction approach, while informative, leads either to a nonsensical result or to the same incorrect result as the plain-meaning approach. On the other hand, the general intent and purpose of Congress was clearly to punish crack cocaine offenses more harshly than other controlled substance offenses. 337 As such, using the general intent analysis—the only acceptable method of interpreting legislative history that does not lead to an unworkable result—"cocaine base" should be defined as exclusively crack cocaine.

C. The 1993 Amendment to the U.S. Sentencing Guidelines

In addition to analysis of legislative history to determine the intent of Congress, the subsequent actions of the U.S. Sentencing

334. See supra Part III.D (discussing the implications of Booker/Fanfan).
335. Cf. Taylor v. United States, 495 U.S. 575, 601 (1990) (regarding career offender law, 18 U.S.C. § 924(e), "[i]f Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process," it would have explicitly noted this in the statute or legislative history).
336. See, e.g., McBoyle v. United States, 283 U.S. 25, 27 (1931) ("[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."). The more general formulation of ambiguity in the statute, namely that the circuits are split as to whether "cocaine base" means any form of basic cocaine or exclusively crack, may also be seen to violate this requirement. However, the courts of appeals have unanimously held that the statute is not unconstitutionally vague. E.g., United States v. Brisbane, 367 F.3d 910, 913 (D.C. Cir. 2004).
337. See supra Part IV.B.2 (quoting numerous members of the Ninety-ninth Congress as to their opinions and intentions with regard to crack cocaine).
Commission and Congress may also shed some light on the problem. In 1993, the Sentencing Commission amended the U.S. Sentencing Guidelines, defining "cocaine base" as exclusively crack cocaine for the Guidelines' purposes.\textsuperscript{338} This was done in an effort to "focus on crack cocaine, which the Commission believed was Congress's primary concern."\textsuperscript{339}

The procedure for amending the Guidelines gives Congress the opportunity to change or reject an amendment proposed by the Commission.\textsuperscript{340} However, if Congress does not reject the amendment within 180 days of the Commission's proposal, the amendment becomes a part of the Guidelines.\textsuperscript{341}

When the Guidelines amendment was proposed in 1993, Congress did not disapprove.\textsuperscript{342} Where Congress is presented with a particular interpretation of a statute, its failure to change the interpretation is seen as evidence that the administrative interpretation is correct.\textsuperscript{343} Thus, by failing to repudiate the Guidelines amendment, "Congress indicated that it intend[ed] the term 'cocaine base' to include only crack cocaine... There is no reason for [the court] to assume that Congress meant for 'cocaine base' to have more than one definition."\textsuperscript{344}

While the Sentencing Commission is not explicitly charged with administering 21 U.S.C. § 841(b), it must interpret and apply the criminal sentencing provisions contained within the United States Code in order to fulfill its mandate of "establish[ing] sentenc-

\begin{itemize}
\item \textsuperscript{338} USSG, \textit{supra} note 3, § 2D1.1(c) ("'Cocaine base,' for the purposes of this guideline, means 'crack'."); Amendments to the Sentencing Guidelines for United States Courts, 58 Fed. Reg. 27,148, 27,156 (May 6, 1993) ("This amendment provides that, for purposes of the guidelines, 'cocaine base' means 'crack.'... Under this amendment, forms of cocaine base other than crack (e.g. coca paste... is a base form of cocaine, but it is not crack) will be treated as cocaine.'").
\item \textsuperscript{339} USSC 2002 Rep., \textit{supra} note 12, at 5 n.17.
\item \textsuperscript{341} Id.
\item \textsuperscript{342} United States v. Munoz-Realpe, 21 F.3d 375, 377 (11th Cir. 1994).
\item \textsuperscript{343} 2A Singer, \textit{supra} note 235, § 49:10, at 117-20 ("Where action upon a statute or practical and contemporaneous interpretation has been called to the legislature's attention, there is more reason to regard the failure of the legislature to change the interpretation as presumptive evidence of its correctness."); see also Alstate Constr. Co. v. Durkin, 345 U.S. 13, 17 (1953) ("We decline to repudiate an administrative interpretation of the Act which Congress refused to repudiate after being repeatedly urged to do so.").
\item \textsuperscript{344} Munoz-Realpe, 21 F.3d at 377-78; see also United States v. Rodriguez, 980 F.2d 1375, 1377 (11th Cir. 1992) (noting that the terms in 21 U.S.C. § 841(b) and the Sentencing Guidelines are interpreted as being consistent with each other).
\end{itemize}
ing policies and practices for the Federal criminal justice system."\(^345\)
This is exactly what the Sentencing Commission did when it passed the amendments to the Guidelines in 1993,\(^346\) defining "cocaine base" as crack cocaine.\(^347\)

Since the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,\(^348\) it has consistently held that the courts will defer to agencies' reasonable interpretations of the statutes they administer.\(^349\) Therefore, so long as the Commission's definition of "cocaine base" is reasonable and not inconsistent with the statute's legislative history,\(^350\) the courts should then be obligated to follow the Commission's interpretation.\(^351\)

While the Guidelines' definition only directly applies to the Guidelines themselves, it is permissible, and even encouraged, to look at other legislative sources to define terms within a statute. For example, in *Oscar Mayer & Co. v. Evans*, the Supreme Court looked at the Civil Rights Act of 1964 in its attempt to construe a term in the Age Discrimination in Employment Act of 1967.\(^352\) It did so because the two statutes share a common purpose and because the language is remarkably similar.\(^353\) The purpose of the hundred-to-one quantity ratio of cocaine to "cocaine base" for the mandatory minimum sentences in the 1986 Act and the ratio in the Sentencing Guidelines for the purpose of determining overall sen-

---

\(^345\) The purpose of the U.S. Sentencing Commission is to "establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b).

\(^346\) USSG, supra note 3, § 2D1.1(c).

\(^347\) USSC 2002 Rep., supra note 12, at 4 n.17 ("In 1993, the Commission narrowed the definition . . . to focus on crack cocaine, which the Commission believed was Congress's primary concern.").


\(^350\) As discussed supra in Part IV.B.2, the legislative history does appear to support the Commission's interpretation.

\(^351\) *Chevron*, 467 U.S. at 844.


\(^353\) *Oscar Mayer & Co.*, 441 U.S. at 755-56; see also *Munoz-Realpe*, 21 F.3d at 378 (citing *Oscar Mayer & Co.*, 441 U.S. at 755-56).
tence length, also have similar goals and language. Thus, the same principle should govern this issue as did in Oscar Mayer, and the definition of "cocaine base" that was tacitly approved by Congress for the Guidelines should also apply to section 1002 of the 1986 Act.

CONCLUSION

Cocaine has been used as a drug for centuries, but only within the last few decades has its derivative, crack, been widely available. In the mid-1980s, a crack panic swept the nation, resulting in the passage of the Anti-Drug Abuse Act of 1986. Because the 1986 Act was enacted with great haste, it has been criticized as not being thoroughly thought out. One Congressman noted that "I'm afraid this bill is the legislative equivalent of crack... It yields a short-term high but does long-term damage to the system. And it's expensive to boot." Because of the haste with which it was passed, the 1986 Act has an ambiguity in section 1002, wherein the term "cocaine base" is used but not defined. In addition, the legislative history gives no specific reason why this term was used in the statute. This has led to a split among the federal circuits, with some defining "cocaine base" as crack, some as any form of chemically basic cocaine, and a couple of circuits using a smokeability test.

355. GAHLINGER, supra note 13, at 241.
356. See supra notes 71-76 and accompanying text.
358. See supra Part II.
359. See Kerr, supra note 153 (noting that several members of Congress regretted the speed with which the 1986 Act was passed).
360. See, e.g., United States v. Davis, 864 F. Supp. 1303, 1306 (N.D. Ga. 1994) ("[T]he statutory provisions that are at issue... were passed with much fanfare and little debate... "); 132 CONG. REC. 32,726 (1986) (statement of Rep. Frenzel) (characterizing the bill as having "lack of coordination, incomplete consideration, [and] misunderstood compromises").
363. See supra Part III.B.
364. See supra Part III.A.
365. See supra Part III.C.
Defining "cocaine base" as any basic form of cocaine, leaves at least one term in the statute redundant and superfluous. This is because all forms of cocaine, other than those explicitly delineated in the statute, are chemically basic. Therefore, the so-called plain-meaning approach violates the rule of statutory construction that each word in a statute should have a distinct meaning. The "smokeability test," while looking more toward the intent of Congress, reaches the same redundant and nonsensical conclusion as the plain-meaning jurisdictions.

On the other hand, the jurisdictions defining "cocaine base" as meaning exclusively crack cocaine, reach their conclusion by looking at the general intent of Congress. These circuits see the ambiguity and potential redundancy within the statute and look to the legislative history to resolve the problem. This approach makes the most sense. Returning to Mr. Barbosa, if the Third Circuit had adopted an analysis consistent with the thesis of this Note, the mandatory minimum sentence for Mr. Barbosa's crime would have been cut in half. Defining "cocaine base" as only crack cocaine reaches a conclusion that respects the text of the statute, comports with the general intent of Congress, and follows the rules and presumptions of statutory construction. As such, the split among the federal circuits should be resolved in favor of a bright-line approach defining "cocaine base" as crack cocaine.

Spencer A. Stone*

366. See supra notes 217-221 and accompanying text.
368. United States v. Booker, 70 F.3d 488, 490 (7th Cir. 1995).
370. E.g., United States v. Shaw, 936 F.2d 412, 415-16 (9th Cir. 1991).
371. See supra notes 326-328 and accompanying text.
372. E.g., Booker, 70 F.3d at 493.
373. Id.
374. Supra text accompanying notes 22-29.

* I gratefully acknowledge the editors and staff of the Western New England Law Review for their dedication to the publication of legal scholarship, and for their assistance in publishing this Note. I would also like to thank my family, friends, and colleagues for their help and support throughout this process.