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## COMMENTS

### IT IS A “WAR ON DRUGS” AND IT IS TIME TO RELOAD OUR WEAPONS: AN INTERPRETATION OF 21 U.S.C. § 841

One of the slogans of the post-Mao reforms in China was, “Any cat is a good cat if it catches mice.” Well, any drug policy is a good drug policy if it reduces the total damage that drugs do. And we ought to start looking for policies that work rather than policies that fits [sic] somebody’s ideological preconceptions.<sup>1</sup>

[I]t’s part of a long running battle in this country between tolerance and intolerance. And we go through periods of respecting diversity and we go through periods of doing everything we can to enforce conformity. And I think that’s really where the war on marijuana and the war on drugs, in particular, seem so important.<sup>2</sup>

#### I. INTRODUCTION

When a defendant is sentenced as a drug offender under the Federal Sentencing Guidelines (“Guidelines”), the quantity and classification of the drug possessed by or attributed to him will largely determine his sentence.<sup>3</sup>

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1. See *Frontline: Busted-America’s War on Marijuana* (PBS television broadcast, Apr. 28, 1998) (interview with Mark Kleiman, Professor at the School of Public Policy and Social Research University of California-Los Angeles (Winter 1997-98)). See generally *Frontline: Busted-America’s War on Marijuana* (visited Aug. 22, 1999) <<http://www.pbs.org/wgph/pages/frontline/shows/dope/interviews/kleiman.html>>.

2. See *Frontline: Busted-America’s War on Marijuana* (PBS television broadcast, Apr. 28, 1998) (interview with Eric Schlosser (Dec. 1997)). See generally *Frontline: Busted-America’s War on Marijuana* (visited Aug. 22, 1999) <<http://www.pbs.org/wgph/pages/frontline/shows/dope/interviews/kleiman.html>>.

3. See generally UNITED STATES SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL, at § 2D1.1 (1997) [hereinafter U.S.S.G.].

Since quantity is so crucial to determining the appropriate sentence, it seems rational that the method for determining quantity should be both thoroughly explained and uniformly applied. Unfortunately, this is not the case for determining what constitutes a marijuana “plant” under 21 U.S.C. § 841.<sup>4</sup>

Imagine the following scenario: You have been in possession of 827 marijuana plants in pre-harvest condition and 288 marijuana stalks.<sup>5</sup> The stalks had no leaves on them, thus leaving only dry husks.<sup>6</sup> Furthermore, you have been charged and convicted for conspiring to violate 21 U.S.C. § 841, and are to be sentenced accordingly.<sup>7</sup> If you are fortunate enough to be tried in the Second or Sixth Circuit, you will be sentenced to sixty-three to seventy-eight months in prison.<sup>8</sup> Tried in any other circuit, you will be sentenced to a

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4. 21 U.S.C. § 841 (1970). 21 U.S.C. § 841 reads as follows:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, and person who violates subsection (a) of this section shall be sentenced as follows. . .

(1)(A)(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight. . .

[S]uch person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life. . . No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

(v)(ii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight. . .

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

(c) In the case of less than 50 kilograms of marijuana, except in the case of 50 or more marijuana plants regardless of weight. . . shall be sentenced to a term of imprisonment of not more than 5 years. . .

*Id.*

5. *See* United States v. Fitch, 137 F.3d 277, 279-80 (5th Cir. 1998). A marijuana stalk is the remains of a previously harvested marijuana plant. *Id.* at 279.

6. *Id.* at 279.

7. *Id.* at 279-80. The hypothetical represents the facts in *Fitch*.

8. *Id.* at 278. The hypothetical assumes that the 288 stalks seized are not considered marijuana plants under 21 U.S.C. § 841. The hypothetical also assumes that when sentenced under the United States Sentencing Guidelines, that there is a base level of twenty-six and a criminal history of I. Thus, making the sentencing range from 63 to 78 months.

minimum of ten years in prison.<sup>9</sup> The cause for the discrepancy between sentences is attributable to the way each circuit interprets the term "plants" under 21 U.S.C. § 841.<sup>10</sup> While finding a definition for "plant" may not seem anymore difficult than consulting a dictionary, doing so has resulted in inconsistent decisions among the circuits.<sup>11</sup> Varied sentencing values, preconceptions among individual district judges, and the unlimited discretion to fashion sentences according to the judge's own sense of what constitutes just and effective sentencing has resulted in a wide disparity in sentencing penalties.<sup>12</sup>

This sentencing disparity caused Congress to enact the Sentencing Reform Act of 1984 ("SRA").<sup>13</sup> At that time, the SRA was "the most far-reaching reform of federal sentencing in the country's history."<sup>14</sup> The SRA created the United States Sentencing Commission and gave it the authority to refine and develop guidelines for sentencing in the federal courts.<sup>15</sup> The purpose behind the SRA was to provide fairness and certainty at sentencing, and to reduce

9. See 21 U.S.C. § 841(b)(1)(A)(vii). The hypothetical assumes that the 288 stalks seized are considered marijuana plants for the purpose of sentencing under 21 U.S.C. § 841; therefore requiring the mandatory minimum sentence of ten years.

10. See *Fitch*, 137 F.3d at 279; *United States v. Stevens*, 25 F.3d 318 (6th Cir. 1994); *United States v. Blume*, 967 F.2d 45 (2d Cir. 1992).

11. See *Fitch*, 137 F.3d at 279; *United States v. Stevens*, 25 F.3d 318 (6th Cir. 1994); *United States v. Blume*, 967 F.2d 45 (2d Cir. 1992).

12. See generally Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 4-9 (1972) (describing the considerable discretion that judges exercise in sentencing and the resulting predominance of judges' personal beliefs in sentencing decision making). As Judge Frankel explained:

The factual basis for the worry [about sentencing disparity] is clear and huge; nobody doubts that essentially similar people in large numbers receive widely divergent sentences for essentially similar or identical crimes. The causes of the problem are equally clear: judges vary widely in their explicit views and "principles" affecting sentencing; they vary, too, in the accidents of birth and biography generating the guilts, the fears, and the rages that affect almost all of us at times in ways we often cannot know. . . . It is disturbing enough that a charged encounter like the sentencing proceeding, while it is the gravest of legal matters, should turn so arbitrarily upon the variegated passions and prejudices of individual judges.

*Id.* at 7-8.

13. S. REP. NO. 98-225, at 54, 56 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3224-29.

14. Honorable William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 305 (1993). See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 99 Stat. 1837 (1987) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.). See, e.g., Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (1990) (stating that the SRA is "the most broad reaching reform of federal sentencing in this century").

15. See S. REP. NO. 98-225, at 63-65 (discussing the Committee's composition and authority).

disparity in sentencing penalties.<sup>16</sup> The Guidelines established specific criteria so that similarly situated defendants convicted of similar offenses would be sentenced uniformly across the circuits.<sup>17</sup> In further effort to end the disparity, the Guidelines only allowed sentences to vary the greatest of twenty-five percent or six months.<sup>18</sup> Consequently, the Guidelines drastically stripped federal court judges of their discretion.<sup>19</sup>

Nevertheless, the SRA was only one piece of a larger scheme designed to improve the federal criminal laws.<sup>20</sup> The Comprehensive Crime Control Act of 1984 ("1984 Crime Act") was also enacted.<sup>21</sup> Congress enacted the 1984 Crime Act in response to the rise in crime, specifically the dramatic increase in the drug arena.<sup>22</sup> The 1984 Crime Act imposed mandatory minimum sentences specifically designed to deter drug-related and violent crimes.<sup>23</sup>

Drug crimes still continued to escalate.<sup>24</sup> In response, Congress enacted tougher statutory mandatory minimum penalties.<sup>25</sup> These penalties came in the form of the Anti-Drug Abuse Act of 1986<sup>26</sup> and the Omnibus Anti-Drug Act of 1988.<sup>27</sup> Incompatibility between the Guidelines, under the SRA, and the

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16. See S. REP. NO. 98-225, at 65. The Senate Committee characterized the "primary goal of sentencing reform" to be the reduction of disparity among similarly situated defendants. *Id.*

17. See 28 U.S.C. § 994(b) (1988).

18. *Id.* § 994(b)(2). Congress provided:

If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25% or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

*Id.*

19. See S. REP. NO. 98-225, at 51 (1984) (stating that "[t]he purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and the appropriateness of the sentence for an individual offender"); S. REP. NO. 98-225, at 52-53 (1984) (the Guidelines should also "enhance the individualization of sentences by imposing on judges a structure for evaluating the fairness of particular sentences in the light of individual case characteristics").

20. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1987) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.) [Hereinafter 1984 Crime Act].

21. See *id.*

22. See Tracy Thompson, *Drug-Case Avalanche Buries Federal Courts*, WASH. POST, Dec. 24, 1990, at A1. Since 1980, the number of drug cases in the federal courts has jumped 300%. *Id.*

23. See generally Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

24. See Anti-Drug Abuse Act of 1986.

25. *Id.*

26. *Id.*

27. Anti-Drug Abuse Act of 1988.

minimum statutory penalties, under 21 U.S.C. § 841, caused a lack of uniformity among drug sentencing cases in the federal courts.<sup>28</sup>

This comment analyzes the question of whether dead marijuana stalks qualify as “plants” under 21 U.S.C. § 841(b)(1)(A)(vii). Part II of this comment describes the evolution of the sentencing of drug offenders in the United States,<sup>29</sup> and briefly explains how the Guidelines operate.<sup>30</sup> This section also discusses how the SRA functions in relationship to 21 U.S.C. § 841.<sup>31</sup> Part III outlines the botanical definition, cultivation, and historical background of marijuana.<sup>32</sup> Part IV describes the circuits’ different approaches in interpreting 21 U.S.C. § 841.<sup>33</sup> Part V contains the author’s analysis of the statute.<sup>34</sup> The Comment concludes by offering a solution to achieve uniformity in sentencing under 21 U.S.C. § 841 and to fight the “war on drugs.”<sup>35</sup>

## II. THE HISTORICAL BACKGROUND OF THE SENTENCING FOR DRUGS

### A. *The Comprehensive Drug Abuse Prevention and Control Act of 1970*

Since 1914, Congress had enacted various laws pertaining to drug importation and distribution,<sup>36</sup> but none of these laws were successful in either reducing the amount of drugs entering the country or lowering the number of drug offenders.<sup>37</sup> Until 1970, the United States was virtually without any clear drug sentencing policy.<sup>38</sup> In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 (“1970 Drug Act”) authorizing the enactment of 21 U.S.C. § 841.<sup>39</sup>

28. See UNITED STATES SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM iv, 3, 118-24 (1991).

29. See *infra* notes 37-97 and accompanying text.

30. See *infra* notes 59-71 and accompanying text.

31. See *infra* notes 98-104 and accompanying text.

32. See *infra* notes 105-41 and accompanying text.

33. See *infra* notes 142-90 and accompanying text.

34. See *infra* notes 191-253 and accompanying text.

35. See discussion *infra* Parts VI and VII.

36. See, e.g., Harrison Anti-Narcotic Act, ch. 1, Pub. L. No. 63-223, 38 Stat. 785 (1914) (codified as part of 21 U.S.C. §§ 801-904 (1994) (previously codified as I.R.C. §§ 4701-76 (1964)); Marihuana Tax Act of 1937, ch. 553, Pub. L. No. 75-238, 50 Stat. 551 (1937); Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567 (1956).

37. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970), hereinafter 1970 Drug Act *reprinted in* 1970 U.S.C.C.A.N. 4550, 4571. According to legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Congress had previously enacted over fifty pieces of legislation attempting to stop illegal drug trafficking. *Id.*

38. See Douglas J. Quivey, Note, *Market-Oriented Approach to Determining Drug Quantity Under the Federal Sentencing Guidelines*, 1993 U. ILL. L. REV. 653, 658 (1993).

39. 1970 Drug Act, *reprinted in* 1970 U.S.C.C.A.N. at 4566.

The 1970 Drug Act was a thorough overhaul of existing federal drug control law.<sup>40</sup> In the 1970 Drug Act, Congress adopted a flexible system of indeterminate sentencing due to the 1956 Narcotic Control Act's<sup>41</sup> strict mandatory sentences failure to reduce the number of drug offenses.<sup>42</sup> In 1970, it appeared that rehabilitation rather than retribution was the philosophy and purpose of imprisonment. The 1970 Drug Act included the repeal of statutory mandatory sentencing provisions for drug offenses<sup>43</sup> giving trial judges almost complete discretion in determining sentences for drug violations.<sup>44</sup> The purpose behind giving judges such freedom was to allow judges to tailor fit a sentence to the offender rather than just to the offense.<sup>45</sup>

*B. The Sentencing Reform Act of 1984*

The continuous rise of crime in the United States caused the criminal justice system to focus less on rehabilitation and more on sentencing.<sup>46</sup> Critics of the rehabilitative model argued that it was ineffective and unrealistic.<sup>47</sup> The high frequency of parole created the perception of a penal system akin to that of a "revolving-door."<sup>48</sup> The availability of parole, which frequently resulted in significant reductions in the amount of time actually served, seemed to make a mockery of the sentences imposed by judges.<sup>49</sup> Still, many often criticized that the federal system allowed for broad discrimination and disparity in sentencing.<sup>50</sup>

In response to the increasing criticism, Congress enacted the Sentencing Reform Act of 1984.<sup>51</sup> The SRA established four goals for a federal sentencing system:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the

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40. *See id.*

41. *See* Narcotic Control Act.

42. 1970 Drug Act, *reprinted in* 1970 U.S.C.C.A.N. at 4570.

43. *See id.*

44. *See* Edward J. Tafe, Comment, *Sentencing Drug Offenders in Federal Courts: Disparity and Disharmony*, 28 U.S.F. L. REV. 369, 377 (1994).

45. *Id.*

46. Wilkins, *supra* note 14, at 308.

47. *Id.*

48. *Id.* at 305.

49. *Id.* at 309.

50. *Id.* at 308.

51. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 99 Stat. 1837 (1984) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.). On October 12, 1984, President Reagan signed the Comprehensive Crime Act of 1984 making the Sentencing Reform Act a law. *Id.* *See generally* Mistretta v. United States, 488 U.S. 361 (1989) (holding both the sentencing guidelines and the commission constitutional).

defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>52</sup>

By abandoning the rehabilitation model and adopting a more retributivist position on sentencing, the SRA reflected the attitude change in the country.

In an attempt to achieve the goals of the SRA, Congress established the United States Sentencing Commission ("Sentencing Commission").<sup>53</sup> The Sentencing Commission was to author a uniform system that would generate fair sentences and sharply curtail the unwarranted disparity in federal sentencing.<sup>54</sup> The sentences were to be known as the Federal Sentencing Guidelines.<sup>55</sup>

The Guidelines became effective in November, 1987.<sup>56</sup> The direct goals of the Guidelines were honesty, uniformity, and proportionality in sentencing.<sup>57</sup> Under the SRA, a court's decisions were to be based on "the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant" as set forth in the Guidelines.<sup>58</sup> In essence, the Guidelines use a matrix, referred to as the Sentencing Table. The Sentencing Table consists of forty-three offense levels and six criminal history categories used to identify the sentencing range applicable to a defendant.<sup>59</sup> Also included in the Guidelines are provisions for mandatory minimum sentences in relation to the substantive drug laws.<sup>60</sup>

52. 18 U.S.C. § 3553 (a)(2)(A)-(D) (1994).

53. 28 U.S.C. § 991(a) (1994). The SRA called for the President to appoint an expert, seven-member full-time commission to create sentencing guidelines that would effectively and rationally channel the discretion of the federal courts. The Commission was established within the judiciary branch. *See* § 991(b)(1)-(2).

54. *See* Lisa Anne Bongiovi, *Criminal Law-Sifting Through the "Mixture" Problem to Determine a Drug Offender's Sentence*, 15 W. NEW ENG. L. REV. 395, 400 (1993).

55. *Id.*

56. *See* Tafe, *supra* note 45, at 372.

57. *See* Bongiovi, *supra* note 55, at 400.

58. 18 U.S.C. § 3553(a)(1)-(7) (1988). The court must review the following seven factors before imposing a sentence:

- (1) the nature and the circumstances surrounding the offense and the defendant's history and characteristics;
- (2) the need for the sentencing to match the offense and the purposes of imposing a sentence;
- (3) the type of sentences available under relevant statutes;
- (4) the type of range for sentencing established by the Guidelines;
- (5) any relevant policy statements of the Sentencing Commission;
- (6) the need to not have sentence disparity for similar situations;
- (7) and the need to provide restitution to the offenses' victims.

*Id.*

59. *See* U.S.S.G., *supra* note 3, § 5A.

60. *See id.* § 5G1.1.



Under the SRA, the applicable sentencing range is derived from an intersection of the defendant's "Total Offense Level" and "Criminal History Category" on the Sentencing Table.<sup>61</sup>

The offense level is represented by the vertical axis of the Sentencing Table.<sup>62</sup> To determine the offense level, the judge selects the applicable base offense level, which is derived from the offense of conviction.<sup>63</sup> The defendant's base level is found by referring to the Guidelines' Drug Quantity Table.<sup>64</sup> The table bases the level on the quantity and type of drugs involved.<sup>65</sup>

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61. *Id.* § 5A.

62. *Id.*

63. *Id.*

64. *See* U.S.S.G., *supra* note 3, § 2D1.1(c). Following the drug quantity table is a provision that explains how to treat marijuana plants for sentencing purposes. On November 1, 1995, the Commission amended the footnote to the Drug Quantity Table to read as follows:

In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. Provided, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

The amendment states:

For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana.

The Commission gave the following justification for the amendment:

For offenses involving 50 or more marihuana plants, the existing § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) uses an equivalency of one plant = one kilogram of marihuana, reflecting the quantities associated with the five- and ten-year mandatory minimum penalties in 21 U.S.C. § 841. For offenses involving fewer than 50 marihuana plants, the guidelines use an equivalency of one plant = 100 grams of marihuana, unless the weight of the actual marihuana is greater. In actuality, a marihuana plant does not produce a yield of one kilogram of marihuana. The one plant = 100 grams of marihuana equivalency used by the Commission for offenses involving fewer than 50 marihuana plants was selected as a reasonable approximation of the actual average yield of marihuana plants taking into account (1) studies reporting the actual yield of marihuana plants (37.5 to 412 grams depending on growing conditions); (2) that all plants regardless of size are counted for guideline purposes while, in actuality, not all plants will produce useable marihuana (e.g., some plants may die of disease before maturity, and when plants are grown outdoors some plants may be consumed by animals); and (3) that male plants, which are counted for guideline purposes, are frequently culled because they do not produce the same quality of marihuana as do female plants. To enhance fairness and consistency, this amendment adopts the equivalency of 100 grams per marihuana plant for all guideline determinations.

Prior to the amendment the provision stated:

In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants, treat each plant as equivalent to 100 G of marihuana. Provided, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

*Id.*

The judge then adjusts the base offense level in the light of various indicators of the real offense conduct.<sup>66</sup>

The criminal history category is represented by the horizontal axis of the Sentencing Table.<sup>67</sup> This category is based on the number and length of the defendant's sentences for prior convictions.<sup>68</sup> Then, the intersection of the total offense level and criminal history category on the Sentencing Table are used to determine the applicable sentencing range under the Guidelines.<sup>69</sup> Ultimately, the sentencing judge must impose a sentence from the range unless aggravating or mitigating circumstances are present and the presence of such circumstances warrants a sentence outside the Guidelines' range.<sup>70</sup>

Particular provisions of the Guidelines have evolved substantially since their initial promulgation. Since 1987, the Commission has adopted over 500 amendments; although, the fundamental structure of the Guidelines has remained constant.<sup>71</sup> Still, many commentators had a negative reaction to such

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65. *See id.*

66. *See* U.S.S.G., *supra* note 3, § 3. The judge may allow adjustments related to:

- (1) the harm to the victim;
- (2) the defendant's role in the offense;
- (3) whether there has been any obstruction of justice;
- (4) whether the defendant was convicted of multiple counts; and
- (5) whether the defendant has accepted personal responsibility for the offense.

*Id.*

67. *See* U.S.S.G., *supra* note 3, § 5A.

68. *Id.* The criminal history portion of the Sentencing Table has six categories, each covering a range of two to three criminal history points. *Id.*

69. *Id.* The range is stated in terms of months of imprisonment. *Id.*

70. *See* 18 U.S.C. § 3553(b). The guidelines state the following:

Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

*Id.*

71. *See id.*

mandatory sentences.<sup>72</sup> Commentators argue mandatory minimum sentences prevent federal judges from exercising discretion, therefore not allowing for human compassion.<sup>73</sup>

*C. The Controlled Dangerous Substances Penalties Amendments Act of 1984*

In addition to the SRA, a chapter in the 1984 Crime Act is the Controlled Dangerous Substances Penalties Amendments Act of 1984.<sup>74</sup> The 1984 Crime Act reintroduced mandatory minimum sentence drug law.<sup>75</sup> The 1984 Crime Act was designed “to provide a more rational penalty structure for the major drug trafficking offenses” by making punishment dependant upon the quantity of the controlled substance.<sup>76</sup> Instead of operating under the theory of whether drugs were narcotic or non-narcotic, the 1984 Act operated on the notion that unjustified sentencing disparity could be reduced by basing sentences on the pure weight and type of drug involved.<sup>77</sup>

*D. The Anti-Drug Abuse Act of 1986*

While Congress was finishing the 1984 Crime Act, problems associated with drug abuse gained increasing national attention.<sup>78</sup> Congress, frustrated by the startling increase of the flow of drugs into the country, sought a broad solution to stop both the supply and the demand of drugs.<sup>79</sup> Furthermore, Congress believed that because sentencing practices were lenient, drug

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72. See *Frontline: Busted-America's War on Marijuana* (PBS television broadcast, Apr. 28, 1998) (interview with Judge Thelton Henderson, Federal District Court Judge, San Francisco (Winter 1997-98)). Judge Henderson stated:

I'm opposed to mandatory minimums, in general, because I think they're unduly harsh. I think that they don't allow the judge the discretion to deal with individual problems. There is a formula that says you've been involved with a certain amount of drugs, for example, ergo you get the mandatory minimum. And then they're very harsh, and I'm opposed to them.

*Id.*

73. See *id.*

74. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1987) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

75. See *id.*

76. See generally S. REP. NO. 98-225 (1983).

77. See, e.g., *Chapman v. United States*, 500 U.S. 453, 460-61 (1991).

78. See generally Jacob V. Lamar, *Rolling Out the Big Guns; The First Couple and Congress Press the Attack on Drugs*, TIME, Sept. 22, 1986, at 25 (results of opinion poll on seriousness of drug problem); Roger Rosenblatt, *The Enemy Within; A Nation Wrestles with the Dark and Dangerous Recesses of Its Soul*, TIME, Sept. 15, 1986, at 58 (outlining parameters of civil war on drugs); Evan Thomas, *America's Crusade: What Is Behind the Latest War on Drugs*, TIME, Sept. 15, 1986, at 60 (looking into current drug policy and analyzing effects of some drugs on the community).

79. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

traffickers were too often arrested, prosecuted, and convicted only to reappear quickly on the streets.<sup>80</sup>

In response, two years following the Act of 1984, Congress enacted the Anti-Drug Abuse Act of 1986 ("Act of 1986").<sup>81</sup> The Act of 1986 materially modified nearly every aspect of the federal sentencing of drugs.<sup>82</sup> It expanded the practice of linking drug quantity to sentencing.<sup>83</sup> Under this Act, drug offenders were punished based on the total quantity of drugs distributed not on the pure amount of drugs involved.<sup>84</sup>

The purpose behind the Act of 1986 was to stop punishing drug traffickers based on the purity of the substance, but instead based on the amount of the substance drug traffickers were dealing.<sup>85</sup> Congress based the mandatory sentences on the weight of a "mixture or substance containing a detectable amount of" the controlled substance in question.<sup>86</sup> Congress also created a violation for possession with the intent to distribute marijuana under 21 U.S.C. § 841 based on the number of plants attributable to the defendant.<sup>87</sup>

#### *E. The Omnibus Anti-Drug Act of 1988*

As the drug problem in the United States continued to increase, Congress responded by passing even more restrictive legislation.<sup>88</sup> The result was the Omnibus Anti-Drug Act of 1988 ("Act of 1988"),<sup>89</sup> which further modified the nation's federal drug laws by enacting several new mandatory minimum penalties.<sup>90</sup> In the Act of 1988, Congress enacted the current congressional penalty scheme for offenses involving marijuana plants.<sup>91</sup> For the purpose of mandatory minimum sentences, Congress in effect made one kilogram of marijuana equivalent to a single marijuana plant.<sup>92</sup> As originally promulgated,

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80. See SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, *supra* note 28, at 9.

81. See generally Anti-Drug Abuse Act of 1986.

82. See *id.*

83. *Id.*

84. See generally H.R. REP. NO. 99-845, pt. 11-12, at 17 (1986), *Chapman*, 500 U.S. at 461 (classifying this approach as the "market-oriented approach").

85. See *Chapman*, 500 U.S. at 461.

86. See *id.*

87. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986). Before 1986, the violation was only based on the weight of the marijuana. *Id.*

88. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

89. *Id.*

90. *Id.*

91. *Id.*

92. See U.S.S.G., *supra* note 3, § 2D1.1(c). When an offense involves marijuana plants, the Guidelines determine the appropriate base level according to the type and quantity of drug concerned by an equivalency ratio of one marijuana plant being equal to 1000 grams of marijuana. *Id.*

the Guidelines treated one marijuana plant as equivalent to one kilogram without regard to the number of plants involved.<sup>93</sup> In response to Congress' enactment, the Sentencing Commission also amended 21 U.S.C. § 841 to base a sentence on the number of plants involved.<sup>94</sup> In the Act of 1988, Congress provided for mandatory minimum sentences of five years for 100 or more plants and ten years for 1000 or more plants.<sup>95</sup> However, Congress failed to define "plant," thus causing litigation about what constituted a marijuana plant for sentencing purposes under 21 U.S.C. § 841.<sup>96</sup>

*F. How 21 U.S.C. § 841 Functions in Conjunction With the Sentencing Reform Act of 1984*

The Guidelines explain that the statutorily authorized maximum sentence, or a required minimum sentence, may effect the determination of a sentence under the Guidelines.<sup>97</sup> If the Guidelines indicate a sentencing range above the maximum sentence set in a substantive criminal statute, then the statutorily prescribed maximum sentence shall be the appropriate sentence.<sup>98</sup> If the

93. See U.S.S.G., *supra* note 3, at App. C. amend. 125.

94. Anti-Drug Abuse Act of 1988. In 1988, Congress substituted "containing a detectable amount of marijuana, or 1,000 or more plants" for "containing a detectable amount of marijuana" in 21 U.S.C. § 841 (b)(1)(A)(vii). *Id.*

95. See 21 U.S.C. § 841 which provides:

Except as authorized provided . . . any person who violates [21 U.S.C. § 841(a)] shall be sentenced as follows: (1)(A) In case of a violation of [21 U.S.C. § 841(a)] involving . . . (vii) 1,000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . . (1)(B) In the case of a violation of subsection (a) of this section involving . . . (vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight. . . or such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years.

*Id.*

96. See *United States v. Fitch*, 137 F.3d 277 (5th Cir. 1998).

97. See U.S.S.G., *supra* note 3, § 5G.1.1. The Guidelines states:

(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence —

(1) is not greater than the statutorily authorized maximum sentence, and

(2) is not less than any statutorily required minimum sentence.

*Id.*

98. *Id.* § 5G.1.1 (a).

Guidelines indicate a sentencing range below a mandatory minimum set by a substantive criminal statute, then the statutorily prescribed minimum sentence shall be the appropriate sentence.<sup>99</sup> Finally, in any other case, the appropriate sentence imposed may be within the Guidelines' sentencing range as long as the sentence is not less than the minimum statutorily prescribed sentence nor greater than the maximum statutorily prescribed sentence.<sup>100</sup>

In application, if a drug offender is convicted under 21 U.S.C. § 841 and the maximum sentence authorized is sixty months and the Guideline range is sixty-three to seventy-eight months, then the sentence required is sixty months.<sup>101</sup> If the minimum mandatory sentence is ten years and the Guideline range is sixty-three to seventy-eight months, then the appropriate sentence would be ten years.<sup>102</sup> If the Guideline range is sixty-three to seventy-eight months and maximum statutory sentence is seventy-four months, then the Guideline range is restricted to sixty-three to seventy-four months.<sup>103</sup> Finally, if the Guideline range is sixty-three to seventy-eight months and minimum statutory sentence is seventy-four months, then the Guideline range is restricted to seventy-four to seventy-eight months.<sup>104</sup>

### III. THE MARIJUANA PLANT

#### A. *What is a Marijuana "Plant"*

*Cannabis sativa* is commonly referred to by its Mexican colloquial name "marijuana."<sup>105</sup> Widely considered the only species in the *Cannabis* genus, marijuana is the mixture of dried, shredded flowers and leaves that comes from the hemp plant.<sup>106</sup> The narcotic effect of marijuana is a result of the tetrahydrocannabinols ("THC") in cannabis; the most psychoactive of which is delta-9-THC.<sup>107</sup> Hemp is an adaptable and versatile plant with its appearance

99. *Id.* § 5G.1.1 (b).

100. *Id.* § 5G.1.1 (c).

101. *See generally* U.S.S.G., *supra* note 3, § 5G.1.1 (a).

102. *Id.* § 5G.1.1 (b).

103. *Id.* § 5G.1.1 (c)(1).

104. *Id.* § 5G.1.1 (c)(2).

105. *See* Eric Schlosser, *Reefer Madness*, THE ATLANTIC MONTHLY, Aug. 1994.

106. *See* JAMES M. DEMPSEY, FIBER 54-55 (1975); R.H. KIRBY, VEGETABLE FIBERS 46 (1963).

107. *See* Schlosser, *supra* note 105. <http://www.theatlantic.com/election/connection/crime/reefm.htm>. "In various forms it [marijuana] has long been familiar throughout the world: in Africa as 'dagga', in China 'ma', in Northern Europe as 'hemp'." *Id.*

depending upon the climate and cultivation techniques as well as the variety of seed used.<sup>108</sup>

*B. Historical Background of the Marijuana*

For thousands of years, hemp has been used on a global scale.<sup>109</sup> Until the late-nineteenth century, many believed hemp was the world's most cultivated crop and primary industry for nearly 3000 years.<sup>110</sup> Although hemp most likely originated in the steppes of central Asia, its cultivation spread throughout Asia and India, and eventually, hemp reached Europe.<sup>111</sup> By the sixteenth century, Henry VIII of England required hemp be grown by the English farmers to support the growing British navy and its continual need for sails and rope.<sup>112</sup> When British colonists came to the New World, they were required to grow the plant to help fulfill Britain's implacable need.<sup>113</sup> In America, the importance of hemp continued through the founding of the United States. Pennsylvania, Virginia, and Maryland, for example, used hemp

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108. See David P. West, *Fiber Wars: The Extinction of Kentucky Hemp*, HEMP TODAY 5, 43 (Ed Rosenthal ed.) (1994). *Id.* See LESTER GRINSPOON, MARIHUANA RECONSIDERED 35 (1971). When the hemp plant is grown in hot and/or dry climates, it tends to produce more resin, which is the most potent part of the narcotic of the plant. In addition, when it is grown to produce narcotics it is planted far apart, this encourages more leaves and flowers that produce the resin. *Id.* See Kirby, *supra* note 106, at 50. Hemp is planted in the early spring, after the danger of extended frosts has passed. In addition, hemp withstands most changes in the temperature, making it suitable for growth in most areas. *Id.* See Dempsey, *supra* note 106, at 66. Once hemp begins to grow, it requires very little care. *Id.*

109. See JACK HERER, HEMP AND THE MARIJUANA CONSPIRACY: THE EMPEROR WEARS NO CLOTHES 2 (7th ed. 1991). It may well have been the fiber used to make the first woven fabric. *Id.*

110. See *id.* Hemp was used to make 90% of all ships' sails, along with an estimated 80% of all other textiles in the world, until the twentieth century. These textiles were used for everything from sheets and towels to the tarpaulins used to create the covered wagons of American pioneers. The original United States flag sewn by Betsy Ross is said to have been made of hemp fabric. See *id.* at 5-6. For centuries, nearly all books were printed on hemp paper, including the Gutenberg Bible. Other paper items such as currency, maps, and government documents were printed on hemp paper as well. Hemp paper was often made from the rags of hemp fabric resulting from worn-out sails, clothing, rope, and other items. See *id.* at 7.

111. See Kirby, *supra* note 106, at 46.

112. See Grinspoon, *supra* note 108, at 11.

113. See Herer, *supra* note 109, at 1. In 1619, the founders of the colony at Jamestown ordered planting of the hemp seed. In 1631, in Massachusetts Bay Colony, other laws making the cultivation of hemp mandatory were passed. In the following years, Connecticut and colonies around the Chesapeake Bay passed such laws. In Virginia, a criminal penalty was imposed on those who failed to grow hemp during the shortage. *Id.*

as legal tender for exchange.<sup>114</sup> In addition, many of the plantations in the southern United States grew hemp.<sup>115</sup>

Throughout history, hemp was grown primarily for industrial uses, although the narcotic strains were apparently used as a popular ingredient in many medical products.<sup>116</sup> During the nineteenth century, the use of marijuana for recreation became a craze in France, and also, to some extent, in the United States.<sup>117</sup> However, it was not until the early twentieth century that marijuana use became a focal point for public concern. In 1910, after the Mexican Revolution, Mexican immigrants introduced the recreational use of marijuana to the American culture.<sup>118</sup> Consequently, the media campaigned to end the use of marijuana in the United States via uniform state legislation.<sup>119</sup>

In 1930, the Federal Bureau of Narcotics ("FBN") was established.<sup>120</sup> Harry Anslinger, who supported this campaign against marijuana, headed the FBN.<sup>121</sup> Concerned about the increase in the use of marijuana and research linking marijuana usage to crime and other social problems, the FBN encouraged all states to enact a law making marijuana illegal.<sup>122</sup> Even with powerful supporters, Anslinger was only partly successful in getting states to pass uniform legislation.<sup>123</sup> By 1931, marijuana had been outlawed in twenty-nine states.<sup>124</sup>

Nonetheless, the media's condemning of marijuana paid off in 1937 when Congress passed the Marihuana Tax Act of 1937 ("Marihuana Tax Act").<sup>125</sup> The Marihuana Tax Act effectively criminalized marijuana, restricting possession of the drug to individuals who paid an excise tax for certain medical uses.<sup>126</sup> The taxes essentially were imposed on producers, dispensers, and users of marijuana.<sup>127</sup>

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114. See Marijuana Timeline (last modified August 22, 1999), <<http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html>>.

115. See Herer, *supra* note 109, at 1. Records show that George Washington and Thomas Jefferson both grew hemp. *Id.*

116. See Herer, *supra* note 109, at 9. In the early twentieth century, *Cannabis* appeared in the U.S. Pharmacopoeia. *Id.*

117. See Marijuana Timeline, *supra* note 114.

118. See *id.*; see also RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* 32-52 (1974).

119. Bonnie & Whitebread, *supra* note 118, at 92-117; see also Grinspoon, *supra* note 108, at 323-25. Although in reality marijuana remained virtually unknown to most Americans. *Id.*

120. See Marijuana Timeline, *supra* note 114.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937) [hereinafter Marihuana Tax Act].

126. See *id.*

127. *Id.* The Marihuana Tax Act:



Witnesses from the Treasury Department and the FBN extensively assured Congress that the Marihuana Tax Act would not affect hemp farmers.<sup>128</sup> Hemp farmers would automatically be allowed to continue to cultivate and profit from the non-narcotic use of the plant.<sup>129</sup> This protection for hemp farmers rested in the Act's definition of "marijuana":

[A]ll parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin- but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.<sup>130</sup>

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SEC. 2. (a) Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall (1) within fifteen days after the effective date of this Act, or (2) before engaging after the expiration of such fifteen-day period in any of the above mentioned activities, and (3) thereafter, on or before July 1 of each year, pay the following special taxes respectively:

- (1) Importers, manufacturers, and compounders of marihuana, \$24 per year.
- (2) Producers of marihuana (except those included within subdivision (4) of this subsection), \$1 per year, or fraction thereof, during which they engage in such activity.
- (3) Physicians, dentists, veterinary surgeons, and other practitioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, \$1 per year or fraction thereof during which they engage in any of such activities.
- (4) Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, \$1 per year, or fraction thereof, during which he engages in such activities.
- (5) Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, \$3 per year: Provided, That any person who has registered and paid the special tax as an importer, manufacturer, compounder, or producer, as required by subdivisions (1) and (2) of this subsection, may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by him without further payment of the tax imposed by this section. . . .

*Id.*

128. See generally *Taxation of Marihuana: Hearings on H.R. 6906 Before the Senate Comm. On Finance*, 75<sup>th</sup> Cong. 7 (1937).

129. See Marihuana Tax Act. However, hemp farmers had to pay a small fee to the Treasury Department. *Id.*

130. *Id.*; see 21 U.S.C. § 802(16).

Despite the purported intention of the Act's drafters, the Marihuana Tax Act contributed to the death of the hemp industry.<sup>131</sup>

Throughout the early twentieth century, the United States Department of Agriculture (USDA) had supported hemp cultivation.<sup>132</sup> During World War II, there was a need for hemp and other materials critical to producing cordage, parachutes, and other military necessities.<sup>133</sup> In response, the USDA launched its "Hemp for Victory" program.<sup>134</sup> The program encouraged farmers to plant hemp by granting deferments to those who would remain home in order to grow hemp and supply the seeds.<sup>135</sup> By 1943, the program had harvested 375,000 acres of hemp.<sup>136</sup>

In the 1960s, "[a] changing political and cultural climate was reflected in more lenient attitudes towards marijuana."<sup>137</sup> The use of marijuana became popular among the white upper-middle class.<sup>138</sup> In 1961, only a few years after the final demise of the hemp industry in the United States, Congress ratified the *United Nations Single Convention on Narcotic Drugs* and defined marijuana as a Schedule I narcotic, the most heavily controlled category of drugs.<sup>139</sup> From 1980 to present, there has been a "war on drugs."<sup>140</sup> Currently, marijuana is illegal in all fifty states.<sup>141</sup>

#### IV. CASE LAW

##### A. *The Majority View*

The majority's view is that a marijuana stalk, representing remains of a harvested marijuana plant, is a "plant" within the meaning of the statute.<sup>142</sup> In *United States v. Fitch*, the most recent interpretation on what constitutes a marijuana "plant" for sentencing under 21 U.S.C. § 841, was decided.<sup>143</sup> The

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131. See West, *supra* note 108, at 30.

132. *Id.* at 16, 20.

133. See Marijuana Timeline, *supra* note 114.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. See Marijuana Timeline, *supra* note 114.

139. See *generally* Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1408, 520 U.N.T.S. 204.

140. See Marijuana Timeline, *supra* note 114.

141. See *id.* Some states have enacted statutes allowing the use of marijuana for medical purposes. In 1996, "California voters passed Proposition 215 allowing for the sale and medical use of marijuana for patients with AIDS, cancer, and other serious and painful diseases." However, these state laws are in conflict with current federal prohibition laws dealing with marijuana such as 21 U.S.C. § 841. *Id.*

142. See *id.*

143. *Fitch*, 137 F.3d at 283.

court held that the plant was only required to be alive at some point during the commission of the offense.<sup>144</sup>

### 1. The Facts and Procedural History of *Fitch*

In August of 1993, the Mississippi Bureau of Narcotics Eradication Unit, after being informed of the defendant's marijuana farm, flew over the defendant's farm in a helicopter.<sup>145</sup> The bureau found seventy-two marijuana plants, upon which the Bureau destroyed.<sup>146</sup> Three months later, a search warrant for the defendant's entire farm was obtained and executed by the local law enforcement.<sup>147</sup> The local law enforcement "found approximately twenty kilograms of processed marijuana in individual zip lock plastic "baggies," or in cans."<sup>148</sup> Furthermore, 288 marijuana stalks were found that had been fully stripped of all leaves, leaving only dry husks.<sup>149</sup>

Later, in July of 1996, a random fly-over search revealed marijuana again growing on the defendant's farm.<sup>150</sup> This triggered, the states law enforcement to obtain a search warrant.<sup>151</sup> The search led to the seizure of 827 marijuana plants in pre-harvest condition.<sup>152</sup>

In 1996, the defendant was charged and convicted of knowingly manufacturing, distributing, and possessing with intent to distribute marijuana.<sup>153</sup> The defendant's offense involved 1187 marijuana plants.<sup>154</sup> The court attributed more than 1000 plants to the defendant, therefore, he was sentenced under 21 U.S.C. § 841 to the mandatory minimum sentence of ten years imprisonment.<sup>155</sup>

The defendant appealed, relying on the minority position's definition of "plant" as interpreted by the courts in the *United States v. Stevens* and *United*

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144. *Id.* at 282.

145. *Id.* at 279.

146. *Id.*

147. *Fitch*, 137 F. 3d at 279.

148. *Id.* at 279. Also found were "large amounts of marijuana residue throughout the area" and "evidence of a marijuana growing operation." *Id.*

149. *Id.*

150. *Id.* at 280.

151. *Id.*

152. *Fitch*, 137 F. 3d at 280. Essentially, the 827 plants were alive and growing at the time of seizure. *Id.*

153. *Id.* at 280. The defendant was charged with violating 21 U.S.C. § 841(b)(1)(A)(vii). *Id.*

154. *Id.* at 278. The 1187 plants attributed to the defendant are the number of plants found at the farm during the three seizures of the defendant's farm. *Id.*

155. *Id.* 21 U.S.C. § 841(b)(1)(A)(vii) provides:

1000 kilograms of more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight. . . .

[S]uch person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life. . . . No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

*States v. Blume*.<sup>156</sup> The minority position is that the remains of a harvested marijuana plant is not a "plant" within the meaning of the 21 U.S.C. § 841.<sup>157</sup> Thus, the plant must be alive at the time of seizure.<sup>158</sup> In *Fitch*, the defendant argued that the 288 marijuana plants should not have been counted against him because they were stalks, not plants.<sup>159</sup> The defendant stated that the term "plant" means a plant that is alive at the time of the seizure; thus, a stalk is not a "plant" because a stalk is not alive.<sup>160</sup>

## 2. The Court's Holding And Reasoning

In *Fitch*, the court disregarded the fact that 288 of the marijuana plants had been harvested before their discovery. It stated that the fact that the plants were not alive at the time of seizure did not affect their status as marijuana plants for applying the mandatory minimum sentence required by 21 U.S.C. § 841.<sup>161</sup> The court based its holding on several factors: the plain language of the statute,<sup>162</sup> the legislative intent,<sup>163</sup> and the notion that the defendant was seeking to add an additional evidentiary requirement to the statute.<sup>164</sup> The court found that the plant was only required to be alive at some point during the commission of the offense.<sup>165</sup> In *Fitch*, the marijuana stalk was alive before the defendant harvested it; thus, it constituted a marijuana plant.

### a. The Plain Language

In *Fitch*, the court found the plain language of the statute indicates that the only requirement of 21 U.S.C. § 841 is that the offense involve 1000 or more plants.<sup>166</sup> In the statute's text, nothing suggests that the application of the

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156. *Fitch*, 137 F.3d at 281; see also *Stevens*, 25 F.3d at 318; *Blume*, 967 F.2d at 45.

157. *Fitch*, 137 F.3d at 281.

158. *Id.*

159. *Id.* at 279.

160. See *id.* at 281. Using the defendant's definition, the plant must be unharvested at the time of the seizure. Therefore, a stalk would not fit into the meaning of "plants" for sentencing purposes under 21 U.S.C. § 841. *Id.*

161. See *id.* at 282-83; see *United States v. Silvers*, 84 F.3d 1317, 1327 (10th Cir. 1996) (stating that all the government must prove is that at some point in time the defendant possessed marijuana plants with the intent to distribute in order to obtain a sentence under 21 U.S.C. § 841(b)(1)(A)(vii)).

162. See *infra* notes 166-70 and accompanying text.

163. See *infra* notes 171-73 and accompanying text.

164. See *infra* notes 174-77 and accompanying text.

165. *Fitch*, 137 F.3d at 282; see also *United States v. Fletcher*, 74 F.3d 49, 55 (4th Cir. 1996) (holding a marijuana plant can be a plant even if it is not alive).

166. *Fitch*, 137 F.3d at 282. The court stated:

The statute § 841(b)(1)(A)(vii), states that any defendant convicted of an offense under this subsection involving "1,000 or more marijuana plants" shall be subject to a ten year mandatory minimum sentence regardless of the weight of the marijuana produced. Thus, under the plain language of the statute, the only requirement which must be met in order

statute depend upon whether at the time of the seizure marijuana plants are harvested or unharvested.<sup>167</sup> The court stated the term “offense involving marijuana plants” means only the cultivation and harvesting of marijuana plants and the processing of plants into consumable products is required.<sup>168</sup> The defendant’s argument that the plant must be alive at the time of seizure cannot be inferred from the text of 21 U.S.C. § 841.<sup>169</sup> Nor does any authority exist within the plain language of the statute for creating such a requirement.<sup>170</sup>

b. The Legislative Intent

In *Fitch*, the court found nothing in the legislative history of 21 U.S.C. § 841 that supported the defendant’s position.<sup>171</sup> The court stated “Congress did not distinguish between harvested and unharvested, live or dead plants. . . .”<sup>172</sup> Furthermore, the court stated that there was no evidence to the contrary that Congress intended to define “plant” in any other way than by its ordinary and plain dictionary meaning.<sup>173</sup>

c. The Addition of An Extra Evidentiary Element

In *Fitch*, the court found the defendant sought to add an additional evidentiary requirement to the statute by claiming that marijuana plants must be alive at the time of seizure to be counted as plants for sentencing purposes.<sup>174</sup> The court stated that the statute itself does not contain the

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to trigger the applicable mandatory sentence is that the offense involve 1,000 or more marijuana plants.

*Id.*

167. *See id.*; *see also* United States v. Shields, 87 F.3d 1194, 1197 (11th Cir. 1996) (rejecting the similar argument that for sentencing purposes only seized alive plants can be considered); United States v. Fitol, 733 F.Supp. 1312, 1316 (D.Minn 1990). The court stated, “[t]here is no distinction made in the statute [§ 841] between seedlings, cuttings, small plants, medium plants, large plants, mother plants, plants with secondary root and leaf stem, etc. These groupings are all subcategories of plants[,] plants at various stages of growth, but plants nonetheless.” *Id.*

168. *Fitch*, 137 F.3d at 282; *see also* United States v. Layman, 116 F.3d 105, 109 (4th Cir. 1997) (holding 21 U.S.C. § 841 applies to all offenses involving the growing of marijuana); United States v. Haynes, 969 F.2d 569, 573 (7th Cir. 1992) (holding the offense encompassed only growing of the marijuana plants).

169. *Fitch*, 137 F.3d at 282; *see Shields*, 87 F.3d at 1197 (“Nothing in the text of . . . §841(b) suggests that their application depends upon whether the marijuana plants are harvested before or after authorities apprehend the grower.”).

170. *Fitch*, 137 F.3d at 282.

171. *Id.*; *see Fletcher*, 74 F.3d at 55 (“ . . . Congress has not further subdivided live marijuana plants into growing plants and cut plants.”).

172. 137 F.3d at 282.

173. *Id.*; *see* United States v. Eves, 932 F.2d 856, 860 (10th Cir. 1991) (holding there was not “. . . any aspect of legislative history that supports [the] theory that Congress intended “plant” to be construed other than by its plain and ordinary dictionary meaning”).

174. *Fitch*, 137 F.3d at 282.

requirement set out by the defendant, and to accept the defendant's construction would in effect require rewriting the statute.<sup>175</sup> In order to obtain a sentence under 21 U.S.C. § 841, the court held the government is only required to prove that the defendant possessed with the intent to distribute or distributed marijuana plants at some duration during the offense.<sup>176</sup> Thus, the statute only requires evidence that 1000 marijuana plants are attributable to the defendant during the offense. The statute does not require the plants be alive at the time of seizure.<sup>177</sup>

### B. *The Minority View*

The minority's view is that only live marijuana plants should be counted in the number of plants, while dry or post-harvested plants should be calculated for sentencing purposes by actual weight of marijuana they produced.<sup>178</sup> The court in *Blume* held that a marijuana plant must be in plant form at time of seizure.<sup>179</sup> In *Stevens*, the court held that a plant is not a plant unless it is alive.<sup>180</sup>

#### 1. The Facts of *Stevens*

In September of 1992, agents obtained and executed search warrants at the defendant's home and cabin. Between the home and the cabin, the agents seized 756.88 grams of marijuana, a thermos with marijuana residue, and a notebook containing names and dollar amounts.<sup>181</sup> During the defendant's grand jury indictment, a witness testified that he began providing the defendant with marijuana in 1988.<sup>182</sup>

175. *Id.*

176. *Id.*; see also *Silvers*, 84 F.3d at 1327.

177. See *Silvers*, 84 F.3d at 1327 (relying on *United States v. Wegner*, 46 F.3d 924, 928 (9th Cir. 1995)).

178. See *Stevens*, 25 F.3d at 323; *Blume*, 967 F.2d at 49.

179. *Blume*, 967 F.2d at 51. The court noted that:

[T]he intent of the guidelines was "to measure live marijuana by the number of plants and dry leaf marijuana by weight." We believe this approach best comports with congressional intent in passing its mandatory sentencing provision, 21 U.S.C. § 841(b)(1)(B)(vii), and with the rationale for the corresponding sentencing guideline. . .

*Id.*

180. See *Stevens*, 25 F.3d at 323.

181. *Id.* at 320. Other objects found were not relevant to the defendant being charged under 21 U.S.C. § 841.

182. *Id.* The court stated:

Through an intermediary that year, he provided [the defendant] with about five pounds of marijuana from 50 plants. He then met, [the defendant] for the first time in 1989, and [the defendant] indicated he would take whatever [the witness] grew that year. [The witness] supplied [the defendant] with approximately 10 pounds from 100 plants. [The witness's] testimony is unclear as to how much marijuana he supplied [the defendant] with in 1990. In 1991, he grew between 700 and 1000 plants resulting in 20 to 30 pounds of marijuana.

Overall, he provided the defendant with approximately 1600 plants worth of marijuana.<sup>183</sup> After the indictment, the defendant entered a plea admitting to participating in a marijuana conspiracy. At sentencing, the defendant was sentenced outside the perimeters of his plea agreement.<sup>184</sup> Consequently, the defendant appealed to the sixth circuit to re-evaluate his sentence.<sup>185</sup>

## 2. The Court's Holding and Reasoning

In *Stevens*, the court held the defendant was wrongly sentenced upon the number of plants his supplier grew, rather than upon the weight of marijuana that the defendant conspired to possess.<sup>186</sup> The court held that 21 U.S.C. § 841 only applies to the number of marijuana plants that are found alive. The court based its decision solely on legislative intent of 21 U.S.C. § 841 and the Guidelines.<sup>187</sup> It looked at the amendments made to both the Guidelines and 21 U.S.C. § 841 and their legislative intent.<sup>188</sup> The court stated that for marijuana that has been harvested, punishment is provided for in the Guidelines based upon the actual weight.<sup>189</sup> The court concluded that under the initial editions of the Guidelines, harvested marijuana was to be measured by weight, not by the number of plants that the marijuana came from. The court emphasized that neither Congress nor the Sentencing Commission has ever repudiated this proposition. Accordingly, the court held the proper way to calculate the quantity of marijuana for sentencing is to apply the provision only to live marijuana plants seized.<sup>190</sup>

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Before planting in 1992, [the defendant] told [the witness] he wanted 100 pounds of marijuana, and [the witness] said he grew about 1000 plants that year, though not all were harvested, as police broke up the conspiracy.

*Id.*

183. *Id.* The court stated:

[I]n determining how much marijuana to attribute to [the defendant], the court added up the number of plants [the witness] grew, ignoring 1990 in which the court found [the witness's] testimony unclear. Each plant was assumed to weigh one kilogram. The court stated that [the witness] grew 50 plants in 1988, 100 in 1989, and, based upon the lowest estimates from 1991 and 1992, 700 and 750 plants in those years respectively. Thus, there alone we have 1600 plants over the course of this conspiratorial relationship.

*Id.*

184. *Id.*

185. *See Stevens*, 25 F.3d at 319.

186. *Id.* at 323.

187. *Id.* at 322-23. *See also supra* notes 53-56, 65 and accompanying text.

188. *Stevens*, 25 F.3d at 322-23.

189. *Id.* at 322.

190. *Id.* at 322-23. The court stated:

The important point emerging from this history is that under the initial editions of the Guidelines, harvested marijuana was to be measured by weight, not by the number of plants that the marijuana came from, and neither Congress nor the Sentencing Commission has ever repudiated this proposition. The equivalency provision was

## V. CRITICAL ANALYSIS

When interpreting a statute, one must look to the plain language of the text. When the plain language is unambiguous, a court generally will give effect to the plain and ordinary meaning, unless, there is legislative intent to the contrary.<sup>191</sup> The policy implication of the possible interpretations of the statute must also be considered. One should first look to the words of the statute, but "not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or objective to accomplish, whose sympathetic and imaginative discovery is the surest guide to the meaning."<sup>192</sup>

A. *The Plain Language of 21 U.S.C. § 841*

There are customary ways to interpret a statute called the "Canons of Construction."<sup>193</sup> Most importantly, the "Canons" state that ordinary terms shall be construed by their ordinary meaning and when the same language is used in various parts of the act, the language is presumed the same throughout.<sup>194</sup> The first issue is the definition of a marijuana "plant."

Throughout the history of 21 U.S.C. § 841 and the SRA, there have been many different definitions of "plant." However, a stalk is not included in any of the definitions of "plant." The common everyday meaning of "plant" is a living organism, which belongs to the vegetable kingdom in the broadest sense.<sup>195</sup> According to *Webster's Dictionary* a "plant" is "a young tree, a shrub, or herb, planted or ready to plant; a slip, cutting, or sapling. . . ."<sup>196</sup>

In 1994, one court defined a plant by its characteristics stating, "[m]arijuana plants have three characteristic structures, readily apparent to the unaided layperson's eye: root, stems, and leaves."<sup>197</sup> In 1995, the Sentencing Commission added a note to the Guidelines stating that for the purpose of the Guidelines, a plant "is an organism having leaves and a readily observable root

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developed to apply in sentencing when the plants have not been harvested. The proper way to calculate the quantity of marijuana for sentencing here, then, is to apply the provision only to live marijuana plants found. Additional amounts for dry leaf marijuana that a defendant possesses—or marijuana sales that constitute "relevant conduct" that has occurred in the past—are to be added based upon the actual weight of the marijuana and not based upon the number of plants from which the marijuana was derived.

*Id.*

191. See *Chapman*, 500 U.S. at 461-62.

192. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) *aff'd*, 326 U.S. 404 (1945).

193. See generally Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

194. *Id.* at 403.

195. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1881, def. no. 3 (2d ed. unabridged 1961).

196. See *Eves*, 932 F.2d at 859.

197. See *United States v. Robinson*, 35 F.3d 442, 446 (9th Cir. 1994).



formation.”<sup>198</sup> The Sentencing Commission explained the amendment stating that it addresses the issue of what constitutes a marijuana plant because several circuits have addressed the issue of when a cutting from a marijuana plant becomes a plant.<sup>199</sup> The Guidelines’ amendment defines “plant” for guidance purposes; however, the Guidelines’ definition mentions nothing of whether a stalk is a plant.<sup>200</sup> Though it can be inferred that the Guidelines’ definition does not include a stalk as a plant because stalk does not have “readily observable root formation.”

The most sensible definition for “plant” is found within the same title as 21 U.S.C. § 841. In 21 U.S.C. § 802, a marijuana plant is defined as follows:

[A]ll parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.<sup>201</sup>

Since, the preceding definition also does not include a stalk, it can be inferred that Congress did not intend to include a stalk in the definition “plant” for the purposes of sentencing under 21 U.S.C. § 841.<sup>202</sup>

#### B. *Legislative Intent of 21 U.S.C. § 841*

Before 1986, sentences for possession with the intent to distribute marijuana in violation of 21 U.S.C. § 841 were based on the weight of the marijuana seized.<sup>203</sup> In the Act of 1986, Congress, for the first time, based sentencing on the number of plants attributable to the defendant.<sup>204</sup> However, no House or Senate Report was submitted with this legislation.<sup>205</sup> In addition, the discussion of the statute reported in the *Congressional Record* sheds no light on Congress’ intent.<sup>206</sup>

198. See U.S.G.G., *supra* note 3, § 2D1.1(c), cmt. 18. The comment was added as a response to all the litigation of what constitutes a “plant.” It became effective on November 1, 1995. *Id.*

199. *Id.*

200. *Id.*

201. 21 U.S.C. § 802 (16). See also Marihuana Tax Act of 1937, ch. 553, Pub. L. No. 75-238, 50 Stat. 551 (1937). The definition from the Marihuana Tax Act is the same as the definition Congress adopted in Title 21.

202. See *supra* note 194 and accompanying text.

203. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); see *supra* notes 86-88 and accompanying text.

204. See *id.*

205. See *id.*

206. See *Silvers*, 84 F.3d at 1322.

Congress enacted the amendments changing relevant sections of 21 U.S.C. § 841(b) into their present form as part of the Act of 1988.<sup>207</sup> Once more, no House or Senate Reports were submitted with the amendments.<sup>208</sup> The only relevant discussion of either part of the statute was a section-by-section analysis read into the *Congressional Record* by Senator Biden.<sup>209</sup> Nothing in Senator Biden's discussion can be interpreted as an expression of Congress' intent to require a plant to be alive at the time of seizure.<sup>210</sup> Nor does it give any insight on what the definition of plant should be.<sup>211</sup>

Moreover, there is no indication in the legislative history of the 1988 amendment why this method was used instead of simply stating whether stalks were to be included in determining the amount of plants. Nor has any legislative material been found that sheds any light on what motivated the 1986 change employing the number of plants involved in the determining sentences or what is meant by "plants" in either amendment.<sup>212</sup>

Despite the lack of legislative history, many courts have inferred that the purpose of the statute is to punish marijuana growers more severely than other defendants. This line of cases began with *United States v. Fitol* in which the district court stated:

It seems clear . . . that by changing the determining factor from weight to number of "plants regardless of weight," Congress intended to punish growers

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207. See Anti-Drug Abuse Act of 1988, Pub L. No. 100-690, 102 Stat. 4181 (1988); see *supra* notes 92-97 and accompanying text.

208. See *id.*

209. See 134 CONG. REC. S17360-02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden). Senator Biden, then chairman of the Senate Judiciary Committee, regarding § 6479 stated:

Section 841(b)(1)(A) provides for a mandatory minimum 10 year penalty for distribution, or possession with intent to distribute, of "1,000 kilograms or more of a mixture or substance containing a detectable amount of marijuana." Defendants charged with possessing large quantities of marijuana plants have argued that the statutory definition of marijuana specifically excludes the seeds and stems of the plant, and that therefore these items may not be counted toward the 1,000 kilogram requirement.

The government has argued in response that the term "mixture or substance" encompasses all parts of the plants as harvested, notwithstanding the statutory definition of "marijuana," but defendants contend that the "mixture or substance" language applies only to marijuana after it has been prepared for illegal distribution. The defendants' position has been adopted by at least one court.

The amendment is intended to curtail this unnecessary debate by providing that the minimum penalty is triggered either by the weight of the "mixture or substance" or by the number of plants regardless of weight. The bill uses 1,000 plants as the equivalent of 1,000 kilograms.

*Id.*

210. See generally 134 CONG. REC. S17360-02 (1988) (statement of Sen. Biden); see also *Silvers*, 84 F.3d at 1322.

211. *Id.*

212. See *Silvers*, 84 F.3d at 1321-22.

of marihuana by the scale or potential of their operation and not just by the weight of the plants seized at a given moment. Congress must have found a defendant who is growing 100 newly planted marihuana plants to be as culpable as one who has successfully grown 100 kilograms of marijuana.<sup>213</sup>

The *Fitol* interpretation of Congress' intent has gained a wide following.<sup>214</sup> If the intent was to punish growers more harshly than other defendants, then a new question arises under the majority approach: whether the Government must prove that the defendant was the grower.

However, the history surrounding the enactment of 21 U.S.C. § 841 suggests that Congress had a broader purpose in enacting the statute.<sup>215</sup> Since the marijuana industry is like any other agricultural business and drug crimes have been on the rise, it appears that Congress intended to punish the marijuana industry as a whole.<sup>216</sup> The people involved in it have the same basic roles as their counterparts in the legitimate agricultural trade.<sup>217</sup> Within the trade some people plant the seeds, some tend to the plants, some harvest the plant's, some dry the plants, some cut and package them, and some distribute them to the wholesale and retail markets. Accordingly, the purpose of 21 U.S.C. § 841 appears to be to punish more harshly people involved in production regardless of whether they are the grower, the harvester, or the dryer.

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213. *Fitol*, 733 F. Supp at 1315.

214. *See Fletcher*, 74 F.3d at 55 ("By providing that processed marijuana be measured by weight but live plants be counted by number and then treated as the equivalent of an amount of dry marijuana as set by statute, Congress has established a system of stepped-up punishment for growers."); *Wegner*, 46 F.3d at 926 ("Our precedent unambiguously endorses the view that the one kilogram conversion ratio represents congressional intent to punish growers of 50 or more marijuana plants to a greater extent than smaller producers or mere possessors."); *United States v. Foree*, 43 F.3d 1572, 1581 (11th Cir. 1995) (21 U.S.C. § 841(b) "punishes marijuana growers by relying in sentencing on the number of live plants recovered rather than marijuana weight"); *United States v. Jackson*, 11 F.3d 953, 956 (10th Cir. 1993) ("Congress intended to punish growers of marijuana by the scale or potential of their operation and not just by the weight of the plants seized at a given moment."); *United States v. Occhipinti*, 998 F.2d 791, 802 (10th Cir. 1993) ("[W]e rejected a challenge to the constitutionality of the minimum sentencing provisions found at 21 U.S.C. § 841 (b)(1)(B)(vii), holding that Congress rationally 'intended to punish growers of marijuana by the scale or potential of their operation and not just the weight of the plants seized at a given moment.'"); *United States v. Smith*, 961 F.2d 1389, 1390 (8th Cir. 1992) ("The cases suggest Congress intended to account for the heightened culpability of growers because of their primacy in the distribution chain, rather than to punish them based on predictable yield of their plants.").

215. *See supra* notes 37-97 and accompanying text.

216. *See supra* notes 218-25 and accompanying text.

217. *See supra* notes 105-08 and accompanying text.

### C. Policy

Currently, the United States is in a "war on drugs."<sup>218</sup> Along with interdiction, education, and testing, reform of the national drug laws has become one of the major weapons of the "war on drugs." It is estimated that over \$300 billion is spent annually on the drug problem.<sup>219</sup> Society believes that drug abuse is one of the single most important problems facing our country.<sup>220</sup> Society feels that harsher punishment and cutting the drug supply is the most important thing that can be done to help reduce drug crime.<sup>221</sup> Overall, society feels the country is spending too little in dealing with drug crimes.<sup>222</sup>

In 1997, 38.7% of all the sentencing guideline cases were drug offenses. The largest percentages of those offenses were cases involving marijuana.<sup>223</sup> Of the 27,000 drug offenders sentenced to probation in seventeen states in 1986, 49% were rearrested for a felony offense within three years in which 26.7% were drug related.<sup>224</sup> In response to the obvious economic and social problems created by illegal use of drugs, in order to fight the "war on drugs" Congress needs to reload its weapons by including harsher measures for drug offenders.<sup>225</sup>

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218. See Katherine Bishop, *Mandatory Sentences in Drug Cases: Is the Law Defeating Its Purpose?*, N.Y. TIMES, June 8, 1990, at B16 (quoting Judge David Williams, Federal District Judge in Los Angeles, California). Judge Williams stated, "We are in a war on drugs and it does require harsh action. It deals harshly with a lot of people, but it may get some out of business." *Id.*; see also *supra* notes 79-81 and accompanying text.

219. See Naftali Bendavid, *Is Drug Czar Destined for Siberia?: Clinton Slow to Focus on Leadership, Fate of Troubled Office*, LEGAL TIMES, Jan. 18, 1993, at 1, 20.

220. BUREAU OF JUSTICE, STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE, 32 (1993). A recent Gallup Poll reported that in 1994 nine percent of the people surveyed said drug abuse was the single most important problem facing the country. In 1985, two percent of respondents felt this way. *Id.*

221. *Id.* In a 1989 Gallup Poll, a question was "What is the most important thing that can be done to help reduce crime?" Twenty-four percent responded "harsher punishment" and twenty-five percent responded "cutting the drug supply." *Id.*

222. *Id.* In a National Opinion Research Center Poll, sixty percent of the respondents, when asked about the spending for various social problems, said the country is spending too little in dealing with drug crimes. *Id.*

223. UNITED STATES SENTENCING COMM'N, 1997 DATAFILE OPAF (1997). More than twenty-five percent of the 38.7% were marijuana-related cases. *Id.*

224. STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE, *supra* note 220, at 26. Thus, one out of three were rearrested for drug offenses. *Id.*

225. *Id.* at 27. Eighty-three percent of the people surveyed said marijuana was easy to obtain. *Id.*

*D. Case Analysis*

## 1. The Author's Analysis of the Majority Position

In *Fitch*, the court did not actually analyze the question of what constitutes a "plant." The analysis of the court never discusses the meaning of term "plant." Essentially, all the court states is that the term "plant" is to be defined by its ordinary and common meaning since there is no evidence to the contrary.<sup>226</sup> Instead, the court interpreted the statute to mean that at some point during the commission of the offense, the stalk must have been a plant.<sup>227</sup> The court inferred this from the plain language of the text.<sup>228</sup> The court found that the text of the statute did not state whether the plant had to be harvested at the time of seizure.<sup>229</sup> Furthermore, the legislative history revealed nothing of a requirement that the plant had to be alive at the time of seizure.<sup>230</sup> The court concluded that the defendant was trying to add an extra requirement that is not supported by legislative intent or by the plain language of the statute.<sup>231</sup> Accordingly, the court held that a plant does not have to be alive at the time of the seizure.<sup>232</sup>

The statute states "any person who violates subsection (a) of this section shall be sentenced as follows: In a case of a violation of subsection (a) of this section involving. . . ."<sup>233</sup> Then, § 841 lists different types and quantities of controlled substances. Subsection (a) of 21 U.S.C. § 841 reads, it shall be unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ."<sup>234</sup> In the reading of the plain language of 21 U.S.C. § 841, it could be inferred that sentencing should occur under 21 U.S.C. § 841 for an offense as described in subsection (a) involving any of the enumerated categories.<sup>235</sup> Here, the enumerated quantity and type of drug at issue is 1000 marijuana plants.<sup>236</sup> The court rationalized that since a stalk at one point in time had to be a marijuana plant, it counts as a plant under 21 U.S.C. § 841 for the purposes of sentencing.<sup>237</sup> However, how far will the courts take the interpretation of "the offense involves?" Will a person who intends to manufacture marijuana plants

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226. *See supra* notes 166-70 and accompanying text.

227. *Fitch*, 137 F.3d. at 282-83.

228. *See supra* notes 166-70 and accompanying text.

229. *Id.*

230. *See supra* notes 171-72 accompanying text.

231. *See supra* notes 173-76 and accompanying text.

232. *Fitch*, 137 F.3d at 282.

233. 21 U.S.C. § 841(b)(1)(a).

234. 21 U.S.C. § 841(a)(1).

235. *See generally* 21 U.S.C. § 841.

236. *Id.*

237. *Fitch*, 137 F.3d at 282-83.

be sentenced to ten years if he is found with 1000 marijuana seeds? How about if a person is found with processed marijuana attributable to 1000 marijuana plants? Thus, under the majority approach another problem arises: What does the term "the offense involves" means?<sup>238</sup>

On the other hand, the consequence of adopting the majority's position does collaborate with the society's view in taking a harsher stance on drug crimes.<sup>239</sup> By encompassing more drug offenders under the mandatory minimum of ten years, the majority is essentially taking a tough stance on drug crimes, which is needed in America due to the alarming number of people who use illegal drugs.<sup>240</sup> Furthermore, such a tough stance is needed due to the increase in drug use among America's youth.<sup>241</sup> The majority's approach would be a more effective weapon and aid in the "war on drugs."

### 3. The Author's Analysis of the Minority Position

The minority's approach is unlike the majority's approach, which states the legislative history revealed nothing about the plant being alive at the time of seizure; thus, it must not be a requirement.<sup>242</sup> The minority stated that 21 U.S.C. § 841 and the Guidelines as originally promulgated punished harvested marijuana by its actual weight.<sup>243</sup> The court emphasized that though a punishment has been added based on the number of marijuana plants, neither Congress nor the Sentencing Commission has said anything that contradicted the original idea of harvested plants being measured by weight.<sup>244</sup> Accordingly, the court stated since the legislative history reveals nothing about the change, Congress meant it to remain as originally promulgated.<sup>245</sup> Under the minority's approach, a stalk is a harvested marijuana plant and measured by its weight for sentencing purposes.<sup>246</sup> The minority does not discuss the

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238. See *supra* notes 213-27 and accompanying text.

239. See *supra* notes 218-25.

240. See STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE, *supra* note 220, at 30. In a 1993 Substance Abuse and Mental Health Administration survey, seventy-seven million Americans, thirty-seven percent of the population, claimed they had used drugs at least once in their lifetime. Twelve percent said they had used drugs within the last twelve months. *Id.*

241. See STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE, *supra* note 220, at 27. In a 1993 Substance Abuse and Mental Health Administration survey, twenty-six percent of high school students reported using drugs within the last year, which is a 4.1% increase from the prior year. In addition, 15.5% of high school students said they had used drugs within the last month, which is 2.6% increase from the prior year. *Id.*

242. See *supra* notes 161-77 and accompanying text.

243. See *supra* notes 186-90 and accompanying text.

244. See *supra* notes 187-90 and accompanying text.

245. *Id.*

246. *Id.*

plain language of the text the minority only stated that the term “plant” should be interpreted by its common meaning thus, a stalk is not a plant.<sup>247</sup>

The consequence of adopting the minority’s approach is that it imposes lenient sentences upon drug offenders. Under the minority’s approach, the sentence of the defendant in *Fitch* would be a maximum of six and a half years<sup>248</sup> and a minimum of five years and three months.<sup>249</sup> However, under the majority’s approach, the sentence of the defendant in *Fitch* would be a minimum of ten years.<sup>250</sup> Consequently, the minority’s approach contradicts the goals of the society in cutting the drug supply and imposing harsher penalties to win the “war on drugs.”<sup>251</sup> The minority’s approach provides for a lighter penalty for drug offenders, which is less of a deterrent to potential offenders.<sup>252</sup> Furthermore, the minority’s narrow reading of 21 U.S.C. § 841 causes the early release of drug offenders, thus placing them back into the community to commit yet another crime.<sup>253</sup>

## VI. SUGGESTED SOLUTION

It is a goal of the Congress and the Sentencing Commission to have uniformity in sentencing.<sup>254</sup> This goal is not achieved due to the different interpretations of 21 U.S.C. § 841. The minority’s approach imposes a substantially lesser sentence on the violators of 21 U.S.C. § 841 than the majority’s approach, which completely contradicts the current policy surrounding drug offenders.<sup>255</sup> Furthermore, the statute was developed to be tough on drug crimes and to punish the producers of marijuana harsher than other defendants.<sup>256</sup> The minority’s interpretation is not fulfilling the purpose of the statute.<sup>257</sup> On the other hand, the majority’s approach leads to additional 21 U.S.C. § 841 interpretational problems surrounding the term “the offense

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247. *See id.*

248. *Fitch*, 137 F.3d at 281. Six and one-half years is assuming that the 288 stalks in *Fitch* were not counted as plants, thus the defendant was sentenced under the Guidelines where the maximum range was 78 months, hence, six and one-half years.

249. *Id.* Five years and three months is assuming that the 288 stalks in *Fitch* were not counted as plants, thus the defendant was sentenced under the Guidelines where the minimum range was 63 months, hence, five years and three months.

250. *Id.* Ten years is assuming that the 288 stalks in *Fitch* were counted as plants, thus the defendant was sentenced under 21 U.S.C. § 841 where the minimum sentence is ten years.

251. *See supra* notes 218-25 and accompanying text.

252. *See supra* note 23 and accompanying text.

253. *See supra* note 223 and accompanying text.

254. *See supra* note 13 and accompanying text.

255. *See supra* notes 215-25, 242-53 and accompanying text.

256. *Id.*

257. *See supra* notes 213-17 and accompanying text.

involves" which could be interpreted in a number of different ways causing further sentencing disparity.<sup>258</sup>

In order to eliminate sentencing disparity, Congress must amend the statute. In the amendment, Congress should adopt the majority's approach in order to more effectively fight the "war on drugs" before the "war" is lost. Furthermore, Congress must explain that it is not relevant whether the plant is alive at the time of seizure, or if the plant is actually seized. Therefore, all that must be proven is that "the offense involves" marijuana plants. Congress must further explain what is included under "the offense involves," so that the courts will have uniform guidance in applying 21 U.S.C. § 841, thus reducing the chance for sentencing disparity. If Congress amends the statute as suggested, it will take the disparity out of sentencing and will be a starting point in winning the "war on drugs."

#### VII. CONCLUSION

The sentencing reform movement of the 1970s and 1980s came out of the concern that a defendant's actual time served was often not commensurate with his acts or equivalent to other defendants who committed the same crime.<sup>259</sup> At the same time, Congress sought to address the growing drug problem in America by harshly punishing drug offenders. However, Congress failed to give the courts any guidance in how to achieve these, at times, conflicting goals. Whether it was an intentional omission or an ill-considered oversight amidst massive legislation and a tremendously complex sentencing schedule, both Congress and the Sentencing Commission failed to explain how 21 U.S.C. § 841 should be applied. A combination of inaction and ambiguous drafting has failed to resolve the continuing problems of the interpretation of 21 U.S.C. § 841. Furthermore, Congress has remained silent on the issue, thus, leaving the door open to disparity in sentencing. Ultimately Congress needs to remedy the current situation by adopting the majority's approach and by explaining what is meant by the term "the offense involves."<sup>260</sup>

KRISTIN J. BALDING\*

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258. See *supra* notes 237-38 and accompanying text.

259. See discussion *supra* Part II.

260. See discussion *supra* Part VI.

\* I dedicate this paper to my parents for all their love and support throughout the years.



