NOTE

DEFERENCE VERSUS DEPARTURE: THE UNIQUE QUESTION OF DEFERENCE TO THE UNITED STATES SENTENCING GUIDELINES COMMENTARY

NATHALIE BEAUCHAMPS*

ABSTRACT

The United States Sentencing Commission is a unique institution within the structure of Government: it is a multi-member body housed within the judicial branch with the responsibility to promulgate Sentencing Guidelines that assist judges in making federal criminal sentencing decisions. Shortly after the Commission was created, the Supreme Court held in Stinson v. United States *that the Commission's commentary accompanying the Guidelines are authoritative sources for interpreting the Guidelines. In so doing, the Court borrowed from a deference doctrine in administrative law that was reserved for agency interpretations of their regulations. However, in* Kisor v. Wilkie*, the Supreme Court cabined the deference doctrine that* Stinson *relied on. Hence, there is an open question regarding whether the Guidelines commentary can or should still be authoritative sources of interpretation for the Sentencing Guidelines. To make things more complicated, the Supreme Court held in* United States v. Booker *that the Guidelines could no longer bind federal judges in their sentencing decisions. In light of this and the Commission's distinctive policy mandates and operational features, this Note argues that the Supreme Court should reaffirm* Stinson *on renewed grounds. While it is true that the landscape of deference to administrative agencies has changed considerably in recent years, a rote transfer of these shifting decisional rules to the federal sentencing scheme is inappropriate. Careful consideration of the matter demonstrates that the federal sentencing scheme operates better when judges respect the Commission's discretion to interpret its own Guidelines and meaningfully exercise their right to depart from those Guidelines they deem unjustified.*

* J.D. Candidate, 2026, Harvard Law School. Special thanks to Matthew Stephenson for his enthusiastic supervision and support throughout my writing process. I am also grateful to Justice Stephen Breyer and Ryan Doerfler for their guiding thoughts and to the *Harvard Journal on Legislation* editors for their engaged feedback on this Note.

I. Introduction

The task of criminal sentencing is far from straightforward. This is true even decades after the formation of the United States Sentencing Commission ("the Commission"), an independent agency created by Congress to increase the "certainty and fairness" of criminal sentencing.[1] Take, for example, *United States v. Chandler*.[2] In this case, the Third Circuit upheld a district court's application of a sentencing enhancement recommended by the United States Sentencing Guidelines (the "Guidelines"). Defendant-Appellant James Chandler had twice robbed on-duty United States postal employees and used

[1] U.S. Sent'g Comm'n, Guidelines Manual, ch.1, pt.A, at 2 (Nov. 2025). Hereinafter referred to as "U.S.S.G."; 28 U.S.C. § 991(b)(1).

[2] United States v. Chandler, 104 F.4th 445 (3d Cir. 2024).

a replica gun to scare his victims.[3] Chandler pled guilty to his charges after which a sentencing judge enhanced his sentence pursuant to § 2A4.1(b)(3) and § 2B3.1(b)(2)(D) of the Guidelines for use of a "dangerous weapon" during the commission of his crimes.[4] The commentary to the relevant Guidelines provides that a "dangerous weapon" includes an object that "closely resembles" an "instrument capable of inflicting death or serious bodily injury[.]"[5]

On appeal, the Third Circuit affirmed Chandler's sentence.[6] In so doing, it applied *Kisor v. Wilkie*,[7] in which the Supreme Court held that courts must defer to agency interpretations of their regulations only if the text of the regulation is "'genuinely ambiguous.'"[8] The *Chandler* court found that the term "dangerous weapon" was genuinely ambiguous, but that accompanying commentary was a reasonable interpretation of the Guidelines.[9] Thus, it gave the commentary controlling weight.[10]

Judge Bibas dissented, arguing that because the text of the Guidelines was ambiguous, the court should have applied the rule of lenity.[11] Judge Bibas argued that lenity, as a tool of statutory interpretation, "come[s] before deference."[12] In a subsequent dissent to the Third Circuit's denial of Chandler's petition for rehearing, he argued that "lenity prevents agencies from using delegated power to expand criminal liability without going through proper lawmaking processes."[13] The specific commentary at issue expanded criminal liability for defendants who used replica guns during certain crimes. Thus, the court should have declined to apply it.

The tension between deference to the Guidelines commentary and lenity as exemplified by *Chandler* obfuscates the "certainty and fairness"[14] of federal criminal sentencing which the Guidelines were meant to enable. Central to this tension is a question of how much deference courts ultimately owe to the Guidelines commentary. The current state of the law, however, does not provide a clear answer.[15] Before the Supreme Court decided *Kisor*, *Stinson v. United States*[16] directly addressed the question of deference to Guidelines commentary. Decided in 1993, *Stinson* held that the commentary to the Guidelines are "authoritative."[17] By analogizing Guidelines commentary to agency

---

[3] *See Chandler*, 104 F.4th at 448.
[4] *Id*. at 449.
[5] *Id.* (quoting U.S.S.G. § 1B1.1).
[6] *See id.* at 448.
[7] Kisor v. Wilkie, 588 U.S. 558 (2019).
[8] *Chandler*, 104 F.4th at 450 (quoting *Kisor*, 588 U.S. at 573).
[9] *See id.* at 454–55.
[10] *Id.*
[11] *See id.* at 465 (Bibas, J., dissenting).
[12] *Id.*
[13] *Id.* at 241.
[14] U.S.S.G. § 1A2.
[15] *See infra* Part II.
[16] Stinson v. United States, 508 U.S. 36 (1993).
[17] *Id.* at 38.

interpretations of their regulations,[18] the *Stinson* Court adopted the pre-*Kisor* deference framework established in *Bowles v. Seminole Rock & Sand Co.,*[19] now referred to as *Auer* deference.[20] *Auer* deference instructed courts to give authoritative weight to agency interpretations of agency regulations so long as they were not "plainly erroneous or inconsistent with the regulation[s]."[21] Thus, unlike other deference doctrines like *Chevron*, courts had no discretion to evaluate if agency interpretations were reasonable.[22] But in 2019, the Supreme Court changed course and adopted a less deferential test for agency interpretations of their own rules in *Kisor*.[23] Having not written a word about *Stinson* in its opinion, the *Kisor* Court left no guidance to lower courts regarding whether the guardrails it had set around *Seminole Rock*/*Auer* deference also should apply to *Stinson* deference.[24] This uncertainty surrounding the precedential weight of *Stinson* versus *Kisor* has divided the circuit courts which now vigorously disagree on when and how to defer to the Guidelines commentary.[25]

Complicating the question of whether *Stinson* deference or *Kisor* deference is more appropriate for the Guidelines commentary is the fact that the Supreme Court held the Guidelines are advisory in *United States v. Booker*,[26] meaning that courts are not bound by Guidelines ranges when sentencing defendants. Thus, even if the interpretation of a Guideline put forth in the commentary would add time to an offender's sentence, a judge has the discretion to depart from the Guideline as interpreted by its commentary.

In light of these tensions in the law and the central role the Guidelines play in federal criminal sentencing, a discussion centering the importance of deference to the Guidelines commentary is important. Although deference

---

[18] *See id.* at 44.

[19] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 461 (1945).

[20] The framework established in *Seminole Rock* eventually matured to what is known as *Auer* deference after the Supreme Court reaffirmed its *Seminole Rock* holding into a formal rule in Auer v. Robbins, 519 U.S. 452 (1997).

[21] *Seminole Rock*, 325 U.S. at 414.

[22] *But see* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984), *overruled by*, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

[23] Kisor v. Wilkie, 588 U.S. 558, 573 (2019).

[24] *See id.*

[25] *See, e.g.*, United States v. Lewis, 963 F.3d 16, 24–25 (1st Cir. 2020); United States v. Rainford, 110 F.4th 455, 475–76 n.5 (2d Cir. 2024); United States v. Nasir, 17 F.4th 459, 472 (3d Cir. 2021) (en banc); United States v. Moses, 23 F.4th 347, 357 (4th Cir. 2022); United States v. Campbell, 22 F.4th 438, 444 (4th Cir. 2022); United States v. Vargas, 74 F.4th 673, 698 (5th Cir. 2023) (en banc), *cert. denied*, 144 S. Ct. 828 (2024); United States v. Riccardi, 989 F.3d 476, 484–85 (6th Cir. 2021); United States v. Smith, 989 F.3d 575, 584–86 (7th Cir. 2021); United States v. Rivera, 76 F.4th 1085, 1090–91 (8th Cir. 2023); United States v. Castillo, 69 F.4th 648, 664 (9th Cir. 2023); United States v. Maloid, 71 F.4th 795, 805 (10th Cir. 2023); United States v. Dupree, 57 F.4th 1269, 1279 (11th Cir. 2023); United States v. Jenkins, 50 F.4th 1185, 1197 (D.C. Cir. 2022).

[26] United States v. Booker, 543 U.S. 220, 245 (2005).

doctrines are increasingly disfavored in administrative law,[27] *Stinson* stands in sharp contrast to the current trend and has not yet been overruled. The Commission, however, is a *sui generis* organization within the administrative state.[28] Thus, any path forward towards devising a proper deference framework for the Guidelines commentary must center the unique policy goals underlying the formation of the Commission.[29]

This Note argues that a reflexive deference framework with a corresponding heightened use of voluntary departures from the Guidelines is preferable in the Sentencing Commission context for several reasons. For one, this approach is more consistent with the Commission's policy mandates, especially its responsibility to dynamically communicate with the courts to update the Guidelines.[30] Additionally, the advisory nature of the Guidelines combats the negative implications of reflexive deference. Finally, preserving the reflexive deference framework from *Stinson* better preserves the principle of *stare decisis*.

This Note proceeds in five parts. Part I provides a background of the Commission. Part II discusses the tension between *Stinson* and *Kisor*. Part III discusses the circuit split resulting from *Kisor* regarding its impact on deference to the Guidelines commentary. Part IV argues that the Supreme Court should reaffirm *Stinson* on renewed grounds and explains why a reflexive framework is appropriate in the Sentencing Guidelines context. Part V responds to counterarguments.

II. Background

A. The United States Sentencing Commission

1. The Original Purposes of the Commission

This Note assumes the reader's familiarity with the Sentencing Guidelines; however, emphasizing several aspects of the Guidelines' purposes and operation will support this Note's central thesis. Before Congress enacted the Sentencing Reform Act of 1984 ("SRA"), federal judges had complete discretion over the criminal sentences defendants received. The result was a federal

---

[27] *See Loper Bright*, 603 U.S. at 385 (asserting that the "final 'interpretation of the laws' [is] 'the proper and peculiar province of the courts.'") (quoting The Federalist No. 78, at 525 (A. Hamilton)).

[28] *See infra* Part IV.

[29] *See supra* Part II.A.

[30] *See* 28 U.S.C. § 994(o) (mandating that the Commission "periodically" "review and revise, in consideration of comments and data coming to its attention, the guidelines").

criminal sentencing regime riddled with arbitrary—and racially problematic—disparities, reflecting the unfortunate reality that "the personality of a judge mattered in a criminal case."[31] Not only was there a significant disparity in the sentences imposed by federal judges for similar offenses, but these disparities often turned on the gender, race, or sentencing jurisdiction of the defendants.[32]

To address these concerns, Congress established the United States Sentencing Commission through the SRA as an independent agency within the judicial branch.[33] The Commission was charged with "establish[ing] sentencing policies and practices for the [f]ederal criminal justice system."[34] Specifically, Congress set out three central functions for the Commission: (1) create a federal criminal sentencing scheme that takes into account the core goals of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation; (2) increase the certainty and fairness in sentencing by limiting disparity in sentencing; and (3) create an evolving sentencing scheme that the Commission continuously modifies based on its ongoing research.[35]

In designing a sentencing regime that could achieve all these functions, the Commission balanced uniformity—the principle that like crimes receive like punishments—with proportionality—the principle that the punishment should fairly fit the actual circumstances of the crime.[36] In striking the right balance, the Commission decided against a major rehaul of the federal criminal sentencing scheme. Specifically, the Commission took an empirical approach using actual sentencing data as a baseline for its initial set of Guidelines[37] and devising an initial list of "relevant distinctions" for criminal punishment.[38]

Also important among the Commission's original functions is to promulgate Guidelines that dynamically evolve over time based on the actual behavior of sentencing courts.[39] Congress tasked the Commission with "ongoing responsibilities" to oversee the operation of the Guidelines, recommend to Congress modifications to criminal statutes, and create research and education programs related to its work.[40] Specifically, the SRA instructs the Commission to periodically review and revise the Guidelines based on

---

[31] *See* Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 36 FED. SENT'G REP. 244, 244 (2024).

[32] *See id*.

[33] *Organization*, UNITED STATES SENT'G COMM'N., https://www.ussc.gov/about/who-we-are/organization#:~:text=The%20U.S.%20Sentencing%20Commission%20is,serve%20staggered%20six%2Dyear%20terms [https://perma.cc/26RJ-2QR6].

[34] 28 U.S.C. § 991(b)(1).

[35] *See* U.S.S.G. §§ 1A1.2, 1A1.3; 28 U.S.C. §§ 994(c), 994(f); 28 U.S.C. § 991(b)(1).

[36] *See* Breyer, *supra* note 31, at 249–50.

[37] *See* U.S.S.G. § 1A1.3.

[38] *Id.*

[39] *See* U.S.S.G. § 1A2 (describing the Guidelines as "evolutionary in nature"). Moreover, "[a]s envisioned by Congress, implemented by the Commission, and reaffirmed by the Supreme Court, the guidelines are the product of a deliberative and dynamic process that seeks to embody within federal sentencing policy the purposes of sentencing set forth in the [SRA]." *Id.*

[40] *Id.*

comments it receives from courts, lawyers, the Department of Justice, and the Bureau of Prisons as well as criminal sentencing data.[41] Thus, central to the Commission's original mandate is to promulgate policy directives responsive to the input of key actors in the federal sentencing scheme, especially courts.

Originally, the Guidelines were understood to be mandatory.[42] Judges were not to depart from the sentencing ranges recommended by the Guidelines unless it was for an enumerated reason specifically approved by the Commission,[43] or "there exist[ed] 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."[44] However, given the Commission's policy mandate to periodically review and revise the Guidelines, the Guidelines were still to operate dynamically and evolve over time by responding to the behavior of sentencing courts.[45] Thus, courts had considerable discretion in finding factors not adequately taken into consideration by the Commission. The Commission itself instructed courts "to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describe[d]."[46] However, "[w]hen a court [found] an atypical case . . . where [a defendant's] conduct significantly differ[ed] from the norm, the court [could] consider whether a departure [was] warranted."[47] For example, a court could depart downward based on a finding that the notoriety of a case created a particularly high risk that a defendant would be a target of abuse in prison.[48] Thus, while the Guidelines were mandatory, they were not designed to be rigid.

2. The Role of the Guidelines Post-Booker

The Supreme Court fundamentally changed the operational relationship between the Guidelines and federal courts through a series of cases starting with *United States v. Booker*. This rendered the Guidelines advisory rather than mandatory.[49] In *Booker*, the Court held that the Guidelines' mandatory

---

[41] *Id.*; 28 U.S.C. §§ 994(o), (w).

[42] *See* Mistretta v. United States, 488 U.S. 361, 367 (1989) (discussing how Congress "settl[ed] on a mandatory-guideline system," by enacting the SRA).

[43] For example, the Commission specifically permitted downward departures for defendants that provided substantial assistance to authorities and upward departures for defendants that caused a threat to national security. *See* U.S. Sent'g Comm'n, Guidelines Manual §§ 8C4.1, 8C4.3 (Nov. 2004).

[44] 18 U.S.C.A. § 3553(b), *invalidated by* United States v. Booker, 543 U.S. 220, 245 (2005); *see also* Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 Hofstra L. Rev. 1167, 1185 (2017).

[45] *See* U.S.S.G. § 1A2.

[46] U.S. Sent'g Comm'n, Guidelines Manual, ch.1, pt.A, at 5 (Nov. 1995).

[47] *Id.*

[48] *See* Koon v. United States, 518 U.S. 81, 89 (1996).

[49] *See Booker*, 543 U.S. at 246; *see also* 18 U.S.C. §§ 3553(b)(1), 3742(e) (both struck from the SRA in *Booker*).

nature violated the Sixth Amendment right to trial by jury by encroaching on the ability of judges to impose sentences based on jury fact-finding.[50] Thus, the *Booker* Court severed the SRA's unconstitutional provisions, which had two direct consequences: first, while judges must still consider Guidelines-calculated sentence ranges,[51] they must no longer adhere to them and, second, appellate courts are to review departures from the Guidelines for unreasonableness rather than de novo.[52]

The Supreme Court in *Kimbrough v. United States*[53] and *Gall v. United States*[54] went further in increasing sentencing courts' discretion. In *Kimbrough*, the Court affirmed that courts are free to depart from the Guidelines based on policy disagreements with them.[55] Additionally, in *Gall*, the Court held that there need not be any "'extraordinary'" circumstances for a federal judge to depart from the Guidelines as some appellate courts had previously found, because such a requirement would be inconsistent with the reasonableness standard of review established in *Booker*.[56]

While these cases collectively give federal judges far more discretion in federal criminal sentencing than they had pre-*Booker*, judges still face some restraints under the SRA that limit their discretion. For one, judges must still consider the sentencing objectives set out in 18 U.S.C. § 3553(a)[57] and properly calculate sentencing ranges using the Guidelines before sentencing defendants.[58] Even if a court ultimately decides to depart from the Guidelines, the Guidelines must serve as "the starting point and initial benchmark" of any sentencing decision.[59] Additionally, on review, an appellate court must first determine whether there was no "significant procedural error" in a district court's calculation of the applicable Guidelines range,[60] which can be grounds for prejudicial error.[61] Second, an appellate court must consider

---

[50] *See Booker*, 543 U.S. at 250.
[51] *See* 18 U.S.C. § 3553(a).
[52] *See Booker*, 543 U.S. at 261.
[53] Kimbrough v. United States, 552 U.S. 85 (2007).
[54] Gall v. United States, 552 U.S. 38 (2007).
[55] *See Kimbrough*, 552 U.S. at 91, 101.
[56] *See Gall*, 552 U.S. at 38.
[57] These include (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) "the need for the sentence imposed"; (3) "the kinds of sentences available"; (4) "the kinds of sentence and the sentencing range established for" (a) "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines" and (b) "in the case of a violation of probation or supervised release, the applicable guidelines or policy statements . . . "; (5) "any pertinent policy statement"; (6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and (7) "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a).
[58] *See Booker*, 543 U.S. at 264; *Gall*, 552 U.S. at 49; Rita v. United States, 551 U.S. 338, 351 (2007).
[59] *Gall*, 552 U.S. at 51.
[60] *Id.*
[61] *See* Molina-Martinez v. United States, 578 U.S. 189, 198 (2016).

the "substantive reasonableness" of a sentence under an abuse-of-discretion standard.[62]

The Commission's core functions also remain the same post-*Booker*. For one, the Guidelines are still the product of a "deliberative and dynamic process" that seeks to accomplish the purposes of criminal sentencing.[63] Just as the Commission must consider the purposes of criminal sentencing when promulgating the Guidelines, courts must consider these same purposes, set out in 18 U.S.C. § 3553, within every sentencing decision.[64] Secondly, even though the Guidelines are advisory, they still "continue to move sentencing in Congress's preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary."[65] Courts must calculate the Guidelines at the beginning of each sentencing decision and are evaluated on appeal for the correctness of such calculations.[66] Thus, the Guidelines serve as a useful starting point to federal criminal sentences that, without such a benchmark, would reflect unwarranted disparity.[67]

Thus, the important role played by the Guidelines both before and after *Booker* demonstrates the continuing relevance of determining the proper level of deference that courts should grant to the Guidelines commentary.

III. The Tension Between *Stinson* And *Kisor*

This Note is inspired by the seemingly irreconcilable tension between *Stinson* and *Kisor* and the broader discussion about deference to the Guidelines commentary that ensued. Oddly, as the deference debate percolated among the federal circuit courts, it largely failed to account for the advisory nature of the Guidelines post-*Booker*. In 1993, the Supreme Court established a highly deferential framework for the Guidelines commentary which mirrored the deference framework that already existed for agency interpretations of their own regulations. However, in 2019, the Supreme Court refined the deference framework applicable to agency interpretations of their own regulations without clarifying whether it also modified deference to the Guidelines commentary. To this day, these two decisions exist as conflicting sources of precedent for courts interpreting the Guidelines commentary.

---

[62] *Gall*, 552 U.S. at 51.
[63] U.S.S.G. § 1A2.
[64] *See* Rita v. United States, 551 U.S. 338, 347 (2007).
[65] United States v. Booker, 543 U.S. 220, 311 (2005) (Scalia, J., dissenting in part).
[66] *See Gall*, 552 U.S. at 49, 51.
[67] *See* Peugh v. United States, 569 U.S. 530, 535 (2013) (finding that sentences anchored by the Guidelines promotes uniformity).

A. Stinson v. United States

In *Stinson v. United States*, the Supreme Court held that interpretive or explanatory Guidelines commentary is binding on judges unless the commentary "violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that [G]uideline."[68] The Court did not create an entirely new standard of deference for the Guidelines commentary; rather, it adapted the pre-existing *Seminole Rock* (now *Auer*) deference framework for agencies' interpretations of their own legislative rules.[69] *Auer* deference called for courts to give authoritative weight to agency interpretations of their own rules unless they were "plainly erroneous or inconsistent" with the Guidelines.[70] The *Stinson* Court drew an analogy between the Guidelines commentary and agency interpretations of legislative rules.[71] Just as interpretive rules "assist in the interpretation and application" of legislative rules, so do the Guidelines commentary with respect to the Guidelines.[72] While this analogy was "not precise," because Congress plays a unique role in promulgating the Guidelines,[73] the Court found that the Commission ultimately has the "first responsibility" to assist in the interpretation of the Guidelines which are "within the Commission's particular area of concern and expertise."[74]

The deference framework resulting from *Stinson* is highly deferential. Not only are courts to defer to commentary unless "inconsistent" or "plainly erroneous" with the Guidelines provisions they interpret, but "inconsistent" is defined narrowly to mean that "following one will result in violating the dictates of the other."[75] The Court acknowledged as much, writing that amendments to the commentary are "binding on federal courts even though [they are] not reviewed by Congress."[76] The Guidelines commentary also instructs as to the proper application of "even unambiguous guidelines."[77] Additionally, "prior judicial constructions of a particular guideline cannot

---

[68] Stinson v. United States, 508 U.S. 36, 38 (1993).

[69] *See id.* at 45. *Auer* was not decided until after the Supreme Court decided *Stinson*, which is why the *Stinson* Court only refers to *Seminole Rock* in its analogical analysis.

[70] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 461 (1945).

[71] *Stinson*, 508 U.S. at 44.

[72] *Id.* The *Stinson* Court also analogized the Guidelines themselves to legislative rules, referring back to a previous decision, Mistretta v. United States, 488 U.S. 361, 371–79 (1989), which confirmed the Commission's delegated authority to promulgate authoritative and binding Guidelines through the informal rulemaking procedures set out in 5 U.S.C. § 553. *See Stinson*, 503 U.S. at 44.

[73] Guidelines, like legislative rules, are subject to the notice and comment procedures set out in the Administrative Procedure Act. *See* 5 U.S.C. § 553; 28 U.S.C. § 994(x). They must also, however, be submitted to Congress for approval per 28 U.S.C. § 994(p). *See supra* Part II.A. This was not yet the established practice for most administrative rules at the time *Stinson* was decided because Congress had not yet promulgated the Congressional Review Act. *See* 5 U.S.C. §§ 801–808.

[74] *Stinson*, 508 U.S. at 44.

[75] *Id.* at 43.

[76] *Id.* at 46.

[77] *Id.* at 44.

prevent the Commission from adopting a conflicting interpretation."[78] As the Court noted, the Commission's own pronouncement of the role of the Guidelines commentary within the federal sentencing scheme ironically underestimated the prescriptive nature of the commentary in practice. The Commission predicted that "the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter."[79] However, the commentary operates far more rigidly in practice, and even the Commission itself indicated that a judge's failure to follow the commentary would constitute an incorrect application of the Guidelines they interpret, resulting in reversible error.[80] Despite this, there is, of course, a limit to *Stinson* deference. Judges should not defer to the commentary if doing so would "result in violating the dictates" of the Guidelines.[81]

In justifying such authoritative weight to the Guidelines commentary, the *Stinson* Court drew support from textual, structural, and policy-based evidence unique to the federal sentencing scheme, such as the expansive deference to the commentary that was contemplated by the SRA.[82] Namely, the SRA sets out statutory mandates for the Commission that operate best when courts defer to the Commission's interpretations of the Guidelines. Under the SRA, the Commission must "'periodically [] review and revise'" the Guidelines. In doing so, the Commission must "consult[] with authorities on and representatives of the federal criminal system,"[83] and "'revie[w] the presentence report, the guideline worksheets, the tribunal's sentencing statement, and any written plea agreement,' with respect to every criminal sentence."[84] Congress "'contemplated that the Commission would periodically review the work of courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.'"[85] Thus, the SRA permits the Commission to amend the Guidelines to incorporate revisions, and the Commission can also amend the Guidelines by amending the commentary.[86]

Some of the *Stinson* Court's justifications for deference to the Guidelines commentary also resemble those underlying deference to agency interpretations of their regulations. Courts defer to agency interpretations in recognition of the "unique expertise and policy making prerogatives" that render agencies more equipped to interpret their own regulations.[87] In the

---

[78] *Id.* at 45.
[79] *Id.* at 46 (quoting U.S.S.G. § 1B1.7).
[80] *See Stinson*, 508 U.S. at 47.
[81] *Id.* at 43.
[82] *See id.* at 45.
[83] *Id.* (quoting 28 U.S.C. § 994(o)).
[84] *Id.* at 45–46 (quoting *Mistretta*, 488 U.S. at 369–70) (internal citation omitted); *see also* 28 U.S.C. § 994(w).
[85] *Stinson*, 508 U.S. at 46 (quoting Braxton v. United States, 500 U.S. 344, 348 (1991)).
[86] *See id.* at 45.
[87] Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 151 (1991); *see also* Ford Motor Credit Co. v. Milhollin, 444 U.S. 556 n.9 (1980) (explaining that "deference to administrative views is bottomed on respect for agency expertise").

Guidelines context, deference to the Guidelines commentary exemplifies respect towards the Commission's expertise on the federal criminal system. Despite these common rationales, however, the central driving force behind *Stinson*'s holding was the unique mandates laid out in the SRA, especially the Commission's responsibility to play a comprehensive, deliberative, and responsive role in guiding federal criminal sentencing. These core policy mandates informed the Court's conclusion that "the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute."[88]

B. Kisor v. Wilkie

Over two and a half decades after it decided *Stinson*, the Supreme Court decided *Kisor v. Wilkie*, which limited the scope of the deference framework applicable to agency interpretations of their own regulations.[89] The Court noted that lower courts had been incorrectly applying *Seminole Rock/Auer* deference—which called for deference to not-plainly-erroneous agency interpretations—in a "reflexive" manner.[90] This was due to the Court's own "mixed messages" on the matter.[91] Although the Court had, in the past, applied *Seminole Rock/Auer* deference without much analysis, the *Kisor* Court emphasized that the deference analysis did not simply start and end with determining whether an interpretive rule is "'plainly erroneous or inconsistent with the regulation'" it interprets.[92] Rather, *Seminole Rock/Auer* deference "gives agencies their due," while also "obligating[] courts to perform their reviewing and restraining functions."[93] Thus, the *Kisor* Court focused its opinion on clarifying the limits to *Seminole Rock/Auer* deference.

First, the *Kisor* Court clarified that courts should not grant *Seminole Rock/Auer* deference to agency interpretations of their regulations "unless the regulation is genuinely ambiguous."[94] In determining whether a regulation is ambiguous, courts must "exhaust all the 'traditional tools' of construction."[95] The Court reasoned that ambiguity is the proper starting point for *Seminole Rock/Auer* deference because deference to an interpretive rule when a

---

[88] *Stinson*, 508 U.S. at 45.
[89] *See Kisor v. Wilkie*, 588 U.S. 558, 563–64 (2019).
[90] *Id.* at 574.
[91] *Id.*
[92] *Id.* (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).
[93] *Id.*
[94] *Kisor*, 325 U.S. at 574.
[95] *Id.* at 575 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

regulation is clear would "'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'"[96] Second, if a regulation is ambiguous, an agency's interpretation must fall within the "zone of ambiguity the court has identified after employing all its interpretive tools."[97] This reasonableness standard mirrors that which had applied to agency constructions of statutes under *Chevron*.[98] Third, and finally, the "character and context of the agency interpretation" must "entitle[] it to controlling weight."[99] Courts should evaluate several factors when making this determination: whether the interpretation is one "actually made by the agency" or the agency's "'official position'" on a regulation,[100] the interpretation "implicat[es] [an agency's] substantive expertise,"[101] and the interpretation reflects "'fair and considered judgment,'"[102] meaning that the interpretation does not constitute a "'*post hoc* rationalizatio[n]'"[103] of an agency's position, and would not create "'unfair surprise' to regulated parties."[104]

Interestingly, the *Kisor* Court maintained that it had not overruled *Auer v. Robbins*, although it "cabined" its scope.[105] Resulting from its holding, however, is a deference framework that hardly resembles the "reflexive" operation of *Seminole Rock*/*Auer* deference and *Stinson* deference. For instance, the first step of the *Kisor* Court's reformulation of *Seminole Rock*/*Auer* deference—that courts should not defer unless a regulation is ambiguous as determined by exhausting the tools of statutory interpretation—directly contradicts the *Stinson* Court's assertion that the Guidelines commentary instructs how "even *unambiguous* Guidelines are to be applied in practice."[106] Additionally, the *Kisor* Court's "reasonableness" standard has little resemblance to the *Stinson* Court's "plainly erroneous" standard. Finally, the *Kisor* Court's concerns with "fair warning" do not comport with the *Stinson* Court's complete silence on the matter, although it had knowledge that the Commission often amends commentary in a non-contemporaneous manner with the Guidelines.[107] Thus, *Seminole Rock*/*Auer* deference as articulated by the *Stinson* Court and later defined by the *Kisor* Court are effectively two different deference frameworks.[108]

---

[96] *Id.* at 575 (quoting Christensen v. Harris County, 529 U.S. 576, 588 (2000)).

[97] *Id.*

[98] At the time *Auer* was decided, *Chevron* had not been overruled. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

[99] *Kisor*, 588 U.S. at 576.

[100] *Id.* at 577 (quoting U.S. v. Mead Corp., 533 U.S. 218, 257–59 (2001) (Scalia, J., dissenting)).

[101] *Id.*

[102] *Id.* at 579 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (quoting Auer v. Robbins, 519 U.S. 462 (1997))).

[103] *Id.* (quoting *Christopher*, 567 U.S. at 155).

[104] *Id.* (quoting Long Island Care v. Coke, 551 U.S. 158, 170 (2007)).

[105] *Kisor*, 588 U.S. at 580.

[106] Stinson v. United States, 508 U.S. 36, 44 (1993) (emphasis added).

[107] *See id.* at 43.

[108] *Cf.* John S. Acton, *The Future of Judicial Deference to the Commentary of the United States Sentencing Guidelines*, 45 Harv. J. L. & Pub. Pol'y 349, 391 (2022) (discussing how

Even more confounding is the *Kisor* Court's absolute silence on the Guidelines, the commentary, or the Commission in its opinion.

Despite the *Kisor* Court's cabining of *Seminole Rock*/*Auer* deference, it reiterated the many rationales that support why deference to interpretive rules is appropriate in the first place. The central theory justifying any application of *Seminole Rock*/*Auer* deference is a recognition that "sometimes the law runs out, and policy-laden choice is what is left over."[109] Agencies, as the drafters of regulations, are therefore best equipped to interpret ambiguous regulations. Not only are agencies tasked with making policy judgments that fulfill their statutory mandates, but "[a]gencies (unlike courts) have 'unique expertise,' often of a scientific or technical nature, relevant to applying a regulation 'to complex or changing circumstances.'"[110] Additionally, agencies have the benefit of regulatory experience, which provides a big picture perspective of how experts have handled certain "issues over the long course of administering a regulatory program."[111] Also favoring deference is the fact that agencies are politically accountable actors, subject to the supervision of the President, who "in turn answers to the public."[112] Courts, on the other hand, are free to interpret regulations in manners inconsistent with democratic norms and without repercussion. Finally, the "well-known benefits of uniformity in interpreting genuinely ambiguous rules" also favor deferring to agency interpretations of their own regulations.[113] Judges are more likely than are agencies to "come to divergent conclusions" regarding the meaning of a given regulation because regulations are often able to support "more than one eminently reasonable reading."[114]

Though the *Kisor* Court reiterated many of these rationales, it still ultimately endorsed a limited deference framework. As the Court explained, courts should "presume that Congress intended for courts to defer to agencies when they interpret their own *ambiguous* rules."[115] In order to avoid agencies creating "de facto" new regulations,[116] the Supreme Court in *Kisor* ultimately advocated for "a strong judicial role in interpreting [agency] rules."[117]

Kisor effectively overruled *Stinson* because it "broke the relationship between *Stinson*'s analysis and its holding").

[109] *Kisor*, 588 U.S. at 575.

[110] *Id.* at 571 (quoting Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 151 (1991).

[111] *Id.*

[112] *Id.* at 572.

[113] *Id.*

[114] *Id.*

[115] *Kisor*, 588 U.S. at 573 (emphasis added).

[116] *Id.* at 575.

[117] *Id.* at 580.

C. The Circuit Split Surrounding Stinson *and* Kisor

After the Supreme Court decided *Kisor*, lower courts faced an imperative choice in federal sentencing cases for which the *Kisor* Court left little guidance. Either courts could find that *Stinson*'s ultimate holding is distinct from and remains unaffected by *Kisor*, or they could choose to apply *Kisor* to the Guidelines commentary by maintaining *Stinson*'s analogy between Guidelines commentary and agency interpretations of their regulations. The federal courts of appeals can be roughly divided into these two camps, although their reasonings for taking one or the other approach diverge considerably.[118]

1. Courts That Continue to Follow Stinson

Courts in the Second, Fifth, Seventh, and Tenth Circuits[119] have chosen to faithfully apply *Stinson* until the Supreme Court says otherwise.

First, these courts rest their approach on qualities unique to the Sentencing Commission that justify reflexive deference. *United States v. Vargas* exemplifies this point well. In *Vargas*, the Fifth Circuit Court of Appeals explained that Guidelines commentary must be flatly inconsistent with the Guideline to withhold deference.[120] The court explained that "*Stinson* deference differs from *Seminole Rock* in important ways."[121] For one, *Stinson* deference applies even if a Guideline is unambiguous, while *Seminole Rock* "required deference only when 'the meaning of the words used [was] in doubt.'"[122] Moreover, under *Stinson* deference, interpretations put forth in Guidelines commentary trump even conflicting prior judicial interpretations of the Guidelines they interpret.[123] As the *Vargas* court explained, these

---

[118] This section also discusses opinions by individual judges that depart from the majority view taken by their circuit and circuit court opinions in circuits that have not taken an official position. Two Fourth Circuit opinions fall into this latter camp. Within a single year, the Fourth Circuit issued two conflicting opinions on this issue in United States v. Campbell, 22 F.4th 438 (4th Cir. 2022) (finding that *Kisor* "at the very least undermined" Fourth Circuit precedent that rested on *Stinson*) and United States v. Moses, 23 F.4th 347, 349 (4th Cir. 2022) ("Upon consideration of the unique role served by the Sentencing Commission and its Guidelines Manual and a careful reading of both *Stinson* and *Kisor*, we conclude that *Kisor* did not overrule *Stinson*'s standard for the deference owed to Guidelines commentary.").

[119] United States v. Rainford, 110 F.4th 455 (2d Cir. 2024); United States v. Vargas, 74 F.4th 673 (5th Cir. 2023); United States v. White, 97 F.4th 532 (7th Cir. 2024); United States v. Maloid, 71 F.4th 805 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 1035 (2024).

[120] *Vargas*, 74 F.4th at 689–90.

[121] *Id.* at 682; *see also* United States v. Dupree, 57 F.4th 1269, 1284 (11th Cir. 2023) (en banc) (Grant, J., concurring in the judgment) (clarifying that *Stinson* and *Seminole Rock* deference are not "interchangeable").

[122] *Id.* at 682 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). Of course, this feature of *Stinson* also renders it diametrically opposed to *Kisor*'s articulation of *Auer* deference, which demands ambiguity as a necessary starting point to deference to agency interpretations of their own rules. *Kisor*, 588 U.S. at 573.

[123] *Vargas*, 74 F.4th at 682.

distinct features of *Stinson* deference are directly responsive to the Commission's statutory mandate to reduce "unwarranted sentencing disparities."[124]

The Fourth Circuit in *United States v. Moses* expanded upon this point in another case involving the "career offender" enhancement.[125] The *Moses* court explained that the Commission is tasked with "cabin[ing] the sentencing discretion" of judges and does so by promulgating a Guidelines Manual "structured with interrelated layers of explanation consisting of Guidelines, policy statements, and official commentary."[126] In line with this, the commentary does not exist solely to interpret the Guidelines, but to explain how the Guidelines should be applied "in a manner most 'consistent with the Guidelines Manual as a whole.'"[127] Adding to this discussion, the Tenth Circuit in *United States v. Maloid*[128] explained that another one of the Commission's mandates is to periodically review sentencing materials in "every federal criminal sentence" and "mak[e] whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest."[129] Thus, *Stinson* deference acknowledges that the commentary is just one tool that the Commission can use to regularly revise the Guidelines—so long as the Guidelines it interprets can "bear [its] construction."[130]

Second, courts that continue to follow *Stinson* do so due to the simple fact that the Supreme Court has not yet overruled *Stinson*. *Vargas* again summarizes this point well. As the *Vargas* Court explained, the principle of vertical stare decisis commands that "[u]ntil the Supreme Court overrules *Stinson*, then, [its] duty as an inferior court is to apply it faithfully."[131] The Supreme Court has already instructed lower courts to "adhere strictly to Supreme Court precedent," regardless of whether they "think a precedent's best days are behind it."[132] As these principles demonstrate, because the Supreme Court has not yet authoritatively spoken on the precedential status of *Stinson*, it is still the law of the land.

Third, courts that faithfully apply *Stinson* insist that the rationales in *Kisor* for narrowing the scope of *Seminole Rock*/*Auer* deference do not apply to the Sentencing Commission. *United States v. Maloid* best summarizes this

---

[124] *Id.* at 683 (quoting 28 U.S.C. § 991(b)(1)(B)).
[125] United States v. Moses, 23 F.4th 347, 349 (4th Cir. 2022).
[126] *Id.* at 354.
[127] *Id.* at 356 (quoting Stinson v. United States, 508 U.S. 36, 45 (1993)).
[128] 71 F.4th 795 (10th Cir. 2023).
[129] *Id.* at 803 (quoting *Stinson*, 508 U.S. at 46).
[130] *Id.* (quoting *Stinson*, 508 U.S. at 46). Similarly, as Judge Grant, concurring in *United States v. Dupree*, noted, the *Stinson* Court also sanctioned the Commission's use of commentary to "effect a change in interpretation of the overall Guidelines." 57 F.4th 1269, 1285 (11th Cir. 2023) (en banc) (Grant, J., concurring in the judgment).
[131] United States v. Vargas, 74 F.4th 673, 678 (5th Cir. 2023).
[132] *Id.* at 683 (citing Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 136 (2023) (lower courts "should follow the case which directly controls, . . . even if the lower court thinks the precedent is in tension with 'some other line of decisions.'" (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)))).

point. In *Maloid*, the Tenth Circuit Court of Appeals applied *Stinson* rather than *Kisor*, because "*Kisor* had everything to say about executive agencies and precious little about the Sentencing Commission."[133] The court explained that, while administrative agencies primarily exist to "regulate the public," the Commission exists to "'establish sentencing policies and practices' for the courts."[134] Unlike administrative agencies, the Commission has "no enforcement or investigative authority"[135] and has a smaller "scope of rulemaking authority [than that which] most executive agencies enjoy."[136] At a high level, the Commission "speaks as an agent of the Judiciary to help judges properly sentence defendants."[137] Thus, the court explained that these unique attributes rendered it incongruous to apply *Kisor*'s underlying rationales to deference within the Sentencing Commission context.

2. Courts That Follow Kisor

Courts in the Third, Sixth, Ninth, and Eleventh Circuits believe that *Kisor* is the proper rule of decision for cases involving the Guidelines commentary.[138]

First, courts that have applied *Kisor* in federal criminal sentencing cases recognize that *Kisor* directly spoke to the rationales underlying *Stinson*. The Eleventh Circuit in *United States v. Dupree* best conveyed this point. In *Dupree*, the Eleventh Circuit, sitting en banc, acknowledged that, while "[t]he Supreme Court did not overrule *Stinson*,"[139] "the only way to harmonize [it with *Kisor*] is to conclude that *Kisor*'s gloss on *Auer* and *Seminole Rock* applies to *Stinson*."[140] As the court noted, "*Stinson* adopted word for word the test the *Kisor* majority regarded as a 'caricature'" of the proper doctrine.[141] In light of this, "the continued mechanical application of that test would conflict directly with *Kisor*."[142] Moreover, the Supreme Court in *Kisor* took note of *Stinson* "as one of the Court's 'legion' *Seminole Rock* cases that pre-dated *Auer*."[143] This provided authoritative support that *Kisor* deference applies to the Guidelines commentary.[144]

---

[133] *Maloid*, 71 F.4th at 806.
[134] *Id.* at 806–07 (quoting 28 U.S.C. §§ 991(b)(1)–(2)).
[135] *Id.* at 807.
[136] *Id.* While the Commission can only promulgate policy through Guidelines, policy statements and commentary, executive agencies have the choice between "formal and informal rulemaking, adjudications, legal briefs, and FAQ documents, to name a few." *Id.*
[137] *Id*.
[138] *See* United States v. Nasir, 17 F.4th 459, 471 (3d Cir. 2021) (en banc); United States v. Riccardi, 989 F.3d 476, 485 (6th Cir. 2021); United States v. Castillo, 69 F.4th 648, 651 (9th Cir. 2023); United States v. Dupree, 57 F.4th 1269, 1276–77 (11th Cir. 2023).
[139] *Dupree*, 57 F.4th at 1275.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.* at 1276 (quoting Kisor v. Wilkie, 588 U.S. 558, 568 n.3 (2019)).
[144] *See id.* at 1276–77.

Second, courts that apply *Kisor* reason that extending *Kisor* deference to federal criminal sentencing cases reinforces the Commission's obligation to follow its mandated procedures. The Sixth Circuit exemplified this rationale in *United States v. Riccardi*. In this case, the Sixth Circuit overturned Jennifer Riccardi's sentence, which was enhanced under U.S.S.G. § 2B1.1(b)(1) based on the loss resulting from her theft offense.[145] Guidelines commentary provided that a loss "'shall not be less than $500' for each 'unauthorized access device,' a phrase that Riccardi concede[d] covers stolen gift cards."[146] The *Riccardi* court found this commentary to be an "improper expansion beyond . . . § 2B1.1's text"[147] and "a substantive legislative rule that belongs in the guideline itself to have force."[148] The court was specifically concerned with the Commission's ability to effectively amend the Guidelines without following statutorily mandated procedures.[149] *Kisor* deference, however, prevented agencies from "adopt[ing] a new legislative rule under the guise of reinterpreting an old one."[150] Thus, although the Commission is not subject to the Administrative Procedure Act's ("APA") judicial review provision,[151] the court concluded that the "healthy judicial review" reinforced by *Kisor* applied with equal force to the Commission.[152]

Third, courts that apply *Kisor* deference to the Guidelines commentary reason that doing so better preserves the individual liberty of defendants. In *United States v. Nasir*, Judge Bibas wrote a concurring opinion articulating this point. Joined by five judges, Judge Bibas argued in favor of *Kisor* deference due to a core principle underlying the rule of lenity: "the nation's strong preference for liberty."[153] Because "the presumption of liberty remains crucial to guarding against overpunishment,"[154] Judge Bibas argued, the rule of lenity was appropriate in any reading of an ambiguous guideline where there is a "more lenient [version] of two plausible readings."[155] Judge Bibas concluded that a preference for individual liberty, as pursued through the rule of lenity, outweighed "[w]hatever the virtues of giving experts flexibility to adapt rules to changing circumstances in civil cases."[156]

---

[145] United States v. Riccardi, 989 F.3d 476, 479–80 (6th Cir. 2021).
[146] *Id.* at 479 (quoting U.S.S.G. § 2B1.1 cmt. n.3(F)(i)).
[147] *Id.* at 480.
[148] *Id.* at 483.
[149] *See id.* at 485.
[150] *Id.*
[151] *See* 5 U.S.C. §§ 701, 706.
[152] *Riccardi*, 989 F.3d at 485.
[153] United States v. Nasir, 17 F.4th 459, 473 (3d Cir. 2021) (Bibas, J., concurring).
[154] *Id.* at 474.
[155] *Id.*
[156] *Id.*

IV. The Supreme Court Should Reaffirm *Stinson* on Renewed Grounds

This Note argues that *Stinson*'s reflexive deference to the Guidelines commentary with a corresponding increase in departures from the Guidelines is the correct approach. The Supreme Court should thus reaffirm *Stinson* on renewed grounds. The proposal put forth in this Note is preferable for three predominating reasons: (1) reflexive deference best pursues the Commission's policy mandates and is contemplated by the SRA; (2) reflexive deference is more justified in light of the advisory nature of the Guidelines; and (3) reflexive deference better preserves principles of stare decisis because *Stinson* was not wrongly decided.

The Supreme Court's reasoning in *Stinson* largely rested on an analogy between agency interpretations of their regulations and the Guidelines commentary.[157] However, this has not only resulted in confusion and created a circuit split over the proper level of deference to the Guidelines commentary, but it is also unrelated to what specifically justifies reflexive deference in this context. Thus, the Court should reaffirm *Stinson*'s holding but focus its reasoning on the Commission's distinctive attributes and policy mandates, as is discussed below. To this end, the rationales put forth in this Note do not simply restate those underpinning *Seminole Rock*/*Auer* and *Kisor* deference—namely, expertise, uniformity, and political accountability.[158] Although there are certainly areas of overlap, this Note focuses on rationales either specific to the Sentencing Commission context or those that have extra force in this context.

Several commentators have similarly proposed various solutions regarding the proper role of deference to the Guidelines commentary, some borrowing from deference doctrines in administrative law and others not; however, unlike the proposal put forth in this Note, these approaches all fail to adequately contend with the advisory nature of the Guidelines. One approach would not broach the deference question until first determining whether a commentary truly interprets a Guideline or expands upon it—if the latter, then courts must instruct the Commission to re-promulgate the commentary using the procedures required for Guidelines amendments or else not defer to the commentary.[159] Another approach would do away with deference doctrines altogether in the Sentencing Commission context and adopt the relationship between the Federal Rules of Civil Procedure and its Application Notes, the latter of which judges are not formally obliged to look at.[160] A third approach,

---

[157] *See* Stinson v. United States, 508 U.S. 36, 44–45 (1993).

[158] *See* Kisor v. Wilkie, 588 U.S. 558, 571–72 (2019).

[159] *See, e.g.*, Tim Steininger, *Due Deference:* Kisor*,* Stinson*, and the United States Sentencing Commission*, 98 Notre Dame L. Rev. 2287, 2304–05 (2023).

[160] *See, e.g.*, Amy Walker, *An Apt Analogy?: Rethinking the Role of Judicial Deference to the U.S. Sentencing Guidelines Post*-Kisor, 92 Fordham L. Rev. 2805, 2846–48 (2024).

supported by several commentators, would simply apply *Kisor* deference to the Guidelines commentary in place of *Stinson* deference.[161]

Underlying all these approaches is the impetus to prevent the Commission from making substantive amendments to the Guidelines through the commentary without utilizing the proper procedures.[162] This concern is especially heightened given the Commission's ability to expand the criminal liability of individual defendants.[163] However, given judges' ability to depart from the Guidelines post-*Booker* even based on their policy disagreements,[164] a better approach is for courts to not police the Commission's discretion to promulgate policy through the Guidelines or commentary and, instead, depart from the Guidelines when necessary.

It is also worth acknowledging the apparent tension within a proposal that favors deference to the Guidelines commentary but also encourages departures from the Guidelines. In fact, this tension exists at the very core of the Sentencing Commission itself. On one hand, the Commission promulgates Guidelines that promote uniformity in sentencing, even after becoming advisory post-*Booker*, because they serve as "the starting point and the initial benchmark" of any sentencing decision.[165] On the other hand, the Guidelines are meant to be evolutionary,[166] a quality that can only be realized when judges exercise their discretion to depart from the Guidelines. This tension, however, is better characterized as a balancing act that evinces exactly what the Guidelines are meant to do. Congress intended for the Guidelines to both serve as a benchmark to reduce the problem of sentencing disparities[167] and

---

[161] *See, e.g.*, Acton, *supra* note 108, at 386–405 (imploring the Supreme Court to overrule *Stinson*); Liam Murphy, *What's the Deference? Interpreting the U.S. Sentencing Guidelines after* Kisor, 75 VAND. L. REV. 957, 994–95 (2022) (criticizing *Stinson* deference but arguing that "*Kisor* may represent new authority" in this domain); Jarrett Faber, Kisor v. Wilkie *As A Limit on Auer Deference in the Sentencing Context*, 70 EMORY L.J. 905, 953 (2021) (same).

[162] Steininger, *supra* note 159, at 2306 (arguing that "[u]nder both *Kisor* and *Stinson*, deference expressly applies only to an agency's *interpretation* of its regulation"); Walker, *supra* note 160, at 2845 (arguing that the Commission should "adhere strictly to the notice-and-comment procedures for substantive amendment and use commentary to genuinely *guide* subsequent interpretation"); Acton, *supra* note 108, at 393 (discussing how "there are strong formalist reasons to ignore the Commission's self-imposed procedures [to promulgate Guidelines commentary]," and that the statutory difference in procedures required to promulgate the Guidelines versus the commentary is "fundamental"); Murphy, *supra* note 161, at 989 (criticizing the Commission's ability to recommend additional punishment via commentary and the problems of "foregone procedure and deficient notice" this raises).

[163] Steininger, *supra* note 159, at 2291 (arguing that "in the sentencing context, the stakes of deference are higher," because "[a]n individual's liberty is often on the line"); Acton, *supra* note 108, at 397–403 (arguing that "[p]rinciples of lenity counsel against *Stinson* deference"); Faber, *supra* note 161, at 932 (contending that "*Auer* deference in the sentencing context poses problems far and above those posed in the administrative context more generally," because "deference might be granted at the expense of a criminal defendant's liberty").

[164] *See* Kimbrough v. United States, 552 U.S. 85, 107–08 (2007).

[165] Gall v. United States, 552 U.S. 38, 49 (2007).

[166] *See* U.S.S.G. § 1A1.3.

[167] *See id.* § 1B1.1.; *Gall*, 552 U.S. at 49 (2007) (designating the Guidelines as the "initial benchmark" for sentencing); U.S.S.G. ch. 1, pt. A, intro. 4(b) (explaining that the Commission

mature according to judges' actual sentencing decisions.[168] Accordingly, the Guidelines do not prescribe exact sentencing directives: rather, they carve out a "heartland"[169] of "typical" offenses and associated sentencing ranges, which are meant to be shaped by the realities of actual criminal cases that only sentencing judges are attuned to.

To understand how this proposal would play out in practice, the facts of *Chandler* can again serve as an example. Under a reflexive deference framework, the sentencing court would refer to the commentary of U.S.S.G. § 2A4.1 and § 2B3.1 and find that the definition of a dangerous weapon includes instruments resembling an object capable of inflicting serious harm or death.[170] The court would be resigned to interpreting the Guidelines as covering James Chandler's crime because he used a fake gun during his robberies. But perhaps the court believes that "[a] dangerous weapon must be both dangerous and a weapon," but that "[f]ake guns are neither."[171] In this case, the court would exercise its discretion to depart from § 2A4.1 and § 2B3.1 based on its disagreement with the policy judgment reflected in these guidelines to punish the use of fake weapons. This is permissible under *Kimbrough*.[172] Finally, on review of sentencing data involving these Guidelines, the Commission would consider whether enough courts departed from these Guidelines to warrant their reconsideration and evaluate the grounds of departure to determine what amendments to the Guidelines are called for.

A. Reflexive Deference Better Fulfills the Commission's Policy Mandates and is Contemplated by the SRA

Reflexive deference better fulfills the Commission's policy mandates provided in the SRA. At first blush, it may seem odd to recommend a deference framework because of its operational benefits, rather than its ability to enhance the accuracy of legal interpretations. However, as mentioned, the rationales proposed in this Note are not mutually exclusive from those elsewhere in administrative law devoted to improving legal interpretations: for example, that institutions with expertise can best interpret the meaning of their own regulations.[173] Moreover, rationales based in operational benefits are certainly not foreign elsewhere in administrative law. For instance, the Court has justified deferring to agency interpretations due to agencies' greater relative political accountability to those subject to their rules.[174] Thus, this

---

will refine the Guidelines over time by monitoring judges' reasons for departures); *see also* 28 U.S.C. § 994(o) (mandating periodic review and revision of the Guidelines).

[168] *See id.* § 1A2.

[169] *Id.* § 1A1.4(b).

[170] *Id.* § 1B1.1, comment. (n.1(E)).

[171] United States v. Chandler, 104 F.4th 445, 461 (3d Cir. 2024) (Bibas, J., dissenting).

[172] *See* Kimbrough v. United States, 552 U.S. 85, 91 (2007).

[173] *See* Kisor v. Wilkie, 588 U.S. 558, 571 (2019).

[174] *See id.* at 571–72.

Note argues that reflexive deference should be upheld particularly because it facilitates the Commission's unique duties—namely, to (1) increase the uniformity of federal criminal sentencing by reducing sentencing disparities[175] and (2) periodically review and revise the Guidelines based on its consultation with authorities in the federal criminal sentencing system[176] and its review of all federal sentencing judgments, presentence reports, Guidelines worksheets, and written plea agreements.[177] This rationale also disposes of the objection that reflexive deference is inconsistent with the Court's departure from deference to administrative agencies.

1. Reflexive Deference Increases Certainty and Uniformity

It is widely accepted that deference to agencies is associated with the benefit of promoting uniformity in the application of agency policy. As the Supreme Court has asserted, deference ensures the resolution of interpretational questions through "uniform administrative decision, rather than piecemeal through litigation."[178] The Supreme Court in *Kisor* reaffirmed the "well-known benefits of uniformity in interpreting ambiguous rules": this was a major reason the Court did not overrule *Seminole Rock*/*Auer* deference in favor of a narrower form of deference (although it did severely cabin it).[179] Empirical research studying the impact of *Chevron* deference on the operation of administrative law demonstrates that deference to agencies does, in practice, actually result in greater uniformity in the interpretation of regulatory policy.[180] Thus, it is easy to imagine how reflexive deference would ensure even more uniformity in the application of the Guidelines than would *Kisor* deference, which does not permit deference except to interpret "genuinely ambiguous regulations."[181]

This justification is especially important in the Sentencing Commission context: a uniform application of the Guidelines is central to the Commission's ability to fulfill its congressional mandate, which is not the case for most administrative agencies. A primary goal of the Commission is to reduce "excessive sentencing disparities."[182] This is best pursued when judges follow the policies and recommendations put forth in the Guidelines Manual regardless of whether such policies appear in the Guidelines themselves, the

---

[175] *See* 28 U.S.C. § 991(b)(1)(B).
[176] *See id.* § 994(o).
[177] *See id.* § 994(w).
[178] *Kisor*, 588 U.S. at 572 (citation omitted).
[179] *Id.* Courts and commentators have justified *Chevron* deference for this reason. *See infra* Part IV.
[180] *See, e.g.*, Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1481 (2019) (reporting "that agencies prevailed 39% more often under *Chevron* than de novo review").
[181] *Kisor*, 588 U.S. at 563.
[182] Peugh v. United States, 569 U.S. 530, 536 (2013); *see also* 28 U.S.C. § 991(b)(1)(B).

commentary, or policy statements.[183] One of the original Guidelines promulgated by the Commission instructs courts that their "[f]ailure to follow [Guidelines] commentary could constitute an incorrect application of the [G]uidelines, subjecting the sentence to possible reversal on appeal."[184] This demonstrates that the Commission itself contemplated Guidelines commentary as a means by which it promulgates sentencing policy. Congress has also implicitly sanctioned this interpretation of Guidelines commentary many times over because it periodically reviews the Guidelines Manual as a "reticulated whole" that is routinely subjected to the same congressional-submission procedures each time the Commission amends the Guidelines.[185]

Kisor deference would impede the Commission's ability to ensure a uniform application of the Guidelines. Rather than having a unifying effect on court interpretations, the commentary would influence the interpretations of only those Guidelines that courts deem "genuinely ambiguous."[186] Courts would divide even over the question of whether a Guideline is ambiguous, the answer to which would, in turn, dictate whether they consult the Guidelines commentary.[187] As Judge Grant discussed in her concurrence in *United States v. Dupree*, *Kisor* deference would hamper the Commission's ability to reduce excessive sentencing disparities because "similarly situated defendants may receive substantially different sentences just because courts cannot agree whether a guideline's text is still sufficiently ambiguous after applying the traditional tools of construction."[188] Thus, where a Guidelines commentary was once uncontroversial, disagreements over whether it should be given weight would inevitably arise, thereby "shifting the ultimate responsibility for sentencing policy from the Commission to the courts."[189]

The increasing complexity of the Guidelines also counsel against the propriety of using elaborate deference frameworks borrowed from administrative law, like *Kisor* deference. The Guidelines, commentary, and policy statements have become increasingly lengthy and convoluted since the Commission promulgated its first Guidelines Manual in 1984.[190] Complexity is not inherently problematic per se, but, in operation, it frustrates the Commission's ability to fulfill its statutory goals. For instance, complexity encourages judges

---

[183] *See Peugh*, 569 U.S. at 531 (finding that sentences anchored by the Guidelines promote uniformity).

[184] U.S.S.G. § 1B1.7.

[185] United States v. Moses, 23 F.4th 347, 355 (4th Cir. 2022).

[186] *Kisor*, 588 U.S. at 563.

[187] *See* United States v. Dupree, 57 F.4th 1269, 1286 (11th Cir. 2023) (Grant, J., concurring).

[188] *Id.* at 1287.

[189] *See id.*

[190] *See* Breyer, *supra* note 31, at 185 ("The original 1987 Guidelines draft was just over 200 pages long, and many criticized that draft as too lengthy and too complex. The Guidelines are now twice as long."). The most recent Guidelines promulgated in 2025 are 516 pages long. *See generally* GUIDELINES, *supra* note 2.

to rely on heuristics when faced with difficult sentencing decisions.[191] Complexity can also lead to minute distinctions in sentencing recommendations that do not make any difference in practice.[192] *Kisor* deference, which involves multiple analytical steps and has been critiqued for being overly complex,[193] would add complexity to the operation of the Guidelines and hamper its central purpose of increasing uniformity in sentencing.

2. Reflexive Deference Enables the Dynamic Nature of the Guidelines

Reflexive deference better allows the Commission to dynamically revise the Guidelines through its consultation with authorities on the federal criminal justice system and analysis of federal criminal sentencing data.[194] For one, reflexive deference to the Guidelines commentary facilitates the frequency and mode by which the Commission can revise the Guidelines pursuant to its statutory mandates. As the Tenth Circuit noted in *United States v. Maloid*, the Supreme Court concluded that "Congress did not intend to handicap the Commission in interpreting and clarifying federal sentencing law."[195] The Commission is better able to dynamically revise federal sentencing policy if it has the flexibility to choose between revising the Guidelines commentary and promulgating Guidelines amendments[196] and knows that courts will defer to both modes of sentencing policy. This ability to choose between revising the commentary or revising the Guidelines also advances the incorporation of empirically-backed policies into the Guidelines. For instance, empirical

---

[191] *See* R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 753–54, 763 (Dec. 2001) (discussing how complex decision-making causes decisionmakers to default to heuristics, errors, or biases which inserts uncertainty into the federal criminal sentencing scheme).

[192] *See* R. Barry Ruback, *Warranted and Unwarranted Complexity in the U.S. Sentencing Guidelines*, 20 LAW & POL'Y 357, 358, 376 (July 1998) (discussing how the overall length of the Guidelines, legal complexity, and number of amendments are not wholly warranted based on whether such complexity results in different sentencing outcomes in practice). The Commission itself recognized in its original introduction to the Guidelines Manual that "[t]he greater the number of decisions required and the greater the complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce." U.S.S.G. Ch. 1, Pt. 1 (1987).

[193] *See* Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1602–03 (2021) (describing how *Kisor* "craft[ed] a complex new five-part test," whose application "depend[s] heavily on the lower federal courts[]"); Zubin Khambatta, *The Future of Deference to Health Care Sub-Regulatory Guidance Under* Kisor v. Wilkie, 14 J. HEALTH & LIFE SCI. L. 8, 8, 21 (2020) (discussing how *Kisor*'s "complex checklist of threshold factors" may expand judicial discretion enough to leave agency interpretations "more vulnerable to challenges in court").

[194] *See* 20 U.S.C. § 994(o), (w).

[195] United States v. Maloid, 71 F.4th 795, 803 (10th Cir. 2023) (discussing Stinson v. United States, 508 U.S. 36, 46 (1993)).

[196] *See id.*

findings based on sentencing data may operate more effectively as a clarification within a commentary rather than a wholesale modification to a Guideline.[197]

Additionally, such empirically-backed policymaking, especially as it incorporates sentencing data, depends on meaningful dialogue between the Commission and courts applying the Guidelines. The Supreme Court in *Rita* explained how this dialogue should operate in practice:

> The sentencing courts, applying the Guidelines in individual cases, may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The courts of appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.[198]

Courts can thus effectively communicate their disagreements with Guidelines policies through departures. Reflexive deference to the Guidelines commentary better ensures effective use of this mode of communication between the Commission and the courts by encouraging courts to use departures to communicate disagreements with the Guidelines rather than withholdings of deference.

By contrast, *Kisor* deference would impede the Commission's ability to regularly review and revise its Guidelines based on sentencing data. Courts who disagree with the policy put forth by a Guidelines commentary could choose simply not to defer to the commentary rather than depart from the Guidelines as interpreted by the commentary. In other words, decisions not to defer to Guidelines commentary could occur under the guise of interpretive disagreements although they are truly based in disagreements with the policy put forth in the Guidelines. To refer back to the *Chandler* example, a court could perhaps agree with the interpretation that a fake gun is a dangerous weapon as defined in U.S.S.G. § 2A4.1 and § 2B3.1 but disagree that it presents the same degree of danger to warrant the sentencing increase recommended by the Guidelines.[199] It would be improper in this circumstance, however, for the court not to defer to the commentary because the disagreement is

---

[197] The Supreme Court implied as much in James v. United States, 550 U.S. 192 (2007), *overruled on other grounds by* Johnson v. United States, 576 U.S. 591 (2015). The Court interpreted the career-offender enhancement in § 4B1.2 of the Guidelines, which is triggered by a predicate "crime of violence." *James*, 550 U.S. at 206. The application note to § 4B1.2 includes inchoate offenses within the definition of "crime of violence"—a policy that the Court justified because it reflects the Commission's empirical review of sentencing data and corresponding judgment that inchoate offenses "pose a similar risk of injury as completed offenses." *Id.*

[198] Rita v. United States, 551 U.S. 338, 350 (2007).

[199] *See* discussion *supra*.

not based in legal interpretation. On the other hand, courts that do depart from the Guidelines may do so without first consulting the commentary, which sheds light on the proper meaning of the Guidelines. Thus, under *Kisor*, the Commission, when reviewing sentencing decisions, would have to disentangle whether the rate of departures from the Guidelines reflects the true extent of disagreement with the Guidelines and parse out whether departures from the Guidelines were made with Guidelines commentary in mind.[200] *Kisor* deference would thus add an extra layer of complication to this analysis, which involves an already large and granular body of sentencing data. This would hamper the Commission's ability to fulfill its mandate to review sentencing data with the goal of revising sentencing policy.

As the Supreme Court argued in *Stinson*, the SRA also contemplates that the Guidelines commentary has controlling weight.[201] For one, the SRA explicitly requires the Commission to promulgate policy statements alongside the Guidelines provisions "regarding application of the guidelines."[202] In § 1B1.7 of the Guidelines, the Commission provides that even unlabeled portions of the Guidelines Manual "are to be construed as commentary and thus have the force of policy statements."[203] Pursuant to 18 U.S.C. § 3553(a), judges must consider specified sentencing factors and calculate (but not necessarily adhere to) sentencing ranges as determined by the Guidelines and policy statements.[204] While one could give weight to the fact that § 3553(a) explicitly mentions Guidelines provisions and policy statements but not Guidelines commentary,[205] a perfectly reasonable interpretation is that the provision references Guidelines *as accompanied* by their corresponding commentary.[206] In fact, in § 3553(b)—later struck down in *Booker* for having mandatory language[207]—the SRA explicitly envisioned a key role played by the Guidelines commentary. Section 3553(b)(1) instructed courts to "consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" before departing from the Guidelines' recommended ranges.[208] Thus, Congress considered the commentary essential

---

[200] The SRA expressly requires district court judges to submit their sentencing decisions to the Commission including a "written statement of reasons for the sentence imposed." The Act expressly requires this statement to explain any departures but is silent on deference decisions. *See* 28 U.S.C. § 994(w)(1)(B).

[201] *See* Stinson v. United States, 508 U.S. 36, 46 (1993).

[202] 20 U.S.C. § 994(a)(2).

[203] U.S.S.G. § 1B1.7.

[204] *See* United States v. Booker, 543 U.S. 220, 245 (2005); Gall v. United States, 552 U.S. 38, 49–50 (2007).

[205] *See* Walker, *supra* note 161, at 2841.

[206] This is consistent with the fact that the vast majority of Guidelines commentary accompanies specific Guidelines whereas policy statements typically appear as standalone provisions. *See generally* GUIDELINES, *supra* note 2.

[207] *Booker*, 543 U.S. at 245.

[208] 18 U.S.C. § 3553(b)(1). To be certain, this provision does not *require* courts to consider commentary before departing from a recommended Guidelines-calculated sentence; however, it does put Guidelines, policy statements, and commentary on an equal playing field in terms of their interpretive importance within decisions to depart from the Guidelines.

to understanding the final policy recommendations put forth in the Guidelines. There is no evidence that *Booker* intended to alter this analysis.

The SRA also envisions many discrete objectives for the Guidelines which have necessitated the creation of the Guidelines Manual comprised of the Guidelines, policy statements, and commentary as one interrelated document. As the Fourth Circuit in *United States v. Moses* explained:

> [T]o address the multifarious circumstances that can be relevant to each individual defendant and statutory sentencing objectives, . . . the Guidelines Manual is structured with interrelated layers of explanation consisting of Guidelines, policy statements, and official commentary. . . . [T]he policy statements and commentary are especially meaningful in understanding the Guidelines, regardless of whether any Guideline is ambiguous.[209]

Thus, as the *Stinson* Court wrote, "amendments to guidelines provisions are [just] one method of incorporating revisions" to the Guidelines.[210] However, "another method open to the Commission is amendment of the commentary."[211] This is because the SRA supports a presumption that a Guidelines commentary represents the best indication of how that Guideline should operate in practice and in a manner consistent with the Guidelines Manual in totality.[212]

3. Reflexive Deference Is Not Inconsistent with the Supreme Court's Shift Away from Deference to Administrative Agencies

Objectors may argue that the Supreme Court has recently shifted *away* from deference to agency interpretations of law, making reflexive deference to Guidelines commentary inappropriate. *Loper Bright Enterprises* is apparently revolutionary for its forceful assertion that it is the province of courts, not agencies, to interpret the law.[213] This invites the question of why the Commission deserves special treatment in the form of reflexive deference to the Guidelines commentary while other administrative agencies are no longer presumed to have this authority. Deference to the Sentencing Commission to interpret Guidelines still makes sense, first, because Guidelines commentary are meaningfully distinct from other agency interpretations, and, second, there are independent reasons to presume the Commission's authority to interpret the Guidelines at the first instance.

First, Guidelines commentary serve more than purely interpretational purposes. Agency interpretations, on the one hand, conceivably intrude on the

---

[209] United States v. Moses, 23 F.4th 347, 354 (4th Cir. 2022).
[210] Stinson v. United States, 508 U.S. 36, 46 (1993).
[211] *Id.*
[212] *See id.* at 45.
[213] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 385 (2024).

responsibility of courts to interpret the law. Commentary, however, functions to provide concrete instructions for how Guidelines are to be applied "in a manner most "'consistent with the Guidelines Manual as a whole.'"[214] The commentary can also instruct courts on when departures from the Guidelines are advisable and provide background information as to the rationales underlying specific Guidelines.[215] Given the wide array of functions the commentary serves, it would be unwise to prohibit deference to the commentary unless the Guidelines reach a threshold level of ambiguity, as *Kisor* instructs.[216] This would not only impede the operational function of the commentary, but would also limit the certainty and consistency with which judges apply the Guidelines.

Second, the Commission's unique relationship with the courts, Congress, and the public counsel in favor of presuming its authority to interpret the Guidelines. As the Supreme Court itself noted, the Commission is "a peculiar institution within the framework of our Government," having "an unusual hybrid in structure and authority."[217] For one, the Commission is housed within the judicial branch.[218] And, as the Supreme Court explained, criminal sentencing is both a "peculiarly shared responsibility among the Branches of Government" and one which has historically been placed within the judiciary's "special authority."[219] Thus, presuming the authority of the Commission to interpret its Guidelines while also empowering courts to depart from the Guidelines is perfectly consistent with the judiciary's special responsibility in the domain of criminal sentencing. The Commission also receives close supervision from Congress, which has engaged its shared responsibility in criminal sentencing. This supervision arguably exceeds Congress's oversight of other agencies,[220] which counsels in favor of presuming that Congress intends the Commission to resolve ambiguities in the Guidelines. Thus, these distinct features of the Commission put into question the appropriateness of transferring all deference doctrines from administrative law to the Sentencing Commission context.

B. Reflexive Deference Is Further Justified by the Advisory Nature of the Guidelines

Additionally, reflexive deference is more justified given the advisory nature of the Guidelines. The advisory nature of the Guidelines adequately addresses two related objections to reflexive deference in the sentencing context: (1) that reflexive deference entrenches overly punitive Guidelines and (2) that reflexive deference violates the APA.

---

[214] United States v. Moses, 23 F.4th 347, 356 (4th Cir. 2022) (quoting Stinson v. United States, 508 U.S. 36, 45 (1993)); *see also* U.S.S.G. § 1B1.7. The *Stinson* Court also explained that this function of commentary operates even when Guidelines are unambiguous. 508 U.S. at 36.

[215] *See* U.S.S.G. § 1B1.7.

[216] *See* Kisor v. Wilkie, 588 U.S. 558, 566 (2019).

[217] Mistretta v. United States, 488 U.S. 361, 384, 412 (1989).

[218] *See* 28 U.S.C. § 991(a).

[219] *Mistretta*, 488 U.S. at 390.

[220] *See supra* Part III.C.1; United States v. Maloid, 71 F.4th 795, 807 (10th Cir. 2023).

1. Advisory Guidelines Permit Departure from Overly Punitive Guidelines

Many commentators advocating for less deference to the Guidelines commentary are disquieted by the fact that deference to expansive commentary can have the result of increasing a defendant's criminal punishment.[221] In *United States v. Nasir*, Judge Bibas articulated this concern in his concurrence, arguing that "[t]here is no compelling reason to defer to a Guidelines comment that is harsher than the text."[222] This concern is perfectly reasonable. However, it fails to recognize that the advisory nature of the Guidelines already furnishes the remedy.

Before *Booker* held that the Guidelines are not binding, the SRA provided for departures in "specific, limited cases."[223] Specifically, it permitted a sentencing court to depart from the Guidelines if it "f[ound] that there exist[ed] 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."[224] After *Booker*, the Supreme Court confirmed that judges can depart from Guidelines-calculated sentence ranges even based on reasons that are not "extraordinary,"[225] or on the basis of policy disagreements with the Guidelines.[226] This leaves plenty of room for judges to depart from Guidelines-calculated sentence ranges based on commentary that is overly harsh. After conducting its review of these departures, the Commission will adjust its sentencing policy accordingly.[227] Thus, if the sentencing system is operating as it should be, sentencing decisions that defer to the Guidelines commentary and depart when warranted should actually reduce the number of incidences where the Guidelines or Guidelines commentary are overly harsh, holding constant other variables. Though the normative demerits of the Guidelines are not the core focus of this Note, it is widely contended that mandatory minimums in sentencing statutes, prosecutorial discretion to charge crimes corresponding with Guidelines that recommend higher sentencing, and political influence resulting in overly harsh Guidelines have all led to the rise in criminal punishment at the federal level.[228] Intentional departures are, thus, just one way that judges can counteract this trend, and they are more consistent

---

[221] *See supra* Part I.B.1.
[222] United States v. Nasir, 17 F.4th 459, 474 (3d Cir. 2021) (Bibas, J., concurring).
[223] United States v. Booker, 543 U.S. 220, 221 (2005).
[224] 18 U.S.C. § 3553(b)(1).
[225] Gall v. United States, 552 U.S. 38, 47 (2007).
[226] *See* Kimbrough v. United States, 552 U.S. 85, 101 (2007).
[227] *See supra* Part IV.A.2.
[228] *See e.g.*, Hon. Lynn Adelman, *How Congress, the U.S. Sentencing Commission and Federal Judges Contribute to Mass Incarceration*, American Constitution Society (Jan. 2023), https://www.acslaw.org/expertforum/how-congress-the-u-s-sentencing-commission-and-federal-judges-contribute-to-mass-incarceration/ [https://perma.cc/L6UC-FRLY]; Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence From* Booker, 89 N.Y.U. L. Rev. 1268, 1309, 1323–26 (2014).

with the evolutionary nature of the Guidelines than are withholdings of deference to the commentary.

In line with the advisory nature of the Guidelines, district court judges can and do take advantage of their ability to depart from the Guidelines. Commentators who advocate for less deference to the Guidelines commentary typically make similar arguments as did Judge Bibas in *United States v. Nasir*: because Guidelines "exert a law-like gravitational pull on sentences" it is important not to defer reflexively to expansive commentary.[229] To an extent, it is true that "Guidelines and their commentary remain the 'lodestone' of federal sentencing,"[230] because all sentencing decisions must begin with a proper calculation of the Guidelines.[231] Some level of "anchoring bias" may also be at play, causing judges to lean on calculated Guidelines ranges rather than exercise their own sentencing discretion.[232] Nonetheless, *Booker* makes clear that not all sentencing decisions need to sentence defendants within the Guidelines-calculated ranges.[233] Moreover, by excising the mandatory provisions of the SRA, *Booker* implicitly reaffirmed the abuse of discretion standard that the Court had previously held applied to sentencing departures permitted by the Guidelines.[234] This standard, notably, is more deferential to district courts than the de novo standard by which courts of appeals review decisions to defer to Guidelines commentary.[235] Additionally, while the Supreme Court held that courts of appeals may apply a presumption of reasonableness to sentencing decisions within a Guidelines-calculated sentencing range,[236] sentencing decisions outside of a Guidelines-recommended range cannot be

---

[229] United States v. Nasir, 17 F.4th 459, 474 (3d Cir. 2021) (Bibas, J., concurring); *see also* Steininger, *supra* note 159, at 2293 (arguing the same); Acton, *supra* note 108, at 401 (same); Walker, *supra* note 160, at 2819 (surmising that judges might be reluctant to depart from the Guidelines because of their discomfort with exercising their own discretion and accustomedness to relying on the Guidelines).

[230] United States v. Havis, 907 F.3d 439, 444 (6th Cir. 2018), *vacated by reh'g en banc*, 921 F.3d 628 (6th Cir. 2019).

[231] *See* Gall v. United States, 552 U.S. 38, 49 (2007).

[232] "Anchoring bias" is a psychological phenomenon that causes individuals to use numbers previously disclosed to them as anchors for their decisions. In the sentencing context, judges may subconsciously base sentencing decisions on Guidelines-calculated ranges by using them as heuristics instead of exercising their own discretion. *See* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. and Criminology 489, 489, 523–29 (2014).

[233] *See* United States v. Booker, 543 U.S. 220, 259 (2005); Rita v. United States, 551 U.S. 338, 361 (2007) (Stevens, J., concurring); Koon v. United States, 518 U.S. 81, 91 (1996) (holding that an abuse-of-discretion standard applies to sentencing departures).

[234] *See Booker*, 543 U.S. at 259; *Koon*, 518 U.S. at 91.

[235] *Compare* United States v. Dupree, 57 F.4th 1269, 1272-80 (11th Cir. 2023) (en banc) (conducting full statutory interpretation-like analysis to review application of Guideline and commentary by district court), *with* United States v. Canova, 412 F.3d 331, 335 (2d Cir. 2005) (explaining that *Booker* modified standard of review for departures such that only "a significant error in the calculation or construction of the Guidelines may preclude affirmance").

[236] *See Rita*, 551 U.S. at 338.

considered presumptively *un*reasonable.[237] Thus, courts of appeals are largely obliged to respect a district judge's discretionary decision to depart from the Guidelines.

Empirical data also demonstrates that judges have taken advantage of their ability to depart from the Guidelines post-*Booker*, which counterbalances concerns of overly punitive Guidelines. One study demonstrates that inter-judge disparity in sentencing doubled after *Booker*.[238] The majority of these departures were below rather than above the recommended Guidelines-calculated sentencing ranges.[239] This data overall is consistent with the conclusion that the advisory nature of the Guidelines does result in greater departures from the Guidelines, reducing the concerns associated with reflexive deference to the commentary. Additionally, as noted by Judge Bibas in *Nasir*, the Commission itself reported that, in the 2019 fiscal year, "75% of offenders received sentences that were either within the Guidelines range or justified by a Guidelines ground for departure."[240] A necessary corollary to this finding is that twenty-five percent of sentences were not within the range or justified by a Guidelines ground of departure. While this rate of departures may not seem significant, it is a twenty-five percent higher rate of departures than would have been justified pre-*Booker*. Ultimately, a high rate of compliance with the Guidelines means that the Commission is fulfilling its mandate to increase the certainty and fairness of sentencing.[241] To counterbalance this, a healthy rate of noncompliance is also good—it means the Commission can better fulfill its mandate to revise the Guidelines based on criminal sentencing data from the federal courts.[242] The balance between both reflexive deference and departures should, thus, permit the Guidelines to both reduce sentencing disparities and evolve according to actual sentencing data.[243]

2. Advisory Guidelines Are Not Subject to the Administrative Procedure Act

Objectors may also argue that upholding reflexive deference to the Guidelines commentary would violate the APA. Judges and commentators are concerned that, by promulgating commentary that automatically gets approval from reviewing courts, the Commission can effectively amend the Guidelines

---

[237] *See* Gall v. United States, 552 U.S. 38, 51 (2007).

[238] *See* Yang, *supra* note 228, at 1268.

[239] *See id.* at 1309, 1314. While Yang finds that above-range departures occur in roughly two percent of cases, below-range departures occur in forty percent of cases. *See id.*

[240] United States v. Nasir, 17 F.4th 459, 474 (3d Cir. 2021) (Bibas, J., concurring) (citing U.S. Sentencing Comm'n, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics* 8). This figure was 66.9% in the 2023 fiscal year. U.S. Sentencing Comm'n, *2023 Sourcebook of Federal Sentencing Statistics* 60.

[241] *See supra* Part I.

[242] *See supra* Part IV.B.2.

[243] *See supra* Part II.A.1.

without utilizing the APA's § 553 rulemaking procedures,[244] which require agencies to promulgate legislative rules through notice and comment.[245] This argument has the same central underlying concern as caselaw dealing with the propriety of interpretive rules,[246] which are exempted under the APA's rulemaking procedures.[247] As courts have argued, interpretive rules that substantively expand upon the regulations they interpret are effectively legislative rules with the force of law; yet because agencies forego the APA's rulemaking procedures by issuing such expansive interpretive rules, this raises rule of law concerns.[248]

However, in the sentencing context, this objection does not cleanly apply, because neither Guidelines nor Guidelines commentary serve as bases for enforcement actions—rather, they serve as advisory benchmarks for criminal punishment post-conviction.[249] Given the difference in procedural requirements between the Guidelines and commentary, there may indeed be a "clear legal distinction" between the two.[250] However, it is not clear why this distinction should necessarily require courts to either impose strict procedural requirements on the Guidelines commentary or not defer to them in the context of federal sentencing. The same rule of law concern underlying the distinction between legislative rules and interpretive rules simply does not extend to the Guidelines and Guidelines commentary due to their advisory nature.

The Commission's unique attributes also temper the rule of law concern with the Commission's apparent ability to circumvent the APA's rulemaking procedures, then receive deference under *Stinson*. For one, as the Eleventh Circuit argued in *Maloid*, the Commission does not make "broad-ranging policy choices" like most administrative agencies, but rather "guide[s] federal judges through the complex process of sentencing."[251] The Commission is meant to establish sentencing policies, not enforce the laws against the public; thus, there is less urgency for courts to police the bounds of the Commission's

---

[244] *See, e.g.*, Acton, *supra* note 108; Steininger, *supra* note 159; United States v. Nasir, 17 F.4th 459, 471 (3d Cir. 2021); United States v. Riccardi, 989 F.3d 476, 487 (6th Cir. 2021).

[245] *See* 5 U.S.C. § 553.

[246] *See, e.g.*, American Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1107 (D.C. Cir. 1993); Hoctor v. U.S. Dep't. of Agric., 82 F.3d 165, 171 (7th Cir. 1996).

[247] *See,* 5 U.S.C. § 553(b)(4)(B); *see also Riccardi*, 989 F.3d at 487 (arguing that caselaw distinguishing between interpretive rules and legislative rules "reinforced" its own holding regarding Guidelines commentary).

[248] *See American Mining Cong.*, 995 F.2d at 1112.

[249] U.S.S.G. § 1A1.1, Background.

[250] Acton, *supra* note 108, at 392.

[251] United States v. Maloid, 71 F.4th 795, 807 (10th Cir. 2023) (citing 28 U.S.C. 991(b)(1)(B)) (a central purpose of the Commission is to "provide certainty and fairness in meeting the purposes of sentencing"). The Fourth Circuit Court of Appeals in *United States v. Moses* also emphasized this point in asserting that the "purposes and roles" of the Sentencing Commission and executive agencies are distinct. 23 F.4th at 355. While the Commission "is judicial in nature," and its Guidelines "[are] directed at providing guidance to district judges," executive agencies "regulate the broad range of people covered by the particular agency's jurisdiction, and they do so without the express authorization of Congress." *Id.*

discretionary authority through procedural guardrails. Additionally, unlike most administrative agencies, the Commission's entire substantive authority is limited to the Guidelines Manual.[252] As the Fourth Circuit Court of Appeals stated in *Moses*, most administrative agencies have a panoply of avenues through which they can regulate, including "letters, opinions, press releases, and legal briefs."[253] The Commission, on the other hand, only has three options by which it can promulgate policy: Guidelines, commentary, and policy statements.[254] It is, thus, reasonable to assume that Congress gave the Commission more flexibility to choose how it promulgates sentencing policy, especially given its mandate to dynamically review and revise the Guidelines.[255] To this point, *Stinson* effectively interpreted the SRA to enable the Commission to amend the Guidelines via commentary.[256] By holding that amended commentary is "binding on the federal courts even though it is not reviewed by Congress," and so long as "the guideline which the commentary interprets will bear [its] construction,"[257] the Court has given the Commission substantial leeway to issue commentary as a means of policymaking.

C. Reaffirming Stinson*'s Reflexive Deference Upholds Principles of Stare Decisis, Because* Stinson *Was Not Wrongly Decided*

Reaffirming *Stinson* on improved grounds is the preferable approach, because *Stinson* was not wrongly decided.[258] Stare decisis demands that courts must have "special justification" to overturn a case—meaning something more than "an argument that the precedent was wrongly decided."[259] Thus, the threshold for overturning *Stinson* has not been met.

There are several reasons to believe that *Stinson* was not wrongly decided despite *Kisor*'s reasoning. Although the *Stinson* Court analogized Guidelines commentary to agency interpretations of their regulations, its holding did not rest solely on this comparison. This counsels against assuming the incorrectness of *Stinson* based solely on *Kisor*'s reasoning. For one, *Stinson*'s holding rested in considerable part on the Court's interpretation of the SRA—particularly its conclusion that the Act contemplates the commentary

---

[252] *Moses*, 23 F.4th at 355.
[253] *Id.*
[254] *See* U.S.S.G. § 1A3.1.
[255] *See* 28 U.S.C. § 994(o).
[256] *See* Stinson v. United States, 508 U.S. 36, 46 (1993).
[257] *Id.*
[258] The Supreme Court could possibly extend *Kisor* to the Guidelines commentary by severely limiting the scope of *Stinson* deference rather than fully overruling *Stinson*. However, this seems unlikely because, as will be discussed, *Stinson* deference is even more deferential to the Guidelines commentary than *Seminole Rock*/*Auer* deference was to agency interpretations of their regulations. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). It would, thus, be difficult for the Court to reframe *Kisor* deference as a more limited version of *Stinson* deference.
[259] Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014).

as meriting controlling weight.[260] *Stinson* deference is also more expansive than *Seminole Rock*/*Auer* deference in ways that meaningfully enhance the Commission's central mandates. While *Seminole Rock*/*Auer* deference only applies when the meaning of a regulation is in doubt,[261] *Stinson* deference applies even to commentary that accompanies unambiguous guidelines,[262] and even if deference would overrule "prior judicial constructions" of the Guidelines they interpret.[263] The *Stinson* Court further explained that amendments to Guidelines commentary can authoritatively "effect . . . change[s] in [the] interpretation of the overall Guidelines."[264] These features of *Stinson* deference operate in ways that go "beyond ordinary principles of administrative law."[265]

One counterargument against the correctness of *Stinson* is that it was decided during a time when the Guidelines had the force of law, which heightened the risk that the Commission could promulgate new law through commentary. As the *Kisor* Court explained, deferring to agency interpretations even when a binding regulation is unambiguous "would 'permit the agency, under the guise of interpreting a regulation, to create *de facto a new regulation*.'"[266] Although *Auer* deference does not "go that far,"[267] the Supreme Court in *Stinson* could have very well intended the Commission to have the ability to make amendments to the Guidelines via the commentary.[268] As discussed, this is consistent with the Commission's mandate to regularly revise the Guidelines, thereby meriting a unique level of discretion.

A less compelling counterargument rests on the fact that developments in administrative and federal sentencing law render *Stinson* a "doctrinal dinosaur."[269] This argument points out that the *Stinson* Court drew only one meaningful distinction between the Guidelines and agency regulations, which is that Congress is more involved in the promulgation of Guidelines.[270] This distinction has been used by courts to justify a heightened deference to the

---

[260] *See Stinson*, 508 U.S. at 45–46; *see also supra* Part II.A.1.

[261] *See Seminole Rock*, 325 U.S. at 414.

[262] *See Stinson*, 508 U.S. at 44 (describing how commentary "provides concrete guidance as to how even unambiguous guidelines are to be applied in practice").

[263] United States v. Dupree, 57 F.4th 1269, 1285 (11th Cir. 2023) (en banc) (Grant, J., concurring) (quoting *Stinson*, 588 U.S. at 46).

[264] *Id.*

[265] *Id.* Judge Grant goes on to describe how the Supreme Court "has never held that an agency's reinterpretation of its own legislative rule can override a past judicial construction of that rule." *Id.*

[266] Kisor v. Wilkie, 588 U.S. 558, 575 (2019) (quoting Christensen v. Harris County, 529 U.S. 576, 588 (2000)).

[267] *Id.*

[268] *Cf. infra* Part I.A (discussing why deference in the federal criminal sentencing context does not raise the same constitutional concerns surrounding deference in administrative law due to the distinct features of the Commission and Guidelines).

[269] *Kisor*, 588 U.S. at 588 (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 459 (2015)).

[270] *See* Acton, *supra* note 108, at 360.

commentary.[271] But, since *Stinson* was decided, Congress passed the Congressional Review Act,[272] which contemplates very similar Congressional involvement with respect to other agency regulations.[273] This argument is not compelling because *Stinson*'s holding did not turn on this distinction between Guidelines and agency regulations—rather, the *Stinson* Court bolstered its reasoning by drawing an analogy between the two.[274] Although the relationship between Congress and the Commission was not central to *Stinson*'s holding, it continues to support an argument in favor of reflexive deference to the commentary.

V. Counterarguments

Given that the Supreme Court has increasingly disfavored deference to administrative agencies regarding their legal interpretations, there are predictable and plausible objections to a reflexive deference framework for the Guidelines commentary. The two strongest likely objections are as follows: first, reflexive deference threatens the separation of powers and, second, reflexive deference frustrates the application of the rule of lenity. This Part addresses each of these arguments in turn and demonstrates why they do not apply in the Sentencing Commission context.

A. Reflexive Deference Does Not Violate the Separation of Powers

A likely objection to giving reflexive deference to Guidelines commentary is that it would threaten the separation of powers by authorizing the Commission's authority to both promulgate laws and interpret them. However, this objection has not only already been addressed by the Supreme Court, but its concomitant concern that reflexive deference permits the Commission to augment its own power is doubtful.

Professor John Manning most famously articulated the separation of powers argument against *Auer* deference by arguing that it gives agencies binding authority over both lawmaking and legal interpretation.[275] When an

---

[271] *See, e.g.*, United States v. Maloid, 71 F.4th 795, 812 (10th Cir. 2023) (arguing that because "Congress retains substantial control over sentencing matters and the Guidelines Manual," it can easily "revoke or amend" a disfavored commentary in the manual at any time).

[272] *See* Maeve P. Carey & Christopher M. Davis, Cong. Rsch. Serv., IF10023, The Congressional Review Act (CRA): A Brief Overview 1 (2023), https://www.congress.gov/crs-product/IF10023 [https://perma.cc/E9ZL-XLCT].

[273] The Congressional Review Act allows Congress time to review and accept, reject, or modify agency regulations, much in the same manner as it can the Guidelines. *Compare* 5 U.S.C. §§ 801, 802, *with* 20 U.S.C. § 994(p).

[274] *See* Stinson v. United States, 508 U.S. 36, 44 (1993).

[275] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 654 (1996). Similarly, in *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597 (2013), the late Justice Scalia ironically expressed regret over *Auer* deference, a creation of his own judicial making, because it violates

agency promulgates regulations, it exercises lawmaking authority, and when it interprets its regulations, it exercises interpretive authority. Thus, as Justice Gorsuch explained in his *Kisor* concurrence, *Auer* deference "does not *limit* the scope of the judicial power; instead, it seeks to *coopt* the judicial power."[276] As the argument goes, when an agency promulgates a regulation knowing that its later interpretations of the regulation will receive deference in court, it is incentivized to promulgate vague regulations that it can later interpret expansively to give itself more power.[277] In effect, the agency self-delegates rulemaking authority to be exercised via interpretive rules.[278] This, however, results in more unpredictable and arbitrary regulations, which, in turn, threatens the rule of law.[279]

This objection, based in separation of powers principles, is misguided as applied to the Guidelines and commentary. *First*, the concern that reflexive deference gives agencies binding authority over both lawmaking and legal interpretations does not apply to the Sentencing Guidelines. Starting with the Commission's lawmaking powers, the Guidelines are not binding on courts post-*Booker*, making it questionable whether the Commission can even be said to have lawmaking powers. Even when the Guidelines were binding, however, the Supreme Court in *Mistretta* held that the Commission does not violate the separation of powers principle.[280] While the Commission has significant discretion within its mandate, its authority does not aggrandize the powers of the judicial branch.[281] Rather, as mentioned, the Commission's power of "judicial rulemaking" operates within a "twilight area" of responsibilities that can be shared between the branches of government.[282] Some courts have even characterized federal criminal sentencing as a function that traditionally "fall[s] uniquely in the Judiciary's purview."[283] Thus, the Commission's authority to promulgate substantive sentencing Guidelines while being housed in the judicial branch is consistent with the separation of powers principle. As for the Commission's interpretational power, because the Guidelines are not binding on courts, the Guidelines commentary is also not binding, even if courts reflexively defer to the commentary. In fact, the central thrust of this Note has aimed to demonstrate that courts that substantively disagree with the Guidelines commentary can choose to depart from the Guidelines wholesale rather than not defer to the Guidelines commentary. However, even if the Guidelines were binding and courts reflexively deferred to Guidelines commentary, the

---

the principle of the separation of powers by placing "the power to write a law and the power to interpret it . . . in the same hands." *Id.* at 619 (Scalia, J., concurring in part and dissenting in part).

[276] Kisor v. Wilkie, 588 U.S. 558, 617 (2019) (Gorsuch, J., concurring).

[277] *See* Manning, *supra* note 275, at 647–60.

[278] *See id.*

[279] *See id.* at 654–56.

[280] *See* Mistretta v. United States, 488 U.S. 361, 380–412 (1989).

[281] *See id.* at 395.

[282] *Id.* at 386.

[283] *See, e.g.*, United States v. Maloid, 71 F.4th 795, 812 (10th Cir. 2023).

fact that the Commission is housed within the judicial branch complicates the question of whether the Commission's interpretational authority violates the separation of powers. Even if rulemaking authority is not clearly a judicial function,[284] interpretive authority certainly is.[285]

Second, there are reasons to doubt the applicability of the self-delegation argument to the Commission. In general, agencies have countervailing incentives to draft clear rather than vague regulations, even if that limits their own flexibility. For one, because it is more difficult to undo legislative rules through formal rulemaking procedures than it is to undo interpretive rules exempted from formal rulemaking procedures, agencies that want to preserve their rules across administrations are incentivized to issue clearer legislative rules.[286] Additionally, as the majority in *Kisor* reasoned, "'[r]egulators want their regulations to be effective, and clarity promotes compliance.'"[287] When it comes to the Commission, there is an additional reason to believe that it would not promulgate vague Guidelines to give itself more interpretive leeway. Imprecise Guidelines would defeat a central purpose of the Commission to "'provide certainty and fairness in meeting the purposes of sentencing.'"[288] Thus, while the Guidelines must be general enough to facilitate their "application to the many varied facts and circumstances presented in the sentencing process,"[289] their central purpose is to be clear beyond simply being effective.

B. Reflexive Deference Is Not Inconsistent with the Rule of Lenity

Finally, an additional likely objection to upholding reflexive deference to the Guidelines commentary is that it improperly interferes with the operation of the rule of lenity. As Judge Bibas's dissent in *Chandler* demonstrates, the rule of lenity and deference exist in direct tension with one another by requiring courts to choose between deferring to Guidelines commentary or applying the rule of lenity. Several circuits agree that the rule of lenity nonetheless has a role to play in properly interpreting the Guidelines.[290] In Judge Bibas's view, if a Guideline is ambiguous, a court should apply lenity before deferring

---

[284] *See Mistretta*, 488 U.S. at 386.

[285] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 384 (2024) (reasserting that "the final 'interpretation of the laws' [is] 'the proper and peculiar province of the courts.'" (quoting THE FEDERALIST NO. 78, at 525 (A. Hamilton)).

[286] *See* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1464 n.52 (2011); *see also* Cass R. Sunstein and Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 309 (2017).

[287] Kisor v. Wilkie, 588 U.S. 558, 585 (2019) (quoting Brief for Administrative Law Scholars as *Amici Curiae* at 18–19, Kisor v. Wilkie, 588 U.S. 558 (2019) (No. 18–15)).

[288] *Maloid*, 71 F.4th at 807 (quoting 28 U.S.C. § 991(b)(1)(B)).

[289] United States v. Moses, 23 F.4th 347, 356 (4th Cir. 2022) (quoting United States v. Allen, 909 F.3d 671, 674 (4th Cir. 2018)).

[290] *See e.g.*, United States v. Lazaro-Guadarrama, 71 F.3d 1419, 1421 (8th Cir. 1995); United States v. Fuentes-Barahona, 111 F.3d 651, 653 (9th Cir. 1997); United States v. Tony, 121 F.4th 56, 59 (10th Cir. 2024).

to the Guidelines commentary.[291] If Judge Bibas is correct, then any time a Guideline is ambiguous and there is a more forgiving alternative interpretation of a Guideline, a court would adopt that interpretation even if it conflicts with the Guidelines commentary. There are reasons to hesitate before adopting this view, however. It is debatable whether principles of lenity apply in the sentencing context at all and, even if they did, whether a zero-sum choice between deference and the rule of lenity is necessary.

First, it is doubtful that lenity's central justifications apply in the sentencing context. There are three central principles undergirding the rule of lenity: due process, the separation of powers, and the preference for individual liberty.[292] None of these principles apply cleanly in this context.

The rule of lenity seeks to uphold due process, specifically by providing fair notice to defendants by preventing vague laws from serving as bases to proscribe the conduct of individuals.[293] As the Supreme Court has asserted, "fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property."[294] However, it is questionable whether the concern of fair notice applies in the sentencing context. Although this issue has not been much discussed, it is worth noting that, in the sentencing context, "it is the magnitude of the defendant's sentence after conviction that is ambiguous, not the illegality of the defendant's conduct."[295] Guidelines do not inform the public on the scope of legally permissible behavior. Rather, they "structure and confine the ways in which judges exercise discretion in sentencing."[296] This understanding of the Guidelines is consistent with *Beckles v. United States*,[297] in which the Supreme Court held the U.S. Sentencing Guidelines Manual was not subject to due process vagueness challenges, because it does not set a range of sentences but rather guides a judge's discretion while choosing a sentence within a statutory range.[298] As a set of flexible standards, the Guidelines do not cleanly fit within the definition of laws that define criminal conduct. Now that the Guidelines are advisory, they do not even prescribe the extent to which judges can punish criminal behavior.

---

[291] *See* United States v. Chandler, 104 F.4th 445, 465 (3d Cir. 2024) (Bibas, J., dissenting).

[292] *See* United States v. Nasir, 17 F.4th 462, 473 (3d Cir. 2021) (Bibas, J., concurring).

[293] *See* United States v. Lanier, 520 U.S. 259, 266 (1997).

[294] Huddleston v. United States, 415 U.S. 814, 831 (1974).

[295] Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. Tol. L. Rev. 511, 550 (2002); *see also* Elkan Abramowitz and Barry A. Bohrer, *The Rule of Lenity in Sentencing*, 239 N.Y. L. J. 1, 2 (2008) (arguing that "notice typically is not a concern at the sentencing stage where it has been determined that a defendant has engaged in culpable conduct" and where "'the question of statutory interpretation affects only the degree of punishment.'") (quoting The Supreme Court, 2006 Term, Leading Cases, James v. United States, 121 Harv. L. Rev. 185, 351 (Nov. 2007)).

[296] United States v. White, 888 F.2d 490, 498 (7th Cir. 1989).

[297] *See generally* Beckles v. United States, 580 U.S. 256 (2017).

[298] *See id.* at 263; *see also Lanier*, 520 U.S. at 266 (describing the rule of lenity as a "'junior version of the vagueness doctrine'") (quoting Herbet L. Packer, The Limits of the Criminal Sanction 95 (1968)).

The rule of lenity upholds separation of powers principles by preventing courts from defining criminal conduct by interpreting vague laws. This ensures that "the power of punishment is vested in the legislative, not in the judicial department."[299] However, as discussed,[300] the Commission, unlike Congress, does not define criminal conduct. It is a *sui generis* body within the judicial branch that establishes sentencing policies, which now do not even bind courts.

Finally, the rule of lenity embodies a principle in favor of individual liberty by ensuring that when laws are ambiguous, courts "guard[] against overpunishment,"[301] by favoring legal interpretations that are more lenient to defendants. This concern arguably deserves the most serious consideration[302] especially given the upward trend in criminal sentencing and severe problem of mass incarceration at the federal level.[303] The Commission itself estimated that its policy decisions would lead to a ten percent increase in prison population over ten years, holding constant the impact of mandatory minimums in statutes or career offender sentences.[304] Additionally, data demonstrates that, although the Guidelines became advisory after the Supreme Court decided *Booker*, the average sentence length has remained consistent.[305]

Nonetheless, it is important to keep in mind that the advisory nature of the Guidelines itself acts as a deterrent to overly punitive Guidelines. Judges that substantively disagree with the Guidelines can and should depart from them because that is how the Guidelines are meant to operate.[306] Additionally, the rule of lenity is not clearly a better alternative solution to overly punitive Guidelines. For as many judges that may disagree with the propriety of departing from the Guidelines, there are even more who believe that lenity should play a very limited role within statutory interpretation. To these judges, lenity only comes into play as a last resort after courts exhaust all other tools of statutory interpretation, thereby narrowing its operation.[307] Thus, lenity is an exceedingly weak stop-gap measure to the increasing punitiveness of the

---

[299] United States v. Wiltberger, 18 U.S. 76, 95 (1820).

[300] *See supra* Part II.A.1.

[301] United States v. Nasir, 17 F.4th 462, 474 (3d Cir. 2021) (Bibas, J., concurring).

[302] *See id.* (arguing that, in the sentencing context, "one can debate the relevance" of the due process and separation of powers rationales for lenity but that the preference for individual liberty applies).

[303] *See Mass Incarceration Trends*, The Sentencing Project (May 2024), https://www.sentencingproject.org/reports/mass-incarceration-trends/ [https://perma.cc/UY8L-MYRF] (describing, among other statistics, the striking increase of the U.S. prison population since the 1970s); *Prison Time Surges for Federal Inmates*, The Pew Charitable Trusts (Nov. 2015), https://www.pew.org/ar/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates? [https://perma.cc/L4DJ-AK87] (discussing how the average federal prison stay "more than doubled from 1988 to 2012").

[304] *See* U.S.S.G. § 1A1.4(g) (2024).

[305] *See* Lynn Adelman & Jon Deitrich, *How Federal Judges Contribute to Mass Incarceration and What They Can Do About It*, 99 Judicature 72, 74 (2015).

[306] *See supra* Part I.B.1.

[307] *See* Joel S. Johnson, *Vagueness Avoidance*, 110 Va. L. Rev. 71, 77 (2024).

Guidelines. On the other hand, departures from the Guidelines, while they may not have reversed the increasing length of criminal sentences,[308] have evidently counteracted the increasing punitiveness of the Guidelines. Moreover, departures can occur coincidingly with courts affording due deference to the Guidelines commentary as a means to properly understand the Guidelines.

Second, it is not clear that the rule of lenity and reflexive deference cannot coexist. The rule of lenity and deference doctrines are both characterizable as substantive canons that only apply when the text being interpreted is ambiguous.[309] When text is ambiguous, deference could either completely trump lenity or vice versa. This dilemma has been discussed with respect to *Chevron* deference and has resulted in a split among the circuit courts.[310] However, there are varying ambiguity thresholds at which the rule of lenity could operate which may differ from the ambiguity threshold required to confer deference to the Guidelines commentary. So long as a deference doctrine and the rule of lenity have different ambiguity thresholds, one canon need not necessarily defeat the other, thereby narrowing the dilemma of choosing between the two.[311]

Reflexive deference likely obviates choosing between deference and lenity. While *Chevron* and *Kisor* deference most likely apply at the same ambiguity threshold as the rule of lenity (after a given text is still ambiguous after a court exhausts all other tools of statutory interpretation),[312] *Stinson* deference applies even if a Guideline is not ambiguous at all. This does not necessarily mean that reflexive deference must extinguish any role for the rule of lenity within the interpretation of the Guidelines. Rather, a court could defer to the Guidelines commentary unless a Guideline reaches a certain significant threshold of ambiguity,[313] and has at its disposal a more defendant-friendly

---

[308] *See* Adelman & Deitrich, *supra* note 305, at 74.

[309] *See* Lacey Ferrara, *Uncommon Allies: Bridging the Gap Between* Auer *Deference and the Rule of Lenity in Criminal Cases*, 54 Suffolk U. L. Rev. 157, 165 (2021) (describing both the rule of lenity and *Auer* deference as "normative canons of construction and [that] both involve an ambiguity threshold"); *see also* William T. Gillis, *An Unstable Equilibrium: Evaluating the "Third Way" Between* Chevron *Deference and the Rule of Lenity*, 12 NYU J.L. & Liberty 352, 360 (2019) (making a similar characterization of the rule of lenity and *Chevron* deference).

[310] *Compare* United States v. Tony, 121 F.4th 56, 69 (10th Cir. 2024) *with* United States v. Smith, 977 F.3d 431, 435 (5th Cir. 2020) (arguing that the rule of lenity does not apply to the Guidelines because they are "merely advisory").

[311] Some commentators have even argued that *Kisor* deference and the rule of lenity need not exist in conflict. This is because *Kisor* itself encapsulates the concerns that underly the rule of lenity by asking if the character and context of an agency's interpretation entitle it to controlling weight. *See, e.g.*, Ferrara, *supra* note 309, at 171; Steininger, *supra* note 159, at 2311–12.

[312] *See* Acton, *supra* note 108, at 401.

[313] The Supreme Court has most recently suggested that this threshold is reached when there is "grievous ambiguity" in the text being interpreted. *See* Ocasio v. United States, 578 U.S. 282, 295 n.8 (2016); *see also* Shular v. United States, 589 U.S. 154, 167 (2020) (Kavanaugh, J., concurring). In *United States v. Campbell*, the Fourth Circuit Court of Appeals suggested that the rule of lenity could apply after a court deferred to a Guidelines commentary but still could not discern the proper meaning of a Guideline. 22 F.4th 438, 446 (4th Cir. 2022).

interpretation of the Guideline. Under this approach, courts would not have to choose between deference and the rule of lenity. Rather, deference would precede lenity in the analysis, but the rule of lenity could supersede deference if absolutely necessary. Thus, to the extent that the rule of lenity has any operation within the sentencing context, it need not necessarily be defeated by reflexive deference to the Guidelines commentary, nor must it necessarily defeat deference to the Guidelines.

VI. Conclusion

The U.S. Sentencing Commission is a singular body within the government with unique policy prerogatives. Nonetheless, many lower courts have begun to insert *Kisor* deference, a convoluted deference framework from administrative law, into their interpretations of the Guidelines, which themselves are growing increasingly complex. The rationales against deference to most administrative agencies—including procedure, the separation of powers, and lenity—are ill-fitting as applied to the Commission. Granting *Stinson* deference to the Guidelines commentary and leaving courts the discretion to depart from the Guidelines, when necessary, is preferable to relying on *Kisor* deference to avoid disfavored Guidelines.

The Supreme Court has the power to clarify what role deference should play in interpreting the Guidelines. When the Court does so, it should reaffirm *Stinson* with updated rationales in line with the Sentencing Commission's distinct policy mandates and the advisory nature of the Guidelines. Other options, including extending *Kisor*'s holding to *Stinson* or overruling *Stinson* entirely based on *Kisor*, would improperly import a deference doctrine into the Sentencing Commission context and frustrate the Commission's policy mandates. These options are also unnecessary given that the concerns underlying *Kisor* deference are already remedied by the Guidelines' advisory nature or inapplicable to the Commission as a *sui generis* institution. Reaffirming *Stinson* deference is, thus, the best path forward and would best ensure the Commission's ability to operate as Congress intended it to.