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## THE DEVIL IS IN THE DEFERENCE

### ADDRESSING THE CIRCUIT SPLIT IN INTERPRETING THE COMMENTARY IN THE U.S. SENTENCING GUIDELINES

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#### I. INTRODUCTION

In 2014, inmate Keith White was serving a sentence at an Indiana Correctional Facility when he was charged with conspiracy to distribute heroin for running a drug ring in the facility with another inmate.<sup>1</sup> Because White had two state felony convictions for cocaine distribution, his offense level and

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<sup>1</sup> *United States v. White*, 97 F.4th 532, 532 (7th Cir. 2024).

criminal history category were raised per the United States Sentencing Guidelines' ("Guidelines") career-offender provision.<sup>2</sup> With an elevated offense level to 31 and a criminal history category of VI, White's range for sentencing was 188 to 235 months in prison (approximately 15–19 years).<sup>3</sup> Although White was sentenced below the Guideline range, he challenged his designation as a "career-offender."<sup>4</sup> At the time of White's sentencing, the Guidelines did not address whether inchoate offenses—such as the conspiracy charge for which White was convicted—met the definition of either a "controlled substance offense" or a "crime of violence."<sup>5</sup> However, the Sentencing Commission, in the commentary of the Guidelines, clarified that a "controlled substance offense" or "crime of violence" includes inchoate offenses such as "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."<sup>6</sup> White asserted the Guidelines commentary is owed no deference because of the Supreme Court's decision in *Kisor*, which held that an agency's regulatory definition is awarded deference "only if a regulation is genuinely ambiguous."<sup>7</sup> White believed the terms "controlled substance offense" and "crime of violence" in Guidelines section 4B1.2(b) were not ambiguous. The Seventh Circuit rejected White's argument, instead determining that, although *Kisor* did lower the level of deference, it did not ultimately "disturb" the Supreme Court's decision in *Stinson*, which held that the commentary in the Guidelines is ultimately authoritative unless the district court had a "plainly erroneous reading" of the commentary.<sup>8</sup>

Meanwhile, in 2017 in Knoxville, Tennessee, Jeffrey

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<sup>2</sup> The career offender designator is designed to raise the offense level of offenders who have "(1) an offense of conviction which is a felony 'crime of violence' or 'controlled substance offense' and (2) the defendant has two or more prior felony convictions for a 'crime of violence' or 'controlled substance offense.'" *Id.* See U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2021).

<sup>3</sup> White, 97 F.4th at 536.

<sup>4</sup> *Id.* at 537.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 536.

<sup>7</sup> *Id.* at 535; *Kisor v. Wilkie*, 588 U.S. 558, 581 (2019).

<sup>8</sup> White, 97 F.4th at 535; *Stinson v. United States*, 508 U.S. 36, 38 (1993).

Havis pled guilty to possessing a firearm as a felon.<sup>9</sup> His conviction under 18 U.S.C. § 922(g) was subject to a hefty enhancement because of a previous state conviction in Tennessee for what the district court determined was a qualifying “controlled substance offense.”<sup>10</sup> Havis’s Tennessee conviction was based on the “sale, delivery, or both” for cocaine. “Delivery” in the state code referred to “the actual, constructive, or attempted transfer” of a controlled substance; therefore, Havis appealed the district court’s sentencing because, similar to White’s argument above, the Guidelines’ definition of a “controlled substance offense” does not include inchoate crimes.<sup>11</sup> Unlike the Seventh Circuit, however, the Sixth Circuit, en banc, agreed with Havis’s (and White’s) argument. The court concluded that the Commission’s expanded definition of a “controlled substance offense” to include attempt crimes in the commentary should receive no deference because, by including “attempt” in the commentary rather than the Guidelines, the Commission exceeded their constitutional reach.<sup>12</sup> Havis was resentenced without his state conviction in question as a basis for increasing his offense level.<sup>13</sup> While not explicitly citing to *Kisor*, the Sixth Circuit in *Havis* echoes *Kisor*’s holding that the Guidelines’ commentary does not receive significant deference.<sup>14</sup>

Keith White’s and Jeffrey Havis’s cases demonstrate a circuit disagreement which is now “quite entrenched.”<sup>15</sup> The Seventh Circuit, along with the First, Second, Fifth, Eighth, and Tenth Circuits, assert the position of *Stinson*, that the United States Sentencing Guidelines commentary is “authoritative unless it violates the Constitution or a federal statute, or is

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<sup>9</sup> *United States v. Havis*, 927 F.3d 382, 382 (6th Cir. 2019). See 18 U.S.C. § 922(g).

<sup>10</sup> *Havis*, 927 F.3d at 382. See U.S. SENT’G GUIDELINES MANUAL § 2K2.1(a)(4)–(6) (U.S. SENT’G COMM’N 2021).

<sup>11</sup> *Havis*, 927 F.3d at 382.

<sup>12</sup> *Id.* at 387. See *United States v. Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018).

<sup>13</sup> *Havis*, 927 F.3d at 387.

<sup>14</sup> The Sixth Circuit does cite to *Stinson* several times in *Havis* to support the notion that they would not support an interpretation of the commentary that was “plainly erroneous.” *Id.* at 386.

<sup>15</sup> *United States v. White*, 97 F.4th 532, 539 (7th Cir. 2024); U.S. SENT’G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT’G COMM’N 2021).

inconsistent with, or a plainly erroneous reading of, that guideline,” effectively *Auer* deference.<sup>16</sup> Conversely, the Third, Sixth, Ninth, and Eleventh Circuits hold the position of *Kisor* – that *Auer* deference is only applicable “if a regulation is genuinely ambiguous . . . even after a court has resorted to all the standard tools of interpretation.”<sup>17</sup>

This note begins by arguing that the Supreme Court will support interpreting the Guidelines commentary in accordance with the Third, Sixth, Ninth, and Eleventh Circuits, and that *Kisor* has overridden the previous precedent in *Stinson*. It then examines the history of the United States Commission and Guidelines and explains how the courts utilize the Guidelines in practice. The Guidelines were established out of Congress’s delegation of power to a bipartisan judicial agency.<sup>18</sup> After determining the base offense level, accounting for adjustments, and assigning a criminal history level, the court utilizes the range from the Guidelines to sentence the offender.<sup>19</sup> Although the Guidelines are no longer mandatory after the Supreme Court’s decision in *Booker*, it remains the “starting point and initial benchmark” for sentencing in the federal system.<sup>20</sup> The court can depart from the Guidelines’ range when considering factors in 18 U.S.C. 3553(a).<sup>21</sup> Finally, this note explains the current circuit split on interpreting the Guidelines commentary and what, if any, insight the recent Supreme Court decision in *Loper Bright* offers regarding the future of *Auer* deference in sentencing.<sup>22</sup> Part IV argues that the precedent established by the Third, Sixth, Ninth, and Eleventh circuits aligns with the Roberts Court’s traditional interpretation of administrative agencies’ role in the federal system, but also concedes that, in light of the Court overturning *Chevron* deference in *Loper Bright*,

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<sup>16</sup> *Stinson v. United States*, 508 U.S. 36, 38 (1993).

<sup>17</sup> *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019).

<sup>18</sup> U.S. SENT’G GUIDELINES MANUAL ch. 1 (U.S. SENT’G COMM’N 2023).

<sup>19</sup> *Id.* at §1B1.1.

<sup>20</sup> *United States v. Booker*, 543 U.S. 220 (2005); *Gall v. United States*, 552 U.S. 38, 49 (2007).

<sup>21</sup> 18 U.S.C. § 3553(a).

<sup>22</sup> *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024); *Auer v. Robbins*, 519 U.S. 452 (1997).

it is not beyond the pale that this Court could choose a “third door” and overturn *Auer* deference completely, if not only as it relates to criminal defendants.

## II. BACKGROUND

### A. A BRIEF HISTORY OF THE UNITED STATES SENTENCING COMMISSION AND GUIDELINES

Congress passed the Comprehensive Crime Control Act of 1984 in an effort to reform the U.S. criminal code for the first time since the early 1900s.<sup>23</sup> The Act prompted reform in Title II of the Comprehensive Crime Control Act, also known as The Sentencing Reform Act of 1984 (“SRA”). Congress created the United States Sentencing Commission (“Commission”) as an independent advisory agency within the judicial branch.<sup>24</sup> The Commission is comprised of seven voting members and two non-voting members, who are nominated by the President and confirmed by the Senate.<sup>25</sup> As no more than four voting members can be from the same political party, the Commission is inherently bipartisan.<sup>26</sup> At least three members must be current federal judges.<sup>27</sup> Although the Commission is admittedly “an unusual hybrid in structure and authority” with elements of both legislative and judicial power, it is still “fully accountable to Congress.”<sup>28</sup> Congress delegated to the Commission broad, non-adjudicative authority to realign the federal sentencing scheme with the purpose behind punishment in the United States—a delicate balance of deterrence, incapacitation, and rehabilitation—through the

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<sup>23</sup> See generally Comprehensive Crime Control Act of 1984, S.1762, 98th Cong. (as passed by Senate Feb. 2, 1984).

<sup>24</sup> U.S. SENT’G GUIDELINES MANUAL ch. 1 (U.S. SENT’G COMM’N 2023).

<sup>25</sup> *Basics of Federal Sentencing I: The Evolution of Federal Sentencing*, U.S. SENT’G COMM’N, [https://www.ussc.gov/sites/default/files/elearning/2020-basics-of-federal-sentencing-i/index.html#/lessons/TpX\\_jtoNGw\\_qEOp1pg4IjzXjlcnbbyJy](https://www.ussc.gov/sites/default/files/elearning/2020-basics-of-federal-sentencing-i/index.html#/lessons/TpX_jtoNGw_qEOp1pg4IjzXjlcnbbyJy) (last visited July 12, 2025).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Mistretta v. United States*, 488 U.S. 361, 393-94, 412 (1989).

creation of Guidelines and policy statements.<sup>29</sup> To accomplish this, Congress had three guiding principles.

First, the Commission had no greater goal than to tackle system-wide disparities in federal sentencing and establish greater sentencing consistency amongst federal districts.<sup>30</sup> Congress explicitly directed the Commission to provide “certainty and fairness” in the sentencing process.<sup>31</sup> Prior to the Guidelines, “[e]ach judge [was] left to apply his own notions of the purposes of sentencing. . . . As a result, every day federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.”<sup>32</sup> The Guidelines thus function as, from Congress’s perspective, an essential check on judicial power in sentencing.

Second, prior to the SRA, a lack of honesty plagued defendants’ sentencing, not intentionally, but in application. The overwhelming power of parole boards, as a product of indeterminate sentencing, provided little clarity to the public and even the offender himself as to how much time he would be sentenced to by the court. Moreover, offenders were routinely serving as little as one-third of the court-imposed sentence, effectively gutting the ability of courts to incapacitate offenders.<sup>33</sup> This led to the elimination of parole at the federal level and a transition to determinate sentencing to ensure a defendant was serving the entirety of his sentence.<sup>34</sup> The federal government used a funding incentive to encourage states to pass “truth in sentencing” statutes to ensure offenders, particularly violent offenders, served a “substantial portion” of their sentences.<sup>35</sup>

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<sup>29</sup> *Basics of Federal Sentencing I*, *supra* note 26.

<sup>30</sup> William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 69 (1993).

<sup>31</sup> 28 U.S.C.S. § 994(f).

<sup>32</sup> *Basics of Federal Sentencing I*, *supra* note 26.

<sup>33</sup> U.S. SENT’G GUIDELINES MANUAL ch. 1 (U.S. SENT’G COMM’N 2023).

<sup>34</sup> The transition to determinate sentencing did not impact a prisoner’s ability earn “good time” under 18 U.S.C. § 3624(b). Good time can reduce the sentence by up to approximately fifteen percent.

<sup>35</sup> U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, NCJ 170032, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS (Jan. 1999), <https://bjs.ojp.gov/content/pub/pdf/tssp.pdf>.

Third, Congress placed a high value on the proportionality of the sentence to the severity of the offense committed.<sup>36</sup> This inherently creates strife with the first goal of uniformity because although having fewer offense categories creates greater uniformity in sentencing, crucial aspects of the offense are omitted. This is detrimental to the idea that the term of months should be narrowly tailored to the type of offense.<sup>37</sup>

The Commission, in ushering in a new era of sentencing, presented to Congress the first iteration of the Guidelines in 1987.<sup>38</sup> However, because sentencing is “a dynamic field that requires continuing review,” the Commission is a permanent fixture and is instructed by Congress to revise and review the Guidelines annually to address application issues in the courts, the passing of new criminal statutes, and other policy concerns.<sup>39</sup> Additionally, the SRA instructs the Commission to collect and distribute data on federal sentencing and to provide training to legal professionals involved in the sentencing process.<sup>40</sup>

## B. AN EXPLANATION OF THE UNITED STATES SENTENCING GUIDELINES

The SRA detailed instructions for establishing the Guidelines, starting with creating categories for different offenses and categories for an offender’s history of criminal activity.<sup>41</sup> The court determines the offender’s sentencing range (in terms of months) based on the Guidelines first by calculating the offense level, then adjusting the level as appropriate, and finally considering factors such as an offender’s acceptance of responsibility and multiple counts of

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<sup>36</sup> U.S. SENT’G GUIDELINES MANUAL ch. 1.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> The Commission has the authority to send Congress the proposed amendments to the guidelines and updates to policy statements by May 1st annually. Congress then has 180 days to review. Should Congress not make pass legislation that modifies or declines the amendments by November 1<sup>st</sup>, they become effective as submitted by the Commission. *Basics of Federal Sentencing I, supra* note 26.

<sup>40</sup> *Basics of Federal Sentencing I, supra* note 26.

<sup>41</sup> Comprehensive Crime Control Act of 1984, S.1762, 98th Cong. (as passed by Senate Feb. 2, 1984).

conviction.<sup>42</sup> Next, the offender's criminal history level is calculated based on a points system that considers prior sentences to integrate policy considerations such as recidivism.<sup>43</sup>

### i. OFFENSE LEVEL

A Guideline sentencing calculation begins with an offense level, which can range from "1" to "43."<sup>44</sup> An offense's base level generally corresponds with its severity. For example, while a property crime such as trespass carries a base offense level of 4, aggravated assault carries a base offense level of 14, and first-degree murder carries a base offense level of 43.<sup>45</sup> The base offense level is the starting point and is subject to change at numerous points throughout the process of determining an offender's Guideline range.<sup>46</sup> An offense's base level is initially adjusted after determining if any "special offense characteristics" were involved.<sup>47</sup>

The offense level is vital to determining which type of sentence is to be imposed. For offense levels one through eight—Zone 1—the court may sentence the offender to probation (with or without conditions on confinement) or incarceration.<sup>48</sup> For offense levels nine through eleven—Zone 2—the court again may sentence the offender to probation or incarceration, but any probationary sentence must have some confinement component, whether that be a community

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<sup>42</sup> U.S. SENT'G GUIDELINES MANUAL § 1B1.1 (U.S. SENT'G COMM'N 2023).

<sup>43</sup> *Id.*

<sup>44</sup> *See infra* Appendix A

<sup>45</sup> U.S. SENT'G GUIDELINES MANUAL §§ 2B2.3, 2A2.2, 2A1.1.

<sup>46</sup> *Id.* at ch. 1.

<sup>47</sup> E.g., the Special Offense Characteristics under § 2A6.2. Stalking or Domestic Violence reads as follows: "If the offense involved one of the following aggravating factors: (A) the violation of a court protection order; (B) bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; (D) possession, or threatened use, of a dangerous weapon; or (E) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by 2 levels. If the offense involved more than one of subdivisions (A), (B), (C), (D), or (E), increase by 4 levels." *Id.* at § 2A6.2.

<sup>48</sup> *Id.* at ch. 1.

confinement, home detention, or other measure.<sup>49</sup> For offense levels twelve and thirteen—Zone 3—the court must sentence the offender to at least half of the minimum sentence to incarceration, while the remainder may be served under supervised release with a strong confinement component.<sup>50</sup> Offenders who commit offenses in levels thirteen through forty-three are generally subject to incarceration for the entirety of the sentence imposed. The Commission encourages the court to consider probation for nonviolent, first offenders whose offense level is in Zone A or B.<sup>51</sup>

## ii. CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

Criminal History is a prominent feature of the Guidelines because it assists in considering the general deterrence factor of sentencing.<sup>52</sup> In compliance with the congressional intent behind the Sentencing Reform Act, to “protect the public from future crimes,” the Guidelines’ criminal history categories consider “the likelihood of recidivism and future criminal behavior” and function under the premise that “[r]epeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.”<sup>53</sup>

There are six criminal history categories: I (0 or 1 point), II (2 or 3 points), III (4, 5, or 6 points), IV (7, 8, or 9 points), V (10, 11, or 12 points), and VI (13 or more points).<sup>54</sup> Because the Guidelines’ Sentencing Table is a matrix, a higher criminal history category is devastating for offenses in Zone D.<sup>55</sup>

While the offense categories operate on a “level” system, the criminal history categories operate on a points system, where every offender starts at zero and accrues points based upon each of his “prior sentence[s] of imprisonment.”<sup>56</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at ch. 4.

<sup>53</sup> *Id.*

<sup>54</sup> See *infra* Appendix A.

<sup>55</sup> E.g., the Guideline range for an offense level 20 with a criminal history category II is 37-46 months, while the range for the same offense level with a criminal history category IV is 51-63 months, a 30% increase in imprisonment time. See *infra* Appendix A.

<sup>56</sup> U.S. SENT’G GUIDELINES MANUAL § 4A1.1.

For purposes of the Guidelines, a “prior sentence” generally is one which was “imposed upon the adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.”<sup>57</sup> The points system is steep for offenders who have any criminal history – each prior sentence of imprisonment for at least sixty days equates to two points, and each prior sentence of imprisonment that exceeds a year and one month (usually as the result of felony convictions) equates to three points.<sup>58</sup> There are additional avenues in which an offender accrues points; notably, if an offender has seven or more points and commits an additional offense while subject to “probation, parole, supervised release, imprisonment, work release, or escape status,” it equates to an additional point.<sup>59</sup>

### iii. ADJUSTMENTS AND DEPARTURES

Although there are base offense levels and a starting criminal history category, there are various avenues for those levels and categories to be adjusted. Additionally, there are two notable provisions in the Guidelines that have the potential to significantly alter an offender’s Guideline range: the Career Offender and the Armed Career Criminal.

A career offender is one who has three (including the one for which the Guideline range is being determined) felony convictions for either a “controlled substance offense” or a “crime of violence.”<sup>60</sup> Offenders who are determined to be career offenders, like Keith White, who ran a heroin distribution ring in Indiana, are automatically assigned to criminal history category VI, regardless of what their actual point total calculation is without the career offender designation. It should be noted that almost half of career offenders would be in criminal history category VI even if the career offender

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<sup>57</sup> U.S. SENT’G GUIDELINES MANUAL § 4A1.2.(a)(1).

<sup>58</sup> U.S. SENT’G GUIDELINES MANUAL § 4A1.1.

<sup>59</sup> U.S. SENT’G GUIDELINES MANUAL § 4A1.1.(e).

<sup>60</sup> *Career Offenders*, U.S. SENT’G COMM’N <https://www.ussc.gov/research/quick-facts/career-offenders> (last visited July 11, 2025). For further discussion on the definitions of “controlled substance offense” and “crime of violence,” see generally U.S. SENT’G GUIDELINES MANUAL (U.S. SENT’G COMM’N 2023).

designation is not applied.<sup>61</sup> Additionally, the career offender designation is subject to higher offense levels that “bump up” to at or near the offense’s statutory maximum penalty.<sup>62</sup> In 2023, there were 1,351 cases involving career offenders, and in 91.8% of those cases, the career offender designation increased the Guideline range.<sup>63</sup> The average sentence for a career offender in 2023 was 154 months, and 50.9% of career offenders were sentenced to a range of ten to twenty years.<sup>64</sup> Notably, more than two-thirds of career offenders in 2023 were convicted of offenses with mandatory minimums, leaving it unclear as to what effect the career offender designation had on an upward departure from the sentence imposed.<sup>65</sup>

Although armed career criminals comprise a minuscule number of the federal offenders, their impact is devastating; not only do more than 80% of armed career criminals have a history of violent offenses, but almost two-thirds are rearrested within eight years.<sup>66</sup> To combat this high recidivism rate for violent offenders, the Armed Career Criminal Act addresses the incapacitation purpose behind punishment by raising the penalties for the sentences imposed. The Armed Career Criminal Act imposes a “15-year mandatory minimum” term of imprisonment for offenders who violate 18 U.S.C. § 922(g) and have three or more prior convictions for a “violent felony,” a “serious drug offense,” or “both.”<sup>67</sup> Although “violent felony” and “serious drug offense” are not duplicate definitions of the “crime of violence” and “controlled substance offense,” the offense level for an armed career criminal is raised from the applicable offense level to level 33 or 34 if the offender

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<sup>61</sup> U.S. SENT’G GUIDELINES MANUAL §4B1.1. (“A career offender’s criminal history category in every case under this subsection shall be Category VI.”); *Career Offenders*, *supra* note 61.

<sup>62</sup> *Career Offenders*, *supra* note 61.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> In 2019, ACCs were less than 1% of offenders sentenced but over 90% of ACCs were in the three highest criminal history categories IV, V, and VI. U.S. SENT’G COMM’N, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 7, 18 (2021).

<sup>67</sup> 18 U.S.C. 924(e); U. S. SENT’G COMM’N, *supra* note 67 at 4.

“possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b).”<sup>68</sup> Additionally, the criminal history category is often shifted to either category IV or category VI, again if offender’s possession of the firearm or ammunition was connected to the above offenses.<sup>69</sup> Similar to career offenders, armed career criminals receive increased sentences when they do not assist the government and are sentenced to an average of 206 months in prison.<sup>70</sup>

A common adjustment in favor of the offender is for “Acceptance of Responsibility.”<sup>71</sup> An offender qualifies for an offense level decrease of two levels if his base level was 16 or greater and he “assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty.”<sup>72</sup>

iv. 18 U.S.C. § 3553(a)

The Guidelines remain the “starting point and initial benchmark” for sentencing in the federal system.<sup>73</sup> However, in *Booker*, the Supreme Court settled a mounting issue and definitively held if the Guidelines were mandatory, it would be “incompatible with the United States Supreme Court’s constitutional holding that the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing.”<sup>74</sup> After *Booker*, the court is required to consider the Guideline ranges, but is permitted to deviate from the guidelines by considering a series of factors identified in 18 U.S.C. § 3553(a):

[1] the nature and circumstances of the offense and the history and characteristics of the defendant . . . [2] the need for the sentence imposed—(A) to reflect the seriousness of the

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<sup>68</sup> U.S. SENT’G GUIDELINES MANUAL § 4B1.4 (U.S. SENT’G COMM’N 2023).

<sup>69</sup> *Id.*

<sup>70</sup> U.S. SENT’G COMM’N, *supra* note 67 at 7.

<sup>71</sup> U.S. SENT’G GUIDELINES MANUAL § 3E1.1.

<sup>72</sup> *Id.*

<sup>73</sup> *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007) (citation modified).

<sup>74</sup> *United States v. Booker*, 543 U.S. 220, 226 (2005).

offense, to promote respect for the rule of law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . [3] the kinds of sentences available . . . [4] the sentencing guidelines . . . [5] any relevant policy statement . . . [6] the need to avoid unwarranted sentence disparities [among defendants with similar records who have been found guilty of similar conduct] . . . [7] the need to provide restitution to any victim[s of the offense].<sup>75</sup>

Although a sentence imposed by a district court within the correctly calculated Guideline range has a presumption of reasonableness, courts are currently sentencing outside the Guidelines at a higher frequency than within them.<sup>76</sup> When a court does depart from the Guideline range, the departure is much more likely to be a downward departure.<sup>77</sup>

### C. THE COMMENTARY, AMENDMENTS, AND POLICY STATEMENTS

After the initial Guidelines were presented to and passed by Congress, the Supreme Court, through a series of rulings, held not only that the Guidelines are constitutionality permissible but affirmed that the Commission's role is active

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<sup>75</sup> 18 U.S.C. § 3553(a).

<sup>76</sup> See *Rita v. United States*, 551 U.S. 338, 351 (2007); U.S. SENT'G COMM'N, UNITED STATES SENTENCING COMMISSION QUARTERLY DATA REPORT: 3RD QUARTER RELEASE 11 (2024) (From October 1, 2023, through June 30, 2024, 45.3% of federal sentences were within the Guideline range.).

<sup>77</sup> U.S. SENT'G COMM'N, *supra* note 77. (From October 1, 2023, through June 30, 2024, downward departures account for 21.3% and downward variances for 29.6%, while upward departures account for .5% and upward variances for 3.3%.).

and ongoing.<sup>78</sup> In *Mistretta v. United States*, the Supreme Court rejected nondelegation and separation of powers challenges against the Guidelines themselves and the role of the Commission and noted that, although Congress had delegated “significant discretion” to the Commission, it had done so properly.<sup>79</sup> The Supreme Court later in *Booker* clarified that while the Guidelines are merely advisory, rather than mandatory, district courts must consider them during sentencing.<sup>80</sup> Additionally, the Court noted that the Commission role “remains in place” and the Guidelines “continue to move sentencing in Congress’ preferred direction.”<sup>81</sup> Two years later, the Supreme Court in *Rita* confirmed that the “Commission’s work is ongoing [because] [t]he statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.”<sup>82</sup> The Commission’s “active and ongoing” role is present in the continual revision of the Guidelines<sup>83</sup>

Under each of the Guideline sections, there are “Application Notes” or commentary.<sup>84</sup> This commentary puts forth practical direction by defining offense elements, providing background information, and offering examples in a similar manner to restatements.<sup>85</sup> The United States Sentencing Commission’s stated purpose for the commentary is that it may “interpret the guideline [that it accompanies] or explain how is

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<sup>78</sup> *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *Booker*, 543 U.S. at 264-65; *Rita*, 551 U.S. at 347-48.

<sup>79</sup> *Mistretta*, 488 U.S. at 379.

<sup>80</sup> *Booker*, 543 U.S. at 264.

<sup>81</sup> *Id.*

<sup>82</sup> *Rita*, 551 U.S. at 350.

<sup>83</sup> U.S. SENT’G GUIDELINES MANUAL ch. 1 (U.S. SENT’G COMM’N 2023).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (e.g., “Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not within the scope of the jointly undertaken criminal activity (i.e., the forgery of the \$800 check”), U.S. SENT’G GUIDELINES MANUAL §1B1.3 cmt. n.4 (U.S. SENT’G COMM’N 2015)).

to be applied” by providing background information behind the “underlying promulgation of the guideline”.<sup>86</sup> The Commission additionally asserts that the commentary is the “legal equivalent of a policy statement.”<sup>87</sup> Even so, while the Guidelines are subject to congressional review, importantly, the commentary to those Guidelines is not because it is an “interpretation of, not additions to, the Guidelines themselves.”<sup>88</sup>

The Guidelines are amended annually as part of the Commission’s ongoing duty to ensure compliance with Congress’s three objectives: honesty, uniformity, and proportionality in sentencing.<sup>89</sup> While the aim is for a symbiotic relationship between the courts and the Commission, there have been notable points of incongruity.<sup>90</sup> One of the most recent amendments, which took effect on November 1, 2024, prohibits courts from considering acquitted charges under “relevant conduct” for sentence calculation.<sup>91</sup> Although this change is supported across both ends of the political spectrum, sentencing reform supporters argue the amendment is too narrow because it continues to grant courts discretion to include uncharged and dismissed conduct.<sup>92</sup> Additionally, the

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<sup>86</sup> U.S. SENT’G GUIDELINES MANUAL §1B1.7 (U.S. SENT’G COMM’N 2023).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See generally U.S. SENT’G GUIDELINES MANUAL.

<sup>90</sup> See, e.g., Note: *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 HARV. L. REV. 994, 1004 (2017) (“The Commission’s take on youth appears to be out of step with the Supreme Court’s recent juveniles-are-different sentencing jurisprudence . . .”). See e.g., Letter from Thomas M. Susman, A.B.A. to Honorable Patti B. Saris, U.S. Sent’g Comm’n (Feb. 14, 2011), [https://www.ussc.gov/sites/default/files/pdf/amendment-](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110826/Susman_ABA_pubcom_priorities.pdf)

[process/public-comment/20110826/Susman\\_ABA\\_pubcom\\_priorities.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110826/Susman_ABA_pubcom_priorities.pdf) (urging the Commission to reexamine sentencing for economic crimes when the guidelines resulted in “virtually any defendant in the cases featured in the media run-up to the Sarbanes-Oxley Act [facing] an advisory range of life without parole.”).

<sup>91</sup> Holly Barker, *Major Amendments to Sentencing Guidelines to Take Effect Friday*, BLOOMBERG L. NEWS (Nov. 1, 2024), [https://www.bloomberglaw.com/bloomberglawnews/litigation/X1T1997K000000?bna\\_news\\_filter=litigation#jcite](https://www.bloomberglaw.com/bloomberglawnews/litigation/X1T1997K000000?bna_news_filter=litigation#jcite)

<sup>92</sup> *Id.*

Commission is increasingly responding to criticism and discord regarding the commentary by simply moving the disputed commentary into the guideline, affording greater deference.<sup>93</sup>

### III. ISSUE

“Two roads diverged in a yellow wood” and the circuits are sorry to have traveled both.<sup>94</sup> The split on what level of deference should be granted to the United States Sentencing Commission’s commentary in the Guidelines is “quite entrenched.”<sup>95</sup> Examining each side of this entrenchment requires first explaining the contested standard of deference in question, *Auer* deference.

First, *Auer* deference is distinct from its notorious counterpart: *Chevron* deference.<sup>96</sup> Originally a case focused on overtime payments for a group of police officers under the Fair Labor Standards Act, the Court in *Auer v. Robbins* confirmed that because the contested salary-basis test was a *regulation* created under the authority of the Secretary of Labor, the Department of Labor’s interpretation of the test as applied to the officers was controlling unless it was determined to be “plainly erroneous or inconsistent with the regulation.”<sup>97</sup> The Court also confirmed that an agency’s interpretation of its own regulation as merely “arbitrary” and “capricious” is not sufficient to deny deference.<sup>98</sup> Though the Court cites to *Chevron* when it holds that the Secretary of Labor’s interpretation be sustained, *Auer* deference is generally applied when

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<sup>93</sup> *Id.* (“Another amendment revises the guideline for calculating economic loss by incorporating commentary regarding ‘intended loss’ into the guideline itself. The amendment is intended to resolve a circuit split over the commentary.”).

<sup>94</sup> Robert Frost, *A Group of Poems: “Birches,” “The Road Not Taken,” and “The Sound of Trees,”* THE ATL. MONTHLY (Aug. 1915).

<sup>95</sup> *United States v. White*, 97 F.4th 532, 539 (7th Cir. 2024).

<sup>96</sup> David L. Portilla & Will Coffee Giles, *Kisor v. Wilkie: A New limit on Agency Deference and Its Implications for Banking Organizations*, A.B.A. (Jan. 14, 2020), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2020-january/kisor-v-wilkie/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2020-january/kisor-v-wilkie/).

<sup>97</sup> *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

<sup>98</sup> *Id.* at 459.

considering an agency's interpretation of its own regulations, while *Chevron* is appropriate to implement when the agency's interpretation of a statute relevant to its decision-making authority is in question.<sup>99</sup>

Second, though not as frequently invoked as *Chevron*, it is difficult to understate *Auer* deference's supporting role in bolstering the administrative states over the past twenty years. In an empirical study of approximately 1000 Supreme Court cases between 1984 and 2006 where the Court was considering an agency's interpretation of its own regulations (155 cases) the Court deferred to the agency's interpretation in 90.9% of cases.<sup>100</sup> Because *Auer* and *Chevron* address tangential questions, the Court's most recent ruling on matters related to *Chevron*, *Loper Bright*, is valuable as a predictive indicator of its predilections on *Auer*.

#### A. THE CIRCUITS ON THE QUESTION OF DEFERENCE TO THE USSG'S COMMENTARY

The defendant in *Stinson* sought to challenge his status as a career offender based on his conviction for possession of a firearm by a convicted felon in violation of 18 U.S.C. §922(g).<sup>101</sup> His challenge originated from an amendment to the Guidelines,

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<sup>99</sup> See *id.* at 457 (1997) ("Because Congress has not 'directly spoken to the precise question at issue,' we must sustain the Secretary's approach so long as it is 'based on a permissible constitution of the statute.'") (quoting *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)); Portilla & Giles, *supra* note 97. ("In short, application of the doctrines depends on whether the agency interpretation is of a regulation or a statute.")

<sup>100</sup> See William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L. J. 1083, 1104 (2008). ("One partial explanation is that the Court was more likely to invoke the deference regime when it was prepared to uphold the agency's view. The agency win rate for cases where the Court invoked *Seminole Rock* (or an analogous precedent) was an outstanding 90.9%. This is significantly higher than the win rate for those *Seminole Rock*-eligible cases where *Seminole Rock* was not invoked, which was 75.0% (not unimpressive).")

<sup>101</sup> *Stinson v. United States*, 508 U.S. 36, 38 (1993).

which only became effective after his conviction was upheld<sup>102</sup> The new commentary under section 4B1.2 reads<sup>103</sup> that the court of appeals denied the defendant's petition that the amendment should be applied retroactively and held that the Guidelines' commentary is limited in authority rather than binding on federal courts because Congress "does not review amendments to the commentary under 28 U.S.C. §944(p)."<sup>104</sup> The Supreme Court rejected the court of appeals' reasoning, relying primarily on a previous ruling in *Williams v. United States*, which posited that a policy statement in the Guidelines is "an authoritative guide."<sup>105</sup> The Court bolsters its holding with a hearkening back to *Seminole Rock*, confirming that, assuming constitutionality, an agency's interpretation of its own regulations, as applied to the United States Sentencing Commission and the Guidelines Manual, has "controlling weight unless is it is plainly erroneous or inconsistent with the regulation."<sup>106</sup> The latest iteration of the Guidelines, in its description of the weight and significance of the commentary, cites to *Stinson*.<sup>107</sup>

The Court's holding in *Stinson* resulted in decades of "almost reflexive[]" deference to the Sentencing Commission's interpretation of its own Guidelines through policy statements

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<sup>102</sup> *Id.* at 39.

<sup>103</sup> *Id.* (quoting U.S. SENT'G GUIDELINES MANUAL app. C (U.S. SENT'G COMM'N 1992)).

<sup>104</sup> *Id.* at 39-30.

<sup>105</sup> *Id.* at 42-43. ("Our holding in *Williams* dealing with policy statements applies with equal force to the commentary here before us.").

<sup>106</sup> *Id.* at 45. (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (Note: Courts today will frequently use "Auer" and "Seminole Rock" deference interchangeably. The Court here references *Seminole Rock* as *Auer v. Robbins* would not be deciding until five years after *Stinson*.); *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019) ("This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it.").

<sup>107</sup> See U.S. SENT'G GUIDELINES MANUAL §1B1.7 (U.S. SENT'G COMM'N 2023) ("Commentary in the *Guidelines Manual* that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." (quoting *Stinson*, 508 U.S. at 38)).

and commentary.<sup>108</sup> However, the circuits began fracturing when the Supreme Court seemingly withdrew from its full endorsement of agency deference in *Kisor v. Wilkie* in 2019.<sup>109</sup> Notably, the facts of *Kisor* are not related to the Guidelines like *Stinson* is; however, this is not an indication that the Court's ruling in *Kisor* is inapplicable to how the courts interpret the commentary in the Guidelines.<sup>110</sup> Though the Court admittedly did not discard *Auer* deference, *Kisor* is a firm limitation on when applying *Auer* deference is appropriate and when it is not.<sup>111</sup> As a starting point, there is a presumption that an agency has the power, as a part of its lawmaking powers delegated from Congress, to "authoritatively interpret its own regulations."<sup>112</sup> But that does not mean applying *Auer* deference is "the answer to every question of interpreting an agency's rules."<sup>113</sup> The Court put forth a series of requirements necessary for an agency to receive *Auer* deference.<sup>114</sup> The regulation must be "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation."<sup>115</sup> The agency's interpretation of the regulation must be "reasonable[.]" meaning that it "must come within the zone of ambiguity the court has identified after employing all its interpretive tools."<sup>116</sup> The court must then analyze the "character and context" of the agency's reading to determine if it is entitled to deference.<sup>117</sup> The interpretation of the regulation must be the agency's "authoritative" or "official position[.]" which stems from the

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<sup>108</sup> Holly Barker, *SCOTUS Asked to End Split Over Sentencing Commission Commentary*, BLOOMBERG L. NEWS (Dec. 4, 2023), [https://www.bloomberglaw.com/bloomberglawnews/litigation/XFJUTHO0000000?bna\\_news\\_filter=litigation#jcite](https://www.bloomberglaw.com/bloomberglawnews/litigation/XFJUTHO0000000?bna_news_filter=litigation#jcite).

<sup>109</sup> See generally *Kisor v. Wilkie*, 588 U.S. 558 (2019).

<sup>110</sup> See *id.* at 564 ("The question whether to overrule *Auer* does not turn on any single application, whether right or wrong, of that decision's deference doctrine.").

<sup>111</sup> *Id.* at 563.

<sup>112</sup> *Id.* at 569. ("Consider that if you don't know what some text . . . means, you would probably want to ask the person who wrote it.").

<sup>113</sup> *Id.* at 573.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 576.

<sup>117</sup> *Id.*

agency's "substantive expertise" in the subject matter.<sup>118</sup> Finally, the interpretation must be viewed in light of fairness and justice and not merely as a pretense for purposes of litigation.<sup>119</sup> By the end of this factor test, the Court has left us with a deference "not quite so tame as some might hope, but nearly so meaning as they fear."<sup>120</sup>

As of November 2024, the First, Second, Fifth, Seventh, and Tenth Circuits uphold *Stinson's* ruling and defer to the commentary in the Guidelines, "even if it expands its scope" of the Guidelines themselves.<sup>121</sup> The First Circuit recently upheld a petitioner's sentence after he plead guilty for his role in a bank fraud and was sentenced based on the commentary's definition in section 2b1.1 of "loss" as "the greater of actual loss or intended loss," raising his total offense level by twelve levels.<sup>122</sup> The ruling demonstrates the First Circuit's doubts that *Kisor* has ousted *Stinson*.<sup>123</sup> Notably, until the most recent publication of the Guidelines Manual, the term "loss" was solely defined in the commentary and not within the Guideline of section 2b1.1 itself.<sup>124</sup> The Second Circuit echoed the First Circuit's holding regarding the commentary's definition in section 2b1.1 of loss.<sup>125</sup> The Fifth Circuit held that "*Stinson* squarely applies to the [G]uidelines commentary at issue here and was not overturned or modified by *Kisor*" when affirming a petitioner's sentence as a career offender under section 4B1.1(a) based on the definition of a "controlled substance offense" in the

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<sup>118</sup> *Id.* at 577.

<sup>119</sup> *Id.* at 579.

<sup>120</sup> *Id.* at 580.

<sup>121</sup> Barker, *supra* note 109.

<sup>122</sup> *United States v. Gadson*, 77 F.4th 16, 19-20 (1<sup>st</sup> Cir. 2023).

<sup>123</sup> *Id.* at 20. ("And even assuming *Kisor* abrogated *Stinson*, and further assuming that the district court committed error by using intended, any such error was not 'clear and obvious.'").

<sup>124</sup> The latest version of the Guidelines Manual took effect on November 1, 2024. U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2024).

<sup>125</sup> *United States v. Rainford*, 110 F.4th 455, 475 (2<sup>nd</sup> Cir. 2024) ("Here, the application note defining loss [in the commentary of § 2b1.1] is neither inconsistent with nor a plainly erroneous reading of the guideline.").

Guidelines and commentary of section 4B1.2(b).<sup>126</sup> The Seventh Circuit determined that Keith White's designation as a career offender was also proper under the same Guideline and commentary of section 4B1.2(b) because *Kisor* ultimately did not "disturb" *Stinson*.<sup>127</sup>

Conversely, the Third, Sixth, Ninth, and Eleventh Circuits posit that *Kisor* has displaced *Stinson's* hardline deference to the Sentencing Commission.<sup>128</sup> The Third Circuit, when determining whether inchoate offenses are definitionally a "controlled substance offense" under the Guidelines, conceded it "ha[d] gone too far" in the deference given to the Guidelines' commentary and that, post-*Kisor* an "uncritical" interpretation is no longer the prevailing analysis.<sup>129</sup> The Sixth Circuit agreed, and noted *Kisor's* limitations prevent the commentary from expanding the scope of a Guideline.<sup>130</sup> The Ninth Circuit has echoed the "grave constitutional concerns" that reflective deference to the Guidelines pose.<sup>131</sup> The Eleventh Circuit stated that *Kisor* is affirmation that the commentary to the Guidelines should be analyzed under the same framework as agencies' interpretations of their own regulations as demonstrated in *Seminole Rock* and *Auer*.<sup>132</sup>

Meanwhile, The D.C. Circuit seems to lean toward the *Kisor* approach but fails to fully articulate it in explicit terms.<sup>133</sup> The Fourth Circuit suffers from internal strife, with conflicting decisions on which approach prevails.<sup>134</sup>

## B. *LOPER BRIGHT* AND THE DEATH OF *CHEVRON*

The administrative state was delt a devastating blow in the

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<sup>126</sup> *United States v. Vargas*, 74 F.4th 673, 678 (5<sup>th</sup> Cir. 2023).

<sup>127</sup> *United States v. White*, 97 F.4th 532, 535 (7<sup>th</sup> Cir. 2024).

<sup>128</sup> *Barker*, *supra* note 109.

<sup>129</sup> *United States v. Nasir*, 17 F.4th 459, 470-71 (3<sup>d</sup> Cir. 2021).

<sup>130</sup> *See United States v. Riccardi*, 989 F.3d 476, 485 (2021) ("So if the Commission could freely amend the guidelines by amending the commentary, it could avoid these notice-and-comment obligations. The healthy judicial review that *Kisor* contemplates thus will restrict the Commission's ability to do so.").

<sup>131</sup> *United States v. Castillo*, 69 F.4th 648, 663 (9<sup>th</sup> Cir. 2023).

<sup>132</sup> *United States v. Dupree*, 57 F.4th 1269, 1276-77 (11<sup>th</sup> Cir. 2023).

<sup>133</sup> *United States v. Vargas*, 74 F.4th 673, 678 (5<sup>th</sup> Cir. 2023).

<sup>134</sup> *Id.*

summer of 2024, when the Supreme Court overruled *Chevron* deference, a bedrock doctrine for agency deference, in *Loper Bright Enterprises v. Raimondo*. Under *Chevron*, if a statute was either silent or ambiguous, courts deferred to agency interpretations of their own statutes or regulations, even when the court may have a different interpretation.<sup>135</sup> Subsequent court decisions affirmed *Chevron* as the guiding star, rooted in a presumption that when there is ambiguity in an agency statute, Congress intends for the agency, not the courts, to resolve such ambiguities.<sup>136</sup> The reasoning follows that, because addressing ambiguities often involves policy considerations, agencies are “better equipped” than the courts to do so.<sup>137</sup>

*Loper Bright* is a sharp rejection of this reasoning.<sup>138</sup> In fact, the Court notes *Chevron* “gravely erred” in deviating from the “traditional tools of statutory construction” and that carte blanche deference to an agency’s own interpretation may be the “least appropriate” means of analysis.<sup>139</sup> The Court was notably troubled that *Chevron* and its progeny seemingly collides with The Administrative Procedure Act’s judicial review provision in §706, which states “the reviewing court shall decide all relevant questions of law,” and therefore “agency interpretation of statutes—like agency interpretations of the Constitution—are *not* entitled to deference.” Not only did the Court fully endorse the plain language of §706, it also asserted that the congressional intent supports the plain meaning.<sup>140</sup> The

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<sup>135</sup> *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-844 (1984) (“In such a case, a court may not substitute its own construction of statutory provision for a reasonable interpretation made by the administrator of an agency.”).

<sup>136</sup> *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-71. *See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

<sup>137</sup> *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 980.

<sup>138</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 373 (2024) (“Perhaps most fundamentally, *Chevron*’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.”).

<sup>139</sup> *Id.*

<sup>140</sup> 5 U.S.C. § 706 (“The Administrative Procedure Act”); *Loper Bright Enters.*, 603 U.S. at 393 (“The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning .

holding, though controversial in particular for its stare decisis analysis, squarely situated the Court back to its foundation.<sup>141</sup>

The axe to *Chevron* deference in *Loper Bright* demonstrates the Roberts Court's waning tolerance of a bloated administrative state and, when separation of powers is threatened, an argument of stare decisis is insufficient to hold the status quo.

#### IV. ARGUMENT

This issue is worthy of the Court's consideration, particularly given the significant liberty interest at hand. The *Stinson* side of the split is outdated and comes dangerously close to threatening the separation of powers due to the commentary not being subject to the same congressional review process as the Guidelines themselves. The *Kisor* side of the split is likely to be more tolerable to a majority of the Roberts Court because it accounts for a more robust analysis before providing deference and allows deference to be revoked; however, it still is an imperfect fit after the Court's ruling in *Loper Bright*. A circuit split is traditionally resolved by the Supreme Court finding one side of the split more persuasive than the other. However, this issue offers a unique third alternative: the Court could reject *Auer* deference in part, as it relates to the commentary in the Guidelines, or reject it completely.

##### A. THE SPLIT IS RIPE FOR REVIEW BY THE SUPREME COURT

While on the surface appearing minuscule, this issue is of profound importance and is meritorious of the Court's consideration. The Guidelines are utilized daily in federal courts and, although no longer mandatory, remain enormously

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. . . Section 706 'provide[d] that law questions of law are for courts rather than agencies to decide in the last analysis.'" (quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946)).

<sup>141</sup> See Thomas E. Nielsen & Krista A. Stapleford, *What Loper Bright Might Portend for Auer Deference*, HARV. L. REV.: BLOG ESSAYS (July 5, 2024), <https://harvardlawreview.org/blog/2024/07/what-loper-bright-might-portend-for-auer-deference/>.

influential on the federal sentencing process.<sup>142</sup> The degree of deference given to commentary in the Guidelines creates a concrete liberty interest. As demonstrated by Kevin White and Jeffrey Havis, the deviation between a *Stinson* supported interpretation and a *Kisor* supported interpretation of the commentary in the Guidelines could result in a variance of years, perhaps decades, of incarceration.<sup>143</sup>

It is true that the Commission updates the Guidelines annually, and amendments often address the rumblings of the lower courts.<sup>144</sup> However, this is not solely a discord regarding the interpretation of *one* commentary of the Guidelines, but rather a national “dispute about what deference courts should give to the commentary [as a whole] [which] cannot be resolved by the ‘Commission... on its own.’”<sup>145</sup> The circuits are in a deep conflict about which standard, *Stinson* or *Kisor*, is appropriate to apply, and the Supreme Court is the only body that can settle the chaos.

Alas, the Supreme Court denied certiorari to three cases in the 2023-2024 cycle squarely addressing this question, despite a near perfect circuit split.<sup>146</sup> Each of these cases was reviewed by a court of appeals that supports the *Stinson* standard of deference.<sup>147</sup> However, it is crucial to consider that certiorari was denied in these cases before the Court reached a resolution on *Loper Bright*. It is quite possible the denial of certiorari was not an endorsement of a strict *Stinson* standard of deference but instead an exercise in restraint until the Court established its abrogation of *Chevron*.

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<sup>142</sup> See *Peugh v. United States*, 569 U.S. 530, 544 (2013). (“[T]he Sentencing Commission’s data indicates that when a Guidelines range moves up or down, offenders’ sentences move with it.”).

<sup>143</sup> See *United States v. Booker*, 543 U.S. 220, 264; *Rita v. United States*, 551 U.S. 338, 351 (2007).

<sup>144</sup> See *Barker*, *supra* note 92.

<sup>145</sup> *Ratzloff v. United States*, 144 S. Ct. 554 (2023) (cert. denied) (quoting *United States v. Dupree*, 57 F.4th 1269, 1289 n.6 (Grant, J., concurring in the judgement) (11th Cir. 2023). (“[O]nly the Supreme Court will be able to answer that question.”)).

<sup>146</sup> *Vargas v. United States*, 145 S. Ct. 1067 (2024) (cert. denied); *Ratzloff v. United States*, 144 S. Ct. 554 (2023) (cert. denied); *Maloid v. United States*, 144 S. Ct. 1035 (2024) (cert. denied).

<sup>147</sup> See *id.*

## B. THE COURT'S HOLDING IN *STINSON* V. *UNITED STATES* IS INCONGRUENT WITH SUBSEQUENT RULINGS

It is true that the *Stinson* ruling initially brought clarity to how the Commission, as an agency under the judicial branch rather than the executive branch, interacted with administrative law.<sup>148</sup> However, that clarity diminished, even before *Kisor*, as the Court's subsequent rulings cast doubt on *Stinson*'s rationale. In *Booker*, for example, the Supreme Court cites to *Mistretta* and *Stinson* to demonstrate that "we have consistently held that the Guidelines have the force and effect of laws" but then confirms the Guidelines are not in fact mandatory.<sup>149</sup> Although *Booker* did not explicitly overrule *Stinson*, it began a slow erosion of its initial assertions.<sup>150</sup> Strife arose in the lower courts regarding *Stinson*'s reach in circumstances where the commentary fundamentally expands, rather than merely interprets, the Guidelines.<sup>151</sup>

Some circuits who support a *Kisor* approach assert that *Stinson* requires comports to *Kisor*.<sup>152</sup> Even the circuits who unequivocally apply *Stinson* are not blind to its faults. The Fifth Circuit conceded that the "precedent's best days are behind it."<sup>153</sup> Further, the Eighth Circuit admitted that *Kisor* may now undermine *Stinson*'s precedent.<sup>154</sup> While there may be a kernel of analysis worth salvaging, a *Stinson*-only approach has

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<sup>148</sup> *Stinson v. United States*, 508 U.S. 36, 44 (1993) ("Although the analogy is not precise because Congress has a role in promulgating the guidelines, we think the Government is correct in suggesting that the commentary be treated as an agency's interpretation of its own legislative rule.").

<sup>149</sup> *United States v. Booker*, 543 U.S. 220, 234 (2005). See generally John S. Action, *Notes and Case Comment: The Future of Judicial Deference to the Commentary of the United States Sentencing Guidelines*, 45 HARV. J.L. & PUB. POL'Y 349 (2022).

<sup>150</sup> *United State v. Douglas*, 634 F.3d 852, 862 n.1 (6th Cir. 2011) ("*Stinson* is still good law after *Booker*").

<sup>151</sup> Action, *supra* note 150.

<sup>152</sup> See *United States v. Dupree*, 57 F.4th 1269, 1276 (11th Cir 2023) ("[to] follow *Stinson*'s instructions to treat the commentary like an agency's interpretation of its own rule, we must apply *Kisor*'s clarification of Auer deference to *Stinson*").

<sup>153</sup> *United States v. Vargas*, 74 F.4th 673, 683 (5th Cir. 2023).

<sup>154</sup> *United States v. Rivera*, 76 F.4th 1085, 91 (8th Cir. 2023).

become unworkable.

Practically, a *Stinson* approach, one which grants significant deference to an agency, does not comport with the Roberts Court. As counsel in a recent petition for certiorari aptly framed the issue, “[t]he *Stinson* rule transforms the sentencing court’s task—from applying the Guidelines to applying the commentary.”<sup>155</sup>

### C. *KISOR* IS AN IMPERFECT FIT

The *Kisor* ruling, particularly in its advocacy for courts to engage in “all the traditional tools of construction[,]” is certainly more aligned with the framework of the Roberts Court than *Stinson*.<sup>156</sup> First, it is promising that, under *Kisor*, an agency interpretation can fail and be afforded little to no deference.<sup>157</sup> It also emphasizes that regulatory interpretation “remains in the hands of the courts.”<sup>158</sup>

However, even a *Kisor* approach still affords a significant level of deference to the commentary in the guidelines. Although Justice Keagan in *Kisor* states it is quite possible for an agency interpretation to not raise the level of deference assigned in *Auer*, it is difficult to conceive the deference not being awarded to the United States Sentencing Commission given the express authority delegated to it by Congress, even if the commentary to the Guidelines is not reviewed by Congress before implementation. Moreover, it has been established that historically, when *Auer* deference is invoked by courts, the agency received the requisite deference in approximately 91% of the cases.<sup>159</sup> Ultimately, the test in *Kisor* is somehow both too permissive and too complicated to functionally apply to the commentary in the Guidelines.

### D. *AUER* DEFERENCE, AS APPLIED TO THE GUIDELINES,

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<sup>155</sup> *Perales v. United States*, petition for writ of certiorari from the US Court of Appeals for the 5th Circuit.

<sup>156</sup> *Kisor v. Wilkie*, 588 U.S. 558, 558 (2019) (emphasis added).

<sup>157</sup> *Id.* at 576 (“And let there be no mistake: [Reasonableness] is a requirement an agency can fail.”).

<sup>158</sup> *Id.* at 584.

<sup>159</sup> Portilla & Giles, *supra* note 97.

COLLAPSES UNDER THE WEIGHT OF *LOPER BRIGHT*

It is impossible to ignore the resounding mandate given by the Roberts Court in *Loper Bright*: the role of the judiciary to “emphatically . . . say what the law is” is foundational to the separation of powers, and *Chevron*, far from being an aid to the judiciary in that endeavor, is an impediment.<sup>160</sup> While it is true that “deference to administrative agencies traces back to the late 19<sup>th</sup> century,” the majority was undeterred by the argument that *Chevron* should prevail based solely on precedent, even decades of it.<sup>161</sup> But what can the Court’s willingness to discard the “decaying husk” of *Chevron* predict regarding the resolution of the split in question?<sup>162</sup>

Quite a bit. In fact, the premises of *Loper Bright* and *Kisor* are intertwined: to what degree can agencies interpret their own statutes and regulations? The two cases are linked by Justice Kagan’s own admission that “just five years ago, this Court in *Kisor* rejected a plea to overrule *Auer v. Robbins*, which requires judicial deference to agencies’ interpretations of their own regulations. The case against overruling *Chevron* is at least as strong.”<sup>163</sup>

First, since the Guidelines’ first publication, there has been consternation regarding potential separation of powers concerns and the role of the Sentencing Commission, which remains unsatisfied by the court’s affirmations of the Commission’s constitutionality in *Mistretta v. United States*.<sup>164</sup> In *United States v. Castillo*, the 9th Circuit cautions that “the Sentencing Commission’s lack of accountability in its creation and amendment of the commentary raises constitutional concern when we defer to the commentary . . . particularly because of the extraordinary power the Commission has over

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<sup>160</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 369 (2024).

<sup>161</sup> See Nielsen & Stapleford, *supra* note 142. See generally *Loper Bright Enters.*, 603 U.S. at 369.

<sup>162</sup> *Loper Bright Enters.*, 603 U.S. at 410.

<sup>163</sup> *Id.* (Kagan, J., dissenting) (internal citations omitted).

<sup>164</sup> *Mistretta v. United States*, 488 U.S. 361, 379 (1989) (“the Framers did not require—and indeed rejected—the notion that three branches must be entirely separate and distinct”). See, e.g., *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 443 (1977).

individuals' liberty interests."<sup>165</sup> In fact, because the Guidelines are inherently applied in criminal cases, any use of *Auer* deference to the commentary, whether it be the strict *Stinson* approach or the looser *Kisor* approach, is a canary in a coal mine to the judiciary being deprived of its core function and granting the Commission unchecked power.<sup>166</sup> The commentary poses particular issues because, unlike the Guidelines themselves, it is not necessarily subject to notice and comment.<sup>167</sup> Although it is current practice that the comments have some level of congressional oversight, "the Sentencing Commission has explicitly reserved the right to adopt new commentary without notice and without submitting the proposed changes in commentary to Congress."<sup>168</sup> It is also noteworthy that the Commission has previously addressed circuit splits by moving the contested portions of the commentary into the Guidelines themselves, thus affording them greater deference.<sup>169</sup> This separation of powers concern is likely to be renewed and reinvigorated in a post-*Loper Bright* landscape.

Second, one of the strongest arguments for agency deference in interpretation is that of the "expert" analysis – because agency regulations often involve specific knowledge of subject matter outside of the law (science, medicine, education,

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<sup>165</sup> *United States v. Castillo*, 69 F.4th 648, 655 (9th Cir. 2023).

<sup>166</sup> *See United States v. Havis*, 907 F.3d 439, 450-41 (6th Cir. 2018) (Thapar, J., concurring) ("But as this is a criminal case, and applying *Auer* would extend Havis's time in prison, alarm bells should be going off . . . . It is one thing to let the Commission, despite its "unusual" character, promulgate Guidelines that influence how long defendants remain in prison . . . . It is entirely another to let the Commission interpret the Guidelines on the fly and without notice and comment – one of the limits that the Supreme Court relied on in finding the Commission constitutional in the first place.").

<sup>167</sup> *Id.*

<sup>168</sup> Action, *supra* note 150. *See also* U.S. SENT'G COMM'N, RULES OF PRACTICE & PROCEDURE § 4.1 (2016) ("Amendments to . . . commentary may be promulgated and put into effect at any time.").

<sup>169</sup> *Barker*, *supra* note 92. ("Another amendment revises the guideline for calculating economic loss by incorporating commentary regarding "intended loss" into the guideline itself. The amendment is intended to resolve a circuit split over the commentary that emerged in the wake of *Kisor v. Wilkie* . . .").

etc.) the agencies themselves are the subject matter experts and should have all deference and benefit of the doubt.<sup>170</sup> Even a *Kisor* analysis notes that an agency's interpretation must "implicate its substantive expertise."<sup>171</sup> The Sentencing Commission is full of qualified experts,<sup>172</sup> but, in the area of sentencing, the courts are the experts, as federal district courts work intimately with the Guidelines on a daily basis.

Finally, even under the framework of *Kisor*, the role of the doctrine of lenity should make courts hesitant to reflectively defer to the commentary in the Guidelines, particularly when such deference inflates an offender's sentence. The doctrine of lenity asserts that ambiguities in the law shall be resolved against the government and in favor of the accused or offender.<sup>173</sup> Lenity remains woven into the criminal justice system.<sup>174</sup> However, applying *Auer* deference to the commentary on the Guidelines means ambiguity would often tip in favor of the government, as the offender is more frequently sentenced to a lengthier prison time, such as in the case of Jeffrey Havis.<sup>175</sup> It is suspicious when one party resolves an ambiguity in the law against another party, and the court is bound to defer to that resolution.<sup>176</sup>

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<sup>170</sup> See generally Nielsen and Stapleford, *supra* note 142.

<sup>171</sup> *Kisor v. Wilkie*, 588 U.S. 558, 577 (2019).

<sup>172</sup> *Basics of Federal Sentencing I*, *supra* note 27.

<sup>173</sup> See *United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820) ("Where there is no ambiguity in the words, there is no room for construction... It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.").

<sup>174</sup> See *In Re Winship*, 397 U.S. 358, 364 (1970) (holding the standard of beyond of a reasonable doubt required during the "adjudicatory stages of a delinquency proceeding"). See also *United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("There are no common law offense against the United States. Before a man can be punished as a criminal under the federal law his case must be "plainly and unmistakably" within the provisions of some statute.").

<sup>175</sup> See generally *United States v. Havis*, 907 F.3d 439 (2018).

<sup>176</sup> See THE FEDERALIST No. 51, at 349 (James Madison) (J. Cooke ed., (1961) ("[T]he greatest security against a gradual concentration of the

## V. CONCLUSION

The circuit split over the level of deference assigned to the commentary in the Guidelines might be entrenched, but it is also an unsustainable path forward. One of the primary objectives of the Commission's establishment was to promote uniformity in sentencing; however, as demonstrated in Kevin White's and Jeffrey Havis's cases, competing sides of the split create significant variance in incarceration length. This variance is a cognizable liberty interest that can only be resolved with the Supreme Court's attention. The Court's ruling in *Loper Bright* posits that mere precedent is no longer sufficient to prop up a *Stinson*-based approach to the deference afforded to the Guidelines' commentary. Further, even circuits who support a *Stinson*-based approach have admitted that *Kisor* overrules the *Stinson* precedent. While *Kisor* is more aligned with the framework of the Roberts Court, it still allows for a level of deference that does not comport with the strong rebuke of agency creep on the judiciary's role to interpret the law. Separation of powers concerns are still palpable even with the most flexible application of *Auer* deference. In his now often cited *Youngtown* concurrence, Justice Jackson insisted that the Constitution contemplated "upon its branches separateness but interdependence, autonomy but reciprocity."<sup>177</sup> *Auer* deference, as applied to the commentary in the Guidelines, leaves little reciprocity because the commission is permitted to simply circumvent the note and comment process. No part of the law may "impermissibly threaten[] the institutional integrity of the Judicial Branch" and for that reason, and as foreshadowed in *Loper Bright*, permissive deference to the commission's commentary in the Guidelines will cease.<sup>178</sup> It will make "all the

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several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachment of the others.").

<sup>177</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion).

<sup>178</sup> *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

difference.”<sup>179</sup>

APPENDIX A: UNITED STATES SENTENCING GUIDELINES –  
SENTENCING TABLE

SENTENCING TABLE  
(In months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

<sup>179</sup> Frost, *supra* note 95.