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An Apt Analogy?: Rethinking the Role of Judicial Deference to the U.S. Sentencing Guidelines Post-*Kisor*

Amy Walker

Fordham University School of Law

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AN APT ANALOGY?: RETHINKING THE ROLE OF JUDICIAL DEFERENCE TO THE U.S. SENTENCING GUIDELINES POST-KISOR

Amy Walker*

Since its inception in 1984, the U.S. Sentencing Commission (the “Commission”) has struggled to garner and maintain a sense of legitimacy among federal judges. The tension is both a story about competing expertise between judges and the Commission and competing values, namely uniformity and individuality. In 1993, the U.S. Supreme Court in Stinson v. United States prioritized uniformity by telling lower courts to treat the Commission as they would any other administrative agency. Lower courts—for the most part—faithfully executed this directive until 2019, when the Supreme Court in Kisor v. Wilkie gave them another option, one that seemed to leave room for more judicial discretion and, therefore, more sentence individualization, but at the expense of uniformity goals.

This Note examines the circuit split over what level of deference federal judges owe to the commentary to the U.S. Sentencing Guidelines. This Note then advocates for the Supreme Court to abandon deference doctrines in the sentencing context altogether. Instead, this Note suggests that the Court adopt a new approach—what this Note calls the “cooperative partner” approach, inspired by how judges interact with the Advisory Committee Notes that accompany the Federal Rules of Civil Procedure. This Note concludes by arguing that the cooperative partner approach recognizes and respects the sui generis nature of the Commission in ways that encourage key sentencing actors—namely, federal judges, the Commission, and Congress—to prioritize rationality and fairness in federal sentencing.

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INTRODUCTION

Where should judges draw the line between uniformity and individualization in criminal sentencing?¹ What role should morality play, if any? Is there more “justice” in a standardized, rigid approach, or less? The Sentencing Reform Act of 1984² (SRA) took a step toward answering these questions in its formation of the U.S. Sentencing Commission (the “Commission”), which it charged with, among other things, establishing a set of mandatory guidelines to help “provide certainty and fairness in meeting the purposes of sentencing.”³ In 2005, eighteen years after the Commission promulgated the first Guidelines Manual (the “Guidelines”), the U.S. Supreme Court deemed the mandatory regime unconstitutional and demoted the Guidelines from mandatory to advisory status, seemingly opening the door to a new era of judicial discretion in sentencing.⁴ However, as usual, there is more to the story.

The Commission is an independent body housed in the judicial branch.⁵ It is comprised of seven voting members, each appointed by the President and confirmed by the Senate, serving staggered six-year terms.⁶ The U.S. Attorney General (or their designee) and the Chairman of the U.S. Parole Commission⁷ serve as ex officio nonvoting members.⁸ No more than four voting members may be affiliated with the same political party, and three must be federal judges.⁹

The Guidelines Manual¹⁰ contains guidelines, policy statements,¹¹ and commentary.¹² When the Commission wishes to amend a guideline, it must follow the notice-and-comment rulemaking procedures laid out in the

1. Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PENN. L. REV. 1599, 1622 (2012) (“It is, of course, hard to know where to strike the balance between individualization and uniformity.”).

2. Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

3. 28 U.S.C. § 991(b)(1)(B). The purposes of sentencing are laid out in 18 U.S.C. § 3553(a)(2).

4. *See United States v. Booker*, 543 U.S. 220, 233 (2005).

5. *See* 28 U.S.C. § 991(a).

6. *See id.*; *see also Organization*, U.S. SENT’G COMM’N, <https://www.ussc.gov/about/who-we-are/organization> [<https://perma.cc/58FC-5J2H>] (last visited Apr. 3, 2024).

7. The U.S. Parole Commission is an arm of the U.S. Department of Justice. *See* Steven L. Chanenson, *Five Questions for the Next Thirty Years of Federal Sentencing*, FED. PROB., Sept. 2017, at 23, 24 (“[T]he executive branch . . . is given a ‘seat at the table’ at the Commission—literally and figuratively.” (quoting William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-branch Power Struggles*, 26 J.L. & POL. 305, 323 (2011))).

8. *See* 28 U.S.C. § 991(a); *see also Organization*, *supra* note 6.

9. *See* 28 U.S.C. § 991(a).

10. The Guidelines have been amended nearly 800 times since 1987. *See* William H. Pryor Jr., *Returning to Marvin Frankel’s First Principles in Federal Sentencing*, 29 FED. SENT’G REP. 95, 95 (2016).

11. The purpose of general policy statements, as contemplated by the SRA, is to inform Guidelines users of the “application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the [sentencing] purposes set forth in section 3553(a)(2) of title 18, United States Code.” 18 U.S.C. § 994(a)(2).

12. *See Stinson v. United States*, 508 U.S. 36, 41 (1993).

Administrative Procedure Act of 1946¹³ (APA).¹⁴ After providing general notice of the proposed amendment and allowing the public an opportunity to comment, the Commission submits final proposals to Congress.¹⁵ Congress then has 180 days to object before the amendments are automatically adopted.¹⁶ The Commission may promulgate policy statements and commentary without going through the notice-and-comment process.¹⁷ This is because, in theory, policy statements and commentary are explanatory, not substantive. Indeed, the Guidelines state that commentary is there to “interpret the guideline or explain how it is to be applied,” “suggest circumstances which . . . may warrant departure from the guidelines,” or “provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline.”¹⁸

In 1993, in *Stinson v. United States*,¹⁹ the Supreme Court instructed federal judges to think of the Commission as they would any other administrative agency, giving the same degree of deference to guidelines as they would to legislative rules and to commentary as they would to interpretive rules.²⁰ In 1993, agencies’ interpretive rules received “reflexive”²¹ deference under *Bowles v. Seminole Rock & Sand Co.*²² and *Auer v. Robbins*.²³ Provided an agency’s interpretation of its own ambiguous regulation did not run afoul of the Constitution or any federal statutes and was not “plainly erroneous or inconsistent with the regulation” it interpreted, judges were to give it controlling weight.²⁴ As such, *Stinson* assigns judges the role of faithful executioner—adhering to the commands and policy goals of the Commission, as promulgated through the commentary, regardless of whether those commands passed through the procedural “gauntlets of congressional review or notice and comment.”²⁵

13. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.). The APA sets the default rules governing the federal administrative state. *See id.*

14. *See* 5 U.S.C. § 553.

15. *See* 28 U.S.C. § 994(x).

16. *See id.* § 994(p).

17. *See* U.S. SENT’G RULES OF PRAC. & PROC. pt. 4, r. 4.3 (U.S. SENT’G COMM’N 2016) (“The Commission may promulgate commentary and policy statements, and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x).”).

18. U.S. SENT’G GUIDELINES MANUAL § 1B1.7 (U.S. SENT’G COMM’N 2023). The language used in this section is unchanged from the original Guidelines promulgated in 1987. *See* U.S. SENT’G GUIDELINES MANUAL § 1B1.7 (U.S. SENT’G COMM’N 1987).

19. 508 U.S. 36 (1993).

20. *See id.* at 43–45.

21. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (“The type of reflexive deference exhibited in some of these cases is troubling.”).

22. 325 U.S. 410, 414 (1945).

23. 519 U.S. 452, 461 (1997). This Note will principally refer to the doctrine as *Auer* deference.

24. *Stinson*, 508 U.S. at 45.

25. *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019).

Over time, this highly deferential standard of review drew intense criticism from both inside the Court and outside of it.²⁶ In 2019, in *Kisor v. Wilkie*,²⁷ the Court had the opportunity to overrule *Auer* but instead chose to revise the doctrine.²⁸ In an appeal of an application of *Auer* deference to an interpretation of a U.S. Department of Veterans Affairs regulation, the Court announced a new deference doctrine that was “potent in its place but cabined in its scope.”²⁹ Under *Kisor*, judges are no longer faithful executioners; rather, they may only defer to agency interpretations of “genuinely ambiguous” legislative rules.³⁰ Whether a rule is genuinely ambiguous may only be determined after exhausting “all the ‘traditional tools’ of construction.”³¹ Even then, a judge owes deference only to reasonable interpretations that reflect the agency’s “official position,”³² implicate the agency’s “substantive expertise,”³³ and reflect “fair and considered judgment.”³⁴ The problem? But for a footnote collecting over a dozen Supreme Court cases applying *Seminole Rock* deference, *Kisor* did not mention *Stinson*.³⁵ The *Kisor* decision thus presented federal judges with a highly consequential question—how, if at all, does *Kisor* affect *Stinson*? In other words, what level of deference, if any, do federal judges today owe to the Guidelines commentary?

Since 2019, this question has divided the courts, and as of August 2023, every U.S. circuit court of appeals has taken a stance.³⁶ The Supreme Court,

26. See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring) (“It should have been easy for the Court to say goodbye to *Auer v. Robbins* This rule creates a ‘systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else.’” (quoting Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After Seminole Rock and Auer*, 42 HARV. J.L. & PUB. POL’Y 625, 641 (2019))); *United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (“*Auer* thus encourages agencies to change the rules of the game with the benefit of hindsight.”), *reh’g en banc granted, opinion vacated*, 921 F.3d 628 (6th Cir. 2019), *aff’d on reh’g en banc*, 927 F.3d 382 (6th Cir. 2019) (Thapar, J., concurring); *supra* note 21.

27. 139 S. Ct. 2400 (2019).

28. See *id.* at 2414–18.

29. *Id.* at 2408.

30. *Id.* at 2415.

31. *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984)).

32. *Id.* at 2416.

33. *Id.* at 2417.

34. *Id.*

35. See *id.* at 2411 n.3.

36. See, e.g., *United States v. Rivera*, 76 F.4th 1085, 1090–91 (8th Cir. 2023); *United States v. Vargas*, 74 F.4th 673, 698 (5th Cir. 2023) (en banc), *cert. denied*, No. 23-5875, 2024 WL 674897 (U.S. Feb. 20, 2024); *United States v. Maloid*, 71 F.4th 795, 805 (10th Cir. 2023); *United States v. Castillo*, 69 F.4th 648, 664 (9th 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); *United States v. Moses*, 23 F.4th 347, 357 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (en banc); *United States v. Smith*, 989 F.3d 575, 584–86 (7th Cir. 2021); *United States v. Riccardi*, 989 F.3d 476, 484–85 (6th Cir. 2021); *United States v. Lewis*, 963 F.3d 16, 24–25 (1st Cir. 2020); *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020).

however, has declined to weigh in on several occasions.³⁷ Continued and growing uncertainty surrounding judges' relationship with and responsibility to the Guidelines has life-changing implications for the tens of thousands of individuals sentenced in federal court every year.³⁸ This split, symptomatic of a broader moment of uncertainty concerning the role of agency deference in a democratic society,³⁹ presents a unique opportunity to reevaluate the ideal role of Commission-based expertise in federal sentencing and the questions that opened this Note.

This Note examines the circuit split concerning what level of deference federal judges owe to the Guidelines post-*Kisor*. Part I provides relevant background on the impetus for the 1984 SRA creating the Commission, the Guidelines, and how each has evolved alongside changes in Supreme Court sentencing doctrine. Part I also examines the two cases giving rise to the split—*Stinson* and *Kisor*. Part II examines courts' arguments in favor of adhering to *Stinson*, a group that this Note will refer to as the "faithful agents," as well as courts' arguments in favor of adopting *Kisor*, a group that this Note will refer to as the "faithless entrepreneurs." Finally, Part III argues that neither group's approach is sound because analogizing the Commission to other administrative agencies is fundamentally inapt with grave implications for individual defendants in the form of harsher, unexplained, and uninformed sentences. Part III stresses that the circuit split gives judges a choice between adhering to a "dinosaur doctrine"⁴⁰ or a doctrine created solely with civil administrative agencies in mind. Part III calls on the Supreme Court to abandon deference doctrines in the sentencing context and adopt a new approach—what this Note calls the "cooperative partner"

37. See, e.g., *United States v. Lomax*, 51 F.4th 222 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 789 (2023); *Smith*, 989 F.3d 575, *cert. denied*, 142 S. Ct. 488 (2021); *United States v. Cingari*, 952 F.3d 1301 (11th Cir.), *cert. denied*, 141 S. Ct. 835 (2020); *Vargas*, 74 F.4th 673, *cert. denied*, No. 23-5875, 2024 WL 674897 (U.S. Feb. 20, 2024); *United States v. Choulat*, 75 F.4th 489 (5th Cir. 2023), *cert. denied*, No. 23-5908, 2024 WL 674900 (U.S. Feb. 20, 2024). For an interesting review of why the Supreme Court has refrained from granting certiorari, see generally Dawinder S. Sidhu, *Sentencing Guidelines Abstention*, 60 AM. CRIM. L. REV. 405 (2023).

38. In 2022, 64,142 individual defendants were sentenced in federal courts. See U.S. SENT'G COMM'N, ANNUAL REPORT 9 (2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report.pdf> [<https://perma.cc/394D-4REZ>]. The total federal inmate population currently hovers around 155,740 persons. See *Population Statistics*, FED. BUREAU PRISONS, https://www.bop.gov/mobile/about/population_statistics.jsp#old_pops [<https://perma.cc/L77P-XB8R>] (Mar. 28, 2024).

39. The Supreme Court will reconsider the bedrock of judicial deference to agency action, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, this term in *Loper Bright Enterprises v. Raimondo*. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984); *Loper Bright Enters. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *argued*, No. 22-451 (U.S. Jan. 17, 2024).

40. 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, 390 (2022).

approach,⁴¹ inspired by how judges interact with the Advisory Committee Notes accompanying the Federal Rules of Civil Procedure.⁴²

I. THE U.S. SENTENCING GUIDELINES:
WHAT THEY ARE AND WHAT THEY ARE NOT

Appreciating what is at stake in this circuit split requires a basic understanding of how the Commission is structured, its goals, and how it interacts with the other branches of government to achieve said goals. This part provides this background. Part I.A explains how the legislative, judicial, and popular attitudes toward federal sentencing have evolved from the pre-Guidelines era to the era following *United States v. Booker*⁴³ (the advisory Guidelines era). Then, to understand where the Commission fits within the broader administrative apparatus, Part I.B details the guideline and commentary promulgation process and compares it to that of (1) informal agency rulemaking under the APA and (2) the promulgation process for the Federal Rules of Civil Procedure and their corresponding Advisory Committee Notes under the Rules Enabling Act⁴⁴ (REA).

A. *A Brief History of the U.S. Sentencing Commission*

This section briefly explores the structure of federal sentencing at three critical junctures: (1) the pre-Guidelines era (pre-1987); (2) the mandatory Guidelines era (1987–2005); and (3) the current advisory Guidelines era (2005–present).

1. Sentencing Pre-Guidelines

For nearly two centuries, federal judges enjoyed unconstrained and unreviewable discretion in sentencing.⁴⁵ Statutes mandated prison terms only for crimes punishable by death or life imprisonment: treason, murder, rape, mutiny, and piracy.⁴⁶ From the 1950s to 1987, 50 percent of all federal

41. The labels “faithful agent” and “cooperative partner” are borrowed from Justice Barrett’s article *Substantive Canons and Faithful Agency*. See generally Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010) (distinguishing “cooperative partners of Congress”—courts willing to use substantive canons to justify judicial policy choice—from “faithful agents”—courts who use them to evoke legislative will). Although this Note could have neatly applied “faithful agent” and “cooperative partner” to pro-*Stinson* and pro-*Kisor* courts, respectively, this Note instead adopts a new label, “faithless entrepreneurs,” to capture more accurately what this Note sees as a judicial reclamation of sentencing discretion under *Kisor*, reserving the “cooperative partner” label to describe the new dialogic, allied approach envisioned in Part III.B.2.

42. See *Vargas*, 74 F.4th at 700 (Oldham, J., concurring) (“In a post-*Booker* world, one could reasonably argue that the commentary to the Guidelines should not receive any deference that the Advisory Committee’s notes to the Federal Rules does not.”).

43. 543 U.S. 220 (2005).

44. 28 U.S.C. §§ 2071–2077.

45. See KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 2* (1998).

46. See *id.* at 19.

defendants received non-imprisonment penalties (probation or fines).⁴⁷ Although some criminal statutes prescribed maximum penalties (monetary and prison terms), there were no mandatory minimums, meaning judges retained total discretion to punish up to those ceilings.⁴⁸ The fact that sentences were unappealable compounded judges' power.⁴⁹

Before a sentencing hearing, a judge would receive a presentence report (PSR) from the probation office⁵⁰ located within the judicial branch.⁵¹ Although this is still true today, the form of these PSRs is different.⁵² Before 1987, the PSR contained a recitation of the facts as presented by each party, additional factors and considerations the assigned probation officer felt were relevant to sentencing, and a recommended term of either probation or imprisonment based on available national statistics for the offense in question.⁵³ If a sentence included prison, parole boards (agents of the Executive branch)⁵⁴ had the discretion to release an individual before the expiration of the sentence imposed.⁵⁵ This was the "three-way sharing" of sentencing responsibility: Congress passed statutes defining maximum penalties, judges used their discretion to punish up to those maxima, and parole boards determined the actual duration of imprisonment.⁵⁶

Calls for reform in the late 1960s and early 1970s stemmed largely from observed racial disparities in sentencing,⁵⁷ culminating in Judge Marvin E. Frankel's book *Criminal Sentences: Law Without Order*.⁵⁸ Later labeled the "father of sentencing reform," Judge Frankel described total judicial discretion in sentencing as "terrifying and intolerable for a society that professes devotion to the rule of law."⁵⁹ Judge Frankel called on Congress to create an administrative agency to promulgate binding guidelines to constrain judicial discretion and replace it with administrative expertise.⁶⁰ He succeeded.

47. *See id.* at 20.

48. *See id.* at 10.

49. *See id.* at 80.

50. *See id.*

51. *See Probation and Pretrial Services – Mission*, U.S. COURTS, <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission> [<https://perma.cc/R6TU-TZAW>] (last visited Apr. 3, 2024).

52. *See infra* note 69 and accompanying text.

53. *See* STITH & CABRANES, *supra* note 45, at 80.

54. The Parole Commission, an Executive branch agency, created and used its own guidelines for determining release dates. *See* Frank O. Bowman III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 302 (2000).

55. *See* *Mistretta v. United States*, 488 U.S. 361, 364–65 (1989).

56. *See id.*

57. *See* Barkow, *supra* note 1, at 1609 ("The emergence of sentencing guidelines is in large measure a story about the desire for racial justice.").

58. *See generally* MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

59. STITH & CABRANES, *supra* note 45, at 35 (citing MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973)).

60. *See id.*

2. Sentencing Post-Guidelines and Pre-Booker

The Commission released the first iteration of the Guidelines on November 1, 1987.⁶¹ The cornerstone of the Guidelines was, and remains to this day, the Sentencing Table.⁶² The Sentencing Table is a 258-box grid containing a horizontal axis entitled “Criminal History Category” and a vertical axis entitled “Offense Level.”⁶³ The remainder of the Guidelines, 328 pages in the first iteration⁶⁴ and 608 pages as of this Note’s publication,⁶⁵ is meant to lead judges to the right box.⁶⁶ Easier said than done. Getting to the “right” box involves a complex calculation of the defendant’s “real offense”⁶⁷ conduct, specific offense characteristics, aggravating and mitigating factors, qualifying previous offenses, recency of prior offenses, and any applicable reasons for departure.⁶⁸ The probation officer is the first to attempt this calculation and advise the judge of the recommended range, as in the pre-Guidelines era.⁶⁹ Once a judge selects the appropriate box, they find that the given range is quite narrow due to the SRA’s “25 percent rule.”⁷⁰ The 25 percent rule holds that the high end of any acceptable prison term “shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months.”⁷¹ The result is a highly granulated table scaling forty-three offense levels⁷² that forces judges to attempt to draw meaningful distinctions between very similar degrees of offense severity.⁷³

The Guidelines further cabined judicial discretion by severely limiting opportunities to depart from the applicable sentencing range. There were only two valid bases for departure (upward or downward): (1) when the defendant substantially cooperated with law enforcement and the prosecutor filed a motion for a below-guideline sentence before the hearing or (2) when the judge was able to demonstrate that there were factors or circumstances

61. See generally U.S. SENT’G GUIDELINES MANUAL (U.S. SENT’G COMM’N 1987).

62. See Bowman, *supra* note 54, at 305 (“[The] Guidelines are, in a sense, simply a long set of instructions for one chart—the Sentencing Table.”). The sentencing ranges contained in the original Sentencing Table were based on the Commission’s analysis of 10,000 federal PSRs and sentences imposed in the immediate pre-Guidelines era. See U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING, at v (2004).

63. See U.S. SENT’G GUIDELINES MANUAL § 5A.

64. See generally *id.*

65. See generally U.S. SENT’G GUIDELINES MANUAL (U.S. SENT’G COMM’N 2021).

66. See Bowman, *supra* note 54, at 305.

67. “Real offense” sentencing refers to judicial consideration of non-statutory factors such as the magnitude of the harm caused, the duration of the crime, and the defendant’s criminal history. See STITH & CABRANES, *supra* note 45, at 66.

68. See *id.* at 77.

69. Under the Guidelines, the PSR shifted from a two-sided story accompanied by a comparative sentence recommendation to a single version of facts unilaterally written by the probation officer alongside the computed sentencing range. See STITH & CABRANES, *supra* note 45, at 86; *supra* notes 50–53 and accompanying text.

70. See 28 U.S.C. § 994(b)(2).

71. *Id.* (“[E]xcept that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.”).

72. See U.S. SENT’G GUIDELINES MANUAL § 5A (U.S. SENT’G COMM’N 1987).

73. See J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 714 (2011).

not adequately considered in the Guidelines calculation.⁷⁴ The Guidelines already factored in many, if not all, of the circumstances judges previously considered relevant to sentencing, including age, education and vocational skills, mental and emotional conditions, employment records, family responsibilities, and community ties; thus, these were not ordinarily grounds for departure under the second basis.⁷⁵

From the Commission's perspective, the Guidelines represented a comprehensive gradient of culpability based on the confluence of factors that the Commission and Congress deemed important to sentencing.⁷⁶ From judges' perspectives, the Guidelines were a labyrinth, highly prone to mathematical error, that forced them to "confront defendants as numbers rather than as human beings."⁷⁷ Judges' moral qualms⁷⁸ also stemmed from the Guidelines' demand for harsher sentences in almost every case.⁷⁹ This harshness was the natural result of the SRA's explicit commands to the newly formed Commission,⁸⁰ the SRA's abolition of federal-level parole,⁸¹ the Guidelines' preference for prison,⁸² and the introduction of the first mandatory minimums by Congress.⁸³ The undeniable result of the new

74. See STITH & CABRANES, *supra* note 45, at 4.

75. See U.S. SENT'G GUIDELINES MANUAL § 5H1.

76. See Oleson, *supra* note 73, at 720–21 (“[T]he jargon of the Guidelines (e.g., ‘points’ and ‘levels’ and ‘scores’) creates an appearance of objectivity and analytic precision, but the Guidelines were not derived entirely by science. In large part, they were established in the belief that they embodied the punishments Congress wanted.”); see also STITH & CABRANES, *supra* note 45, at 77.

77. See Oleson, *supra* note 73, at 720 (quoting Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 38–39 (2005)); STITH & CABRANES, *supra* note 45, at 82.

78. See Eric S. Fish, *Sentencing and Interbranch Dialogue*, 105 J. CRIM. L. & CRIMINOLOGY 549, 579 (2015) (“By universalizing sentencing decisions into a general formula, and thus reducing sentencing to a box-checking exercise, guideline systems abandon the moral sensitivity and practical wisdom of human judges.”).

79. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 586 (2001) (“[T]he Guidelines are too harsh: they have contributed to a ratcheting up of sentencing levels that has gone much too far.”); Linda Greenhouse, *Guidelines on Sentencing Are Flawed, Justice Says*, N.Y. TIMES (Nov. 21, 1998), <https://www.nytimes.com/1998/11/21/us/guidelines-on-sentencing-are-flawed-justice-says.html> [<https://perma.cc/8GPJ-Q623>].

80. See, e.g., 28 U.S.C. § 994(m) (“The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.”).

81. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, § 229, 98 Stat. 1987, 2031 (codified as amended at 29 U.S.C. § 1111).

82. Of the 258 boxes in the Sentencing Table, only twenty-three offer non-incarceration sentences, meaning that the majority of defendants were never eligible for probation. See U.S. SENT'G GUIDELINES MANUAL § 5B1 (U.S. SENT'G COMM'N 1987). By 2002, not only were 86 percent of offenders serving prison terms (in contrast to 50 percent pre-Guidelines), but they were serving, on average, longer sentences than in the pre-Guidelines era. See U.S. SENT'G COMM'N, *supra* note 62, at vi; STITH & CABRANES, *supra* note 45, at 62. By 2007, only 6 percent of defendants received pure probation sentences. See Oleson, *supra* note 73, at 711.

83. See Oleson, *supra* note 73, at 712 (“Just as iron tends to rust when exposed to oxygen, so do sentence lengths tend to increase when exposed to politics.”). Although there is a huge body of literature dedicated to the effects of mandatory minimums, this Note uses mandatory minimums only as an example of how Congress retains control over sentencing by overriding

system was that more defendants went to prison for longer and served (or are serving) the entirety of their sentences.⁸⁴

At first glance, the upshot of the Guidelines for defendants was that all sentences became reviewable on appeal.⁸⁵ However, the appeal right was limited to incorrect applications of or departures from the Guidelines.⁸⁶ In effect, the Guidelines incentivized judges to be diligent in their calculations and not depart from them,⁸⁷ so judges rarely did.⁸⁸ Although some may have expected to use the SRA's requirement that district courts submit to the Commission a "written statement of reasons for [each] sentence imposed"⁸⁹ to justify departures and signal distaste for certain guidelines, this preordained fear of appeal made the creation of any kind of feedback loop between judges and the Commission dead on arrival. Those judges who were, as Justice Anthony M. Kennedy once said, "courageous, and [who] exercise[ed] the independence and the authority of the judiciary not to follow blindly unjust guidelines,"⁹⁰ were met with congressional backlash and accused of sabotaging sentencing goals.⁹¹ In sum, the Guidelines fundamentally changed the structure of sentencing in a way that was widely disliked but complied with by federal judges.⁹²

Though perhaps somewhat tangential, it is worth noting that judicial animosity toward the Guidelines also stemmed, at least in part, from a recognition that order and predictability at sentencing would not extinguish its worrisome aspects, such as the potential for arbitrariness, abuse of discretion, or impermissible disparity.⁹³ Many judges felt that the Guidelines

the Commission's judgments and binding judges when it feels that the Commission is not being harsh enough. See Paul J. Hofer, *Federal Sentencing After Booker*, 48 CRIME & JUST. 137, 138 & n.2 (2019) [hereinafter Hofer, *Federal Sentencing*]. For more on the effects of mandatory minimums on sentencing, see also Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U. TOL. L. REV. 649 (2016); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 1 (2009).

84. See Oleson, *supra* note 73, at 711.

85. See 18 U.S.C. § 3742.

86. See *id.*

87. See Stuntz, *supra* note 79, at 562.

88. The largest source of departure was for substantial assistance, which is almost entirely determined by prosecutors due to the requirement that prosecutors file a motion for a below-guideline sentence. See STITH & CABRANES, *supra* note 45, at 76 (noting that, in 1996, substantial assistance accounted for more than 60 percent of departures); see also *supra* note 74 and accompanying text.

89. See 28 U.S.C. § 994(w)(1)(B).

90. Oleson, *supra* note 73, at 713.

91. In 2004, Judge James M. Rosenbaum was investigated by the House Judiciary Committee for resisting the Guidelines. See Oleson, *supra* note 73, at 724; see also Debra Rosenberg, *The War on Judges*, NEWSWEEK (Apr. 24, 2005, 8:00 PM), <https://www.newsweek.com/war-judges-116067> [<https://perma.cc/7GHC-95PG>].

92. A 1993 American Bar Association poll reported that nearly half of all federal judges would support doing away with the Guidelines. See STITH & CABRANES, *supra* note 45, at 5; see also Pryor, *supra* note 10, at 95 (noting that over 200 federal judges ruled the 1987 Guidelines unconstitutional); Stuntz, *supra* note 79, at 586 ("[I]t is enough to note that this literature is nearly unanimous on one point: the Guidelines have produced bad outcomes.").

93. See STITH & CABRANES, *supra* note 45, at 130.

would (and did) transfer such unorganized decision-making to other sentencing actors, namely prosecutors.⁹⁴ To this day, federal prosecutors retain unreviewable discretion to determine what crimes to charge a defendant with, whether to offer and enter into a plea deal,⁹⁵ and whether to file a motion for a downward departure.⁹⁶ It is thus notable that although the SRA charges the Commission with “avoiding unwarranted sentencing disparities,”⁹⁷ the SRA’s only source of concern appears to be judges.⁹⁸ How sentencing structures define,⁹⁹ problematize,¹⁰⁰ and police¹⁰¹ disparity is critical for ensuring respect for individual liberty interests and achieving the purposes of sentencing outlined in the SRA.¹⁰²

3. Sentencing Post-Booker

In 2005, in *United States v. Booker*, the Supreme Court held the mandatory Guidelines unconstitutional.¹⁰³ The Court found that by requiring judges to impose sentences based on guideline factors neither proven beyond a reasonable doubt to a jury nor admitted to by the defendant, the Guidelines violated criminal defendants’ Sixth Amendment rights.¹⁰⁴

94. See, e.g., Samuel A. Alito, *Reviewing the Sentencing Commission’s 1991 Annual Report*, 5 FED. SENT’G REP. 166, 168 (1992) (“[T]he guidelines have taken sentencing discretion out of the hands of jurists and placed it in the hands of callow young prosecutors with ‘scant life experience’ and unproven ‘common sense.’” (quoting *United States v. Boshell*, 728 F. Supp. 632, 637 (E.D. Wash. 1990))); Barkow, *supra* note 1, at 1625; Hofer, *supra* note 83, at 138.

95. The majority of criminal cases today are resolved by plea agreement. See ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. D-4 (2022), https://www.uscourts.gov/sites/default/files/data_tables/jff_5.4_0930.2022.pdf [<https://perma.cc/KT4W-UBUW>] (showing that of the 65,763 federal criminal defendants who were convicted and sentenced in 2022, 64,384 pleaded guilty). The issues which arise from this reality are vast and exceed the focus of this Note.

96. See STITH & CABRANES, *supra* note 45, at 130.

97. 28 U.S.C. § 991(b)(1)(B). “Disparity” is defined as disparate sentences for “defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6).

98. See Olesen, *supra* note 76, at 725 (“[U]nder the mandatory Guidelines, prosecutorial discretion was viewed as a necessary evil but all judicial discretion was suspect.”).

99. See, e.g., Hofer, *Federal Sentencing*, *supra* note 83, at 162–64 (advocating for researchers to look at sources of racial disparity other than judicial decision-making, such as structural disparity—disparity caused by unfairly written statutes and guidelines).

100. See, e.g., Tonry, *supra* note 83, at 65–70 (describing how prosecutors sidestep eligible charges and their correlated sentences when they believe them to be unjust and noting that “because these things happen, mandatory penalties produce wide disparities between cases that are comparable in every way except how they are handled”); see also U.S. SENT’G COMM’N, *supra* note 62, at xvi (claiming success at “controlling disparity arising from the source at which the guidelines themselves were targeted—judicial discretion,” while conceding that “decisions of other participants in the sentencing system, or from the process of sentencing policymaking itself, has been less successfully controlled”).

101. See *supra* note 91 and accompanying text.

102. See 18 U.S.C. § 3553; see *infra* Part III.

103. *United States v. Booker*, 549 U.S. 220, 244 (2005).

104. *Id.* at 226–27.

Respondent Booker's case was illustrative. Booker was convicted of possession with intent to distribute at least fifty grams of cocaine.¹⁰⁵ Based on his criminal history and the quantity of drugs found by the jury to be in his possession, the Guidelines prescribed a sentencing range of 210 to 262 months of imprisonment.¹⁰⁶ However, at the posttrial sentencing hearing, the judge found by a preponderance of the evidence that he possessed an additional 566 grams, yielding a range of 360 months to life and, ultimately, a thirty-year prison sentence.¹⁰⁷ Rather than requiring all sentencing factors to be proven to a jury beyond a reasonable doubt¹⁰⁸ or invalidating the SRA in part or in its entirety,¹⁰⁹ the Court held that demoting the Guidelines to advisory status solved the Sixth Amendment issue.¹¹⁰

After *Booker*, "the process, not the product" became mandatory.¹¹¹ In the Court's words, although the Guidelines remain "the starting point and initial benchmark," they are no longer "the only consideration."¹¹² Courts must now consider the applicable guideline range in light of each sentencing factor set forth in 18 U.S.C. § 3553(a)¹¹³ before deciding whether to adhere to or depart from the prescribed range.¹¹⁴

In *Gall v. United States*¹¹⁵ and *Rita v. United States*,¹¹⁶ decided six months apart, the Court clarified the standard of review on appeal. According to *Rita*, within-range sentences are presumptively reasonable on appeal.¹¹⁷ According to *Gall*, courts "may not apply a presumption of unreasonableness" to outside-range sentences.¹¹⁸ Regardless of whether a sentence is within or outside of the advisory range, a reviewing court must first ensure, under an abuse of discretion standard, that the district court committed no significant procedural error, meaning that the district judge calculated the appropriate range, did not treat the Guidelines as mandatory, did not select a sentence based on clearly erroneous facts, considered all § 3553(a) factors, and adequately explained the resulting sentence to the defendant.¹¹⁹ Assuming procedural soundness, the appellate court may then

105. *See id.* at 227.

106. *See id.* (citing U.S. SENT'G GUIDELINES MANUAL §§ 2D1.1(c)(4), 4A1.1 (U.S. SENT'G COMM'N 2003)).

107. *See id.*

108. *See id.* at 246.

109. *See id.* at 258–59.

110. *See id.* at 222.

111. *See Oleson, supra* note 73, at 739.

112. *Gall v. United States*, 552 U.S. 38, 49 (2007).

113. 18 U.S.C. § 3553(a). These factors include the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence imposed to reflect the seriousness of the offense, and the need to avoid unwarranted sentence disparities, among others. *See* 18 U.S.C. § 3553(a).

114. *Gall*, 552 U.S. at 49–50.

115. 552 U.S. 38 (2007).

116. 551 U.S. 338 (2007).

117. *See id.* at 347.

118. *See Gall*, 552 U.S. at 51.

119. *See id.*

consider the sentence's substantive reasonableness, again, under an abuse of discretion standard.¹²⁰

The Court gave further insight into judges' departure power two years later in *Kimbrough v. United States*.¹²¹ Recognizing the "discrete institutional strengths"¹²² of the Commission and federal judges, respectively, the Court held that the Commission's assemblage of experts and unique research function optimally position it to approximate sentences in line with § 3553(a)'s objectives, whereas district court judges are "in a superior position to find facts and judge their import."¹²³ As such, a judge's decision to depart from the advisory range "may attract greatest respect" when it is clear that the case falls outside the "heartland" to which the Commission intends a guideline to apply.¹²⁴ In other words, the appropriateness of a departure may be a function of where the expertise lies in any given case.¹²⁵ Such acknowledgment of the value of judicial discretion juxtaposes judges' feelings in the pre-*Booker* era that the Guidelines existed not to "augment but to replace the[ir] knowledge and experience."¹²⁶

Although analyzing departure rates is complex and may not be owed entirely to judicial discretion,¹²⁷ the Commission's data suggests that judges have increasingly accepted *Booker*'s invitation to deviate from prescribed ranges. In 2008, 59.4 percent of sentences were within the applicable range,¹²⁸ versus 47.3 percent in 2015¹²⁹ and 41.9 percent in 2022.¹³⁰ Scholars suggest that this decline is attributable, at least in part, to a combination of judges perceiving some categories of sentences as too harsh—and thus refusing to adhere to them—and an increased use of mitigating and individualized factors previously proscribed by the mandatory Guidelines.¹³¹ The climbing departure rate may also indicate judges' willingness to use a guideline in cases in which they feel it works well, which

120. *See id.*

121. 552 U.S. 85 (2007).

122. *Id.* at 109.

123. *Id.*

124. *Id.*

125. *See* Barkow, *supra* note 1, at 1618 ("The Court further intimated that the Guidelines merit greater respect when they are based on the Commission's institutional expertise than when they are not.").

126. *See* STITH & CABRANES, *supra* note 45, at 82.

127. *See* Barkow, *supra* note 1, at 1624.

128. *See* U.S. SENT'G COMM'N, ANNUAL REPORT 36 (2008), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2008/Chap5_08.pdf [<https://perma.cc/7YN5-C73D>].

129. *See* U.S. SENT'G COMM'N, ANNUAL REPORT A-5 (2015), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/2015-Annual-Report.pdf> [<https://perma.cc/2E9L-9CSX>].

130. *See* U.S. SENT'G COMM'N, *supra* note 38, at 9.

131. *See* Hofer, *Federal Sentencing*, *supra* note 83, at 140 ("Guidelines applying to several crimes, such as certain drug and child pornography offenses, are widely recognized to be excessive and are rejected by some judges in a large portion of cases."); *see also* Barkow, *supra* note 1, at 1624.

may fluctuate alongside amendments and policy changes,¹³² while using their discretion to deviate in cases that demand more individualized considerations, as envisioned by the Court in *Kimbrough*.¹³³

However, there are also compelling reasons for judges not to depart from advisory ranges, despite their ability to do so. Some judges may fear discretion, preferring to defer to the presumably well-reasoned, though sometimes largely unexplained,¹³⁴ judgments of the Commission.¹³⁵ Some judges may lack experience with a non-Guidelines regime and are thus reliant on and resigned to them.¹³⁶ Finally, some judges may cognitively anchor onto the advisory range and struggle to distance themselves from it.¹³⁷

Regardless of departure rate trends, though *Booker* appeared to place discretion back in federal judges' hands,¹³⁸ it did not entirely revert back to the pre-Guidelines era because *Booker* did nothing to diminish the authority of the Commission.¹³⁹ What judicial discretion looks like in the post-*Booker* era is thus largely a function of how judges decide—and, in the case of deference doctrines, are compelled—to interact with commentary and the Commission more generally.

B. Promulgation Procedures

In 1993, the Court in *Stinson* told judges to think of the Commission as akin to any other administrative agency and to give the commentary the same degree of deference that they would give to an agency's interpretation of its own regulation.¹⁴⁰ The Court also cautioned that the analogy was “not precise.”¹⁴¹ This section provides the necessary context to evaluate the implications of adhering to this imprecise analogy.¹⁴²

This section explores three ways rulemaking bodies may interact with deference doctrines by looking briefly at the promulgation procedures of

132. See Hofer, *Federal Sentencing*, *supra* note 83, at 147 (“It appears that changes to charging policy and amendments to the Guidelines that make the guideline range appear more appropriate to sentencing judges can affect rates of sentencing within and below the range.”); *Barkow*, *supra* note 1, at 1621–22.

133. See *supra* notes 124–25 and accompanying text.

134. See Hofer, *Federal Sentencing*, *supra* note 83, at 140 (“Even guidelines that lack any rationale or supporting evidence of effectiveness continue to exert a ‘gravitational pull,’ with substantial numbers of judges simply accepting that the guideline recommendation must have some sound basis.”).

135. See *id.* at 153 (“Why undertake the hard work of scrutinizing the guidelines, explaining ones’ reasoning, and risking appellate and congressional scrutiny, when the guidelines provide a safe harbor?”).

136. See Andrew Hessick, *The Future of Administrative Deference*, 41 CAMPBELL L. REV. 421, 433–34 (2019).

137. See Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT’G REP. 226, 228 (2013) (reasoning that as “the very first thing a judge is still required to do at sentencing is to calculate the Guidelines range, [the calculation] creates a kind of psychological presumption from which most judges are hesitant to deviate too far”).

138. See Fish, *supra* note 78, at 567.

139. See *United States v. Booker*, 543 U.S. 220, 242 (2005).

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

141. *Id.* at 44.

142. See *infra* Part III.A.

(1) legislative and interpretive rules under the APA, (2) guidelines and commentary under the SRA, and (3) the Federal Rules of Civil Procedure and Advisory Committee Notes under the REA. In exploring these three models of interaction, this section aims to do two things: first, to expose the disparate roles of institutional actors in various forms of rulemaking and, second, to recognize how these interactions inform what level of respect and confidence the intended beneficiaries of these processes owe to the resulting promulgations.

1. Legislative and Interpretive Rules

The story of administrative agencies is a story about expertise.¹⁴³ Agencies are created by Congress and housed within the executive branch.¹⁴⁴ In passing what is known as the agency's organic statute, Congress delegates its rulemaking authority to a newly formed body of experts alongside a clear explanation of the scope of the agency's lawmaking power and the purposes for which the agency may exercise such power.¹⁴⁵

Administrative agencies must adhere to the APA's rulemaking and judicial review procedures. Section 553¹⁴⁶ prescribes the dominant informal rulemaking procedure, whereas § 706¹⁴⁷ outlines the standard for judicial review.

Section 553 outlines what is commonly referred to as notice-and-comment rulemaking.¹⁴⁸ Notice-and-comment rulemaking is a three-step process required for all legislative rule promulgations¹⁴⁹: the agency (1) publishes a "general notice of proposed rulemaking" in the Federal Register; (2) allows the public to comment; and (3) after consideration of the comments given, incorporates revisions into a final rule promulgation alongside a "concise general statement of [the rule's] basis and purpose."¹⁵⁰ If challenged, final promulgations are entitled to what is currently known as *Chevron* deference, established in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*¹⁵¹

143. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

144. See *id.* at 424 (Scalia, J., dissenting).

145. This is often referred to as the "intelligible principle doctrine." See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (holding that so long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power").

146. See 5 U.S.C. § 553.

147. See *id.* § 706.

148. See *id.* § 553.

149. Legislative rules carry the force and effect of law and are made pursuant to congressionally delegated authority. See KATE R. BOWERS & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46673, AGENCY REVISIONS OF LEGISLATIVE RULES (2021), <https://crsreports.congress.gov/product/pdf/R/R46673> [<https://perma.cc/4HSG-43CT>].

150. See 5 U.S.C. § 553(b), (c).

151. 467 U.S. 837 (1984).

Interpretive rules are legislative rules' counterparts—they are agencies' interpretations of their own legislative rules.¹⁵² They do not go through notice-and-comment¹⁵³ procedures and do not have the force of law¹⁵⁴ but are, like legislative rules, subject to judicial review under § 706¹⁵⁵ and entitled to judicial deference, albeit in a different form. Until *Kisor* in 2019, agencies' interpretations of their own ambiguous legislative rules received *Auer* deference—so long as the interpretation did not run afoul of the U.S. Constitution or a federal statute and was not “plainly erroneous or inconsistent with the regulation” it interpreted, the agency's interpretation controlled.¹⁵⁶ The impetus for *Kisor* stemmed from widespread anxiety that *Auer* incentivized agencies to evade democratic accountability by enacting vague legislative rules then subsequently importing whatever meaning they pleased using interpretive rules without worrying about meaningful judicial review.¹⁵⁷ *Auer*'s critics claimed that it forced judges to rubber-stamp executive action, abrogate their duties under § 706,¹⁵⁸ and violate both separation of powers and due process principles.¹⁵⁹ Part I.C.2 discusses how *Kisor* attempts to mediate these issues.¹⁶⁰

Regarding institutional oversight, congressional intervention into agency action is relatively limited. The Congressional Review Act of 1996¹⁶¹ (CRA) requires agencies to submit both their legislative and interpretive rules to Congress and the U.S. Government Accountability Office before they may take effect.¹⁶² Congress can then overrule a regulation by joint resolution and presentment to the President.¹⁶³ Once overruled, an agency may not reissue a substantially similar rule.¹⁶⁴ As of February 27, 2023, the CRA has

152. See ADMIN. CONF. OF THE U.S., AGENCY GUIDANCE THROUGH INTERPRETIVE RULES 1 (2019) (defining interpretive rules as “rules or statements issued by an agency to advise the public of the agency's construction of statutes and rules which it administers” (quoting U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT § 4(d)(3) (1947))), https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules#_ftn4 [<https://perma.cc/MH8A-8MJZ>].

153. See 5 U.S.C. § 553(b)(A).

154. See *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015).

155. See 5 U.S.C. § 706.

156. See *Stinson v. United States*, 508 U.S. 36, 45 (1993).

157. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019).

158. Section 706 requires courts to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action,” making deference doctrines appear incongruous. 5 U.S.C. § 706. The tension between § 706 judicial review and deference under *Chevron* and *Kisor* is complex and exceeds the focus of this Note. See, e.g., Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125 (2021). For this Note's purposes, it is enough to appreciate that the APA envisions an administrative state dominated by expertise yet effectively constrained by reasonable judicial review.

159. See *United States v. Maloid*, 71 F.4th 795, 809–14 (10th Cir. 2023).

160. See *infra* Part I.C.2.

161. See 5 U.S.C. §§ 801–808.

162. See MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., IF10023, THE CONGRESSIONAL REVIEW ACT (CRA): A BRIEF OVERVIEW (2023), <https://crsreports.congress.gov/product/pdf/IF/IF10023> [<https://perma.cc/6LFK-4KXW>].

163. See *id.*

164. See *id.*

been used to overturn twenty rules.¹⁶⁵ For context, the U.S. Environmental Protection Agency alone has promulgated over 16,000 rules since January 3, 1994.¹⁶⁶ The story of agency expertise operating to promulgate well-informed and well-reasoned policies independent of politics is thus compelling, at least from a structural point of view, in the administrative realm. The same cannot be said for guidelines and commentary, explored in the next section.

2. Guidelines and Commentary

When it wishes to amend a guideline, the Commission must adhere to notice-and-comment procedures under § 553 of the APA.¹⁶⁷ The process takes about a year.¹⁶⁸ In mid-to-late summer, the Commission conducts a planning session to review its research¹⁶⁹ and identify its priorities.¹⁷⁰ By January, the Commission publishes any proposed amendments for public comment and holds public hearings to receive feedback.¹⁷¹ Revised amendments must then engender the vote of at least four of the seven voting members.¹⁷² The Commission then submits any proposed final amendments, alongside a “statement of reasons” for the amendment, to Congress no later than May 1.¹⁷³ If Congress is silent, the amendments take effect on November 1.¹⁷⁴

As with interpretive rules, the Commission may amend the commentary at any time—regardless of whether the Commission simultaneously amends the corresponding guideline and without public comment or congressional review—so long as the amendment has the support of at least four voting members.¹⁷⁵ Unlike interpretive rules, the Commission’s Rules of Practice and Procedure require the Commission to submit, “to the extent practicable,” any planned amendments to the commentary for congressional approval alongside any planned amendments to the guidelines and to put both into effect on the same November 1 date.¹⁷⁶ The Commission is likewise to endeavor to provide “to the extent practicable, comparable opportunities for public input.”¹⁷⁷ It is somewhat unclear how often this happens, but some

165. *See id.*

166. *See Environmental Protection Agency*, FED. REG., <https://www.federalregister.gov/documents/search> [<https://perma.cc/J5AP-AQT6>] (last visited Apr. 3, 2024) (Federal Register Document search, filter by “Rule” and “Environmental Protection Agency”).

167. *See* 28 U.S.C. § 994(x) (incorporating by reference 5 U.S.C. § 553).

168. *See Policymaking*, U.S. SENT’G COMM’N, <https://www.ussc.gov/policymaking> [<https://perma.cc/F7BH-LPLC>] (last visited Apr. 3, 2024).

169. *See* 28 U.S.C. § 991(b)(2).

170. *See Policymaking*, *supra* note 168.

171. *See id.*

172. *See* U.S. SENT’G RULES OF PRAC. & PROC., *supra* note 17, pt. 2, r. 2.2. The Commission lacked a voting quorum between 2018 and 2022. *See* U.S. SENT’G COMM’N, *supra* note 38, at 2.

173. *See* 28 U.S.C. § 994(p).

174. *See id.*; *Policymaking*, *supra* note 168.

175. *See* U.S. SENT’G RULES OF PRAC. & PROC., *supra* note 17, pt. 2, r. 2.2; *id.* pt. 4, r. 4.1.

176. *See id.* pt. 4, r. 4.1.

177. *Id.* pt. 4, r. 4.3.

courts and scholars suggest that it happens more often than not.¹⁷⁸ Notably, however, the Commission's promulgations are never subject to the APA's § 706 judicial review standard.¹⁷⁹

The impetus for amendments stems from the Commission's constant data collection and research efforts¹⁸⁰ (including its tracking of judicial departure rates post-*Booker*),¹⁸¹ circuit court decisions, submissions from the criminal justice community, and Congress.¹⁸² In stark contrast to Congress's supervisory role under the CRA in the administrative agency context,¹⁸³ Congress is not shy about exercising its special directive authority toward the Commission.¹⁸⁴ Given Congress's heavy hand in amending the Guidelines (including the guidelines themselves as well as policy statements and commentary),¹⁸⁵ it is worth noting the kind of expertise that drives congressionally authored versus Commission-authored provisions. The most shocking and salient cases usually inform the former,¹⁸⁶ whereas the Commission's research and cumulative experience inform the latter.¹⁸⁷

178. See *United States v. Henry*, 1 F.4th 1315, 1336 (11th Cir. 2021); Acton, *supra* note 40, at 357. The most recent round of amendments to the guidelines, policy statements, and commentary were published all together on November 1, 2023. See generally U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2023).

179. See 28 U.S.C. § 994(x); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 226 BUFFALO CRIM. L. REV. 101, 181 (1999).

180. See 28 U.S.C. § 994(o).

181. See *supra* notes 128–30 and accompanying text.

182. See *Policymaking*, *supra* note 168; see also U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A (“Congress retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines.”).

183. See *supra* notes 161–65.

184. See, e.g., Chanenson, *supra* note 7, at 27 (recalling “the dark days of 2003 when Congress bypassed the USSC and directly rewrote some sections of the federal Guidelines”); see also Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 719 (2005) (describing how legislatures’ attentiveness to interest groups and voters who favor harsher sentences and less flexibility in sentencing “create[] strong incentives for legislatures to exercise close oversight of commissions”).

185. See SENT'G RES. COUNS. PROJECT, CONGRESSIONAL DIRECTIVES TO THE SENTENCING COMMISSION 1988–2016, at 1 (2016), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/deconstructing_the_guidelines/congressional-directives-to-the-sentencing-commission.pdf [<https://perma.cc/FK7G-YFJL>] (“[T]his table . . . makes clear that the Commission has functioned like the ‘junior varsity Congress’ predicted by Justice Scalia in *Mistretta v. United States*, promulgating guidelines in response to political pressure and without independent empirical study or analysis . . .” (citation omitted) (quoting *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting))).

186. See Rachel E. Barkow, *The Wholesale Problem with Congress: The Dangerous Decline of Expertise in the Legislative Process*, 90 FORDHAM L. REV. 1029, 1064 (2021) (“In just about every area where Congress considers legislation dealing with crime, it relies heavily on narratives of egregious cases but fails to consider data or facts, even when the stated goal is public safety and a broader consideration of facts would suggest a different approach to maximize public safety.”).

187. See 28 U.S.C. § 994(o). It is worth noting that the Commission has historically been comprised primarily of individuals with prosecutorial experience, with very little representation from those with criminal defense backgrounds. See Rachel E. Barkow & Mark Osler, *Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 471–72 & nn.414–15 (2017). The

In name, the Commission is an independent agency within the judiciary promulgating guidelines and commentary to help judges achieve the purposes of sentencing set forth in the SRA.¹⁸⁸ In practice, the SRA and its promulgation procedures are structured such that the Commission's work is largely the result of congressional-Commission coordination.¹⁸⁹ This happens via Congress's special directive authority,¹⁹⁰ the Commission's ability to amend the commentary at any time in response to institutional and political pressures,¹⁹¹ and the lack of formal judicial review of Commission action.¹⁹² The incentive structure is quite different within the Commission's neighboring judicial agency, the Committee on Rules of Practice and Procedure (the "Standing Committee") responsible for monitoring and amending the Federal Rules of Civil Procedure, as explored in the final section of Part I.B.¹⁹³

3. The Federal Rules of Civil Procedure and Advisory Committee Notes

In 1934, Congress passed the REA, which gave the Supreme Court the power to "prescribe general rules of practice and procedure" binding on all federal courts in civil proceedings.¹⁹⁴ The first iteration of the resultant Federal Rules of Civil Procedure (FRCP) became effective in 1938.¹⁹⁵ In 1988, amendments to the REA formalized the Court's delegation of its rulemaking authority to the Standing Committee and five advisory committees.¹⁹⁶ Together, these committees carry out "a continuous study of the operation and effect of the general rules of practice and procedure"¹⁹⁷ and

three-judge requirement may play a role in creating this asymmetry because most federal judges are former prosecutors. *See id.* at 472 (noting how, in 2017, "a full 43 percent of active Article III judges have prosecutorial experience, compared with only 10.4 percent with public defense experience"). This asymmetry does not go unnoticed by scholars and criminal justice advocates. *See, e.g.,* Chanenson, *supra* note 7, at 25 ("[B]y excluding them from any presence on the Sentencing Commission, Congress sent a clear and troubling message that defense voices are less important at the policy level.").

188. *See* 18 U.S.C. § 3553(a).

189. *See* SENT'G RES. COUNS. PROJECT, *supra* note 185.

190. *See id.*

191. *See supra* note 175 and accompanying text.

192. *See* Miller & Wright, *supra* note 179, at 181 ("Unlike other agencies, the Sentencing Commission never has to convince a court that it has fulfilled [its notice-and-comment] obligations.").

193. *See infra* Part I.B.3.

194. 28 U.S.C. § 2072.

195. *See Federal Rules of Civil Procedure Establish Uniformity*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/federal-rules-civil-procedure-establish-uniformity> [<https://perma.cc/TXA5-6SNZ>] (last visited Apr. 3, 2024).

196. The Standing Committee is housed within the Judicial Conference of the United States in the judicial branch. *See How the Rulemaking Process Works*, U.S. CTS., <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> [<https://perma.cc/56BX-JSTW>] (last visited Apr. 3, 2024).

197. *See* 28 U.S.C. § 331.

promulgate amendments necessary to effectuate the FRCP's four stated goals.¹⁹⁸

Although the Standing Committee is not beholden to the APA, the process of amending the FRCP is almost identical to the notice-and-comment process,¹⁹⁹ with one important distinction. As of 1988, the REA requires the Standing Committee to provide an “explanatory note” alongside each proposed rule amendment.²⁰⁰ An explanatory note, otherwise referred to as an Advisory Committee Note (“Committee Note”), must, indeed, explain the purpose of the amendment and how it promotes any or all of the FRCP's objectives.²⁰¹ It may also discuss the amendment's relationship to surrounding law, guide potential rule interpretations, and provide practice tips for lawyers and judges.²⁰²

Like commentary and interpretive rules, Committee Notes are intended to serve a non-substantive supporting role and thus do not go through notice-and-comment procedures.²⁰³ Unlike commentary and interpretive rules, Committee Notes are reviewed, edited, and promulgated *alongside* the text of the proposed rule amendment.²⁰⁴ Further, Committee Notes are neither legally binding nor entitled to judicial deference.²⁰⁵ As such, judges applying the FRCP understand that although the text of the rule controls, they may look to Committee Notes as an additional source of guidance.²⁰⁶ The nonbinding, no-deference status of Committee Notes also means that judges are free to not look at them at all.²⁰⁷

C. *Setting Up the Split—Stinson and Kisor*

In 1993, in *Stinson*, the Court instructed federal judges to adopt administrative agencies' deference model in the sentencing context.²⁰⁸ In 2019, in *Kisor*, the Court amended the administrative model but was silent

198. *See id.* (“[T]o promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.”).

199. Each advisory committee meets to review proposals for rule amendments submitted by interested groups and individuals, draft amendments, submit drafts for public comment, then submit final drafts to the reigning Standing Committee, followed by the Supreme Court and Congress. *See* 28 U.S.C. § 2074; *How the Rulemaking Process Works*, *supra* note 196.

200. *See* 28 U.S.C. § 2073(d).

201. *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1113–114 (2002).

202. *See id.* at 1113.

203. *See* *United States v. Vargas*, 74 F.4th 673, 700 (5th Cir. 2023) (en banc) (Oldham, J., concurring), *cert. denied*, No. 23-5875, 2024 WL 674897 (U.S. Feb. 20, 2024).

204. *See id.*

205. *See id.*

206. *See, e.g.*, *Krupski v. Costa Crociere S.P.A.*, 560 U.S. 538, 557 (2010) (Scalia, J., concurring) (“The Advisory Committee’s insights into the proper interpretation of a Rule’s text are useful But the Committee’s *intentions* have no effect on the Rule’s meaning [T]he text of the Rule controls.”).

207. *See id.*

208. *See* 508 U.S. 36, 44–45 (1993).

about its application in the sentencing context.²⁰⁹ This section explores these holdings, which gave rise to the circuit split at the heart of this Note.

1. *Stinson v. United States*

In *Stinson*, a unanimous Supreme Court instructed judges to treat guidelines as akin to legislative rules and their commentary as akin to interpretive rules.²¹⁰ Under the then-reigning, highly deferential *Auer* standard, this meant that commentary interpreting or explaining a guideline was binding on judges unless it ran afoul of the Constitution or a federal statute or was “plainly erroneous or inconsistent” with the guideline it interprets.²¹¹ If the guideline and its commentary were truly inconsistent, the text of the guideline would control.²¹² However, in most cases, a failure to follow the commentary that resulted in a sentence selected from the “wrong” guideline range would constitute “an incorrect application of the sentencing guidelines”²¹³ and be subject to reversal on appeal.²¹⁴

Stinson is thus clear that new and amended commentary is binding on federal courts, even though Congress need not review it and,²¹⁵ unlike interpretive rules in the agency context,²¹⁶ the Commission may adopt interpretations of a guideline that conflict with prior judicial constructions.²¹⁷ For example, nothing could stop the Commission in 1989 from promulgating commentary interpreting the now-infamous career offender guideline—which requires a significant sentence enhancement for anyone convicted of three felony “crime[s] of violence” or “controlled substance offense[s]”—to count inchoate offenses, even if earlier courts had categorically excluded inchoate offenses from consideration.²¹⁸

The Court cautioned that its analogization of the Commission to administrative agencies was “not precise” because Congress plays more of a role in promulgating the Guidelines than it does in agency rulemaking.²¹⁹ Nevertheless, the Court was satisfied that the congressional delegation of authority to the Commission via the SRA, Commission adherence to informal rulemaking procedures under § 553 of the APA, and the functional purpose of the commentary made the Commission and administrative agencies sufficiently similar to warrant the analogy.²²⁰ The Court was also confident that the commentary embodied “the most accurate indications of

209. *See generally* 139 S. Ct. 2400 (2019).

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

211. *See id.* at 45.

212. *See id.* at 43.

213. *See id.*

214. *See* 18 U.S.C. § 3742(f)(1); *see also* U.S. SENT’G GUIDELINES MANUAL § 1B1.7 (U.S. SENT’G COMM’N 2023).

215. *See supra* notes 175–76 and accompanying text.

216. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

217. *See Stinson*, 508 U.S. at 46.

218. *See* U.S. SENT’G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT’G COMM’N 1989).

219. *Stinson*, 508 U.S. at 44–45.

220. *See id.*

how the Commission deems that the guidelines should be applied” and that the Commission would “periodically review the work of the courts” and “make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.”²²¹ The Court brushed past the Commission’s prediction that “courts will treat the commentary much like legislative history . . . that helps determine the intent of a drafter,”²²² finding such an admonition to be “inconsistent with the uses to which the Commission in practice” has put the commentary, specifically, the fact that “failure to follow interpretive and explanatory commentary could result in reversible error.”²²³ Finally, the Court expressed dissatisfaction with alternative analogies, including treating commentary as akin to the FRCP’s “contemporaneous statement of intent” (Committee Notes) because the Commission can promulgate commentary long after the guideline it interprets.²²⁴

2. *Kisor v. Wilkie*

In 2019, twenty-six years after *Stinson*, in a case entirely removed from the sentencing context,²²⁵ the Supreme Court in *Kisor* narrowed *Auer*’s scope such that courts may only defer to agency interpretations of “genuinely ambiguous” legislative rules.²²⁶

Faced with the chance to overrule the highly criticized doctrine, the Court fell back on the familiar logic that when you do not understand a piece of writing, “you would probably want to ask the person who wrote it.”²²⁷ The Court acknowledged that this justification breaks down when the ambiguity stems from an issue unanticipated by the original authors or when the rule is so old that placing oneself in the mind of the author is a particularly difficult task.²²⁸ Still, the Court said that in many cases, these interpretive obstacles should not dwarf the “comparative advantages of agencies over courts in making . . . policy judgments” and the “well-known benefits of uniformity in interpreting genuinely ambiguous rules.”²²⁹ Thus, when an agency’s interpretation withstands the new rigor of a *Kisor* analysis, deference will apply, but when it does not, courts may adopt what they determine to be the best reading of a regulation.²³⁰

221. *Id.* at 45–46 (quoting *Braxton v. United States*, 500 U.S. 344, 348 (1991)).

222. *Id.* at 46 (quoting U.S. SENT’G GUIDELINES MANUAL § 1B1.7 cmt. background (U.S. SENT’G COMM’N 1993)).

223. *See id.* at 46–47.

224. *See id.* at 43.

225. Recall that *Kisor* concerned an appeal of an application of *Auer* deference to an interpretation of a U.S. Department of Veterans Affairs regulation. *See supra* note 29 and accompanying text.

226. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

227. *Id.* at 2412.

228. *See id.*

229. *Id.* at 2413.

230. *See id.* at 2419.

A court may only conclude that a legislative rule is genuinely ambiguous after exhausting “all the ‘traditional tools’ of construction.”²³¹ If found to be ambiguous, the court then inquires into “whether the character and context of the agency interpretation entitles it to controlling weight” by ensuring that the interpretation is the agency’s “official position,” implicates the agency’s “substantive expertise,” and reflects “fair and considered judgment.”²³²

The process for granting deference to an agency’s interpretive rule is, evidently, now intensive rather than reflexive.²³³ At the same time, and as Justice Gorsuch highlighted in his concurring opinion, *Kisor* contains “so few firm guides and so many cryptic ‘markers’” that courts may “rarely, if ever, have to defer to an agency regulatory interpretation that differs from what they believe is the best and fairest reading.”²³⁴ As such, some may read *Kisor* as closer to de novo review than a deference doctrine.²³⁵

Importantly, *Kisor* never explicitly implicates the Commission or the commentary.²³⁶ *Kisor* cites *Stinson* in just one footnote, joined by only four justices, collecting over a dozen cases in which the Court applied the now-abrogated *Seminole Rock/Auer* doctrine.²³⁷ Lower courts’ disagreement about whether and how *Kisor* affects courts’ application of *Stinson*, and accordingly how much weight commentary ought to have in sentencing decisions, is the subject of Part II.²³⁸

II. THE SPLIT: THE FAITHFUL AGENTS VERSUS THE FAITHLESS ENTREPRENEURS

This part analyzes the circuit split concerning what deference doctrine controls in the sentencing context: *Stinson* or *Kisor*?²³⁹ Part II.A explores the structural arguments made by circuits adhering to *Stinson*. Part II.A categorizes these courts as “faithful agents” because of their willingness to execute the commentary as written. Part II.B explores circuit courts’ structural arguments in favor of forgoing *Stinson* and adopting *Kisor*. Part

231. *Id.* at 2415 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984)).

232. *Id.* at 2416–17.

233. *See supra* note 21 and accompanying text.

234. *Kisor*, 139 S. Ct. at 2448 (Gorsuch, J., concurring).

235. *See id.*

236. *See generally id.* (majority opinion).

237. *See id.* at 2411 n.3.

238. *See infra* Part II.

239. It is important to note that some circuits do not fall neatly into “pro-*Kisor*” or “pro-*Stinson*” categories. For example, the First Circuit in *United States v. Lewis* acknowledged that “*Kisor* sought to clarify the nuances of judicial deference to interpretations of agency regulations,” but it found no “sound basis for concluding with sufficient confidence that our prior panels would have found in *Kisor* any reason to ‘change [their] collective mind[s]’ with respect to the deference owed to” the commentary at issue in the case. 963 F.3d 16, 24 (1st Cir. 2020) (alterations in original) (quoting *United States v. Wurie*, 867 F.3d 38, 34 (1st Cir. 2017)). Thus, the First Circuit may have implicitly embraced *Kisor*, but it was unwilling to actually perform the analysis. *See id.* This Note acknowledges these nuances and chooses to focus on the circuits and opinions which squarely address the structural arguments in favor of and against adherence to either deference doctrine.

II.B categorizes these courts as “faithless entrepreneurs” because of their willingness to problematize the commentary’s directives, push back on the Commission’s exercise of authority, and make room for greater judicial discretion in sentencing.

A. *The Faithful Agents*

The “faithful agent” circuits generally hold that *Stinson* controls absent clear guidance from the Supreme Court to the contrary.²⁴⁰ As such, faithful agent courts continue to give reflexive deference to the commentary so long as it does not violate the U.S. Constitution or a federal statute and is not plainly erroneous or inconsistent with the guideline it interprets.²⁴¹ These courts’ confidence stems, at least in part, from a belief that the Commission is fundamentally different from other administrative agencies, and as such, the Court in *Kisor* could not possibly have implicated both administrative agencies and the Commission without being explicit.²⁴² As this section will highlight, these courts may not entirely agree with *Stinson*, but they feel obliged to adhere to it out of respect for stare decisis,²⁴³ policy justifications, or a mix of both.²⁴⁴

1. The Fifth Circuit: *United States v. Vargas*

In *United States v. Vargas*,²⁴⁵ the U.S. Court of Appeals for the Fifth Circuit revealed itself to be a faithful agent in its choice to adhere to a doctrine whose “best days are behind it” in the name of institutional integrity—opting to maintain the Commission’s sui generis nature rather than to allow inapplicable administrative principles to subsume it.²⁴⁶

Andres Vargas pled guilty to conspiring to possess cocaine with the intent to distribute, entangling himself in what has become one of the most, if not the most, litigated sections of commentary: the career offender enhancement.²⁴⁷ The career offender enhancement applies when a defendant commits either a crime of violence or a controlled substance offense after two prior felony convictions of the same nature.²⁴⁸ At the time Mr. Vargas’s sentence was calculated, the guideline’s definition of “controlled substance

240. The faithful agent courts include the U.S. Courts of Appeals for the Fifth, Tenth, and D.C. Circuits. *See, e.g.*, *United States v. Vargas*, 74 F.4th 673, 680 (5th Cir. 2023) (en banc), *cert. denied*, No. 23-5875, 2024 WL 674897 (U.S. Feb. 20, 2024); *United States v. Maloid*, 71 F.4th 795, 798 (10th Cir. 2023); *United States v. Jenkins*, 50 F.4th 1185, 1197 (D.C. Cir. 2022).

241. *See Stinson v. United States*, 508 U.S. 36, 45 (1993).

242. *See Maloid*, 71 F.4th at 805.

243. *See, e.g.*, *United States v. Rivera*, 76 F.4th 1085, 1091 (8th Cir. 2023); *United States v. Smith*, 989 F.3d 575, 584–85 (7th Cir. 2021).

244. *See infra* Parts II.A.1–2.

245. 74 F.4th 673 (5th Cir. 2023) (en banc), *cert. denied*, No. 23-5875, 2024 WL 674897 (U.S. Feb. 20, 2024).

246. *Id.* at 683.

247. *See id.* at 678; U.S. SENT’G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT’G COMM’N 2021).

248. *See* U.S. SENT’G GUIDELINES MANUAL § 4B1.1(a).

offense”²⁴⁹ did not include inchoate offenses, but its commentary did.²⁵⁰ Due to his previous convictions for both possessing drugs and conspiring to possess drugs with intent to distribute, as well as the judge’s willingness to defer to the commentary’s directive to include conspiracy offenses in the career offender calculation, the district court sentenced Mr. Vargas to 188 months of imprisonment followed by four years of supervised release.²⁵¹ Absent the enhancement, the advisory prison term would have capped out at 125 months.²⁵²

The Fifth Circuit affirmed Mr. Vargas’s sentence.²⁵³ The court made three main findings en route to its decision: (1) *Stinson* applies, not *Kisor*; (2) *Stinson* demands deference to the commentary; and (3) even if the court were to adopt *Kisor*, it would reach the same result in this case.²⁵⁴

First, “*Stinson*, not *Kisor*” is based on a recognition that “the Sentencing Commission and administrative agencies are different animals.”²⁵⁵ Although *Stinson* borrowed from administrative principles at play in *Auer*, “the two doctrines were distinct from the beginning and remain distinct today.”²⁵⁶ For example, under *Stinson*, the commentary controls even unambiguous guidelines,²⁵⁷ whereas *Auer* only applies when “the meaning of the words used is in doubt.”²⁵⁸ Under *Stinson*, the Commission can interpret a guideline in ways that conflict with prior judicial interpretations,²⁵⁹ whereas administrative agencies cannot.²⁶⁰ In sum, *Stinson* recognizes that the relationship between federal judges and the Commission fundamentally differs from that of federal judges and other administrative agencies—the former is instructive, whereas the latter is supervisory.²⁶¹ “[T]hese differences justify a distinct approach in considering Guidelines commentary, on the one hand, and an agency’s interpretation of its legislative rules, on the other.”²⁶²

Second, the Fifth Circuit worried about inviting unwarranted sentencing disparity by adopting *Kisor*, which it perceived as layering “new complexity

249. *See id.* § 4B1.2(b).

250. *See id.* § 4B1.2(b) cmt. n.1. On November 1, 2023, the guideline was amended to explicitly include inchoate offenses in the definitions of “crime of violence” and “controlled substance offense.” *See id.* § 4B1.2(d).

251. *See Vargas*, 7 F.4th at 679.

252. *See id.* at 678.

253. *See id.* at 699.

254. *See id.* at 680–98.

255. *Id.* at 680, 682.

256. *Id.* at 682.

257. *See Stinson v. United States*, 508 U.S. 36, 44 (1993) (“[C]ommentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice.”).

258. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

259. *See Stinson*, 508 U.S. at 46.

260. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

261. *See Vargas*, 7 F.4th at 682.

262. *See id.* at 683 (quoting *United States v. Moses*, 23 F.4th 347, 355 (4th Cir. 2022)).

onto an already complex [sentencing] system.”²⁶³ *Stinson*, by comparison, is straightforward, guarantees uniformity, and “follows from the role Congress assigned the Sentencing Commission.”²⁶⁴ Thus, the Fifth Circuit held that a court should only avoid deference when the commentary is inconsistent with the guideline, and “inconsistency” demands more than showing that the commentary’s reading of the guideline is incorrect or implausible.²⁶⁵ Rather, there must be some “irreconcilable variance . . . between the two” such that the commentary renders a guideline functionally “inoperable.”²⁶⁶

As applied to Mr. Vargas, then, the Fifth Circuit only needed to determine “whether the guideline [could] bear the commentary’s construction that includes inchoate crimes.”²⁶⁷ Because “not mentioning something does not necessarily mean excluding it,” the court deemed Mr. Vargas’s enhanced sentence permissible.²⁶⁸ At the same time, the Fifth Circuit did not hesitate to signal its distaste for *Stinson*, stating that “[o]ur job, as an inferior court, is to adhere strictly to Supreme Court precedent, whether or not we think a precedent’s best days are behind it.”²⁶⁹

Finally, perhaps in recognition of other circuits’ skepticism of *Stinson*-sponsored sentences, the Fifth Circuit concluded its opinion by conducting a *Kisor* analysis. In doing so, the court realized its own prediction: adhering to *Kisor* risks producing disparity.²⁷⁰ Although the majority found it “obvious” that the rationale supporting the career offender enhancement—that people who commit multiple crimes are more morally culpable and therefore deserving of longer sentences—applies “equally” to inchoate drug crimes,²⁷¹ according to the dissent²⁷² and at least three other circuits,²⁷³ such a conclusion was far from obvious.

The Fifth Circuit’s unwavering majority opinion is thus useful for illustrating why some courts continue to adhere to *Stinson*: in a choice between two pathways to the same result, *Stinson*’s respect for the institutional integrity of the Commission is the better of two bad options.

263. *Id.*

264. *Id.* at 685 (“Under the Sentencing Reform Act, Congress gave the Commission broad authority to write, review, and revise the guidelines.”).

265. *Id.* at 684.

266. *Id.*

267. *Id.* at 689.

268. *Id.* at 686.

269. *Id.* at 683 (“Perhaps *Kisor* is the coming-soon trailer for a rethinking of *Stinson*. Or perhaps the Sentencing Commission’s unique nature and role warrant a distinct deference doctrine untouched by *Kisor*. We express no view on the matter.”).

270. *See id.*

271. *Id.* at 695.

272. *Id.* at 706 (Walker Elrod, J., dissenting) (“To be clear, conspiracy offenses are distinct offenses—not simply a way of committing a substantive offense.”).

273. *See* *United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (en banc); *United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019); *see also infra* Part II.B.1.

2. The Tenth Circuit: *United States v. Maloid*

In contrast to the Fifth Circuit's approach of showing why adopting *Kisor* is unwise compared to keeping *Stinson*,²⁷⁴ the U.S. Court of Appeals for the Tenth Circuit in *United States v. Maloid*²⁷⁵ is a faithful agent due to its explication of why *Stinson* is simply apt.

Quindell Maloid pleaded guilty to a charge of being a felon in possession of a firearm.²⁷⁶ The parties estimated that his advisory sentence range would be thirty to thirty-seven months.²⁷⁷ Unfortunately for Mr. Maloid, the probation officer assigned to his case counted a prior conspiracy-to-menace with a firearm conviction as a "crime of violence,"²⁷⁸ triggering the then-current version of the career offender enhancement.²⁷⁹ Deferring to the commentary by including inchoate offenses in the calculation raised Mr. Maloid's base offense level by five levels, resulting in a new range of fifty-one to sixty-three months of imprisonment.²⁸⁰ The district court sentenced him to fifty-one months.²⁸¹

The Tenth Circuit affirmed.²⁸² Similar to the Fifth Circuit in *Vargas*,²⁸³ the Tenth Circuit gave several reasons for its faithful execution of *Stinson*: (1) "*Kisor* had everything to say about executive agencies and precious little about the Sentencing Commission";²⁸⁴ (2) the Commission is structurally and functionally distinct from administrative agencies;²⁸⁵ and (3) deferring to the commentary does not raise the same statutory and constitutional concerns as deferring to interpretive rules.²⁸⁶

The first two findings are interrelated. The court teased out *Kisor*'s goal of giving the agency, rather than any court, "the laboring oar in clarifying its own regulations," while also recognizing that "excessive deference could be too much of a good thing."²⁸⁷ The Tenth Circuit recognized that, although suitable in the administrative agency context, *Kisor*'s rationale does not adequately map onto sentencing because the Commission "is different" from other agencies.²⁸⁸ For example, executive agencies "base their

274. *See supra* Part II.A.1.

275. 71 F.4th 795 (10th Cir. 2023).

276. *See id.* at 798.

277. *See id.*

278. *See id.* at 798–99 (quoting U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a)(4) (U.S. SENT'G COMM'N 2021)).

279. *See* U.S. SENT'G GUIDELINES MANUAL § 2K2.1 cmt. 1 n.1 (incorporating by reference comment 1 of § 4B1.2 of the Guidelines). Recall that the guideline was amended in November 2023 to explicitly include inchoate offenses. *See supra* note 250.

280. *See Maloid*, 71 F.4th at 799.

281. *See id.* at 798.

282. *See id.* at 817.

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

284. *Maloid*, 71 F.4th at 806.

285. *See id.* at 806–07.

286. *See id.* at 809–11.

287. *Id.* at 806.

288. *Id.* at 807.

interpretations on ‘policy concerns’ as agents of the President,”²⁸⁹ whereas the Commission “speaks as an agent of the Judiciary.”²⁹⁰ Unlike administrative agencies, the Commission has “no enforcement or investigative authority,” nor does it “have the same scope of rulemaking authority” that most agencies enjoy because Congress scrutinizes all of its actions.²⁹¹ These structural differences made the Tenth Circuit unwilling to apply *Kisor*, “crafted entirely in the context of executive agencies,” to the commentary, even if the alternative, *Stinson*, “rests on shaky grounds.”²⁹²

As for the third finding, the Tenth Circuit recalled the main statutory and constitutional anxieties stemming from *Auer*—that too much deference violates (1) the APA, (2) the separation of powers doctrine, and (3) due process—and explains why the same concerns do not apply to the commentary.²⁹³

The first two sub-findings are, again, interrelated. According to the Tenth Circuit, *Stinson* neither abrogates nor aggrandizes judicial power. First, *Stinson* does not abrogate judicial power because § 706 does not apply to the guidelines or commentary and because deference under *Stinson* is not reflexive post-*Booker*.²⁹⁴ Rather, courts “will often interpret the commentary” for themselves and may override its effect after an individualized assessment of each of the § 3553(a) factors.²⁹⁵ Second, *Stinson* does not aggrandize judicial power because it has always been the judiciary’s role to determine proper sentences and because congressional oversight of Commission promulgations serves “as a check on too much deference.”²⁹⁶ In other words, sentencing responsibility under *Stinson* is well-balanced among federal judges, Congress, and the Commission.²⁹⁷

Finally, the Tenth Circuit rebuffed any concerns that *Auer* violates criminal defendants’ due process rights by giving inadequate notice of policy changes because, although *Auer* may incentivize administrative agencies to skirt notice-and-comment requirements, the Commission has “no incentive to promulgate imprecise guideline provisions and commentary that leave defendants and judges unsure of how the Guidelines work.”²⁹⁸

As for Mr. Maloid, the Tenth Circuit concluded that the district court did not err in deferring to the commentary, which it deemed not plainly inconsistent with the guideline because “when an offense is a crime of violence, so is attempting the offense . . . because it presents a serious

289. Executive agencies are subject to the control of the President, whereas “independent” agencies are independent of the President’s control. See *Mistretta v. United States*, 488 U.S. 361, 417 n.2, 424 (1989). For this Note’s purposes, the distinction is inconsequential.

290. *Maloid*, 71 F.4th at 807.

291. *Id.*

292. *Id.* at 807–08.

293. See *id.* at 809; see also *supra* notes 157–59 and accompanying text.

294. See *Maloid*, 71 F.4th at 810.

295. *Id.*; see 18 U.S.C. § 3553.

296. *Maloid*, 71 F.4th at 812.

297. See *id.* at 813 (“There’s nothing tyrannical about judicial deference to the commentary.”).

298. *Id.*

potential risk of physical injury to another comparable to that presented by the completed offense.”²⁹⁹ The Tenth Circuit’s refusal to problematize this supposition, either facially or as applied to Mr. Maloid, follows from its belief in the Commission’s unique structure and mission and solidifies this circuit as a faithful agent.

B. *The Faithless Entrepreneurs*

The “faithless entrepreneur” circuits favor applying *Kisor* to the commentary because they generally agree that *Auer* deference and *Stinson* deference are the same.³⁰⁰ Thus, *Kisor*’s updating of *Auer* necessarily applies to *Stinson*.³⁰¹ These courts view the role of the Commission as differently than their sister circuits do, namely, in that the Commission is not a unique agency.³⁰² As such, these circuits find “grave constitutional concerns” in suggesting that judges treat the Commission differently from other administrative agencies when deciding how and when to afford deference.³⁰³ As this section will highlight, underlying these structural arguments is a suggestion that these courts see administrative remodeling under *Kisor* as an opportunity to reclaim a level of judicial discretion previously unavailable under *Stinson* and more in line with the role envisioned for them by the SRA³⁰⁴ and the Constitution.³⁰⁵ In other words, these courts see *Kisor* as a way to return to an almost pre-Guidelines era of federal sentencing.

1. The Ninth Circuit: *United States v. Castillo*

The U.S. Court of Appeals for the Ninth Circuit in *United States v. Castillo*³⁰⁶ took a straightforward faithless entrepreneur approach to sentencing under *Kisor*. Capitalizing on *Kisor*’s threshold inquiry, the court rebuked the Commission’s attempt to substantively amend a guideline via the commentary, effectively policing what it perceived as an “impermissible” exercise of “extraordinary” authority.³⁰⁷

In September 2020, Robert Castillo pleaded guilty to conspiracy to distribute at least fifty grams of methamphetamine.³⁰⁸ Due to Mr. Castillo’s

299. *Id.* at 814 (quoting *United States v. Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010)).

300. The faithless entrepreneurs include the U.S. Courts of Appeals for the Third, Sixth, Ninth, and Eleventh Circuits. *See, e.g.*, *United States v. Perez*, 5 F.4th 390, 394–95 (3d Cir. 2021); *United States v. Riccardi*, 989 F.3d 476, 484–85 (6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648, 656 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1274 (11th Cir. 2023).

301. *See, e.g.*, *Perez*, 5 F.4th at 394–95.

302. *See, e.g.*, *United States v. Havis*, 927 F.3d 382, 385 (6th Cir. 2019).

303. *Castillo*, 69 F.4th at 663.

304. *See* 18 U.S.C. § 3553(a) (listing factors to be considered at the imposition of a sentence, which include “any pertinent policy statement” but do not include commentary).

305. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

306. 69 F.4th 648 (9th Cir. 2023).

307. *Id.* at 663–64.

308. *See id.* at 650.

two prior felony convictions for controlled substance offenses and the district court's willingness to count Mr. Castillo's conspiracy offense as the trigger for the career offender enhancement, Mr. Castillo's advisory range jumped from between 151 and 188 months to between 262 and 327 months of imprisonment.³⁰⁹ The district court sentenced Castillo to 262 months of imprisonment followed by ten years of supervised release.³¹⁰

The Ninth Circuit vacated and remanded the judgment.³¹¹ According to the Ninth Circuit, *Stinson* is "directly grounded" in *Auer*.³¹² As such, *Kisor*'s gloss on *Auer* necessarily applies to *Stinson*;³¹³ further, "[b]ecause only the commentary includes inchoate crimes, and the text of the guideline unambiguously does not," *Kisor* makes deference to the commentary impermissible.³¹⁴ Castillo's conspiracy conviction was thus incapable of triggering the enhancement.³¹⁵

Deference in this case, the court noted, would raise "grave constitutional concerns" because the function of the commentary is solely interpretive.³¹⁶ Commentary cannot "add[] an offense not listed in the guideline" absent the "institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment."³¹⁷ Due to the "extraordinary power the Commission has over individuals' liberty interests," the Commission cannot exercise "unchecked power" by expanding the definition of "controlled substance offense" without "any grounding in the text" of the guideline itself.³¹⁸ The Ninth Circuit's relatively short, straightforward, and unanimous opinion demonstrates how faithless entrepreneur courts may use *Kisor*, and specifically the threat of giving no deference, to demand a clear delineation between substantive guidelines and interpretive commentary.³¹⁹

2. The Third Circuit: *United States v. Perez*

The U.S. Court of Appeals for the Third Circuit in *United States v. Perez*³²⁰ is a faithless entrepreneur due to its willingness to look beyond the rigidly defined steps of *Kisor* to achieve what it believed to be the best application of a guideline in an individual case.³²¹

309. See *Castillo*, 69 F.4th at 650–51; U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 2021). Recall that the guideline was amended in November 2023, after this decision, to explicitly include inchoate offenses. See *supra* note 250.

310. See *Castillo*, 69 F.4th at 651.

311. See *id.* at 664.

312. *Id.* at 656.

313. See *id.*

314. *Id.* at 653; see also *id.* at 663 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)).

315. *Id.* at 653.

316. *Id.* at 663.

317. *Id.* at 659.

318. *Id.* at 664.

319. *Id.*

320. 5 F.4th 390 (3d Cir. 2021).

321. See *id.* at 399–402.

Lesandro Perez pleaded guilty to federal firearm and drug offenses arising from, among other things, selling two guns to an undercover law enforcement officer.³²² In the course of the sale, the officer came to realize that Perez was also in the possession of drugs.³²³ The relevant guideline imposes a four-level sentence enhancement if the defendant “used or possessed any firearm or ammunition in connection with another felony offense.”³²⁴ According to the commentary, if the other felony offense is drug trafficking, the drugs and firearm must be “found in close proximity.”³²⁵ At Mr. Perez’s sentencing, the government argued that the drugs and guns were in “close proximity” because they were in the same room.³²⁶ As a result, Mr. Perez’s advisory range jumped from between 85 and 105 months to between 121 and 151 months of imprisonment.³²⁷ The district court agreed with the government and sentenced Mr. Perez to 121 months of imprisonment followed by five years of supervised release.³²⁸

The Third Circuit vacated and remanded the judgment.³²⁹ The court’s decision came by way of a meticulous application of *Kisor*, followed by something of a curveball. Before starting its *Kisor* analysis, the court rejected “previous Supreme Court precedent [that] seemed to allow Commentary to expand the scope of the Guidelines beyond the Guidelines text itself” in favor of applying the “plain text of the Guidelines wherever possible.”³³⁰ But the court did not find that the commentary at issue went beyond the guideline’s text—quite the opposite, the court found that the commentary *was* entitled to *Kisor* deference.³³¹

The curveball was that the Third Circuit did not stop there. Concerned about the scenario “of a drug trafficker who coincidentally has a hunting rifle buried in his closet,”³³² the court concluded that the “commentary creates a rebuttable presumption, rather than a bright-line rule, that the enhancement should apply when a defendant possesses guns and drugs together.”³³³ Although a presumed nexus between the presence of drugs and guns does not

322. *See id.* at 392–93.

323. *See id.* at 393.

324. U.S. SENT’G GUIDELINES MANUAL § 2K2.1(b)(6)(B) (U.S. SENT’G COMM’N 2023).

325. *Id.* § 2K2.1 cmt. n.14(B).

326. *See Perez*, 5 F.4th at 393.

327. *See id.* at 392.

328. *See id.* at 393.

329. *See id.* at 402.

330. *See id.* at 395.

331. The Third Circuit held that Note 14(B) was a reasonable interpretation of an ambiguous guideline implicating the Commission’s substantive expertise because the phrase “in connection with” is infamously pliable; the history of the Note reveals that it was added to “address a circuit conflict pertaining to the application” of the guideline; and the language of the Note borrows from Supreme Court precedent, which provides some “boundaries” for when the enhancement should apply (excluding “mere happenstance”). *See id.* at 396–99.

332. *See id.* at 402.

333. *See id.* at 400.

appear to be new,³³⁴ the burden-shifting required to disprove the nexus does.³³⁵ In effect, the Third Circuit tasked defendants with proving to a judge why a sentence enhancement is unnecessary rather than requiring the prosecution to prove why it is necessary.³³⁶ Nonetheless, the court emphasized, the approach avoids allowing the commentary to impermissibly expand the meaning of “in connection with” beyond the substantive law set forth in the guideline by excluding instances in which the firearm’s presence is accidental or coincidental.³³⁷

The Third Circuit remanded the judgment to allow Mr. Perez a chance to prove that the firearm’s presence was a “mere accident or coincidence” and to allow the district court to reevaluate the relationship between Mr. Perez’s drug and firearm-trafficking activities.³³⁸ By calling attention to the various factors the lower court may consider,³³⁹ the majority urged it to pay close attention to the justification for the enhancement³⁴⁰ and its applicability to Mr. Perez. In other words, the court seemed explicitly concerned with ensuring Mr. Perez’s sentence was properly individualized.

The Third Circuit’s dissatisfaction with the outcome of its *Kisor* analysis demonstrates the difficulty of utilizing administrative doctrines in the sentencing context—even if the commentary’s interpretation is reasonable in broad strokes, it may not comport with a judge’s intuition about what degree of punishment promotes the purposes of sentencing in a particular case. The Third Circuit exemplifies how much discretion judges can reclaim by adopting *Kisor* and leaning into the “Commission as an administrative agency” analogy.³⁴¹

3. The Sixth Circuit: *United States v. Riccardi*

Finally, the U.S. Court of Appeals for the Sixth Circuit in *United States v. Riccardi*³⁴² shows faithless entrepreneurs how to use *Kisor* to avoid giving deference to the commentary altogether, even when the relevant provision passed through the procedural gauntlets of notice-and-comment and congressional review.³⁴³

334. See, e.g., *United States v. Slone*, 990 F.3d 568, 572 (7th Cir. 2021) (“Application Note 14(B) creates a presumption that the § 2K2.1(b)(6)(B) enhancement is warranted whenever guns are found in close proximity to drugs.”).

335. See *Perez*, 5 F.4th at 402 (Bibas, J., concurring) (“The majority admits that this reading of the Guideline [with Note 14(b) as written] would be unreasonable. So it misreads the Note to create a rebuttable presumption and then defers to its own creation.”).

336. See *id.*

337. See *id.* at 401 (majority opinion).

338. See *id.*

339. See *id.* (explaining that the factors include: “(1) the type of gun involved, with handguns more likely to be connected with drug trafficking than hunting rifles; (2) whether the gun was loaded; (3) whether the gun was stored (or, we add, possessed) near the drugs or drug-related items; and (4) whether the gun was accessible”).

340. U.S. SENT’G GUIDELINES MANUAL § 2K2.1 cmt. n.14(B) (U.S. SENT’G COMM’N 2023) (“[T]he presence of the firearm has the potential of facilitating another felony offense.”).

341. See *infra* Part III.A.2.

342. 989 F.3d 476 (6th Cir. 2021).

343. See *supra* notes 157–59 and accompanying text.

Jennifer Riccardi, a postal employee, pleaded guilty to stealing 1,505 gift cards, together valuing about \$47,000, from the mail.³⁴⁴ The relevant guideline instructs the sentencing judge to increase the advisory range for theft according to the amount of “loss,” which is undefined.³⁴⁵ The commentary provides some hints, including an instruction that for any case involving an “unauthorized access device,” which the parties conceded includes stolen gift cards,³⁴⁶ the loss “shall not be less than \$500 per access device.”³⁴⁷ For Ms. Riccardi, then, the amount of “loss” relevant for sentencing was not \$47,000, but \$752,500.³⁴⁸

The Sixth Circuit vacated and remanded the judgment.³⁴⁹ Lamenting its history of being “quick to give ‘controlling weight’ to the commentary without asking whether a guideline could bear the construction that the commentary gave it,” the court gave both a “simple” and a “more complicated” reason for adopting *Kisor*.³⁵⁰

The simple reason was that “despite Congress’s decision to locate the relevant agency (the Commission) in the judicial branch rather than the executive branch,” *Stinson* “told courts to follow basic administrative-law concepts.”³⁵¹ Therefore, *Kisor* “applies just as much to *Stinson* (and the Commission’s guidelines) as it does to *Auer* (and an agency’s regulations).”³⁵²

The more complex reason stemmed from a belief that the Commission was subject to the same concerns ever-present in the administrative context, namely “an agency’s power to adopt a new legislative rule under the guise of reinterpreting an old one.”³⁵³ Given the drastic effect that deferring to the commentary would have on Ms. Riccardi’s sentence, the court concluded that the Commission was attempting to do exactly what *Kisor* prohibits—using the commentary to substantively amend a guideline.³⁵⁴ The court’s “healthy judicial review” revealed that “[n]o reasonable person would define the ‘loss’ from a stolen gift card as an automatic \$500.”³⁵⁵ When “the Commission seeks to keep individuals behind bars for longer periods of time based on this type of ‘fictional’ loss amount,³⁵⁶ such a substantive policy decision belongs

344. See *Riccardi*, 989 F.3d at 479.

345. See U.S. SENT’G GUIDELINES MANUAL § 2B1.1.

346. See *Riccardi*, 989 F.3d at 479.

347. See U.S. SENT’G GUIDELINES MANUAL § 2B1.1 cmt. n.3(F)(i).

348. See *Riccardi*, 989 F.3d at 479.

349. *Id.* at 490.

350. *Id.* at 484.

351. *Id.* at 485.

352. *Id.*

353. *Id.*

354. See *id.*

355. *Id.* at 485–86.

356. Fictional here means “cannot ‘be derived from [§ 2B1.1] by a process reasonably described as interpretation.” *Id.* at 487 (alteration in original) (quoting *Hoctor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996)).

in the guidelines, not in the commentary.”³⁵⁷ Thus, the commentary deserved no deference.³⁵⁸

The court refused to adjust its approach because the relevant commentary went through notice-and-comment procedures.³⁵⁹ The Sixth Circuit’s concern stemmed from the Commission’s *ability* to change course with the wind, regardless of how often they took advantage of it.³⁶⁰ In policing the line between substantive and interpretive, as both the Ninth³⁶¹ and the Third³⁶² Circuits had also done, the Sixth Circuit goes a step further in demonstrating a vital consequence of adopting *Kisor* in the sentencing context—the ability of courts to feel that they can engage in meaningful judicial review even though the APA’s § 706 judicial review standard does not apply to the Guidelines.³⁶³

III. RECOGNITION OF THE INAPT ANALOGY AS A WAY FORWARD

This part provides a simple answer to the question at the heart of this Note—what level of deference do courts owe to the commentary in the U.S. Sentencing Guidelines? None. The commentary’s ideal role in an era of advisory Guidelines is purely elaborative—to help judges understand how a particular guideline may be applied in an individual case and how it purports to achieve the purposes of sentencing set forth in the SRA. Although these elaborations can and should, when well-informed and well-reasoned, be given weight by judges, they should not require deference to be persuasive. This part suggests that getting to this ideal model of interaction is not as big of a leap or as disruptive as one might think. It is simply a matter of trading one set of principles—administrative law principles—for another: those embraced by the Standing Committee and advisory committees in their role as stewards of the FRCP.

Part III.A argues against long-term adherence to either *Stinson* or *Kisor* because both undermine the SRA’s vision of an evidence-based approach to federal sentencing. Part III.B argues in favor of abolishing deference doctrines as they apply to the commentary altogether and adopting a new analogy—Guidelines commentary as akin to the FRCP’s Committee Notes. Forgoing the “faithful agent” versus “faithless entrepreneur” divide, Part III.B labels the new analogy the “cooperative partner” approach.

357. *Id.*

358. *Id.*

359. *See id.* at 488.

360. *See id.* at 488–89 (“By placing this loss amount in the commentary, the Commission has retained the power to adjust it tomorrow without satisfying the same procedural safeguards.”); *see also supra* notes 176–78 and accompanying text.

361. *See supra* Part II.B.1.

362. *See supra* Part II.B.2.

363. *See supra* note 179 and accompanying text.

*A. Neither Kisor nor Stinson Adequately
Promotes the Purposes of Sentencing*

This section argues that neither *Kisor* nor *Stinson* promotes “certainty and fairness”³⁶⁴ in sentencing because neither adequately accounts for how judicial expertise can and should interact with the Commission’s expertise in a post-*Booker* world. In other words, deference in the sentencing context has an audience problem. *Stinson* ensures judges promote certainty but forces them to impose sentences that are either unduly harsh or otherwise morally disagreeable.³⁶⁵ *Kisor* allows judges to sentence within their philosophical and moral sensibilities but to the detriment of uniformity goals.³⁶⁶ These doctrines ensure a clash of expertise rather than the collaboration essential to the Commission’s ability to maintain judges’ loyalty post-*Booker*.³⁶⁷

1. Why Not *Stinson*

The upshot of *Stinson* is that it is straightforward, ensures uniformity, respects the sui generis nature of the Commission, and imbues confidence in Commission-based expertise.³⁶⁸ It is true that the Commission’s research capabilities engender a fundamentally different type of expertise than that garnered by boots-on-the-ground judging. It is also true that the Commission is well-positioned to do something individual judges could never do on their own—provide insight into national sentencing trends.³⁶⁹ The problem is the Commission is not transparent about its data collection or how it uses data to inform Guidelines amendments, or at least not to the extent it could be.³⁷⁰ *Stinson*’s pitfall is that it does nothing to alter this status quo by incentivizing or even allowing for judges’ and the Commission’s respective expertise to interact in productive ways.

District court judges can and should do more than determine whether commentary renders a guideline functionally “inoperable.”³⁷¹ Otherwise, as *Vargas*³⁷² and *Maloid*³⁷³ demonstrate, courts adhering to *Stinson* will continue to promote uniformity at the expense of properly individualized punishment. Unlike courts that adopt *Kisor*, *Stinson* courts do not have to stop to ask whether enhanced sentences are (1) sufficient but not greater than necessary to achieve the purposes of sentencing or (2) grounded in any

364. 28 U.S.C. § 991(b)(1)(B).

365. See *supra* Part II.A.

366. See *supra* Part II.B.

367. See *supra* notes 128–30 and accompanying text.

368. See *supra* Part II.A.

369. See Fish, *supra* note 78, at 575 (“The main disadvantage of granting judges sentencing discretion is that they are unable to effectively coordinate with one another.”).

370. See Chanenson, *supra* note 7, at 25 (describing the lack of data transparency at the federal level in comparison to states); Oleson, *supra* note 73, at 746–50 (advocating for a computer software program that would enable judges to track how similar offenders and offenses are sentenced, thus allowing a kind of “common law of sentencing to flourish”).

371. See *supra* note 266 and accompanying text.

372. See *supra* Part II.A.1.

373. See *supra* Part II.A.2.

convincing empirical rationale.³⁷⁴ And although the Tenth Circuit in *Maloid* claimed that judges still meaningfully interpret the commentary under *Stinson*,³⁷⁵ the court failed to recognize how the commentary's promulgation process³⁷⁶—and indeed the very concept of “reflexive” deference³⁷⁷—is designed to keep judges on the sidelines. Professor William J. Stuntz framed the issue nicely: “[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules.”³⁷⁸ By extension, and given the extent to which the Commission relies on congressional approval, judges' interpretations under *Stinson* can rarely be meaningful.³⁷⁹ As such, faithful agent courts improperly accept the limited role *Stinson* leaves for their unique perspective.

Finally, despite their commitment to stare decisis and adhering only to abundantly clear Supreme Court directives,³⁸⁰ faithful agent courts do not have compelling ways of reconciling *Stinson* with *Booker*. *Booker* requires courts to calculate the applicable range and ensure that it comports with each of the sentencing factors under § 3553(a).³⁸¹ Those other factors include consideration of “any pertinent policy statement” issued by the Commission but, unequivocally, do not include consideration of “any pertinent commentary.”³⁸² When the SRA mentions commentary, it is in reference to permissible grounds for departure from the *mandatory* guideline range.³⁸³ This delineation is consistent with the SRA's and the Commission's original understanding that commentary would serve a purely informational purpose rather than as a source of conflicting substance.³⁸⁴ In this sense, *Booker* makes *Stinson* a “doctrinal dinosaur”³⁸⁵ because *Stinson*'s “cornerstone” is the binding nature of the Guidelines.³⁸⁶ Sustained loyalty to a doctrine unequivocally not written for the reigning order is incoherent and concerning.

374. See 18 U.S.C. § 3553(a).

375. See *supra* notes 294–95 and accompanying text.

376. See *supra* Part I.B.2.

377. See *supra* notes 157–59 and accompanying text.

378. Stuntz, *supra* note 79, at 510.

379. See *supra* notes 189–92 and accompanying text.

380. See *supra* note 242 and accompanying text.

381. See *supra* notes 113–14 and accompanying text.

382. 18 U.S.C. § 3553.

383. *Id.* § 3553(b)(1) (“In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.”).

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

385. See Acton, *supra* note 40, at 389–91.

386. See *United States v. Vargas*, 74 F.4th 673, 699 (5th Cir. 2023) (en banc) (Oldham, J., concurring), *cert. denied*, No. 23-5875, 2024 WL 674897 (U.S. Feb. 20, 2024).

2. Why Not *Kisor*

In refusing to do away with *Auer* deference completely, *Kisor* aimed to incentivize administrative agencies to be more thoughtful in their promulgations by stymying the temptation to enact vague legislative rules supplemented by substantive, yet largely unreviewed, interpretive rules.³⁸⁷ It was also meant to bolster courts' ability to conduct meaningful judicial review under § 706 of the APA.³⁸⁸ But the Commission is not subject to § 706,³⁸⁹ even if some courts have come to behave like it is.³⁹⁰ The question of continuing to apply *Kisor* in the sentencing context is thus twofold. First, do the same administrative law concerns that drove the Court to embrace *Kisor* truly mirror those in the sentencing context? If so, does *Kisor* adequately resolve those concerns in a way that furthers the goals of sentencing under the SRA? This Note's answers to these questions, respectively, are not quite and not necessarily.

Firstly, and as the Tenth Circuit in *Maloid* rightly points out, the Commission is not subject to the same concerns plaguing administrative agencies because no one benefits from imprecise guidelines.³⁹¹ To assume otherwise would be to overlook the fact that, unlike administrative agencies whose audiences are the general public, the Commission's audience is federal judges, and, unlike legislative rules, the guidelines do not have the force of law post-*Booker*.³⁹² The Commission must maintain a sense of legitimacy among judges to compel adherence.³⁹³ Legitimacy does not come in the form of illegible guidelines. Anyone who remains skeptical that the Commission would attempt to aggrandize its power absent *Kisor* may find reassurance in the Commission's best practice of subjecting new and amended commentary to the notice-and-comment process.³⁹⁴ In essence, although the Commission's role may have been more regulatory before 2005, which could have justified adopting *Kisor*, post-*Booker*, the paradigm has shifted to something more akin to advice-giving, making adopting *Kisor* inappropriate.

Second, there are reasons to be skeptical about using *Kisor* to promote evidence-based sentencing under the SRA. When judges are committed to reaching the "right" answer under *Kisor*, *Kisor*'s multistep analysis layers "new complexity onto an already complex system,"³⁹⁵ thus inviting error and disparity. When judges, familiar with the guideline and commentary at issue, have a good idea where they would like to end up, *Kisor* gives them the tools

387. See *supra* Part I.C.2.

388. See *supra* note 234 and accompanying text.

389. See *supra* note 179 and accompanying text.

390. See *supra* note 363 and accompanying text.

391. See *supra* note 298 and accompanying text; cf. *supra* note 353 and accompanying text.

392. See *supra* Part I.A.3; see also *supra* note 149.

393. See *supra* notes 127–39 and accompanying text.

394. See *supra* note 176 and accompanying text.

395. *United States v. Vargas*, 74 F.4th 673, 683 (5th Cir. 2023) (en banc), cert. denied, No. 23-5875, 2024 WL 674897 (U.S. Feb. 20, 2024).

and room to get there.³⁹⁶ The Third Circuit in *Perez* is a prime example of this working in a defendant's favor. By encouraging the lower court on remand to scrutinize the commentary's effective synonymizing of "in connection with" and "in proximity to," the Third Circuit second-guessed the Commission's judgment in a manner unavailable under *Stinson*.³⁹⁷ On the one hand, this looks like a reasonable extension of the spirit of *Booker*—recognizing that *Stinson* overly cabined judicial discretion, *Kisor* gives some measure back. On the other hand, as evidenced by the majority versus the dissent in *Vargas*,³⁹⁸ *Kisor* allows philosophical differences to dominate sentencing in ways that disturbed Judge Frankel and others in the 1970s.³⁹⁹ *Kisor* is thus a double-edged sword. The commentary may contain clauses that substantively amend a guideline in impermissible ways such that *Kisor*'s threshold requirement effectively keeps unwarranted enhancements out. Other times, the commentary may provide helpful guidance that the threshold inquiry prevents judges from accessing.⁴⁰⁰

Inevitable judicial disagreement about how *Kisor* applies can and likely will promote impermissible disparities by either unnecessarily protecting or punishing a defendant, depending on the court and the context. Emerging circuit splits will force the Commission to amend the Guidelines in ways that resolve the resultant disparities, for better or for worse. The November 1, 2023 amendment to the career offender enhancement serves as a cautionary tale: "The amendment addresses this circuit conflict by moving, without change, the commentary including certain inchoate and accessory offenses in the definitions of 'crime of violence' and 'controlled substance offense' to the text of the guideline."⁴⁰¹ Recall that, absent the enhancement, Mr. Vargas's maximum sentence would have been 125 months of imprisonment, as opposed to a minimum of 188 months,⁴⁰² and Mr. Castillo's maximum sentence would have been 188 months of imprisonment, as opposed to 327 months.⁴⁰³ The enhancement is far from insignificant, yet the Commission, with little explanation, chose to resolve the split in a way that defaulted to harsher rather than more lenient sentences.⁴⁰⁴ This is where the

396. See *supra* notes 234–35 and accompanying text.

397. See *supra* Part II.B.2.

398. See *supra* notes 271–72 and accompanying text.

399. See *supra* note 59 and accompanying text (describing total judicial discretion in sentencing as "terrifying and intolerable for a society that professes devotion to the rule of law.").

400. See *United States v. Moses*, 23 F.4th 347, 357 (4th Cir. 2022) ("Were we now to relegate commentary to a status where it could be considered only when the relevant Guideline is genuinely ambiguous, we would negate much of the Commission's efforts in providing commentary to fulfill its congressionally designated mission."), *cert. denied*, 143 S. Ct. 640 (2023).

401. U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 58 (2023).

402. See *supra* notes 251–52 and accompanying text.

403. See *supra* note 309 and accompanying text.

404. See U.S. SENT'G COMM'N, *supra* note 401, at 57 ("Informed by the case law, public comment and relevant sentencing data, this amendment specifically addresses application issues regarding . . . the treatment of inchoate offenses.").

Commission's excusal from § 706 review becomes a problem for using *Kisor* in the sentencing context.

Although the Guidelines are no longer mandatory, calculating the applicable range is.⁴⁰⁵ That range serves as both a cognitive anchor⁴⁰⁶ and a safety net⁴⁰⁷ for judges. If they wish to depart, they must be prepared to explain themselves.⁴⁰⁸ The larger the departure, the more significant the explanation must be.⁴⁰⁹ Thus, when the Commission resolves circuit splits in ways that skew harsher, judges are anchored in higher sentences and burdened with the responsibility of either imposing the higher sentence or justifying a significant departure without a formal mechanism to directly question or problematize the Commission's (or Congress's) decisions.⁴¹⁰

Kisor is not a suitable doctrine for incentivizing positive interactions between judges and the advisory Guidelines. For the reasons elucidated above, the Tenth Circuit was correct that *Kisor* was "crafted" and should stay "entirely in the context of [administrative] agencies."⁴¹¹

B. The Court Should Abandon Deference Doctrines in the Sentencing Context

This section begins in Part III.B.1 by urging the Supreme Court to overrule *Stinson* and abandon the project of applying deference doctrines to the commentary. Recognizing that the bedrock of administrative deference, *Chevron*, is up for review this term,⁴¹² Part III.B.2 suggests that judges and the Commission can prepare for the possible end of deference (at least as we know it) by distancing themselves from the administrative law analogy and instead borrowing first principles from its neighboring judicial agency, the Standing Committee, and leaning into the opportunities granted to them by post-*Booker* Supreme Court doctrine.

1. Deference to the Commentary in the Post-*Booker* Era Is Unnecessary

Taking into account the Commission's institutional structure⁴¹³ and circuit court perspectives⁴¹⁴ the best way to implement the evidence-based system envisioned by the SRA is through a set of advisory guidelines that are (1) informed by *both* judicial and Commission-based expertise,⁴¹⁵ (2) supported

405. See *supra* notes 111–12 and accompanying text.

406. See *supra* note 137 and accompanying text.

407. See *supra* note 117 and accompanying text.

408. See *supra* note 119 and accompanying text.

409. See *Gall v. United States*, 552 U.S. 38, 50 (2007).

410. See Rachel E. Barkow, *The Reformation of Criminal Law*, 29 N.Y.U. ENV'T L.J. 363, 376 (2021) ("If criminal law agencies had to explain the evidentiary basis for their policy calls and how they are consistent with public safety goals, many policies would be struck down.").

411. See *supra* note 292 and accompanying text; *United States v. Maloid*, 71 F.4th 795, 807 (10th Cir. 2023).

412. See *supra* note 39.

413. See *supra* Part I.

414. See *supra* Part II.

415. See *supra* Part III.A.

by truly empirical and well-reasoned research,⁴¹⁶ (3) incubated from excessive congressional input⁴¹⁷ (while recognizing sentencing and criminal lawmaking, in general, is an inherently political task),⁴¹⁸ and (4) continuously updated to reflect actual judicial practice and new research findings.⁴¹⁹ A new deference doctrine is unlikely to be the best means to this end.

Deference doctrines like *Auer*, *Stinson*, and *Kisor* presume the superior expertise of policymaking bodies so as to simplify and expedite judicial review, promote agency productivity, and bolster the administrative state's legitimacy.⁴²⁰ These goals and assumptions do not operate as effectively in the sentencing context. *Stinson* leaves little room for judicial expertise, whereas *Kisor* may leave too much. *Stinson* is simple but harsh. The bar for finding "inconsistency" is high,⁴²¹ and rigid adherence leaves judges vulnerable to congressional puppeteering by promoting blatantly unjust policy decisions.⁴²² *Kisor* further complicates an already complex Guidelines regime by adding a more-than-five-step analysis atop a multistep Guidelines calculation, leaving significant room for mathematical error and the flourishing of philosophy-driven sentencing.⁴²³ The combined effect is to undermine, rather than bolster, the Guidelines' legitimacy in the post-*Booker* era in which legitimacy is everything.

Feeding into the administrative law analogy prevents the Commission from interacting with its constituencies in ways that effectuate the purposes of sentencing outlined in the SRA or, at least, from doing so to the fullest extent practicable. The Supreme Court should take note of the appellate courts' near consensus that *Stinson*'s best days are behind it and overrule it.⁴²⁴ It should also clarify that *Kisor* only applies to administrative agencies and decline to put a new deference doctrine in its place. Instead, the commentary should be regarded, by both the Commission and federal judges, as enlightening and persuasive but not binding, like the FRCP's Committee Notes.

416. See, e.g., Chanenson, *supra* note 7, at 25 (arguing that the Commission should release judge-specific sentencing information as a means to promote a norm-reinforcing feedback loop between judges); Oleson, *supra* note 73, at 757 (calling for an evidence-based sentencing information system to reduce inter-judge disparity and provide a noncoercive means of channeling judicial discretion); see also *supra* notes 186–87.

417. See *supra* note 185 and accompanying text.

418. See Barkow, *supra* note 184, at 720 ("A politically savvy and well-connected [Commission] is more likely to wield influence than one that is aloof from political pressures.").

419. See STITH & CABRANES, *supra* note 45, at 82 ("The greatest deficiencies in the pre-Guidelines regime were its failure to provide for review of the decisions of sentencing judges and its failure to ensure that the sentencing judge's exercise of discretion was informed by authoritative criteria and principles.").

420. See *supra* notes 143, 219–21, 229 and accompanying text.

421. See *supra* notes 265–66 and accompanying text.

422. See Oleson, *supra* note 73, at 713.

423. See *supra* Part III.A.2.

424. See *supra* Part II.B; see also *supra* notes 269, 292 and accompanying text.

2. A More Apt Analogy: The Cooperative Partner Approach

Analogizing the commentary to the FRCP's Committee Notes puts federal judges and the Commission in a position to engage in meaningful dialogue and to work cooperatively rather than in tension with each other in pursuit of a common goal: fair and just federal sentencing. This is what this Note labels the "cooperative partner" approach.⁴²⁵

The cooperative partner approach respects the unique structure and goals of judicial agencies. The Commission and the Standing Committee are both rule-promulgating bodies housed in the judicial branch whose target audience is judges, as opposed to the direct public. Congress charges both with continuous oversight responsibilities and delineates specific goals that inform their amendment process.⁴²⁶ Commentary is also, in theory, meant to perform the same supporting role function as Committee Notes, meaning both should explain their respective rule or guideline and ease application in real-world contexts.⁴²⁷ Neither the REA nor the SRA intend for the Committee Notes or commentary to substantively amend.⁴²⁸ Indeed, there would be no point in placing substance in a Committee Note, given the Committee's awareness that judges do not *have* to look at them.⁴²⁹ The fact that commentary tends to substantively amend the guideline it supports⁴³⁰ suggests that the Commission could enhance its legitimacy among judges by taking a page out of the Standing Committee's book: adhere strictly to the notice-and-comment procedures for substantive amendment and use commentary to genuinely *guide* subsequent interpretations.

Of course, this analogy is again "not precise"⁴³¹ because, unlike Committee Notes, Congress plays a role in promulgating the commentary, and the commentary is not always issued contemporaneously with its respective guideline.⁴³² However, this analogy provides a clearer and simpler approach to interpreting guidelines and their commentary than either of the deference doctrines discussed herein, and it does so less problematically.

Treating the commentary as akin to Committee Notes respects judges' individual expertise by making interaction with the commentary more of a dialogue than a mandate. As it stands, judges are required under the SRA,⁴³³ *Gall*,⁴³⁴ and the looming threat of appeal to provide a reasoned explanation for their chosen sentences, although the Commission, immune from § 706

425. *See supra* note 41.

426. *See* 28 U.S.C. §§ 331, 991(b)(2).

427. *See supra* notes 18, 201 and accompanying text.

428. *See supra* notes 18, 201 and accompanying text.

429. *See supra* note 207 and accompanying text.

430. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) cmt. n.1 (U.S. SENT'G COMM'N 2021); U.S. SENT'G GUIDELINES MANUAL § 2B1.1 cmt. n.3(F)(i) (U.S. SENT'G COMM'N 2023).

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

432. *See supra* notes 175–76 and accompanying text.

433. *See* 28 U.S.C. § 994(w)(1)(B); *supra* note 89 and accompanying text.

434. *See supra* note 119 and accompanying text.

judicial review, has no obligation to reason-give in return. The Court in *Kimbrough* recognized the consequences of this asymmetry when it held that a judge's departure decision may garner "greatest respect" when a defendant's case falls outside the "heartland" to which the Commission seems to have intended the guideline to apply.⁴³⁵ But if the Commission were to focus on using the commentary exclusively to provide a well-reasoned, empirical explanation for why it sets the punishment where it does and how it intends the guideline to apply both within and outside the "heartland," then the Commission may garner more legitimacy and witness the departure rate decline in turn.⁴³⁶

Further, the new analogy is preferable in how it promotes thoughtfulness among key sentencing actors—the Commission (and Congress by proxy) will have to be more careful about what they place in the commentary versus the guideline based on what they want to ensure judges internalize. Ideally, this constraint will encourage the Commission to focus more on its research efforts, which could help better equip judges⁴³⁷ and make more persuasive policy arguments to Congress,⁴³⁸ thereby averting problems that might otherwise tend to arise when the Commission seeks to decrease punishment in contravention of Congress's own agenda.⁴³⁹

To the extent any reader worries that abandoning deference in the sentencing context will bring back an era of unfettered judicial discretion like that which impassioned Judge Frankel to advocate for the Guidelines in the first place, it seems safe to say that this will not happen.⁴⁴⁰

First, Commission data shows that, even after more than fifteen years under an advisory system, judges are not using their departure power to its fullest extent.⁴⁴¹ The reigning order retains normative appeal, and a closer look at which guidelines judges are and are not departing from should, instead of being seen as disorderly and net negative, signal to the Commission which guidelines are out of step with judicial expertise and trigger thoughtful amendment.

435. See *supra* note 124 and accompanying text.

436. See Fish, *supra* note 78, at 583 ("[W]hen judges are confronted with a guidelines formula that tracks and partly explains their own intuitions about sentencing, they may well revise those intuitions to accommodate the guidelines. This is especially so if the sentencing commission persuades judges by including reasoned explanations for its recommendations, or if the commission can use peer effects by showing that other judges generally follow the guidelines.").

437. See Oleson, *supra* note 73, at 749–50 ("Imagine how much more effective judges could be if they were equipped with meaningful information about desert and recidivism.").

438. See Barkow, *supra* note 184, at 719 ("When sentencing commissions make persuasive policy arguments grounded in political concerns, legislators are more likely to defer to their judgment."); Fish, *supra* note 78, at 594–95 ("[I]nstructing the Commission to look at costs will at least prevent the political feedback mechanism from flowing only in the direction of harsher penalties.").

439. See Fish, *supra* note 78, at 592–93 ("[A]ttempting to lower Guidelines sentences so that they better fit judicial practice can spark legislative backlash, possibly causing the imposition of new mandatory minimums."); see also *supra* note 91 and accompanying text.

440. See *supra* notes 58–60 and accompanying text.

441. See *supra* notes 128–30 and accompanying text.

Second, this Note does not suggest that there should be no constraining model for judicial interaction with the Commission and the Guidelines. Instead, it suggests trading an unsuitable model (the administrative agency model)⁴⁴² for another existing, more suitable model (the FRCP model).⁴⁴³ The FRCP model, labeled herein as the cooperative partner approach, is more suitable in the post-*Booker* era, in which legitimacy is everything, because the Commission is more likely to compel Guidelines adherence when it clearly delineates substance (in the guideline) from interpretation (in the commentary); uses the latter to reasonably explain the former; and thus genuinely aims to ally with judges in promoting an efficient, fair, and evidence-based system of federal sentencing.

CONCLUSION

The more time the Supreme Court, lower courts, and the Commission spend trying to envision a new deference doctrine that adequately accounts for the Commission's *sui generis* structure, the less time each can spend on their unique substantive goals. The current moment of uncertainty surrounding the future of agency deference provides a unique and crucial opportunity to rethink the ideal role of the Commission and the Guidelines in federal sentencing. Rather than contort an outdated administrative law analogy in an attempt to maintain it, reframing the commentary as akin to the FRCP's Committee Notes and adopting the cooperative partner approach would allow federal judges to recognize that they already have the tools that they need to reassert themselves as meaningful players interacting with, but not beholden to, the Guidelines. In doing so, judges and the Commission, together, may work to create a scheme of rational sentencing policy that gets closer to the elusive balance between uniformity and individualization in sentencing. If and when the Court decides to lean into this idea of a "post-*Stinson*/post-*Kisor* era" of federal criminal sentencing, meaningful reform may begin.

442. *See supra* Part I.B.1.

443. *See supra* Part I.B.3.