DON'T ROUND UP THE USUAL SUSPECTS: THE SENTENCING COMMISSION, CAREER OFFENDERS, AND NARROWING THE DEFINITION OF A CONTROLLED SUBSTANCE OFFENSE

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Every day across the United States, controlled substance offenders are subjected to a provision of the United States Sentencing Commission's Career Offender Sentencing Guidelines that drastically increases their average sentences. The sentences of offenders committing inchoate controlled substance offenses are not, however, enhanced by the actual language of the Guidelines; rather, the enhancement is solely the result of interpretive commentary to the Guidelines that lacks any textual hook in the language of the Guidelines. According to the courts, the commentary to the Sentencing Guidelines are meant to interpret the Guidelines and have no independent legal force. This is crucial—while the Sentencing Guidelines must satisfy the notice and comment provisions of the Administrative Procedure Act and are subject to congressional amendment and revocation, commentary is unilaterally issued by the Sentencing Commission without any scrutiny by the various branches of government. Most courts have declined to challenge the Commission's use of commentary as a back door to substantive rulemaking. Instead, these courts liberally defer to the Commission's wishes, allowing it to operate as a super-legislature with back-door rulemaking powers. Beginning in 2014, federal circuit courts began to push back against the Commission's broad authority, resulting in a serious circuit split that subjects criminal defendants to different rules across different jurisdictions. As the Commission has thus far been unable to resolve the split through amendment, the Supreme Court must step in and take unilateral rulemaking power back from the Commission.

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INTRODUCTION

No one can argue that Aumbrey Winstead did not have trouble with the law. In 1998, Winstead was convicted of attempted possession with intent to distribute cocaine after he was arrested with twenty-three baggies of the drug.[1] In 2002, he was convicted of attempted distribution of marijuana after he sold a baggie of it to an undercover police officer.[2] Then, in 2004, he was convicted of the unlawful possession of a firearm after he was caught with a pistol during a traffic stop.[3] On May 15, 2011, Winstead was arrested again when officers found twenty-five baggies of cocaine on his person and two firearms that he had abandoned some distance away.[4] The evidence against Winstead was overwhelming, and he was convicted again, this time for unlawful possession of a firearm, possession with intent to distribute cocaine, and possession of a firearm during a drug trafficking offense.[5]

Winstead's sentence for his 2011 arrest was calculated according to the United States Sentencing Guidelines ("Sentencing Guidelines"),[6] which are created by the United States Sentencing Commission ("Commission").[7] His initial sentencing range was approximately seventeen to twenty years.[8] But Winstead fell victim to the career offender enhancement of the Sentencing Guidelines.[9]

1. United States v. Winstead, 890 F.3d 1082, 1085 (D.C. Cir. 2018).
2. *Id.*
3. *Id.*
4. *Id.* at 1083–84.
5. *Id.* at 1085.
6. *Id.* at 1087–88.
7. U.S. SENT'G GUIDELINES MANUAL § 1A1.1 (U.S. SENT'G COMM'N 2018).
8. *See Winstead*, 890 F.3d at 1087.
9. *See id.* Section 4B1.1(a) of the United States Sentencing Guidelines "confers career offender status on persons with two prior felony convictions of

Under Section 4B1.1, his prior inchoate "controlled substance offense" convictions in 1998 and 2002 rendered him a "career offender," which required that his guideline range be calculated according to Section 4B1.1(c)(3).[10] The new calculation automatically raised Winstead's Criminal History Category to the highest category available—Category VI—and his sentencing range jumped from a maximum of just under twenty-one years to a range of thirty years to life.[11] A thirty-year sentence is equivalent to the punishment for first-degree murder.[12] Winstead may have had trouble with the law, but he had never brandished weapons or engaged in violence; prior to that day, he had never even been convicted of a substantive controlled substance offense.[13] Despite this, Winstead was sentenced to thirty years in prison simply because he had been previously convicted of two inchoate controlled substance offenses.[14]

Winstead appealed his sentence to the United States Court of Appeals for the District of Columbia Circuit, arguing that his attorney had failed to raise the textual argument that inchoate offenses are not actually included in the definition of a "controlled substance offense" but were only added to the definition by what should be purely interpretive commentary to the guideline contained in Application Note 1.[15] Winstead contended that Application Note 1's interpretation is inconsistent with the plain text of the Sentencing

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'either a crime of violence or a controlled substance offense.'" *Id.* at 1089 (quoting U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a)(3)).

> The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Id. § 4B1.2(b). "'[C]ontrolled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." *Id.* § 4B1.2 cmt. n.1.

10. *See Winstead*, 890 F.3d at 1087, 1089. At the federal level, controlled substances are those scheduled by the Drug Enforcement Administration, the Department of Health and Human Services, or by petition from certain interested parties under procedures set by the Controlled Substances Act. *The Controlled Substances Act*, DRUG ENF'T ADMIN., https://www.dea.gov/drug-information/csa (last visited Nov. 4, 2021); *see also Controlled Substances: Alphabetical Order*, DRUG ENF'T ADMIN., https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf (last visited Nov 4, 2021) (listing federally controlled substances).

11. *See Winstead*, 890 F.3d at 1087; U.S. SENT'G GUIDELINES MANUAL § 4A1.1, 5A.

12. *Winstead*, 890 F.3d at 1088.

13. *See id.* at 1085, 1087–88.

14. *See id.* at 1087–88.

15. *Id.* at 1088. According to Application Note 1, a "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1.

Guidelines, and that by purporting to add inchoate offenses to the clear textual definition of a controlled substance offense—rather than interpreting or explaining the offenses listed—the Commission exceeded its authority in adopting Application Note 1.[16] Therefore, Winstead maintained that his previous inchoate drug convictions should not count towards the career offender enhancement, and that he should not be a career offender.[17]

With no D.C. Circuit precedent directly on point, and no instruction from the Supreme Court of the United States, the D.C. Circuit agreed with Winstead, holding that "Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses."[18] The court also held that the deference standard enunciated in *Bowles v. Seminole Rock & Sand Co.*[19] "does not extend so far as to allow [the Commission] to invoke its general interpretive authority via commentary . . . to impose such a massive impact on a defendant with no grounding in the guidelines themselves."[20] Remarking that "[t]his is all the more troubling given that the Sentencing Commission wields the authority to dispense 'significant, legally binding prescriptions governing application of governmental power against private individuals,'"[21] the court went against its sister circuits' precedents that deferred heavily to the Commission[22] and checked the Commission's ability to subvert congressional review.[23]

The Commission responded to *Winstead* by proposing an amendment to Section 4B1.2 that would move the inchoate offense language from Application Note 1 to the text of the guideline as a new subsection.[24] But the public comment period for this amendment closed on March 15, 2019, and the Commission currently lacks a quorum of voting members.[25] Thus, *Winstead* created a circuit split that has only grown wider, and neither the Commission nor the Supreme Court has resolved it.

This Comment explains the circuit split created by *Winstead*, examines prior and subsequent holdings from other circuits, and analyzes and evaluates the arguments on the "textualist" and "deferential" ends of the split. It argues that the textualists are

16. *Winstead*, 890 F.3d at 1091.
17. *Id.* at 1089.
18. *Id.* at 1091.
19. 325 U.S. 410 (1945).
20. *Winstead*, 890 F.3d at 1092.
21. *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)).
22. *See infra* Subpart I.C.
23. *See Winstead*, 890 F.3d at 1092.
24. United States v. Adams, 934 F.3d 720, 729 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 824 (2020).
25. *See id.*

correct and that the highly deferential treatment other circuits give to the Commission is inappropriate and has turned the Commission into a super-legislature that stifles sentencing reform. Part I of this Comment explores the creation of the Commission, the Sentencing Guidelines, and agency deference standards, along with a brief overview of the circuit court precedent leading up to the *Winstead* opinion. Part II discusses the arguments presented in *Winstead* and the subsequent court opinions that support and reject *Winstead*'s reasoning. Part III argues that the textualist arguments are correct and that the plain language of the "controlled substance offense" definition does not provide for deference when considered alongside the new deference standard set forth by the Supreme Court in *Kisor v. Wilkie*.[26] It evaluates textualist and deferential arguments and examines separation of power concerns regarding the nature of the Commission. Finally, the Conclusion provides a recommendation that the Supreme Court issue a decision to resolve the circuit split in favor of the textualist position.

I. ADMINISTRATIVE AND LEGAL BACKGROUND

A. The Creation of the Sentencing Commission and the Sentencing Guidelines

Created by the Sentencing Reform Act of 1984, the Commission is a unique body in the federal system representing the epitome of checks, balances, and the interplay between the various branches of government.[27] The Commission was established by Congress as an independent agency within the federal judiciary whose members are nominated by the president and confirmed by the Senate.[28] While originally imagined as a neutral body insulated from political influence, the Commission often proceeds with great sensitivity to congressional opinion due to the volatile politics of crime.[29] The Commission's purpose is "to promulgate guidelines to ensure that the purposes of sentencing [are] met by the fair and consistent sentencing of defendants whose conduct was similar."[30] It fulfills this purpose by promulgating the Sentencing Guidelines, which provide judges with guidance about the length and type of sentences to impose in any given case.[31] The Commission also has the authority to issue commentary to its guidelines, which the Supreme Court has held has

26. 139 S. Ct. 2400 (2019).

27. Smita Ghosh, *Congressional Administration During the Crack Wars: A Study of the Sentencing Commission*, 23 U. PA. J.L. & SOC. CHANGE 119, 120–21 (2020).

28. Lauren C. Bell, *Monitoring or Meddling? Congressional Oversight of the Judicial Branch*, 64 WAYNE L. REV. 23, 40 (2018).

29. *See* Ghosh, *supra* note 27, at 121–22.

30. Bell, *supra* note 28, at 40–41.

31. United States v. Havis, 927 F.3d 382, 385 (6th Cir. 2019).

no independent legal force and serves only to interpret the text of the Sentencing Guidelines, "not to replace or modify it."[32]

A criminal defendant's guideline range is calculated by considering offense level, criminal history (ranging from Category I to VI), and any enhancements.[33] Criminal history has a drastic influence, with higher categories enhancing the severity of the initial guideline range.[34] Initially mandatory, the Sentencing Guidelines now grant judges some discretion to deviate from calculated guideline ranges, provided that they fulfill certain requirements.[35] Thus, while the Commission's power is not as significant as it was at its inception, it still "exercises a sizable piece 'of the ultimate governmental power' . . . to take away someone's liberty."[36]

Normally, this kind of power is split between the legislature, which creates the statutory penalties for each federal crime, and federal judges, who sentence those who break federal laws.[37] But "the Commission falls squarely in neither the legislative nor the judicial branch; rather, it is 'an unusual hybrid in structure and authority,' entailing elements of both quasi-legislative and quasi-judicial power."[38] The Commission is an independent agency located within the judiciary, yet it lacks judicial power and accountability to the judiciary.[39] Instead, the Commission's Sentencing Guidelines must satisfy the notice and comment provisions of the Administrative Procedure Act, and its promulgated guidelines are subject to congressional amendment and revocation.[40] The Commission's commentary never passes through congressional review or notice and comment procedures, however, and is instead issued unilaterally by the Commission.[41]

Winstead and its progeny deal with a specific set of guidelines and commentary. Section 4B1.1 confers career offender status on persons with two prior felony convictions of "either a crime of violence or a controlled substance offense."[42] According to the commentary to that guideline, the term "controlled substance offense" is "defined in

32. *Id.* at 386 (citing Stinson v. United States, 508 U.S. 36, 38 (1993)).

33. *See* Jeremy Ritter-Wiseman, Comment, *Departing from the Original Goals of the U.S. Sentencing Guidelines: Drug Sentencing Disparities in the U.S. District of Maryland*, 20 U. MD. L.J. RACE RELIGION GENDER & CLASS 136, 158–61 (2020).

34. *See id.* at 158–59.

35. *See Havis*, 927 F.3d at 385.

36. *Id.* (quoting United States v. Winstead, 890 F.3d 1082, 1092 (D.C. Cir. 2018)).

37. *Id.*

38. *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 412 (1989)).

39. *See Mistretta*, 488 U.S. at 393.

40. *See id.* at 393–94.

41. *Havis*, 927 F.3d at 386.

42. U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a).

[Section] 4B1.2."[43] Section 4B1.2 defines a "controlled substance offense" as:

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense.[44]

The commentary to Section 4B1.2, Application Note 1, states that the term "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."[45] When applied, the career offender guideline automatically raises a defendant's criminal history to Category VI, regardless of his calculated history, and provides for a potentially increased final offense level.[46]

B. Judicial Deference to Commission Commentary

When a court interprets an ambiguous regulation, it will often give significant deference to an agency's own understanding of its regulation.[47] This principle was first articulated by the Supreme Court in *Seminole Rock*, where the Court stated that the ultimate criterion in construing an ambiguous regulation is "the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[48] *Stinson v. United States*[49] applied this principle directly to the Commission's commentary in 1993 when it held that, under *Seminole Rock* deference, agency commentary should "be treated as an agency's interpretation of its own legislative rule."[50] Therefore, "[c]ommentary . . . that interprets or explains a guideline is authoritative unless it . . . is inconsistent with, or a plainly erroneous reading of, that guideline."[51] If the two are inconsistent, then "the Sentencing Reform Act itself commands compliance with the guideline."[52] *Auer v. Robbins*[53] crystallized this principle in 1997 when it decided that courts should defer to an agency's interpretation

43. *Id.* § 4B1.1 cmt. n.1.
44. *Id.* § 4B1.2(b).
45. *Id.* § 4B1.2 cmt. n.1.
46. *Id.* § 4B1.1(b).
47. *See, e.g.*, Auer v. Robbins, 519 U.S. 452, 457 (1997).
48. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).
49. 508 U.S. 36 (1993).
50. *Id.* at 44.
51. *Id.* at 38.
52. *Id.* at 43.
53. 519 U.S. 452 (1997).

of its own ambiguous regulation "so long as it is 'based on a permissible construction of the statute.'"[54]

Put simply, when *Winstead* was decided in 2018, the prevailing view on *Seminole Rock* deference was that "the agency's interpretation of an ambiguous regulation is binding as long as it is a reasonable interpretation of the regulation, even if the agency's interpretation is not the best or most natural interpretation."[55] This expansive deference standard was liberally applied by *Winstead*'s sister circuits, with few courts pushing back on the Commission's interpretation of its promulgated guidelines.[56]

The Supreme Court, however, recently narrowed *Seminole Rock* deference significantly. In *Kisor*, the Supreme Court held that an agency's interpretation of a regulation should only be afforded deference when certain requirements are met.[57] First, the regulation must be "genuinely ambiguous . . . even after a court has resorted to all the standard tools of interpretation."[58] The Court stressed that "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read."[59] In a pointed attack against the overreliance on agency input, the Court held that "if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense."[60] *Kisor* also held that if the regulation is "genuinely ambiguous," the agency's interpretation must "fall 'within the bounds of reasonable interpretation.'"[61] Essentially, the regulation "must come within the zone of ambiguity the court has identified after employing all its interpretive tools."[62] Finally, *Kisor* held that agency deference is only appropriate when "the character and context of the agency interpretation entitles it to

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54. *Id.* at 457 (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

55. Lacey Ferrara, Comment, *A New* Auer*: Overview and Analysis of the Supreme Court's Decision in* Kisor v. Wilkie, 70 CASE W. RSRV. L. REV. 217, 234 (2019).

56. *See, e.g.*, United States v. Lange, 862 F.3d 1290, 1294 (11th Cir. 2017) (accepting the agency's broad definition); United States v. Nieves-Borrero, 856 F.3d 5, 9 (1st Cir. 2017) (accepting the agency's commentary as authoritative); United States v. Solomon, 592 F. App'x 359, 361 (6th Cir. 2014) (applying the agency's definition); United States v. Chavez, 660 F.3d 1215, 1228 (10th Cir. 2011) (stating that the agency acted within its realm of authority when defining controlled substance offenses); United States v. Mendoza-Figueroa, 65 F.3d 691, 692 (8th Cir. 1995) (en banc) (giving deference to the agency's interpretation).

57. Kisor v. Wilkie, 139 S. Ct. 2400, 2448 (2019).

58. *Id.* at 2414.

59. *Id.* at 2415.

60. *Id.*

61. *Id.* at 2415–16 (quoting City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013)).

62. *Id.* at 2416.

controlling weight," "the agency's interpretation . . . in some way implicate[s] its substantive expertise," and "an agency's reading . . . reflect[s] 'fair and considered judgment.'"[63] This much stricter deference standard will likely cause courts to reevaluate their broad grant of authority to the Commission and its interpretive commentary.[64]

C. The Precedent Buildup to Winstead

What is remarkable about the *Winstead* decision is how strongly the court swam against the current of previous decisions rendered by its sister circuits. This spirit of rebellion, however, has roots that can be traced back to an earlier decision by the D.C. Circuit in *United States v. Price*.[65]

In *Price*, the D.C. Circuit considered an issue parallel to the one in *Winstead*, centering on whether the inclusion of conspiracy as a "controlled substance offense" via Application Note 1 was beyond the Commission's authority.[66] Noting that "[a] conspiracy to commit a crime involves quite different elements from whatever substantive crime the defendants conspire to commit," the D.C. Circuit rejected the inclusion of conspiracy as a controlled substance offense.[67] The Commission had previously stated in its background commentary to Section 4B1.1 that it specifically promulgated Sections 4B1.1 and 4B1.2 based on Congress's command in 28 U.S.C. § 994(h).[68] Since Section 994(h) described only substantive offenses but neither conspiracy nor inchoate offenses, however, Application Note 1's inclusion of conspiracy and inchoate offenses was invalidated by the court as extending beyond the Commission's authority.[69] While the reasoning remains compelling, this holding has been rendered moot due to an amendment to the background commentary by the Commission.[70]

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63. *Id.* at 2416–18 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

64. *See* Ferrara, *supra* note 55, at 235–37 ("Deference is likely to become far less frequent as courts have more opportunities to apply *Kisor* because fewer agency interpretations will receive deference under *Auer*.").

65. 990 F.2d 1367 (D.C. Cir. 1993).

66. *Id.* at 1368.

67. *See id.* at 1368–70.

68. *See id.* at 1369.

69. *See id.* at 1368–70.

70. United States v. Seals, 130 F.3d 451, 463 (D.C. Cir. 1997) ("The Commission responded by amending and repromulgating the Background Commentary to section 4B1.1 of the Guidelines. The repromulgated version clarified that, pursuant to the Commission's general statutory authority, 28 U.S.C. § 994(a)–(f), and its amendment authority, 28 U.S.C. § 994(o)–(p), prior convictions that can count toward career offender status include convictions of attempts, aiding and abetting and other inchoate offenses.").

Decisions by other circuits have universally erred on the side of deference to the Commission. For example, in 1995, the en banc Eighth Circuit in *United States v. Mendoza-Figueroa*[71] overruled a divided panel of judges, which agreed with *Price*, and instead accepted the interpretive authority of the very same commentary that *Price* rejected.[72] Overcoming a spirited dissent, the Eighth Circuit held that Application Note 1 was within the Commission's statutory authority vested in 28 U.S.C. § 994(h) and that it could not "be tenably argue[d] . . . that Note 1 is a plainly erroneous reading of § 4B1.2."[73] Decisions by the Second Circuit in *United States v. Jackson*,[74] the Fifth Circuit in *United States v. Lightbourn*,[75] the Tenth Circuit in *United States v. Chavez*,[76] and the Eleventh Circuit in *United States v. Smith*[77] have all come to the same conclusion.[78]

When considering Application Note 1's interpretive authority specifically in relation to the definition of "controlled substance offense," the First, Sixth, Ninth, and Eleventh Circuits all ruled in favor of expansive deference to the Commission. In *United States v. Vea-Gonzales*,[79] the Ninth Circuit stated that "the guideline and commentary are perfectly consistent."[80] Noting that it would consider the guideline alone only if the commentary was "irreconcilable" with the guideline, the court reasoned that inchoate offenses are all violations of the substantive offenses listed in the guideline, despite

71. 65 F.3d 691 (8th Cir. 1995) (en banc).

72. *See id.* at 693.

73. *Id.*

74. 60 F.3d 128 (2d Cir.1995).

75. 115 F.3d 291 (5th Cir. 1997).

76. 660 F.3d 1215 (10th Cir. 2011).

77. 54 F.3d 690 (11th Cir. 1995).

78. *See Chavez*, 660 F.3d at 1228 ("We conclude that the Commission acted within [its] broad grant of authority in construing attempts to commit drug crimes as controlled substance offenses for purposes of determining career offender status."); *Lightbourn*, 115 F.3d at 293 ("The amended version of § 4B1.1 . . . draws its authority from the general guideline promulgation powers found at 28 U.S.C. § 994(a)–(f) and is not limited to the enumerated offenses found at 28 U.S.C. § 994(h). The Sentencing Commission has now lawfully included drug conspiracies in the category of crimes triggering classification as a career offender under § 4B1.1 of the Sentencing Guidelines."); *Jackson*, 60 F.3d at 133 ("[W]e conclude that both 28 U.S.C. §§ 994(a) and 994(h) vested the Commission with authority to expand the definition of 'controlled substance offense' to include aiding and abetting, conspiring, and attempting to commit such offenses."); *Smith*, 54 F.3d at 693 ("[W]e hold that the Commission, in construing attempts to commit narcotics crimes as controlled substance offenses for purposes of determining career offender status, acted within its authority pursuant to [28 U.S.C. §] 994(a).").

79. 999 F.2d 1326 (9th Cir. 1993), *overruled on other grounds by* Custis v. United States, 511 U.S. 485 (1994).

80. *Id.* at 1330.

only being mentioned in Application Note 1.[81] Further, in *United States v. Solomon*,[82] the Sixth Circuit scarcely considered the issue before flatly holding that "Application Note 1 to § 4B1.2 of the Sentencing Guidelines makes clear that 'controlled substance offense' includes [an] attempt to commit a controlled substance offense."[83] Similarly, while noting that commentary to the Sentencing Guidelines "must not be confused with gospel," the First Circuit in *United States v. Nieves-Borrero*[84] nevertheless held that Application Note 1 "makes clear" that the "controlled substance offense" includes inchoate offenses.[85] Finally, in *United States v. Lange*,[86] the Eleventh Circuit gave the Commission even more leeway when it deferred to the Commission, stating that "[w]e give an application note 'its most natural reading' even if 'it actually enlarges, rather than limits, the applicability of the enhancement.' We presume that the Sentencing Commission 'said what it meant and meant what it said.'"[87]

II. *WINSTEAD*: THE OPINION AND ITS PROPONENTS AND DETRACTORS

"As is apparent, neither the crime of attempting to distribute drugs nor attempted possession with intent to distribute drugs is included in the guideline list . . . . [T]here is no question . . . the commentary adds a crime . . . that is not included in the guideline."[88] The *Winstead* opinion lays out its conclusion bluntly: by purporting to add inchoate offenses to the clear textual definition, rather than interpreting or explaining the listed offenses, the commentary in Application Note 1 runs contrary to the Sentencing Guidelines and exceeds its authority under *Stinson*.[89]

Winstead stands for a textual approach to interpreting the Sentencing Guidelines. Since the decision in 2018, several courts have weighed in on this issue, with many favoring *Winstead*'s reasoning, in stark contrast to the past. The circuits can be divided into two groups. The first are the "textualists," who agree with *Winstead* and hold that Application Note 1's addition of inchoate crimes to the definition of "controlled substance offense" exceeds the

81. *Id.*

82. 592 F. App'x 359 (6th Cir. 2014).

83. *Id.* at 361.

84. 856 F.3d 5 (1st Cir. 2017).

85. *Id.* at 9 ("[S]uch commentary 'is generally authoritative' where it is not 'arbitrary, unreasonable, inconsistent with the guideline's text, or contrary to law.'" (quoting United States v. Duong, 665 F.3d 364, 368 (1st Cir. 2012))).

86. 862 F.3d 1290 (11th Cir. 2017).

87. *Id.* at 1294 (first quoting United States v. Probel, 214 F.3d 1285, 1288 (11th Cir. 2000); and then quoting United States v. Shannon, 631 F.3d 1187, 1190 (11th Cir. 2011)).

88. United States v. Winstead, 890 F.3d 1082, 1089–90 (D.C. Cir. 2018).

89. *See id.* at 1091–92.

scope of interpretation.[90] The second group supports a strong deferential posture and consistently holds that the Commission adopted an interpretation that is not inconsistent with the Sentencing Guidelines.[91]

A. The Textualist Courts

The Third and Sixth Circuits have expressly agreed with the D.C. Circuit, with *United States v. Havis*[92] being the first sister circuit decision to support *Winstead*'s interpretation. Questioning point-blank whether Application Note 1 "is . . . really an 'interpretation' at all," the Sixth Circuit in *Havis* reasoned that "[t]o make attempt crimes a part of § 4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in § 4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to *add* an offense not listed in the guideline."[93] Refusing to mince words, the *Havis* court firmly held that the Commission "deserves no deference" because "[t]he text of § 4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses."[94] The Third Circuit arguably went even further in *United States v. Nasir*[95] when it emphatically overruled its previous decision in *United States v. Hightower*.[96] Referencing *Kisor*, the court admitted it "may have gone too far in affording deference to the guidelines' commentary under the standard set forth in *Stinson*" and noted that "the guideline does not even mention inchoate offenses" which "alone indicates it does not include them."[97]

While "officially" ruling in favor of deference, the First and Ninth Circuits have explicitly stated that they would side with *Winstead* if not for binding precedent. In *United States v. Crum*,[98] a panel of the Ninth Circuit conceded that "[i]f we were free to do so, we would follow the Sixth and D.C. Circuits' lead."[99] Like the *Winstead* and *Havis* courts, the *Crum* court reasoned that Application Note 1 improperly expands the definition of "controlled substance offenses" and expressed concern about the expansion of the Commission's authority

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90. *See infra* Subpart II.A.

91. *See infra* Subpart II.B.

92. 927 F.3d 382 (6th Cir. 2019).

93. *Id.* at 386.

94. *Id.* at 387.

95. 982 F.3d 144 (3d Cir. 2020) (en banc), *cert. granted, judgment vacated on other grounds, and case remanded*, No. 20-1522, 2021 WL 4507560 (U.S. Oct. 4, 2021), *conviction aff'd and sentence vacated*, 17 F.4th 459 (3d Cir. 2021) (en banc).

96. *Id.* at 160 (overruling United States v. Hightower, 25 F.3d 182 (3d Cir. 1994)).

97. *Id.* at 158–59.

98. 934 F.3d 963 (9th Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 2629 (2020).

99. *Id.* at 966.

without the opportunity for congressional review.[100] Especially concerning to the *Crum* court was the fact that "the Commission's interpretation will likely increase the sentencing ranges for numerous defendants whose prior convictions qualify as controlled substance offenses due solely to Application Note 1."[101] However, the Ninth Circuit panel acknowledged that it was bound by precedent and reluctantly upheld *Vea-Gonzales*.[102] Judges on the Ninth Circuit have, however, urged the court to sit en banc to reconsider *Vea-Gonzales*.[103]

The First Circuit took a somewhat more measured approach in *United States v. Lewis*.[104] In its majority opinion, the court unenthusiastically upheld the circuit's previous decision in *Nieves-Borrero*, remarking that "[w]ere panels of three too prone to reverse prior precedent, we would lose the benefits of stability and invite litigants to regard our law as more unsettled than it should be."[105] But the majority implied that *Winstead*'s reasoning has strong merit and noted that the underlying question at issue is indeed "close."[106] This reading is further bolstered by a two-judge concurrence that seems to only actually concur that the court is in fact bound by precedent.[107] The concurrence expressed deep discomfort with the practical effects of deferring to the Commission's commentary, explicitly finding that it had "added a substantive offense" without undergoing the gauntlet of congressional review.[108] As if the true opinion of the panel was still in doubt, the concurrence firmly stated that "were we 'free to do so,' we 'would follow the Sixth and D.C. Circuits' lead' and hold that Application Note 1's expansion of § 4B1.2(b) to include conspiracies and other inchoate crimes does not warrant deference."[109]

Finally, the Fourth Circuit has not yet weighed in on whether the commentary in Application Note 1 is inconsistent with the definition of "controlled substance offense."[110] But district courts within the

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100. *Id.*

101. *Id.*

102. *Id.* at 966–67.

103. *See* United States v. Sorenson, 818 F. App'x 668, 670 (9th Cir. 2020) (Paez, J., concurring) ("I believe the commentary in Application Note 1 to § 4B1.2 impermissibly expands the scope of the Guideline's text. . . . The court should go en banc so that we can reconsider our holding in . . . *Vea-Gonzales* . . . and 'follow the Sixth and D.C. Circuits' lead' in rejecting such an unwarranted expansion." (quoting *Crum*, 934 F.3d at 966)).

104. 963 F.3d 16 (1st Cir. 2020).

105. *Id.* at 24–25.

106. *Id.* at 25.

107. *Id.* at 27–29 (Torruella & Thompson, JJ., concurring).

108. *Id.* at 27.

109. *Id.* (quoting United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019)).

110. *See* United States v. Faison, No. GJH-19-27, 2020 WL 815699, at *8 (D. Md. Feb. 18, 2020).

Fourth Circuit have issued relevant opinions, and they have tended to follow *Havis* and *Winstead*.[111] For example, in *United States v. Faison*,[112] the United States District Court for the District of Maryland explicitly adopted the reasoning in *Havis* and *Winstead*, holding that "Application Note 1's expansion of the definition of controlled substance offense to include attempt is inconsistent with the text of § 4B1.2" after remarking that "commentary can explain a guideline, but it cannot change it."[113]

B. The Deferential Courts

In contrast to the textualists, courts defending deference have offered little in the way of new arguments since 2018, with most content simply to uphold prior precedent without additional commentary.[114] One exception to this trend is the Second Circuit's opinion in *United States v. Richardson*.[115] Likely aware of the continued failure to directly confront the textual arguments advanced since *Winstead*, the Second Circuit embarked on its own "plain meaning" analysis.[116] As its foundation, the *Richardson* court enunciated the deference standard set forth in *Stinson*: commentary does not deserve deference if it is inconsistent with, or a plainly erroneous reading of, the guideline it purports to interpret.[117] The Second Circuit proceeded to argue that, not only is the commentary not inconsistent, but a plain reading of the guideline actually reinforces the interpretation.[118] The court pointed specifically to the

111. *See e.g.*, *Faison*, 2020 WL 815699, at *9; United States v. Bond, 418 F. Supp. 3d 121, 122–23 (S.D. W. Va. 2019).

112. No. GJH-19-27, 2020 WL 815699 (D. Md. Feb. 18, 2020).

113. *Id.* at *9.

114. *See, e.g.*, United States v. Webster, 844 F. App'x 937, 939 (8th Cir. 2021) (upholding *Mendoza-Figueroa*'s en banc decision without additional commentary), *cert. denied*, No. 21-5173, 2021 WL 4508837 (U.S. Oct. 4, 2021); United States v. Smith, 989 F.3d 575, 584–86 (7th Cir. 2021) (citing United States v. Adams, 934 F.3d 720, 729–30 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 824 (2020)) ("We concluded that § 4B1.2's Application Note 1 is authoritative and that 'controlled substance offense' includes inchoate offenses. . . . In reaching this conclusion, we relied on [United States v. Raupp, 677 F.3d 756 (7th Cir. 2012)], which deferred to Application Note 1 when applying § 4B1.2 and found no conflict between them."); United States v. Goodin, 835 F. App'x 771, 782 (5th Cir. 2021) (holding that it is bound by *Lightbourn*, which found that the Commission is authorized "to add inchoate offenses such as conspiracy to the 'controlled substance offense' definition in [Section] 4B1.2"); United States v. Bass, 838 F. App'x 477, 481 (11th Cir. 2020) (upholding *Smith* without additional commentary).

115. 958 F.3d 151 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 423 (2020).

116. *Id.* at 154–55.

117. *See id.* at 154 (citing Stinson v. United States, 508 U.S. 36, 38 (1993)).

118. *See id.* at 154–55.

usage of the word "prohibits" in the text of the guideline.[119] Citing the *Oxford English Dictionary*, which states that "prohibit" means "to prevent [or] hinder," the *Richardson* court reasoned that an inchoate offense "is an offense that 'prohibits' those activities."[120] In the court's own words, "[a] ban on attempting to distribute a controlled substance, for example, 'hinders' the distribution of the controlled substance."[121] Accordingly, even a plain reading of the guideline supports the conclusion that Application Note 1 is not inconsistent with the guideline.[122] This is a novel argument by a deferential court. However, *Richardson*, like the other deferential arguments, fails to persuade when compared to the reasoning put forward by the textualist courts.

III. ANALYSIS: TEXTUALISM V. DEFERENCE

Although the tide has begun to turn towards the textualist school, both schools of thought enjoy considerable support. To summarize, the D.C., Third, and Sixth Circuits have all held that Application Note 1 is inconsistent with the text of Section 4B1.2(b).[123] These circuits enjoy the tacit, if nonprecedential, support of the First and Ninth Circuits, along with a growing number of district courts in the Fourth Circuit.[124] On the other side of the split lies the Second, Fifth, Eighth, Tenth, and Eleventh Circuits, with the opinions from the First and Ninth Circuits also upholding precedent, albeit quite unenthusiastically.[125]

A. The Arguments, Distilled

1. The Textualist Conclusions

The first argument that can be distilled from the textualist opinions is that the guideline at issue, the definition of "controlled substance offense," is not actually ambiguous, and commentary to an unambiguous guideline is undeserving of deference. The text of the guideline is clear: it lists a set of offenses that trigger the career offender enhancement, and nowhere in the text does it mention

119. *See id.* ("Section 4B1.2 defines 'controlled substance offense' as an offense under federal or state law 'that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance.'" (quoting U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b))).

120. *Id.* at 155 (quoting *Prohibit*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/152255?rskey=gT2w81&result=2&isAdvanced=false#eid (last visited Nov. 4, 2021)).

121. *Id.*

122. *See id.*

123. *See supra* Subpart II.A.

124. *See supra* Subpart II.A.

125. *See supra* Subparts I.C, II.A & II.B.

inchoate offenses.[126] Further, while decisions operating under the prevailing standards of deference prior to 2018 did not need to make a finding that a regulation was "genuinely ambiguous," the new *Kisor* standard makes it difficult to sustain an argument that the guideline is, in fact, ambiguous.[127]

The second argument is that, even if the guideline can be considered ambiguous, Application Note 1 is not an interpretation of any term in the guideline. Rather, Application Note 1 is an attempt to add an offense not listed in the text of the guideline, impermissibly expanding the scope and authority of commentary. The guideline affirmatively lists the offenses that qualify as controlled substance offenses.[128] The fact that the guideline does not include inchoate offenses or any language referring to inchoate offenses means there is nothing for Application Note 1 to interpret. As succinctly explained by the *Nasir* court, "a familiar canon of construction states, *expressio unius est exclusio alterius*: the expression of one thing is the exclusion of the other."[129]

2. The Deferential Conclusions

Many courts supporting the deferential stance have offered little actual commentary, with most relying exclusively on the standard articulated in *Stinson*—a standard borne from the expansive view of deference that came out of *Seminole Rock*.[130] These courts state that Application Note 1 is simply not an inconsistent or plainly erroneous reading of Section 4B1.2.[131] Deferential courts universally find that the Commission has the authority to include inchoate offenses within the definition of "controlled substance offense" because of the broad grant of authority given to the Commission by Congress and the expansive nature of deference to an agency's interpretation of its own regulations envisioned by *Seminole Rock*, *Stinson*, and *Auer*.[132] Little attempt has been made to conduct plain reading analyses equivalent to the textualist courts,[133] and no court that continues to defer to Application Note 1 has directly confronted the new *Kisor* standard.

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126. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b).

127. *See* United States v. Nasir, 982 F.3d 144, 158–59 (3d Cir. 2020) (en banc) (citing Kisor v. Wilkie, 139 S. Ct. 2400, 2414–17 (2019)), *cert. granted, judgment vacated on other grounds, and case remanded*, No. 20-1522, 2021 WL 4507560 (U.S. Oct. 4, 2021), *conviction aff'd and sentence vacated*, 17 F.4th 459 (3d Cir. 2021) (en banc).

128. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b).

129. *Nasir*, 982 F.3d at 159.

130. *See supra* Subpart I.B.

131. *See supra* Subpart I.C.

132. *See supra* Subparts I.B. & I.C.

133. *But see* United States v. Richardson, 958 F.3d 151, 154–55 (2d Cir. 2020) (making the only textualist argument in favor of deferring to the agency's definition), *cert. denied*, 141 S. Ct. 423 (2020).

B. The Textualist School Has the Better of the Debate

The textualist stance is appropriate when both sides of the circuit split are considered. A plain reading analysis of the text of the guideline, the new deference standard set forward by *Kisor*, and important concerns about blind deference to a potential super-legislature firmly place the deferential schools on the backfoot.

1. Lessons from "Crimes of Violence"

Expressio unius est exclusion alterius. "The expression of one thing is the exclusion of the other."[134] This canon of construction is the bedrock upon which the textualist argument stands.[135] It is best supported by an examination of the sister provision to the "controlled substance offense," the definition of "crime of violence" contained in Section 4B1.2(a).[136] Application Note 1 is equally applicable to the definitions of "crime of violence" and "controlled substance offense."[137]

At first glance, both provisions seem very similar. Both contain lists of substantive offenses that trigger career-offender status.[138] Both are modified by Application Note 1's addition of inchoate offenses. But the "crime of violence" definition contains one stark difference: a textual hook that connects the inchoate offenses in Application Note 1 to the plain text of the guideline. Unlike Section 4B1.2(b), "crime of violence" has a subprovision that explicitly states that a crime of violence "has as an element the use, *attempted* use, or threatened use of physical force against the person of another."[139] While the definition does not explicitly state that attempts of the substantive crimes listed later in the definition are crimes of violence, the inclusion of this subprovision effectively connects the guideline to the commentary in Application Note 1.

As noted by the *Winstead* court, "the Commission showed within § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so."[140] Even when giving the Commission a tremendous amount of leeway, it is clear from the contrast between

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134. *Nasir*, 982 F.3d at 159.

135. *Id.*

136. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (defining "crimes of violence" as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year that" either "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)").

137. *See id.* § 4B1.2 cmt. N.1 ("'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.").

138. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a)-(b).

139. *Id.* § 4B1.2(a)(1) (emphasis added).

140. United States v. Winstead, 890 F.3d 1082, 1091 (D.C. Cir. 2018).

the subsections of 4B1.2 that the drafters affirmatively decided to not include the word "attempt" in the definition of "controlled substance offense." Instead, the clear expression of "attempts" in the definition of "crime of violence" supports the exclusion of "attempts" in the definition of "controlled substance offense." Once again, "The expression of one thing is the exclusion of the other."

Deferential courts have had little to say about this distinction. In fact, those that have considered the difference in wording between the "crime of violence" and "controlled substance offense" definitions tend to ignore the difference and instead treat the definitions identically.[141] This blind deference is inappropriate, especially with the tremendous sentence enhancement that career offender status entails. Courts should not ignore these drafting differences so easily. The fact that "controlled substance offense" and "crime of violence" are defined differently presents a straightforward and reasonable conclusion that supports the textualist approach.

2. An Attempt to Engage in Plain Reading

As noted previously,[142] one deferential court has attempted to directly confront textualist arguments with a plain reading of its own. In *Richardson*, the Second Circuit boldly connected the usage of "prohibits" in the definition of "controlled substance offense," (which it claims means to "prevent [or] hinder") to the commentary in Application Note 1.[143] The court reasoned that, because a ban on an inchoate offense hinders or prevents the substantive offense listed in the guideline, the definition of "controlled substance offense" can be reasonably interpreted to include inchoate offenses.[144] In other words, *Richardson* claimed that the usage of "prohibits" in the guideline is the textual hook that connects the guideline to the commentary.[145]

The First Circuit's *Lewis* concurrence is more persuasive; *Richardson*'s argument "would take any modern English speaker (not to mention any criminal lawyer) by surprise."[146] *Richardson*'s argument is attenuated at best and servile at worst, and it offers the

141. *See* United States v. Adams, 934 F.3d 720, 729 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 824 (2020).

142. *See supra* Subpart II.B.

143. United States v. Richardson, 958 F.3d 151, 154–55 (2d Cir. 2020) (quoting *Prohibit*, *supra* note 120), *cert. denied*, 141 S. Ct. 423 (2020).

144. *Id.* at 155.

145. *Id.*

146. United States v. Lewis, 963 F.3d 16, 27–28 (1st Cir. 2020) (Torruella & Thompson, JJ., concurring) ("The government's late-breaking suggestion at oral argument that the offense of conspiracy to commit a controlled substance offense (which forbids only the agreement to commit such an offense plus, sometimes, an overt act in furtherance) 'prohibits' the acts listed in § 4B1.2(b) . . . would take any modern English speaker (not to mention any criminal lawyer) by surprise.").

Commission far too much leeway when it is clear from the drafting of the "crime of violence" definition that the Commission knows how to properly construct an authoritative guideline.[147] Think about this conceptually. A sign that "prohibits" smoking in a certain place does not criminalize the attempt to smoke. One will not be fined for smoking by pulling out his lighter, attempting to light his cigarette, and failing due to a defective lighter. The prohibition is for the act of smoking, not the attempt to smoke. Criminalizing the attempt without including it on the sign would unjustly punish those who did not actually commit the written offense.

Further, as expressed by the concurrence in *Lewis*, if inchoate offenses "'prohibit' the acts listed in § 4B1.2(b) because they 'hinder' those acts[,] . . ., then it is hard to see why simple possession offenses would not also be 'controlled substance offense[s]' . . . ; certainly, laws against possessing drugs hinder their distribution or manufacture."[148] Like the clear text of a smoking prohibition, the definition of "controlled substance offense" does not apply inchoate crimes to the definition of "controlled substance offense." *Richardson* tries to connect the Commission's commentary to a textual hook that simply does not exist.

3. Applying Kisor

Textualist arguments prior to 2019 had to confront the expansive deference standards espoused in *Seminole Rock*, *Stinson*, and *Auer*. While textualist arguments had strong merit, as evidenced by *Winstead*, it was difficult to overcome the interpretive freedom that the Commission enjoyed.[149] The new *Kisor* deference standard, however, represents a significant departure from the old standards and is a powerful new weapon in the textualist arsenal. As laid out in Subpart I.B, the *Kisor* standard requires a much more thorough examination of the regulation and interpretation at issue before deference is given to the issuing agency.[150] For an agency's interpretation of its own regulation to receive deference under *Kisor*, three elements must be demonstrated: first, the regulation must be "genuinely ambiguous"; second, the agency's interpretation must "fall within the bounds of reasonable interpretation"; and third, "the character and context of the agency interpretation entitles it to controlling weight."[151] This is a far cry from *Stinson*, which preached deference to an agency's interpretation "unless it . . . is inconsistent with, or a plainly erroneous reading of, that guideline."[152] Examining the definition of "controlled substance offense" under the *Kisor*

147. *See supra* Subpart III.B.1.
148. *See Lewis*, 963 F.3d at 28.
149. *See supra* Subpart I.B.
150. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2414–16 (2019).
151. Ferrara, *supra* note 55, at 234–35 (quoting *Kisor*, 139 S. Ct. at 2415–16).
152. Stinson v. United States, 508 U.S. 36, 38 (1993).

standard yields a clear conclusion that the judicial deference to the Commission is undeserved.

First and foremost, the definition of "controlled substance offense" is not "genuinely ambiguous."[153] The definition clearly lays out its only qualifier: a "controlled substance offense" is a felony offense under federal or state law that prohibits a certain, constrained list of substantive acts.[154] This definition is in direct contrast to the definition of "crime of violence," where the application of inchoate offenses is more ambiguous. The usage of the phrase "has as an element the use, attempted use, or threatened use" in the "crime of violence" definition is key.[155] It acts as a textual hook that modifies the substantive offenses listed in the rest of the guideline and arguably creates a genuine ambiguity surrounding what a "crime of violence" is. There, a further examination of the interpretive commentary is merited. Unlike the definition of "crime of violence," there are no subprovisions in the definition of "controlled substance offense."[156] There are no exceptions. There are no ambiguous textual hooks. In fact, the text of the guideline is so clear that multiple courts have declared that the "interpretation" in Application Note 1 is instead a way of trying to add substantive offenses onto an unambiguous regulation.[157] As stated by *Kisor*, "if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense."[158]

The *Richardson* court would argue that the usage of the word "prohibits" does in fact make the regulation "genuinely ambiguous." Even if we were to adopt the *Richardson* court's reading, we would then ask whether the Commission's interpretation "fall[s] 'within the bounds of reasonable interpretation.'"[159] This interpretation, however, must expressly fall into the "zone of ambiguity" identified by the Court in the first step of its analysis in *Kisor*.[160] If finding the definition of controlled substance offense "genuinely ambiguous" is a stretch, a further finding that Application Note 1 is a "reasonable interpretation" due to the usage of "prohibits" is a giant leap. Look

153. *See Kisor*, 139 S. Ct. at 2415.

154. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b).

155. *See id.* § 4B1.2(a)(1).

156. *Id.* § 4B1.2(b).

157. *See* United States v. Nasir, 982 F.3d 144, 159–60 (3d Cir. 2020) (en banc), *cert. granted, judgment vacated on other grounds, and case remanded*, No. 20-1522, 2021 WL 4507560 (U.S. Oct. 4, 2021), *conviction aff'd and sentence vacated*, 17 F.4th 459 (3d Cir. 2021) (en banc); United States v. Havis, 927 F.3d 382, 386–87 (6th Cir. 2019).

158. *Kisor*, 139 S. Ct. at 2415.

159. *Id.* at 2405, 2416 (quoting City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013)).

160. *See id.* at 2415–16.

back to the "crime of violence" definition; there, the inclusion of language implying inchoate offenses represents a textual hook to latch the Commission's interpretation to.[161] A reasonable interpretation of "has as an element the use, attempted use, or threatened use"[162] is that inchoate violent crimes are also "crimes of violence" because "attempted use" can be construed to include inchoate offenses. But that hook does not exist in the definition of "controlled substance offense."[163] Even if we stretch the definition of "prohibit" as laid out in *Richardson*,[164] the inclusion of inchoate offenses is not a reasonable interpretation. Instead, the affirmative addition of inchoate offenses without review by Congress and without a clear textual hook is far from reasonable.

An appropriate analysis of the definition of "controlled substance offense" and Application Note 1 would not make it past these first two hurdles. But if it did, then the third hurdle could be easily surmounted by the Commission. According to *Kisor*, agency deference is only appropriate when "the character and context of the agency interpretation entitles it to controlling weight."[165] The Commission is clearly the appropriate agency to be issuing interpretations of the Sentencing Guidelines.[166] Congress delegated to the Commission the power to essentially regulate judges.[167] Any interpretation issued by the Commission comes from its substantive expertise in the field of criminal sentencing,[168] and deferral to the Commission's interpretations is appropriate when the first two *Kisor* elements are met. However, this is not so. *Kisor* does not support deference to Application Note 1.

4. Commentary as a "Trojan Horse" for Commission Legislation

Justice Scalia once compared the creation of the Commission to "the creation of a new Branch altogether, a sort of junior-varsity Congress."[169] It is true that Congress gave the Commission very

161. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a).

162. *Id.* § 4B1.2(a)(1).

163. *See id.* § 4B1.2(b).

164. *See* United States v. Richardson, 958 F.3d 151, 155 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 423 (2020).

165. *Kisor*, 139 S. Ct. at 2416–18.

166. *About*, U.S. SENT'G COMM'N, https://www.ussc.gov/about-page (last visited Nov. 4, 2021).

167. *See* Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.Q. 1199, 1227–28 (1999).

168. *See Organization*, U.S. SENT'G COMM'N, https://www.ussc.gov/about/who-we-are/organization (last visited Nov. 4, 2021) (discussing the Commission's extensive and constant research on federal crime and sentencing).

169. Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

broad discretion in drafting the Sentencing Guidelines.[170] But Congress also imposed stringent procedural requirements that must be met before new guidelines could be issued.[171] Commission commentary is not subject to these constraints, but conceptually, that is not an issue.[172] Commentary interprets guidelines; it does not add to them. However, if courts defer to commentary that adds substantive offenses to guidelines, then "the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning."[173] Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."[174]

Most deferential courts defer blindly to the Commission without seriously considering textualist arguments, in opposition to *Kisor*'s clarification of *Seminole Rock* deference.[175] This is a dangerous expansion of the Commission's power and does not comport with *Kisor*. "[S]eparation-of-powers concerns advise against any interpretation of the commentary that expands the substantive law set forth in the guidelines themselves."[176] Blind deference to nonlegislative commentary ignores these concerns and turns the Commission into a super-legislature. Vesting the Commission with such authority without congressional approval is dangerous and has a chilling effect on sentencing reform efforts. For example, the Commission could reinterpret the Sentencing Guidelines through commentary freely, even if the reinterpretation is significantly different than what was approved by Congress. "This is all the more troubling given that the Sentencing Commission wields the authority to dispense 'significant, legally binding prescriptions governing application of governmental power against private

170. *See* United States v. Chavez, 660 F.3d 1215, 1227 (10th Cir. 2011) (quoting United States v. Allen, 24 F.3d 1180, 1186 (10th Cir. 1994)).

171. *See Mistretta*, 488 U.S. at 393–94 (noting that the Commission's "rulemaking is subject to the notice and comment requirements of the Administrative Procedure Act").

172. *See* United States v. Havis, 927 F.3d 382, 385–86 (6th Cir. 2019).

173. *Id.* at 386–87.

174. Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (quoting Christensen v. Harris Cnty., 529 U.S. 589, 588 (2000)).

175. *See, e.g.*, United States v. Lange, 862 F.3d 1290, 1294 (11th Cir. 2017) ("We give an application note 'its most natural reading' even if 'it actually enlarges, rather than limits, the applicability of the enhancement.'" (quoting United States v. Probel, 214 F.3d 1285, 1288 (11th Cir. 2000))).

176. United States v. Nasir, 982 F.3d 144, 159 (3d Cir. 2020) (en banc), *cert. granted, judgment vacated on other grounds, and case remanded*, No. 20-1522, 2021 WL 4507560 (U.S. Oct. 4, 2021), *conviction aff'd and sentence vacated*, 17 F.4th 459 (3d Cir. 2021) (en banc).

individuals . . . ."'[177] There is a procedural cost that must be paid by the Commission when it wants to amend its Sentencing Guidelines.[178] Ignoring this cost empowers the Commission "to use its commentary as a Trojan horse for rulemaking."[179]

The Seventh Circuit's decision in *United States v. Raupp*[180] deserves special attention. There, the court considered Application Note 1's effect on the "crimes of violence" definition, rather than the "controlled substance offense" definition.[181] While advancing the same general reasoning as the deferential courts, the *Raupp* majority made one statement that encapsulates much of what is wrong with the highly deferential treatment given to the Commission. After rejecting the appellee's textualist argument, the Seventh Circuit reasoned that

> [t]he Commission could have put the language of the note in § 4B1.2(a) as a new paragraph, and then Raupp's argument would be sunk. . . . Why should it matter that the Commission achieved the same end by using a note to elaborate on the meaning of 'crime of violence?'[182]

This reasoning ignores the checks and balances that are meant to ensure the Commission does not become a super-legislature. While other deferential courts have not been as blatant as the *Raupp* court,[183] their continued acquiescence to the Commission has the same effect. Application Note 1 impermissibly expands the scope of the definition of "controlled substance offense" by ignoring procedural safeguards and congressional review.

"The Sentencing Guidelines are no place for a shortcut around the due process guaranteed to criminal defendants."[184] The Commission's interpretation significantly increases the sentencing ranges for numerous defendants whose prior convictions qualify as controlled substance offenses solely due to Application Note 1. Criminal sentencing is well within the grasp and experience of federal judges.[185] They should not defer easily; instead, the importance of ensuring fair sentencing and due process for criminal defendants

177. United States v. Winstead, 890 F.3d 1082, 1092 (D.C. Cir. 2018) (quoting Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)).

178. United States v. Lewis, 963 F.3d 16, 28 (1st Cir. 2020) (Torruella & Thompson, JJ., concurring).

179. *Id.* at 28–29.

180. 677 F.3d 756 (7th Cir. 2012), *overruled on other grounds by* United States v. Rollins, 836 F.3d 737 (7th Cir. 2016).

181. *Id.* at 757–58.

182. *Id.* at 758.

183. *See supra* Subpart I.C.

184. *Lewis*, 963 F.3d at 29.

185. *See* Luby, *supra* note 167, at 1227–28.

supports strict judicial review of Commission interpretation and implementation of substantive criminal law.

CONCLUSION

The Commission has thus far been unable to adopt an amendment to the Sentencing Guidelines that would resolve these issues.[186] Therefore, it is up to the Supreme Court to settle the circuit split created by *Winstead* and advanced by the decisions in *Havis* and *Nasir*. These textualist decisions hold that deference to the Commission's commentary on the definition of "controlled substance offense" in Section 4B1.2(b) of the Sentencing Guidelines is impermissible.[187] This is in stark contrast to a large number of decisions holding that deference to the Commission's interpretation of "controlled substance offense" is proper.[188] The Supreme Court should uphold the reasoning of the textualists and definitively rule that judicial deference to Application Note 1's interpretation of Section 4B1.2(b) is impermissible under the *Kisor* standard. A plain reading analysis of the text of the guideline, the new deference standard set forward by *Kisor*, and important concerns about blind deference and separation of powers firmly place the textualists in the right.

The need for a unifying ruling is urgent. In 2020, 1,216 career offenders were convicted with an average sentence of 12.5 years.[189] Of these career offenders, 948 were convicted of a drug trafficking offense.[190] The career offender guideline was solely responsible for increasing the criminal history category of 56.4 percent of those convicted as career offenders to Category VI, the highest classification level under the Sentencing Guidelines.[191] Deference to this commentary is creating significant disparities in sentencing across jurisdictions as the deferential circuits apply career-offender status

186. *See* United States v. Adams, 934 F.3d 720, 729 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 824 (2020).

187. *See* United States v. Nasir, 982 F.3d 144, 158–59 (3d Cir. 2020) (en banc), *cert. granted, judgment vacated on other grounds, and case remanded*, No. 20-1522, 2021 WL 4507560 (U.S. Oct. 4, 2021), *conviction aff'd and sentence vacated*, 17 F.4th 459 (3d Cir. 2021) (en banc); United States v. Havis, 927 F.3d 382, 387 (6th Cir. 2019); United States v. Winstead, 890 F.3d 1082, 1091 (D.C. Cir. 2018).

188. *See, e.g.*, United States v. Richardson, 958 F.3d 151, 154–55 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 423 (2020); United States v. Lange, 862 F.3d 1290, 1294 (11th Cir. 2017); United States v. Nieves-Borrero, 856 F.3d 5, 9 (1st Cir. 2017); United States v. Solomon, 592 F. App'x 359, 361 (6th Cir. 2014); United States v. Chavez, 660 F.3d 1215, 1228 (10th Cir. 2011); United States v. Mendoza-Figueroa, 65 F.3d 691, 692 (8th Cir. 1995) (en banc).

189. *Quick Facts: Career Offenders*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY20.pdf (last visited Nov. 4, 2021).

190. *Id.*

191. *See id.*

to those convicted of inchoate controlled substance offenses. Further, decisions such as *Crum* and *Lewis* indicate that some circuits upholding the deference rulings are only doing so due to an inability to overrule prior precedent.[192] The Commission must not be allowed to use its commentary as a Trojan horse for rulemaking.

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192. *See* United States v. Crum, 934 F.3d 963, 967 (9th Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 2629 (2020); United States v. Lewis, 963 F.3d 16, 22–23 (1st Cir. 2020).

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