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New York Law Journal

WHITE-COLLAR CRIME

'Beaird' and Judicial Deference to Sentencing Guidelines Commentary

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November 12, 2026

The Sentencing Guidelines play a vital role in the administration of criminal justice in federal courts. They are part of what has become an intricate body of law and norms that includes not only the guidelines themselves, which establish sentencing ranges for criminal offenses, but also "policy statements" and "commentary," as well as court decisions on a host of interpretive and procedural issues.

Over time, this body of law, which governs sentencing in federal criminal prosecutions, has been shaped by broad constitutional principles. Most notably, in *United States v. Booker,* 543 U.S. 220 (2005), the Supreme Court held that mandatory application of the guidelines based on judicial factfinding violated the Sixth Amendment right to a jury trial; as a result, guidelines sentencing ranges are now advisory: they must be consulted by sentencing courts but are no longer binding.

The *Booker* decision followed several Supreme Court decisions that analyzed federal and state sentencing procedures in light of Sixth Amendment protections.



Courtesy photos

Elkan Abramowitz, left, and Jonathan Sack.

In similar fashion, application of the Sentencing Guidelines is now being scrutinized in relation to developments in administrative law—chiefly, the nature and degree of deference courts should give to executive branch agency interpretations of statutes and regulations.

Soon after the guidelines were developed by the U.S. Sentencing Commission, the Supreme Court held in *Stinson v. United States,* 508 U.S. 36 (1993), that sentencing judges must treat the commentary issued by the Commission regarding the guidelines as authoritative unless it constitutes a plainly erroneous

reading of the guideline or otherwise violates federal law.

This is not a minor or technical concern; commentary can sometimes be a critical factor in the computation of the guidelines range, and years of recommended prison time can turn on instructions set forth only in commentary.

This principle of deference is now in question following a series of subsequent Supreme Court decisions that have cut back on deference to agency interpretations of law. On Oct. 13, 2026, the Supreme Court heard argument in *Beaird v. United States,* No. 25-5343, which addresses the continued validity of *Stinson* and the deference courts should give to guidelines commentary authored by the Sentencing Commission.

In applying recent Supreme Court rulings that question the deference courts should show to rules from other federal agencies, the courts of appeals are divided as to the continued validity of *Stinson* and the appropriate level of deference to now be shown to guidelines commentary.

In this article, we discuss the statutory and procedural background of the guidelines, the arguments in *Beaird*, and what the forthcoming decision may mean for white-collar practice.

Background

The Sentencing Reform Act of 1984 (the Act) established the U.S. Sentencing Commission (the Commission) as "an independent commission in the judicial branch of the United States." 28 U.S.C. §991(a).

The Act directs the Commission to promulgate "guidelines," which establish sentencing ranges "for use of a sentencing court in determining the sentence to be imposed in a criminal case," and "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation." 28 U.S.C. §994(a)(1), (a)(2), (b)(1). The various guidelines are collected in a widely used Guidelines Manual (the Manual), and this Manual is amended by the Commission nearly every year.

Since the first edition in 1987, the Manual has included "commentary," typically in the form of "Application Notes" for a given guideline. Although the Act does not refer to commentary, Congress is well aware of its existence and importance. For example, in 1987, Congress amended Section 3553(b) of Title 18 to provide that, in deciding whether a guidelines departure was warranted, a court "shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." (Emphasis added).

Section 1B1.7 of the Manual states that commentary "may interpret the guideline or explain how it is to be applied," and that "[f]ailure to follow such commentary could constitute an incorrect application of the guidelines." The commentary to §1B1.7 adds that portions of the Manual not labeled as guidelines or commentary "are to be construed as commentary and thus have the force of policy statements."

The Act directs the Commission to "periodically... review and revise" the guidelines, in consultation with the Department of Justice, the Federal Public Defenders, the Judicial Conference and others. 28 U.S.C. §994(o). By May 1 of a given year, amendments to the guidelines must be submitted to Congress together with a statement of reasons, and such amendments take effect no earlier than 180 days later, and no later than Nov. 1, unless Congress modifies or disapproves them. 28 U.S.C. §994(p).

The notice-and-comment provisions of the Administrative Procedure Act apply to the promulgation of guidelines and guidelines amendments, but not to policy statements or commentary. See §994(x). The Commission's rules provide that it "may promulgate commentary and policy statements, and amendments thereto, without regard

to" §994(x)'s notice-and-comment requirement. U.S. Sent. Comm'n R. 4.3.

In practice, the Commission has included commentary in the annual amendment process. When the Commission has published proposed guidelines amendments for notice-and-comment, it has also typically included proposed commentary.

In 1997, the Commission stated that it "will endeavor to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments," U.S. Sent. Comm'n R. 4.3, and that it "shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress," U.S. Sent. Comm'n R. 4.1. The commentary at issue in *Beaird*, for example, was published for comment and submitted to Congress together with the 2006 amendment to Manual §2K2.1 that it interprets.

The *Beaird* Case

Kendrick Beaird pleaded guilty in the Northern District of Texas to possessing a firearm after a felony conviction. His sentence was enhanced under guideline §2K2.1 because the firearm was "capable of accepting a large capacity magazine." The applicable guideline does not define "large," but the commentary defines a large capacity magazine as one capable of accepting more than 15 rounds, and the gun in *Beaird's* case had a 17-round magazine.

The district court considered itself bound by the commentary, which raised the guidelines range from 51-63 months to 63-78 months. The court sentenced *Beaird* to 72 months' imprisonment and said that it would have imposed the same sentence whatever the correct range.

The Fifth Circuit affirmed in a brief unpublished opinion that relied on circuit precedent treating the commentary as authoritative under *Stinson*.

In *Stinson*, the Supreme Court held that commentary that "interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."

This holding relied on a rule of judicial deference to an agency's interpretation of its own regulations, which originated in *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945), and is commonly known as "*Auer* deference" from *Auer v. Robbins,* 519 U.S. 452 (1997).

The *Stinson* Court acknowledged that the analogy between guidelines commentary and agency rulemaking "is not precise because Congress has a role in promulgating the guidelines," but treated guidelines as "the equivalent of legislative rules adopted by federal agencies."

The Circuit Split

The courts of appeals are split on whether *Stinson* still correctly states the rule for the deference due to guidelines commentary. The Second, Fifth, Seventh, and Tenth Circuits continue to apply *Stinson* and follow commentary unless it is plainly inconsistent with the guideline. See, e.g., *United States v. Rainford,* 110 F.4th 455, 483 (2d Cir. 2024).

The Third, Sixth, Ninth, and Eleventh Circuits have concluded that the Supreme Court's recent ruling in *Kisor v. Wilkie*, 588 U.S. 558 (2019), not *Stinson*, is now controlling. See, e.g., *United States v. Nasir,* 17 F.4th 459, 471 (3d Cir. 2021) (en banc).

In *Kisor,* the Supreme Court declined to overrule *Auer/Seminole Rock* deference but sharply limited it, permitting deference to an agency's interpretation of its own regulations only when the regulation is "genuinely ambiguous" after the traditional tools of judicial statutory construction have been exhausted.

The Supreme Court granted certiorari in *Beaird* on April 20, 2026 apparently to resolve this circuit split, even though the district court's statement that it would have imposed the same sentence regardless of the specific guideline range was a basis for not seeking to resolve that split in *Beaird*.

In a different case, of course, such as one in which the district court believed that a mid-guideline range sentence is appropriate, the weight given to commentary could have a direct effect on the guideline range chosen and the ultimate sentence.

In an unusual alignment, both the defendant and the government argued in their briefs that *Stinson,* as applied by the Fifth Circuit, no longer correctly states the rule. The court therefore appointed an amicus to defend the Fifth Circuit's judgment and the broad deference called for by *Stinson*.

The Defendant's Arguments

Beaird's principal argument is that nothing in the Sentencing Reform Act requires deference to interpretive commentary, which leaves in place the ordinary rule, reaffirmed in *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024), that courts must independently resolve questions of law. Courts, not the Commission, are charged with interpreting and applying the guidelines, and the Act is silent as to commentary. According to *Beaird*, deference would allow the Commission to circumvent the vote, notice-and-comment and congressional review requirements for guideline amendments.

Beaird also argues that deference raises separation-of-powers concerns because it gives the Commission the final word on legal questions, and because it permits the Commission to expand criminal punishment without congressional oversight. In this view, deference is incompatible with criminal sentencing, where ambiguity triggers the rule of lenity.

Beaird argues in the alternative that, at a minimum, *Kisor's* limits apply to the commentary. Properly applied, he contends, Kisor would rarely permit deference, because lenity is among the traditional tools a court must exhaust before finding genuine ambiguity, and because the "character and context" of the guidelines counsel against deference.

At oral argument in October, several justices questioned counsel about the practical impact of the distinction between the guidelines and commentary. Chief Justice John Roberts observed that after *Booker* the guidelines are advisory, and he wondered why lower courts should engage in "an academic exercise of interpreting" rather than looking to what the Commission meant and moving on to the §3553(a) factors. Justice Neil Gorsuch, in contrast, expressed his concern in doctrinal terms.

Noting that §994 is silent as to commentary and that §3553(a) directs courts only to "consider" the guidelines and policy statements, he asked, "what would be left of *Loper Bright*?" if these provisions were read to give the Commission power to issue interpretations binding on courts.

The Government's Arguments

The government agrees that the Fifth Circuit erred, but not that deference should be abandoned. Its brief argues that *Stinson* incorporated the whole of the Seminole Rock approach, so *Kisor's* clarification of that doctrine applies to *Stinson* with full force, and that the Fifth Circuit's view that "the commentary controls even unambiguous guidelines" is the deference *Kisor* rejected.

In the government's view, the development of guideline commentary by the Sentencing Commission bears each of *Kisor's* markers of when

Auer deference is appropriate: it is adopted by an absolute majority vote at a public meeting, draws on the Commission's statutory duty to study sentencing practices nationwide, and is typically adopted through the same notice-and-comment and congressional review procedures as the guidelines.

Accordingly, the commentary will typically warrant deference because genuine ambiguities in applying the guidelines are "not uncommon." The government asked the Court to vacate the Fifth Circuit's judgment and remand for further proceedings.

Justice Samuel Alito asked whether overruling *Stinson* could require resentencing "10,000 defendants from 2025 alone." Justice Sonia Sotomayor pressed whether the government's *Kisor* position would "create chaos in the courts below." The government responded that commentary will generally satisfy *Kisor's* requirements, limiting the need for resentencings.

The Court-Appointed Amicus' Arguments

The court-appointed amicus argues that *Stinson* was right when decided and *Kisor* does not apply. *Kisor* set limits on a presumption that Congress impliedly delegates to agencies the authority to resolve ambiguities in their own rules, but the Commission has express authority under §994(a)(2) to issue "policy statements regarding application of the guidelines."

The amicus argues that *Loper Bright* itself recognizes that Congress may expressly delegate authority to "give meaning" to a term, which is what §994(a)(2) of the Act does. Further, because the guidelines are advisory after *Booker,* deference raises none of the usual rule-of-law concerns.

Conclusion

The recent argument in *Beaird* suggests that the court is likely to preserve some form of deference. The justices were sensitive to the practical impact of unsettling sentencing law and practice as well as the broader doctrinal impact of their decision.

If the court adopts the government's proffered *Kisor* framework, defense counsel will have additional room to argue that a court should construe the text of a guideline rather than rely on unfavorable commentary.

If the Court goes further and overrules *Stinson* outright, then courts would have to construe the guidelines independently, treating commentary as at most an interpretive aid.

Notably, one of the guidelines often at the focal point of debates over guidelines commentary is the fraud and theft guideline, §2B1.1, which relies heavily on how "loss" is calculated to determine applicable sentencing ranges.

In a recent amendment, the Commission has already moved some commentary into the §2B1.1 guideline, though that guideline still has considerable commentary on the calculation of loss that could be affected by the Supreme Court's ultimate ruling in *Beaird*.

In any event, with the guidelines no longer mandatory, the question of deference has arguably declined in importance because courts can consider commentary even if it is not authoritative. Cases on the margin, however, may still be affected by the degree of deference ultimately adopted in *Beaird*.

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