SENTENCING GUIDELINES ABSTENTION

Dawinder S. Sidhu*

ABSTRACT

The U.S. Sentencing Guidelines remain the starting point and anchor for every sentence that federal judges impose on criminal defendants. As such, the Guidelines are a critical component of the American criminal justice system. The Supreme Court has categorically refused, however, to resolve circuit splits involving the Guidelines, leaving a significant gap in the coherent and fair administration of criminal justice. It has done so even while acknowledging the existence of a clear split, conceding that denying certiorari will perpetuate drastic sentencing disparities, and knowing that the U.S. Sentencing Commission, the agency responsible for amending the Guidelines, lacked a quorum to address any splits.

This Article highlights and critiques this practice, called sentencing guidelines abstention. It provides an overview of federal sentencing, describes the purported basis for the Court's forbearance, and argues (1) that the Court's precedent at most supports abstention only when the Commission is the middle of amending the guideline provision giving rise to the split and there is an alternative basis for the decision, and (2) that any abstention is inconsistent with the Court's role and rules, congressional intent, administrative law principles, and the practical realities of the Commission's amendment process.

The overarching ambition of this Article is to ensure that the Court assumes its role of resolving Guidelines splits, provides uniformity to the federal judiciary, and contributes thereby to the development of a reasoned criminal justice system.

* Supreme Court Fellow, U.S. Sentencing Commission (2013-14); Special Assistant to the Chair of the U.S. Sentencing Commission (2016). This Article is written in my individual capacity and does not reflect the views of the Commission. I thank Rachel Barkow, Doug Berman, Rusty Burress, Kathleen Grilli, Shon Hopwood, Steve Leckar, Brent Newton, and Kyle Singhal, for helpful conversations, comments, and support; Kelsey Robinson for excellent research assistance, particularly as to the Appendix; and the staff of the *American Criminal Law Review*, particularly Tara Mahesh and Victoria Sheber, for working with me and improving the quality and readability of this piece. I remain responsible for all errors. I dedicate this Article to Rusty Burress, who passed away in 2022. Rusty was a long-standing member of the Commission's professional staff and is the kindest public servant I have ever met.

INTRODUCTION

"The most important thing we do . . . is not doing," Justice Louis Brandeis once said.[1] This principle of judicial forbearance is reflected in several foundational

1. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 313 (1985); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 71 (1962).

legal doctrines, including standing,[2] exhaustion,[3] and estoppel.[4] Another, abstention, generally occurs when a federal court forgoes consideration of a case over which it possesses jurisdiction to avoid a clash with parallel state judicial or administrative proceedings.[5]

This Article identifies and critiques the existence of the abstention doctrine in the criminal justice context: the Supreme Court's categorical refusal to resolve conflicts among the federal circuit courts on the meaning of the U.S. Sentencing Guidelines (the "Guidelines"). The U.S. Sentencing Commission (the "Commission") is the administrative agency responsible for promulgating and amending the Guidelines.[6] The Court has declined review in Guidelines cases on the theory that the Commission instead should resolve these splits.[7]

This theory is wrong. At most, the Court's precedent supports abstention only when the Commission is the middle of amending the guideline provision giving rise to the split *and* there is an alternative basis for the decision.[8] Abstention may not be appropriate in any circumstance, as it is inconsistent with the Court's role and rules, congressional intent, administrative law principles, and the practical realities of the Commission's amendment process.[9]

This issue matters. The Court has left a gaping hole in the exercise of its certiorari power—thereby denying the system the benefits of coherence and uniformity—in a major area of law. The Guidelines remain the starting point and anchor for every federal sentence that is imposed across the country.[10] Over 1.9 million defendants have been sentenced under the Guidelines.[11] More than 3,300 appeals involving the Guidelines are filed every year.[12] And yet these appeals are categorically shut out from Supreme Court review regardless of merit. As the Solicitor General recognized, it has become the Court's "usual practice" to decline "review of issues that the Commission may address."[13]

---

2. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

3. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 608–11 (1975).

4. *See* Allen v. McCurry, 449 U.S. 90, 94–96 (1980).

5. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814–17 (1976) (discussing the circumstances in which abstention is appropriate).

6. *See infra* Part I (surveying federal sentencing, covering both the era of uncoordinated sentencing that existed prior to the creation of the Commission and the current period governed by the Guidelines).

7. *See infra* Part II (introducing the concept of sentencing guidelines abstention by demonstrating that the Court has refused to address circuit splits involving the Guidelines).

8. *See infra* Part III.A.

9. *See infra* Part III.B–D.

10. *See* Gall v. United States, 552 U.S. 38, 49 (2007); Peugh v. United States, 569 U.S. 530, 541 (2013); Molina-Martinez v. United States, 136 S. Ct. 1338, 1349 (2016).

11. *See* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 7 (2020) [hereinafter FEDERAL SENTENCING: THE BASICS].

12. *See* U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 180–82 tbl. A-2 (2019) [hereinafter 2019 ANNUAL REPORT OF FEDERAL SENTENCING STATISTICS] (reporting 3,347 federal appeals of the original sentence in Fiscal Year 2019).

13. Brief for the United States in Opposition at 20–21, Jarvis v. United States, 142 S. Ct. 760 (2022) (No. 21-568) (Mem.) (first citing Bryant v. United States, 142 S. Ct. 583 (2021) (Mem.); then citing Wiggins v. United

In some cases, there is no doubt that a circuit split, the primary predicate for Supreme Court review, exists. For example, in 2021, Justice Sotomayor, joined by Justice Gorsuch, acknowledged that a petition raised an "important and longstanding split" among the circuit courts concerning when a defendant was entitled to a reduction for pleading guilty, but agreed that the petition should be denied in order to allow the Commission to "address the issue in the first instance."[14] Likewise, in 2022, Justice Sotomayor, this time joined by Justice Barrett, admitted that the petition raised a split on what constituted a "controlled substance offense" within the meaning of the Guidelines, but claimed that "[i]t is the responsibility of the Sentencing Commission to address this division[.]"[15]

The Court has punted cases to the Commission knowing that the refusal will perpetuate undue sentencing disparities, such that the scope of a defendant's liberty will depend on geographic happenstance.[16] For example, Justices Sotomayor and Gorsuch acknowledged in the reduction case that, until the Commission resolves the split, "similarly situated defendants may receive substantially different sentences depending on the jurisdiction in which they are sentenced."[17] In the same case, Justices Sotomayor and Gorsuch conceded that the split perpetuated sentencing disparities across the circuits, ranging by a factor of "years" and spanning from a "fixed-term" to a "life sentence."[18] The Court's abstention thus matters in real, human terms. Remarkably, the Court has abstained even when the Commission has lacked a quorum and thus was incapable of addressing any split.

The Court's abstention—effectively making the Commission the Supreme Court for purposes of the Guidelines—is additionally noteworthy because it is the only context in which the Court has fully transferred its role to an agency. "[N]o other federal agency—in any branch—has ever performed a role anything like it," then-Judge Alito observed when he sat on the Third Circuit.[19]

States, 142 S. Ct. 139 (2021) (Mem.); then citing Warren v. United States, 142 S. Ct. 124 (2021) (Mem.); then citing Ward v. United States, 141 S. Ct. 2864 (2021) (Mem.); then citing Tabb v. United States, 141 S. Ct. 2793 (2021) (Mem.); and then citing Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting denial of certiorari)).

14. *Longoria*, 141 S. Ct. at 979 (Sotomayor, J., statement respecting the denial of certiorari) (citing Braxton v. United States, 500 U.S. 344, 348 (1991)).

15. Guerrant v. United States, 142 S. Ct. 640, 640–41 (2022) (Sotomayor, J., statement respecting the denial of certiorari) (citing *Braxton*, 500 U.S. at 348).

16. *See generally* Comm. on Crim. Law of the Jud. Conf., Comment Letter on Proposed Amendments for the 2000 Sentencing Guideline Amendment Cycle, (Mar. 10, 2000), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200003/200003_PCpt3.pdf (noting that the Committee has urged the resolution of such splits in order "to avoid unnecessary litigation, to avoid ambiguity, and to eliminate unwarranted disparity in the application of the guidelines").

17. *Longoria*, 141 S. Ct. at 979.

18. *Id.*

19. Samuel A. Alito, *Reviewing the Sentencing Commission's 1991 Annual Report*, 5 FED. SENT'G REP. 166, 168 (1992).

This Article is the first to launch a comprehensive, head-on attack of the sentencing guidelines abstention doctrine.[20] As such, the primary contribution of this Article is to give full expression to the problems with this doctrine and to enable scholars and practitioners to better understand, and more capably argue against the application of, sentencing guidelines abstention. In doing so, the broad ambition is to ensure that the Supreme Court assumes its role of resolving conflicts involving federal sentencing, infuses the federal judiciary with coherence and uniformity, and contributes thereby to the development of a sound criminal justice system.

This Article flows as follows. Part I offers a brief history of federal sentencing. Part II describes the origins and ongoing nature of the sentencing guidelines abstention doctrine. Part III presents a two-pronged critique of the doctrine: first, that the Court's precedent at most supports abstention only when the Commission is engaged in amending the guideline provision giving rise to the split and there is an alternative basis for the decision, and second, that abstention is inconsistent with the Court's role and rules, congressional intent, administrative law principles, and the practical realities of the Commission's amendment process.

I. A BRIEF HISTORY OF FEDERAL SENTENCING

This Part provides an overview of federal sentencing. First, it summarizes the nature of federal sentencing prior to establishment of the Commission and the concerns with this unregulated phase of federal sentencing. Second, it offers an account of how Congress responded to these concerns, namely creating the Commission and instructing this novel agency to formulate national norms in all federal sentencing decisions.

---

20. The leading criticism of sentencing abstention is that the Commission is unfit to serve as a Sentencing Supreme Court because the Commission does not issue the functional equivalent of opinions. *See* Douglas A. Berman, *The Sentencing Commission as Guidelines Supreme Court: Responding to Circuit Conflicts*, 7 FED. SENT'G REP. 142, 145 (1994) (criticizing the Commission's "general dereliction when it comes to explaining or justifying its guidelines and amendments"); Marc L. Miller & Ronald F. Wright, *"The Wisdom We Have Lost": Sentencing Information and its Uses*, 58 STAN. L. REV. 361, 365–66 (2005) ("[The Commission] acted like a Supreme Court for Sentencing, but without issuing opinions or reasons."); Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 185 (2005) ("The Commission . . . [has not been] particularly clear or principled in explaining and justifying the resolutions it does impose."); Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1275 (1997) ("Unlike the Supreme Court . . . the Commission does not seek to explain or justify its resolution of conflicts."); *see also* Andrew D. Goldstein, Comment, *What Feeney Got Right: Why Courts of Appeals Should Review Sentencing Departures De Novo*, 113 YALE L.J. 1955, 1985 (2004) (same). The other major criticism is that the Commission is unfit for a different reason: its amendment cycle is a timely and inefficient mechanism to resolve circuit conflicts. *See* Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines,* 66 S. CAL. L. REV. 621, 656 (1992) (suggesting that a national court of sentencing appeals would "more effectively and consistently" resolve sentencing splits in light of the "Sentencing Commission operating on yearly amendment cycles").

A. Pre-Guidelines Federal Sentencing

From the inception of the country to 1987, federal sentencing effectively was uncoordinated and decentralized. Judges possessed almost unlimited discretion to determine the form and length of the sentence imposed. A sentence needed (and still must need) to fall within the mandatory minimum, if any, and the statutory maximum, if any; these statutory limits were the only restraints on a judge's sentencing discretion.[21]

A byproduct of this generous discretion was sentencing disparities, or similarly situated defendants not receiving similar sentences.[22] These disparities existed across the country and even in the same courthouses. In a series of speeches and writings, Judge Marvin Frankel, known as the "father of sentencing reform,"[23] called attention to these undue sentencing disparities.[24] He cited "compelling evidence that widely unequal sentences are imposed every day in great numbers for crimes and criminals not essentially distinguishable from each other."[25]

A report published by the Federal Judicial Center in 1974 provided undeniable proof of Judge Frankel's concerns about federal sentencing disparities. The study demonstrated the existence of disparities in one jurisdiction as well as the wide extent of the disparities. In the study, federal judges within the Second Circuit were presented with twenty hypothetical presentence reports, with information on the offense and the defendant, and were asked what sentence they would impose in these cases.[26] "[T]he results diverged dramatically," Justice Stephen G. Breyer later recalled.[27] For the very first of the twenty cases—in which the defendant, a forty-year-old with three prior convictions, engaged in extortionate credit transactions and related income tax violations—one judge would have imposed a sentence of three years of imprisonment, while another would have imposed a twenty-year

---

21. *See* Dorszynski v. United States, 418 U.S. 424, 431 (1974) ("[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end."); Wasman v. United States, 468 U.S. 559, 563 (1984) ("It is now well established that a judge . . . is to be accorded very wide discretion in determining an appropriate sentence.").

22. *See* S. REP. NO. 98-225, at 38 (1983) ("[E]very day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances."); *id.* (attributing these disparities to "unfettered discretion" and the absence of "statutory guidance").

23. *See* 128 CONG. REC. 26411, 26503 (1982) (statement of Sen. Edward Kennedy).

24. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) [hereinafter FRANKEL, CRIMINAL SENTENCES]; Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972) [hereinafter Frankel, *Lawlessness in Sentencing*]. Judge Frankel was not the only member of the judiciary to discuss these disparities. *See* Jon O. Newman, *A Better Way to Sentence Criminals*, 63 A.B.A. J. 1562, 1563 (1977) ("Most of today's criticisms hold that there is too much disparity in sentencing . . . . I agree . . . that there is excessive disparity.").

25. FRANKEL, CRIMINAL SENTENCES, *supra* note 24, at 8.

26. ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 1–5 (1974).

27. Stephen Breyer, Associate Justice, Federal Sentencing Guidelines Revisited, Address Before University of Nebraska College of Law (Nov. 18, 1998) *in* 11 FED. SENT'G REP. (1999).

sentence.[28] These disparities confirmed that "like" defendants who committed "like" offenses were not being given "like" sentences—even in the same jurisdiction.[29] Congress would soon cite this study as evidence of unwarranted sentencing disparities.[30]

B. Federal Sentencing from 1987 to the Present

Judge Frankel's proposed response to undue sentencing disparities was a uniform federal sentencing system and a "National Commission" to develop and monitor that system.[31] Congress did "move the sentencing system in the direction of increased uniformity"[32] and adopted a brand-new agency that would create a system designed to increase sentencing uniformity.[33]

In the Sentencing Reform Act of 1984 ("SRA"),[34] Congress established the U.S. Sentencing Commission, situated this independent agency within the Article III branch of the federal government, and charged it with the responsibility to promulgate sentencing guidelines applicable to all federal judges.[35] The guidelines project was the country's first ever attempt to standardize federal sentencing policy. It has been likened to a revolution in American criminal law and federal sentencing.[36] Indeed, at the confirmation hearing for the first slate of Commissioners, the Chair of the Senate Judiciary Committee said the nominees would be taking on the role of "founders."[37]

---

28. PARTRIDGE & ELDRIDGE, *supra* note 26, at 6–7 tbl.1, A-5.

29. *See id.*

30. *See* S. REP. NO. 98-225, *supra* note 22, at 41–44 & n.144 (citing PARTRIDGE & ELDRIDGE, *supra* note 26, at 1–3).

31. Frankel, *Lawlessness in Sentencing*, *supra* note 24, at 46–47, 51.

32. *See* United States v. Booker, 543 U.S. 220, 253 (2005) (discussing Congress's "basic goal in passing the Sentencing Act").

33. For a detailed overview of the legislative history, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

34. Sentencing Reform Act of 1984, Pub. L. No. 98–473, ch. II, 98 Stat. 1987 (1984); *see also* 18 U.S.C. § 3551; 28 U.S.C. § 991. The Sentencing Reform Act was part of the Comprehensive Crime Control Act. *See* Stith & Koh, *supra* note 33, at 261–66. But the federal criminal code still is in desperate need of reform. *See* William Pryor, Judge, Remarks at Scalia Law School, George Mason University (June 1, 2017), *in* 29 FED. SENT'G REP. 278, 279 (2017) (characterizing the federal criminal code as "a crazy-quilt of over 4,000 crimes spread throughout dozens of titles of the United States Code and enacted by many Congresses over several decades").

35. *See* 28 U.S.C. § 994.

36. As one U.S. Circuit Judge noted, the Guidelines are "the greatest change in federal sentencing since the founding of the republic." Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 22 CAP. U. L. REV. 1, 1 (1993); *see also* Hon. Edwin Meese III, Att'y Gen. of the U.S., Remarks on the Sentencing Commission's Guidelines Before the American Law Institute 11 (May 22, 1987) (transcript released by Department of Justice) ("These guidelines mark a decisive turning point in the history of the federal criminal justice system.").

37. *Confirmation Hearings on Federal Appointments: Hearing on Michael K. Block, Ilene H. Nagel, and Paul H. Robinson Before the S. Comm. on the Judiciary*, 95th Cong. 306 (1985) (statement of Sen. Charles McC. Mathias).

In discharging its awesome responsibility, the Commission analyzed over 10,000 federal sentencing decisions and used an empirical approach of past practice as the touchstone for setting penalty levels, enhancements, and reductions.[38] In 1987, the Commission published the first-ever Guidelines Manual.[39] The Guidelines must be approved by Congress, and as such have the force and effect of federal law.[40]

The essence of the Guidelines is its structure. To find the appropriate sentence under the Guidelines, a judge is to undertake three steps. *First*, the judge will calculate the total score for the offense (which is based on the score for the offense of conviction and the score(s) for the real offense conduct), calculate the defendant's criminal history (based on prior criminal offenses),[41] and then find the intersection of these two inputs on the Sentencing Table, a 258-box grid containing sentencing ranges.[42] As the Supreme Court noted, the Guidelines are a "system under which a set of inputs specific to a given case (the particular characteristics of the offense and offender) yield[] a predetermined output (a range of months within which the defendant could be sentenced.)"[43]

Second, a judge will consider whether there is a basis to "depart[]" from the predetermined sentencing range.[44] The Guidelines range represents the sentence that could or should be imposed in the ordinary, mine run of cases.[45] The Commission contemplated, however, that there may be unusual circumstances of the case such that the standard Guidelines range is not appropriate. That is, the Guidelines anticipate the possibility that unusual facts or criminal history may justify a deviation from the general penalty levels that are otherwise applicable. Accounting for this possibility, the Guidelines enumerate several bases for the sentencing judge to "depart[]," or impose a sentence outside of the Guidelines range.[46]

Third, and finally, the judge must comply with 18 U.S.C. § 3553(a). Under this statutory provision, a judge must ensure that the sentence imposed is sufficient, but no greater than necessary, to reflect the four purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation.[47] Under this last step, the judge may

---

38. *See* U.S. SENT'G GUIDELINES MANUAL, § 1.3 (U.S. SENT'G COMM'N 1987); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. l, 8–9 (1988). For more information on the choices made by the Commission in formulating the Guidelines, see generally Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 HOFSTRA L. REV. 1167 (2017).

39. *See* U.S. SENT'G GUIDELINES MANUAL § 1.2 (U.S. SENT'G COMM'N 1987).

40. *See* 28 U.S.C. § 994(p) (providing that Congress must approve, or affirmatively reject, the Guidelines and any amendments thereto within 180 days after their submission by the Commission).

41. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a)(1)–(6) (U.S. SENT'G COMM'N 2018).

42. *See id.* § 1B1.1(a)(7); *id.* at ch. 5, pt. A.

43. Peugh v. United States, 569 U.S.530, 535 (2013).

44. Gall v. United States, 552 U.S. 38, 50 (2007).

45. *See id.* at 49 (explaining that the Guidelines are a starting point and that judges must make individualized determinations based on the facts of the case to move outside the Guidelines).

46. *Id.* at 50.

47. *See* 18 U.S.C. § 3553(a)(2).

vary, or adjust the sentence otherwise dictated by the first two steps to satisfy the parsimony principle of Section 3553(a).[48]

If 1987 marked the founding of regulated federal sentencing, 2005 may be said to represent the second founding. The original Guidelines were designed to be binding or mandatory. In the 2005 case of *United States v. Booker*,[49] the Supreme Court held that a mandatory guidelines system was unconstitutional, as it required a sentencing judge to impose a sentence based on factors beyond those proven to a jury or admitted by the defendant.[50] As the remedy, the Court rendered the Guidelines advisory.[51]

Despite the advisory status of the Guidelines, the Court has made clear that the Guidelines still represent the "starting point and initial benchmark" for every federal sentence.[52] Because the very first step in a sentencing determination remains the identification of the sentencing range under the Guidelines, the Court repeatedly has stressed that a judge's ultimate sentencing decision will be "anchored" to the initial Guidelines calculation.[53] Though the Guidelines are not ideal,[54] they continue to occupy a "central role" in federal sentencing.[55]

With an overview of federal sentencing in place, the question becomes why the Supreme Court has categorically refused to review circuit court conflicts pertaining to the Guidelines.

II. SENTENCING ABSTENTION

Federal courts may hear cases when a federal question or diversity jurisdiction exists.[56] Federal courts will decline, however, to accept a case in certain

48. *Gall*, 552 U.S. at 50–51.

49. 543 U.S. 220 (2005).

50. *Id.* at 232, 245.

51. *Id.* at 245.

52. *Gall*, 552 U.S. at 49.

53. *See* Peugh v. United States, 569 U.S. 530, 541 (2013); *see also* Molina-Martinez v. United States, 136 S. Ct. 1338, 1349 (2016).

54. For a discussion of problems with the Guidelines, and suggestions on their improvement, see generally William H. Pryor, Jr., *Returning to Marvin Frankel's First Principles in Federal Sentencing*, 29 FED. SENT'G REP. 95 (2017). These perspectives, delivered by the Commissioner and then-Acting Chair of the Commission, Judge William H. Pryor, are an honest appraisal of the Guidelines and a highly persuasive proposal on how the Guidelines may be more simplified and effective in a post-*Booker* regime.

55. *Molina-Martinez*, 136 S. Ct. at 1341; *see also* Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT'G REP. 6, 8 (2013) ("[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."); United States v. Ingram, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) ("[T]he starting, guidelines-departure point matters" because when individuals are "given an initial numerical reference . . . they tend (perhaps unwittingly) to 'anchor' their subsequent judgments . . . ."); United States v. Diaz-Ibarra, 522 F.3d 343, 347 (4th Cir. 2008) (citing *Gall*, 552 U.S. at 40–41); Koon v. United States, 518 U.S. 81, 100 (1996) ("An error in the calculation of the applicable Guidelines range . . . infects all that follows at the sentencing proceeding, including the ultimate sentence chosen by the district court[.]").

56. *See* 28 U.S.C. §§ 1331, 1332.

circumstances. For example, if a plaintiff does not possess a sufficient stake in the case, a court will deny jurisdiction for lack of standing;[57] if the plaintiff has failed to pursue administrative remedies first, a court will kick out the case on exhaustion grounds;[58] and if a party has brought an issue that another court has already decided, the court will not re-litigate the issue on preclusion grounds.[59] Federal courts will forgo consideration of an issue to avoid a clash with parallel state judicial or administrative proceedings.[60] For its part, the primary role of the Supreme Court is to resolve conflicts among the federal circuit courts of appeal as to the same question of federal law.[61]

Here, this Article identifies an additional reason that the Supreme Court refuses to hear a case even when each of the other requirements for jurisdiction are satisfied and even when a clear conflict between the federal circuit courts is present: the conflict raises a Guidelines provision and, in the Court's estimation, the U.S. Sentencing Commission should resolve the conflict instead. Because this rationale for declining certiorari is not predicated on whether the plaintiff is a proper party, whether a plaintiff did not proceed directly to the Commission for an administrative determination, or whether a party is attempting to get a second bite at the apple, and rather is an exercise in deference to another governmental body, this specific practice of refusal may be best characterized as an exercise in abstention.

First, this Part describes the origin of sentencing abstention, the case of *Braxton v. United States*. Second, this Part surveys the application of *Braxton* to other cases presenting splits on the Guidelines, demonstrating that sentencing abstention is a longstanding, effective, and increasingly formidable barrier to the Court's consideration of splits on the Guidelines.

A. The Origins of Sentencing Abstention: Braxton v. United States

On June 10, 1988, four deputies from the U.S. Marshal's Service knocked on the door of Thomas Braxton's apartment and announced that they had a warrant for his arrest.[62] Years prior, Braxton had been committed to St. Elizabeth's Hospital in Washington, D.C., after being accused of robbing a bank and being found not guilty by reason of insanity.[63] The deputies were present to arrest Braxton for leaving the mental hospital without authorization.[64]

---

57. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 562–63 (1992).

58. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 609–11 (1975); *see, e.g.*, 7 U.S.C. § 6912(e) ("[A] person shall exhaust all administrative appeal procedures established by the Secretary [of Agriculture] before the person may bring an action in a court of competent jurisdiction").

59. *See* Allen v. McCurry, 449 U.S. 90, 94–96 (1980).

60. Younger v. Harris, 401 U.S. 37, 43–49 (1971).

61. *See infra* notes 125–28 and accompanying text.

62. Braxton v. United States, 500 U.S. 344, 345 (1991).

63. United States v. Braxton, 903 F.2d 292, 293 (4th Cir. 1990), *rev'd*, 500 U.S. 344 (1991).

64. *Id.*

Braxton did not respond verbally to the deputies, but the deputies heard movement inside the apartment.[65] The deputies knocked again, repeated their announcement, and kicked open the door.[66] Braxton fired a shot from a .38 caliber revolver through the door opening.[67] The door closed shut and the deputies again flung it open.[68] Braxton fired an additional shot.[69] The second bullet also lodged in the door.[70] Ultimately, backup arrived, tear gas was deployed, and Braxton was subdued and arrested.[71] Braxton claimed that he discharged his weapon not to kill the deputies, but to drive them away, as he did not want to return to a mental hospital.[72]

Braxton was charged with three counts: attempting to kill the deputies, assaulting the deputies, and the use of a handgun in the commission of a crime of violence.[73] At a Rule 11 plea hearing, Braxton pled guilty to the second and third counts, but not the first.[74] Importantly, the guilty plea was not made pursuant to a formal, written agreement with the Government.[75] Instead, at the hearing, the Government proffered facts that it contended it could prove if the matter proceeded to trial.[76] Braxton stipulated to the facts because they served as the predicate for the two counts to which he pled guilty.[77] At sentencing, the district court judge credited the facts as also providing a sufficient predicate for the first count, and therefore used the higher base offense level applicable to the attempted murder charge in calculating the sentence to be imposed.[78]

According to the Guidelines, specifically section 1B1.2(a), a district court judge must use the base offense level applicable to the "offense of conviction," unless the defendant by plea of guilty contains a "stipulation that specifically establishes a more serious offense than the offense of conviction."[79] The district court determined that Braxton's stipulation to the Government's proffer sufficed as a stipulation for purposes of section 1B1.2(a). The Fourth Circuit agreed, two to one, affirming the district court's interpretation of section 1B1.2(a) and use of the higher base offense level.[80] In doing so, the Fourth Circuit created a split with the

65. *Braxton*, 500 U.S. at 345.
66. *Id.*
67. *Braxton*, 903 F.2d at 293.
68. *Braxton*, 500 U.S. at 345.
69. *Id.*
70. *Id.*
71. *Braxton*, 903 F.2d at 293.
72. *See id.*
73. *Braxton*, 500 U.S. at 345.
74. *Id.*
75. *Id.* at 345–46.
76. *Id.*
77. *Id.*
78. *Id.*
79. U.S. SENT'G GUIDELINES MANUAL § 1B1.2(a) (U.S. SENT'G COMM'N 2018).
80. United States v. Braxton, 903 F.2d 292, 298 (4th Cir. 1990), *rev'd*, 500 U.S. 344 (1991).

Second, Fifth, and Tenth Circuits, which noted that a stipulation within the meaning of section 1B1.2(a) requires a formal plea agreement.[81]

The Court granted certiorari to resolve the split, noting generally that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."[82] As it turns out, the Commission also was looking into the split as to the meaning of "stipulation" under section 1B1.2(a). After the Court granted certiorari on November 13, 1990, the Commission, on January 17, 1991, requested public comment as to whether section 1B1.2(a) should be amended to clarify that a qualifying "stipulation must be as part of a formal plea agreement."[83] At oral argument, held on March 18, 1991, the Justices raised this parallel process. Early in the argument, Justice Scalia pointed out that "they [i.e., the Commission] have this under consideration," and Justice White disclosed that "[i]t's possible we might wait" for the Commission to complete its amendment process.[84]

Waiting is precisely what the Court did. The Court refused to resolve the split. In a unanimous opinion by Justice Scalia, announced on May 28, 1991, the Court acknowledged that the duty to resolve circuit splits is "initially and primarily ours."[85] But, unless the split involves a constitutional question, the Court stated that it did not possess the sole or exclusive ability to "eliminate such conflicts."[86] Rather, the Court suggested that it would be "more restrained and circumspect in using [the] certiorari power as the primary means of resolving such conflicts."[87]

The Court drew this conclusion from two sources. First, when Congress set up the Commission, Congress instructed the Commission to "periodically . . . review and revise" the Guidelines.[88] The Court seemed to construe this amendment authority as a preference for the Commission to resolve splits by way of its amendment process. Second, the Court observed, Congress also gave the Commission the

---

81. *See* Brief for Petitioner at 23, *Braxton*, 500 U.S. 344 (No. 90-5358) (first citing United States v. McCall, 915 F.2d 811, 816 n.4 (2d Cir. 1990); then citing United States v. Rutter, 897 F.2d 1558, 1561 (10th Cir.); then citing United States v. Strong, 891 F.2d 82, 85 (5th Cir. 1989); then citing United States v. Warters, 885 F.2d 1266, 1273 n.5 (5th Cir. 1989); and then citing United States v. Guerrero, 863 F.2d 245, 248 (2d Cir. 1988)). The Government denied the existence of a circuit split, dismissing the Second and Fifth Circuits' relevant opinions as dicta. Brief for Respondent at 10 n.4, *Braxton*, 500 U.S. 344 (No. 90-5358) (first citing *Strong*, 891 F.2d at 85; then citing *McCall*, 915 F.2d at 816 n.4; and then citing *Warters*, 885 F.2d at 1273 n.5). The Court accepted certiorari on the ground that a split was present, *see infra* note 82 and accompanying text, rejecting the Government's attempt to suggest that no split and no reason for the Court to intervene existed.

82. *Braxton*, 500 U.S. at 347; *see also id.* ("The Courts of Appeals have divided on the meaning of . . . 'containing a stipulation[.]'").

83. Notices United States Sentencing Commission: Sentencing Guidelines for United States Courts, 56 Fed. Reg. 1846, 1891 (Jan. 17, 1991).

84. Transcript of Oral Argument at 8, 16, *Braxton*, 500 U.S. 344 (No. 90-5358).

85. *Braxton*, 500 U.S. at 344–45, 347–48.

86. *Id.* at 347.

87. *Id.*at 348.

88. *Id.* (quoting 28 U.S.C. § 994 (o)).

authority to "decide whether and to what extent its amendments reducing sentences will be given retroactive effect."[89] The Court therefore declined to resolve the split that it acknowledged existed. The Court further noted that "the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of [section] 1B1.2."[90] That proceeding culminated in an amendment to section 1B1.2, made effective on November 1, 1992, requiring that stipulations to a more serious offense must be made pursuant to a written plea agreement.[91]

The Court's opinion did not end there. After refusing to interpret section 1B1.2, the Court turned to the sufficiency of Braxton's stipulation. The Court held that, even if Braxton's stipulation counted for purposes of section 1B1.2, the stipulation did not establish an intent to kill the deputies.[92] This conclusion was the actual holding of the case and basis for the decision.

The next section addresses how *Braxton* has been interpreted and specifically transformed into the broad proposition that the Court should categorically deny petitions involving the Guidelines to allow the Commission to resolve any splits raised in the petitions.

B. Braxton*'s Progeny*

Shortly after the Court's ruling, both the academic community and the Commission itself perceived *Braxton* to mean something different and more drastic than deference: that the Court had effectively ceded the duty to resolve splits concerning the Guidelines to the Commission. A month following the end of the term in which *Braxton* was decided, Professor Ronald Wright observed that, under *Braxton*, the "Commission's statutory authority periodically to review and revise the guidelines . . . indicates Congress' desire to let the Commission, rather than the courts, resolve any conflicts over the meaning of the guidelines."[93] (Professor Wright rightly criticized this conclusion, writing that the Commission's amendment authority "is no signal for courts to bow out of the process" of clarifying and improving federal sentencing law.)[94] The next year, Commission staff also acknowledged that the "Supreme Court is unlikely to resolve a split in the circuits where the Commission has the power to do so."[95] The takeaway from *Braxton* is the principle of sentencing guidelines abstention: the Court's decision to forgo resolution of a clear circuit split involving the Guidelines where the Commission has

89. *Id.* (citing 28 U.S.C. § 994 (u)).

90. *Id.* at 348–49.

91. U.S. SENT'G GUIDELINES MANUAL app. C, amend. 438 (U.S. SENT'G COMM'N 2003).

92. *Braxton*, 500 U.S. at 349–51.

93. Ronald F. Wright, *Sentencing Law in the Supreme Court's 1990–91 Term*, 4 FED. SENT'G REP. 58, 58 (1991).

94. *Id.*; *see also infra* Part III.B (presenting the case against sentencing abstention).

95. *U.S. Sentencing Commission Staff Working Group Report on 3E1.1: The Acceptance of Responsibility Reduction*, 4 FED. SENT'G REP. 336, 340 (1992).

the power to do so.[96] This principle, as predicted by Professor Wright and the Commission, has been applied to a number of subsequent cases brought before the Court.

It is true, as a general matter, that a small number of certiorari petitions—only sixty-seven merits decisions in the Court's 2020–21 term[97]—are accepted every year. The Court may deny certiorari for many reasons[98] and is under no obligation to provide any explanation as to why it has denied review in a particular case.[99] In almost every such case, a response is not ordered, which suggests that not one Justice was interested in discussing the case further at their conference.[100]

Nonetheless, our research[101] has identified thirty-five petitions raising a conflict among the circuit courts involving the Guidelines to which the Court ordered the Solicitor General to respond (indicating that at least one Justice believed at least preliminarily that certiorari was appropriate). The Solicitor General's office then invoked *Braxton* to argue that certiorari should not be granted, and the Court agreed, denying certiorari.[102] Again, while most petitions filed with the Court will be denied anyway, and while most do not lead to a brief in opposition from the Solicitor General, these cases provide proof that, insofar as the Solicitor General is concerned, *Braxton* is an effective weapon to thwart merits review.[103] And, at a minimum, *Braxton* may inform or contribute to the Court's decision to refuse review. In recent statements regarding the denial of certiorari, a rare window into the decision-making of the Court at the certiorari stage, Justice Sotomayor, joined by Justices Barrett and Gorsuch, cited *Braxton* in support of the decision to deny certiorari and expressly for the proposition that the Commission should resolve the

96. This is not the proper conclusion to be drawn from *Braxton*. *See infra* Part III.A.

97. Kalvis Golde, *In Barrett's First Term, Conservative Majority is Dominant but Divided*, SCOTUSBLOG (July 2, 2021, 6:37 PM), https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided/.

98. *See Supreme Court Procedure*, SCOTUSBLOG, https://www.scotusblog.com/supreme-court-procedure/ (last visited Jan. 25, 2023).

99. *Id.*

100. *Id.*

101. Here the author pays tribute to his outstanding former research assistant and current Prettyman Fellow, Kelsey Robinson, who was largely responsible for examining the citations to *Braxton* and developing the Appendix that appears at the end of this Article.

102. *See infra* app. We also have identified seven cases in which the Solicitor General cited to *Braxton* in its Briefs in Opposition and in which the Court denied certiorari, but the petitions did not raise a clear split among the federal courts of appeal. *See* Brief for the United States in Opposition at 19, Stewart v. United States, 139 S. Ct. 792 (2019) (No. 18-274); Brief for the United States in Opposition, Kagan v. United States, 121 S. Ct. 1997 (2001) (No. 00-945); Brief for the United States in Opposition at 23, Smith v. United States, 121 S. Ct. 1956 (2001) (No. 00-1192); Brief for the United States in Opposition at 8, Livoti v. United States, 120 S. Ct. 1961 (2000) (No. 99-1344); Brief for the United States in Opposition at 13, J & T Coal, Inc. v. United States, 116 S. Ct. 2579 (1996) (No. 95-326); Brief for the United States in Opposition at 13, Holland v. United States, 115 S. Ct. 898 (1995) (No. 94 451); Brief for the United States in Opposition at 12, Patriarca v. United States, 114 S. Ct. 1644 (1994) (No. 93-1350).

103. *See* Brief for the United States in Opposition at 21, Jarvis v. United States, 142 S. Ct. 760 (2022) (No. 21-568) (stating that it is the "usual practice" of the Court to deny petitions raising guideline splits).

split presented in the petitions.[104] *Braxton* thus undeniably has an impact on the Court's determinations as to whether to take a Guidelines case.[105]

Sentencing abstention also has impacted petitioners. In petitions themselves, counsel for petitioners have preemptively raised *Braxton*, seeking to distinguish *Braxton* from their specific cases and arguing that *Braxton* is inapplicable rather than challenging *Braxton* on all fours. In *Bryant v. United States*, for example, petitioner's counsel, Kannon Shanmugam, asked the Court to delineate the scope of the reasons that a district court may rely upon to grant compassionate release to a federally incarcerated individual.[106] In the petition, Bryant's counsel asserted that this question concerns an interpretation of a statute, the First Step Act, and not the federal sentencing guidelines, and therefore does not run afoul of *Braxton*.[107] Similarly, in *Rodriguez-Rivera v. United States*, counsel for the petitioner, Neal Katyal, asked the Court to clarify the conspiracies that qualify as a "controlled substance offense," a question that had divided eight courts of appeal.[108] Counsel for petitioner affirmatively argued that *Braxton* did not preclude review.[109] As these

104. *See* Guerrant v. United States, 142 S. Ct. 640, 640–41 (2022) (Sotomayor, J., statement respecting the denial of certiorari) (citing *Braxton v. United States*, 500 U.S. 344, 348 (1991)); Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., statement respecting the denial of certiorari) (citing *Braxton*, 500 U.S. at 348).

105. There are a few cases in which the petition raised a clear split implicating the Guidelines, the Solicitor General referenced *Braxton* in opposing certiorari, and yet the Court granted review. *See* Brief for the United States in Opposition at 16, 19, Beckles v. United States, 579 U.S. 927 (2016) (No. 15-8544); Petition for Writ of Certiorari at 13, Simmons v. United States, 561 U.S. 1001 (2010) (No. 09-676); Brief for the United States in Opposition at 10, *Simmons*, 561 U.S. 1001 (No. 09-676); Petition for Writ of Certiorari at 12–13, Koon v. United States, 515 U.S. 1190 (1995) (Nos. 94–1664, 94–8842); Brief for the United States in Opposition at 11, *Koon*, 515 U.S. 1190 (Nos. 94–1664, 94–8842); *cf.* Brief for the Petitioner at 5, Buford v. United States, 530 U.S. 1306 (2000) (No. 99–9073). The fact that these petitions were granted does not undercut the existence of sentencing abstention. The petitions raised constitutional, statutory, and standard of appellate review issues—whether the residual clause of the definition of a "crime of violence" can be challenged under the Due Process Clause, Brief for the United States in Opposition at I, *Beckles,* 579 U.S. 927 (No. 15-8544); what constitutes a predicate felony for purposes of 21 U.S.C. § 802(44), Brief for the United States in Opposition at I, *Simmons,* 561 U.S. 1001 (No. 09-676); whether courts of appeal are to afford deferential review to a district court's determination as to whether two prior convictions were related for sentencing purposes Brief for the United States at I, *Buford*, 530 U.S. 1306 (No. 99–9073); and whether courts of appeal are to afford deferential review to district court departure decisions, Petition for Writ of Certiorari at I, *Koon,* 515 U.S. 1190 (Nos. 94–1664, 94–8842)—none of which the Commission could resolve through amending the Guidelines. In particular, the Commission cannot provide binding interpretations of the federal constitution, federal statutes, or the standard of review that federal appeals courts are to apply in Guideline cases. Accordingly, the Court could not cede to the Commission the authority to resolve these conflicts. In one Guidelines case, the Court granted certiorari and vacated the decision below where the Government confessed error. Salinas v. United States, 547 U.S. 188 (2006) (per curiam) (interpreting U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT'G COMM'N 2003)).

106. Petition for a Writ of Certiorari at I, Bryant v. United States, 142 S. Ct. 583 (2021) (No. 20-1732). In full disclosure, the author is among the counsel for the petitioner.

107. *Id.* at 19.

108. Petition for a Writ of Certiorari at i, 12, Rodriguez-Rivera v. United States, 142 S. Ct. 235 (2021) (No. 21-143).

109. *Id.* at 32–33. Counsel for the petitioner suggested that the Court has taken up Guideline splits, citing *Witte v. United States*, 515 U.S. 389, 404 (1995) and *United States v. Dunnigan*, 507 U.S. 87, 92 (1993). Petition for a Writ of Certiorari at 33, *Rodriguez-Rivera*, 142 S. Ct. 235 (No. 21-143). But both cases raised constitutional

citations and attempts to distance the cases from *Braxton* make clear, petitioners necessarily understand that *Braxton* has a meaningful adverse impact on the viability of petitions raising questions involving the Guidelines, so much so that they feel compelled to address this case even before the Government may respond.

This practice is ongoing and involves shadow use of *Braxton*. Shortly before this Article went to press, *SCOTUSblog* identified five pending petitions for certiorari that challenge the constitutionality of the consideration of acquitted conduct at sentencing—an issue that has not only divided state courts, but divided state courts with the prevailing regional federal circuit court rulings.[110] The Solicitor General sent a letter to the Clerk of the Court asking that the Justices be notified that the Commission is considering an amendment to the Guidelines that would prohibit consideration of certain acquitted conduct at sentencing.[111] The Solicitor General's letter did not reference *Braxton* by name, but the clear goal of the letter was to invoke *Braxton* abstention. Indeed, *SCOTUSblog* suggested that "the [C]ourt appears to be holding those cases to see whether the U.S. Sentencing Commission acts on a pending proposal to place restrictions on federal courts' consideration of acquitted conduct at sentencing."[112]

In short, sentencing guidelines abstention is a real phenomenon: the Court has backed off from resolving circuit splits, at the urging of the Solicitor General. Our research indicates that the Solicitor General has cited *Braxton* in urging the Court to deny certiorari, and the Court has agreed to step aside, even though the petitions present clear conflicts. Not only has sentencing guidelines abstention occurred since 1991, but it also continues to block certiorari in recent cases. Justices in recent statements have expressly referenced *Braxton* in justifying the denial of certiorari.

The remainder of this Article argues why such abstention is both unprincipled and harmful to the criminal justice system.

---

issues. *Witte* concerned whether inclusion of prior conduct for purposes of determining "relevant conduct" under the Guidelines can violate the Double Jeopardy Clause, while *Dunnigan* concerned whether a sentencing enhancement under the Guidelines is consistent with the right to testify. *Witte*, 515 U.S. at 391; *Dunnigan*, 507 U. S. at 89.

110. John Elwood, *Plea Bargaining and a High-Profile Separation-of-Powers Case*, SCOTUSBLOG (Feb. 15, 2023, 1:07 PM), https://www.scotusblog.com/2023/02/plea-bargaining-and-a-high-profile-separation-of-powers-case/; *see* Petition for Writ of Certiorari 17, McClinton v. United States, No. 21-1557 (U.S. June 10, 2022) ("[S]everal state supreme courts applying federal law have adopted rules about acquitted-conduct sentencing at odds with the corresponding regional federal court of appeals.").

111. Letter from Elizabeth B. Prelogar, Solic. Gen. of the United States to Honorable Scott S. Harris, Clerk of the Sup. Ct. of the United States 1, (Jan. 18, 2023), (available at https://www.supremecourt.gov/DocketPDF/21/21-1557/252407/20230118095503909_Letter%2021-1557%20%2021-8190%20%2022-118%20%2022-5345%20%2022-4828.pdf).

112. Elwood, *supra* note 110.

III. THE CASE AGAINST SENTENCING GUIDELINES ABSTENTION

This Part takes sentencing abstention head on, offering four arguments against this doctrine:

First, that under a proper reading of *Braxton*, the source of sentencing guidelines abstention, the Court should abstain from resolving a clear circuit split involving the Guidelines only when the Commission is in the middle of amending the Guidelines provision giving rise to the split *and* when there is an alternative basis for the Court's ruling. *Braxton* does not stand for the much broader proposition—pushed by the Solicitor General, memorialized by the Commission, and invoked by members of the Court—that the Court should stay out of the business altogether of resolving any conflicts involving the Guidelines in deference to the Commission.

Second, that sentencing abstention is inconsistent with the Court's own rules as to when certiorari is appropriate, its role in the federal judiciary, and its role as the ultimate determinant of the outer bounds of permissible criminal justice law. In staying on the sidelines, the Court has knowingly perpetuated drastic sentencing disparities, as guideline interpretations in one circuit may call for shorter sentences than conflicting interpretations pointing to longer sentences in another circuit.

Third, that while the Court has struggled to make sense of whether the Commission, an independent agency within the federal judiciary, should be treated as an extension of Congress or as executive agency, there is no basis for sentencing guidelines abstention. And if the Commission is viewed as a unique body, unlike a congressional or executive agency, there is nothing in the SRA or its legislative history to suggest that Congress intended for the Commission to serve as a Supreme Court for federal sentencing purposes.

Fourth, that the Commission is, as a practical matter, unable to resolve splits in a timely fashion. It recently lacked a quorum for over three years, the second time in its brief history that it has been rendered dormant due to an absence of sufficient Commissioners. Even then, the Commission resolves only a fraction of the splits that it identifies. Of those that it does resolve, its amendment process is intentionally protracted and lengthy, rendering the Supreme Court's unwillingness to resolve a ripe conflict all the more curious and problematic.

A. Sentencing Guidelines Abstention Stems from a Misreading of Braxton

The doctrine of sentencing guidelines abstention may be traced to the Supreme Court's decision in *Braxton v. United States*.[113] *Braxton* has been interpreted by Justices and others to mean that the Court should decline to resolve circuit splits on the federal sentencing guidelines in order to permit the Commission to resolve those conflicts instead.[114] For at least three reasons, *Braxton* does not stand for this broad proposition.

113. 500 U.S. 344 (1991).

114. *See supra* Part II.B.

1. *Braxton* Applies Only During the Pendency of the Commission's Amendment Process

First, the Court refused to resolve the circuit court disagreement on the proper interpretation of section 1B1.2(a) because the Commission was in the process of amending this specific guideline. The Commission had requested public comment on amending this guideline provision, and Court members were aware, including at oral argument, that the Commission was actively engaged in amending this guideline.[115]

In this sense, the Court's decision to forgo consideration of the guideline split is similar to other forms of abstention in which the Court does not wish to disturb or interfere with active parallel state or administrative proceedings. Somehow the Court's recognition of the Commission's ongoing proceedings has morphed, however, into the broad proposition that the Court should decline to address circuit court conflicts concerning the Guidelines altogether—regardless of whether the Commission is addressing the same issue and even whether the Commission has a quorum to engage in the amendment process. This expansion, completely divorced from the context in which the *Braxton* Court was operating, is unwarranted. An honest, albeit still flawed, reading of *Braxton* would be that the Court should abstain from resolving a split involving the Guidelines *when* the Commission is engaged in the process of addressing the same guideline provision producing circuit division.

2. *Braxton* Applies Only When an Alternative Decisional Basis Exists

Second, the *Braxton* Court's abstention applies not only when the Commission's amendment process is well underway, but also when there is an alternative basis for the Court's resolution of the case. In announcing the *Braxton* opinion from the bench, Justice Scalia stated that the Court "will defer to [the Commission] here where we can resolve the case on another ground."[116] Lost in the discussion of *Braxton* is the fact that the Court disposed of the case on an alternative basis, specifically, the conclusion that Braxton's stipulation did not suffice for purposes of establishing a more serious offense.[117] Justice Scalia made clear that the Court abstained from resolving the split, and did not need to interfere with the Commission's parallel process, because of this alternative basis.

In this sense, the Court's sentencing abstention doctrine resembles a doctrine of avoidance, such as where the Court will decline to resolve a case on a

115. *See* United States v. Nathan, 188 F.3d 190, 199 (3d Cir. 1999) ("The Court acknowledged a circuit split on the meaning of 'stipulation' but declined to resolve the question, since the Sentencing Commission had just requested public comment on whether section 1B1.2(a) should be 'amended." (quoting *Braxton*, 500 U.S. at 348)).

116. Opinion Announcement of Justice Scalia at 2:46, *Braxton*, 500 U.S. 344 (No. 90-5358), https://www.oyez.org/cases/1990/90-5358.

117. *See supra* note 92 and accompanying text.

constitutional ground where a sufficient statutory ground is otherwise available.[118] Similarly, the Court in *Braxton* abstained when the Commission was amending the relevant guideline provision *and* where a sufficient standalone basis for resolution existed. These twin conditions must be met for *Braxton* abstention to apply.

3. Any Discussion of Sentencing Guidelines Abstention Is Dicta

Third, as the Court resolved *Braxton* on the basis of the inadequacy of the stipulation (identified separately in Section I.B. of the opinion), the language from *Braxton* on whether and under what circumstances the Court will abstain from sentencing guidelines matters (Section I.A.) is *dicta*. The Court's refusal to address the conflict as to the meaning of section 1B1.2(a), and any discussion thereof, was not part of the holding of the case and was not necessary to the resolution of the case. Thus, it should not be accorded any binding weight.[119]

In short, a proper reading of *Braxton* is that the Court will forgo consideration of a split concerning the federal sentencing guidelines when the Commission is in the process of amending the relevant guideline and there is an alternative basis to resolve the case, but even then, any discussion of sentencing abstention is pure *dicta* that should have no force or effect.

B. Sentencing Guidelines Abstention Is Inconsistent with the Functions of the Supreme Court

The Supreme Court plays a unique role in the judiciary and in the development of the criminal justice system. The practice of sentencing guidelines abstention is inconsistent with the Court's own identified criteria for Supreme Court review, furthering disparities and confusion, and depriving the lower courts of the clarity and predictability that Court decisions are to provide. It also eliminates the Court as an important voice on criminal justice policy, leaving stakeholders to draw on such policy choices from a legally and intellectually poorer universe of ideas.

1. Sentencing Abstention Is Inconsistent with the Court's Rules and Its Role in the Federal Judiciary

The Supreme Court is a court of limited jurisdiction. The Constitution identifies a narrow set of cases over which the Court has original jurisdiction and must resolve.[120] This small subset of cases aside, the Court's docket is almost entirely

118. *See* Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984) ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.").

119. *See* United States v. Mun, 41 F.3d 409, 412 (9th Cir. 1994) (noting that the "only question" considered by the Court in *Braxton* is whether the stipulation "specifically established" Braxton's intent to kill the deputies (quoting *Braxton*, 500 U.S. at 351)).

120. U.S. CONST. art. III, § 2, cl. 2; *see also* Forsyth v. Hammond, 166 U.S. 506, 514 (1897) ("[The] power [to grant review is one that the Court] sparingly exercise[s].").

discretionary.[121] Over time, the Court has been increasingly selective as to when it accepts review.[122] Given the sheer number of petitions for writ of certiorari,[123] the Court realistically must turn away the vast majority of petitions it receives, and those rejected petitions invariably include questions otherwise worthy of resolution.[124]

To sort through these petitions, the Court itself has established its own rules regarding which petitions are deserving of acceptance. The Court has pronounced that it will exercise its discretionary authority "only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal . . ., or some matter affecting the interests of this nation . . . demands such exercise."[125] As this statement makes clear, a primary role of the Court is to address disagreements among the circuit courts of appeal.[126] The exercise of such jurisdiction is designed to replace the disparities and confusion generated by such disagreements with national rules and thereby with uniformity and coherence.[127]

The argument against sentencing guidelines abstention is not an argument that the Court must take every case that contains a clear conflict among the federal appeals courts as to the meaning of a guideline provision. Rather, it is to argue against the categorical denial of all cases that contain circuit conflicts involving the

---

121. *See* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 497–98 (1971) (discussing the Court's broad discretionary function of whether to hear a case).

122. *See* Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CAL. L. REV. 789, 865 (2020) ("The Court heard between 125 and 200 petitions per year from the mid-1950s through the late 1990s. That number has steadily declined to about seventy-five merits decisions per year.").

123. *See Supreme Court Procedure*, SCOTUSBLOG, https://www.scotusblog.com/supreme-court-procedure/ (last visited Sept. 1, 2021) (noting that "7,000 to 8,000 cert. petitions [are] filed each Term").

124. To be sure, most of the petitions that are filed with the Court do not present actual conflicts between the circuit courts. *See* GERHARD CASPER & RICHARD A. POSNER, THE WORKLOAD OF THE SUPREME COURT 89 (1976) (positing that only 1.3% of denied petitions presented such bona fide conflicts). Even then, according to one study, the Court has taken up only about a third of the petitions that raise bona fide conflicts. *See* Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 456 (2019). Interestingly, Chief Justice Roberts has claimed that the decisional capacity of the Court is greater than its merits docket suggests. He is reported to have said that the Court could take "100 cases without any stress or strain, but the cases just aren't there." Evan Bernick, *Federalism and the Separation of Powers: The Circuit Splits Are Out There—and the Court Should Resolve Them*, 16 ENGAGE 36 (2015).

125. *Forsyth*, 166 U.S. at 514–15; *see also* SUP. CT. R. 10.

126. *See* SUP. CT. R. 10(a); Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014) ("The Circuit Courts have divided . . . [s]uch division is a traditional ground for certiorari."); *see also* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1991) ("Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits.").

127. *See* Cash v. Maxwell, 132 S. Ct. 611, 612–13 (2012) ("The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law." (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 902 (2009) (Scalia, J., dissenting))); Kansas v. Marsh, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) (citing U.S. CONST. art. III, § 2, cls. 1–2) ("Our principal responsibility under current practice . . . and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions . . . is to ensure the integrity and uniformity of federal law.").

federal sentencing guidelines. Put differently, it is an argument for the Court to use its ordinary operation of discretion as to such cases and, in that exercise, to accept at least some splits and thereby infuse the federal courts with some coherence and uniformity in this specific context.

As with the Court, the Commission suffers from deficits in resources and accordingly only has the capacity to address some of the conflicts that it spots.[128] For the Court to bow out and pile all conflicts onto the Commission's plate will make it more likely that the Commission will be able to resolve fewer conflicts. When the administrative burdens on the Commission already are so great and its conflict clearance rate so modest, it makes little practical sense for the Court to sit on the sidelines and add to the queue.

Indeed, the federal courts of appeal are unable to engage in sentencing guidelines abstention: litigants are able to appeal adverse district court rulings to the federal appeals courts as a matter of right.[129] These courts continue to churn out rulings on the Guidelines,[130] without the option to abstain; splits invariably will continue to arise in the absence of the Court performing its usual role of resolving splits and the Commission being able to resolve only a small fraction of these splits when it has a quorum.[131] Put differently, the federal appeals courts do not have the luxury of declining review, and the Court's inaction will only lead to more splits and confusion and more issues for the Commission to sort out.

The Court's sentencing guidelines abstention is anomalous from an administrative law perspective. The standard relationship between the Court and an administrative body is one in which an administrative agency with rulemaking authority over a particular area of law possesses simultaneous authority, shared with the Court, to resolve conflicts among the courts. The only difference between the agency and the Court is one of timing: an agency can act without a live case or controversy, while the Court must wait for a ripe case to ascend to its doors before taking any responsive action. As Chief Justice Marshall wrote in *Marbury v. Madison*,[132] "[i]t is the essential criterion of appellate jurisdiction, that it revises

128. *See infra* notes 216–18 and accompanying text.

129. *See* 28 U.S.C. § 1291.

130. *See* 2019 ANNUAL REPORT OF FEDERAL SENTENCING STATISTICS, *supra* note 12, at 180–82 tbl. A–2 (reporting 3,347 federal appeals of the original sentence in Fiscal Year 2019).

131. A review of the 149 published and unpublished federal appeals court opinions that cite to *Braxton* referenced *Braxton* for unremarkable propositions, such as on specific intent to kill and the Commission's authority to determine the retroactive effect of Guideline amendments. In only one case, *United States v. Goines*, 357 F.3d 469, 476 (4th Cir. 2004), did the circuit court seem to be influenced by principles of sentencing abstention. In *Goines*, a powerhouse panel split, 2–1, with Judge Wilkins (the former inaugural Chairman of the Commission), joined by Judge Wilkinson, citing *Braxton* in support of adopting a modest interpretation of the Guidelines. The majority wanted to avoid making any significant disruptions in Guidelines interpretation, leaving to the Commission the option to take more drastic steps in the amendment process. *See id.* at 475–76. Importantly, the majority still ruled on the merits, preferring the least-disruptive-alternative, and in this sense did not practice sentencing abstention. *Id.* at 480–81. In dissent, Judge Luttig charged that the majority had misread and misapplied the sentencing abstention portion of the *Braxton* opinion. *Id.* at 491 (Luttig, J., dissenting).

132. 5 U.S. (1 Cranch) 137 (1803).

and corrects the proceedings in a cause already instituted, and does not create that cause."[133] For the Court to categorically deny review is to upset this standard process and clog both the Commission and circuit courts with confusion, uncertainty, and unnecessary litigation. Professor Briana Lynn Rosenbaum is spot on when she writes, "the Supreme Court could apply some deference to the Commission's interpretation of its own guidelines, as it would for any agency, without the Court[] avoiding its responsibility to resolve circuit conflicts and ensure correct and consistent application of the law."[134]

2. Sentencing Abstention Is Inconsistent with the Court's Role in Formulating Sound Criminal Justice Policy

The Commission consults with a number of stakeholders when it promulgates the Guidelines. For example, when the Commission crafted the first Guidelines Manual, the Commission conferred with many members of the sentencing community and general public, which included current and former judges, probation officers, prosecutors, public defenders, executive officials, members of Congress and their staff, practitioners, and even members of the press.[135] The Commission may continue to confer with outside experts and witnesses when formulating (and assessing the political appetite for) amendments to the Guidelines.[136]

The input of these stakeholders is essential to the establishment and evolution of sound, workable, and politically viable Guidelines. While the Commission is an expert body with an exceptionally professional staff,[137] the Commission necessarily is limited in the ideas and experiences from which it may draw. The maximum number of voting Commissioners is seven,[138] and these Commissioners are required to meet only twice a quarter to consider and vote upon official matters.[139] The Commissioners bring important perspectives to the table; for instance, former-Chair Judge Ricardo Hinojosa, who sits in a border district,[140] could speak to the contents of the immigration-related Guidelines. Hearing from others in the sentencing community enables the Commission to expand its worldview and hear from others with different experiences with the Guidelines.

133. *Id.* at 175.

134. Briana Lynn Rosenbaum, *Sentence Appeals in England: Promoting Consistent Sentencing Through Robust Appellate Review*, 14. J. APP. PRAC. & PROCESS 81, 148 (2013).

135. *See* Newton & Sidhu, *supra* note 38, at 1218–21.

136. *See* U.S. SENT'G COMM'N, RULES OF PRACTICE AND PROCEDURE 3.3, 3.4 (2016) [hereinafter U.S. SENT'G COMM'N RULES].

137. Kimbrough v. United States, 552 U.S. 85, 109 (2007) (referring to the Commission as a "professional staff with appropriate expertise" (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J. concurring))).

138. 28 U.S.C. § 991(a).

139. *Id.*; U.S. SENT'G COMM'N RULES, *supra* note 136, at 3.2.

140. *Former Commissioner Information*, U.S. SENT'G COMM'N, https://www.ussc.gov/about/who-we-are/commisioners/former-commissioner-information (last visited Nov. 15, 2022).

The Judiciary itself is a critical piece of that input and arguably may be the most important component of that feedback loop.[141] When the inaugural Commission drafted the initial Guidelines, it understood that the experiment in coordinated federal sentencing hinged on the cooperation of the federal judges who would be implementing the Guidelines in actual sentencing hearings. Federal probation officers, who prepared presentence investigation reports for the sentencing judges, were instrumental in educating and obtaining buy-in from the federal judges. As an exhaustive history of the first Guidelines recounts, "[w]ere it not for the probation officers' knowledge of the guidelines and their support for this system, the guidelines may have faltered at the outset."[142] Moreover, when the Commission set penalty levels in the initial Guidelines, the Commission memorialized what judges already were doing, reducing a dataset of over 10,000 cases to specific factors and weights.[143] The Commission also emphasized that the Guidelines would be "evolutionary," informed primarily by the empirical information continually emerging from the federal courts.[144]

From the inaugural Guidelines to the present, federal judges have played a fundamental part in the drafting and development of the Guidelines. For at least two reasons, the Supreme Court has a leading role in the contents of the Guidelines as well. First, members of the Court themselves have had relevant expertise in federal sentencing. Justice Breyer served on the first Commission;[145] Justice Sotomayor served as a federal district and appellate court judge;[146] and Justice Alito served as a federal prosecutor and federal appellate court judge.[147] These professional experiences may help enrich and inform, in the Justices' conference and through their opinions, the substance of federal sentencing law. It would not do any good for the criminal justice system to be deprived of these perspectives. It is true that members of the Court may speak to matters of legal importance in other ways, such as in addresses to law schools or professional societies.[148] But the context of a case gives

141. *See* Wright, *supra* note 93, at 58 ("The Supreme Court and the other federal courts should not view their task as confined to resolving uncertainties in guideline language; they have a positive (and statutory) duty to help improve the guidelines."); Stith & Cabranes, *supra* note 20, at 1275–76 ("The Supreme Court has welcomed the Commission's efforts to reduce circuit conflicts, a practice that regrettably also reduces the role of the appellate courts and the Supreme Court itself in giving meaning to the Guidelines." (footnotes omitted)).

142. *See* Newton & Sidhu, *supra* note 38, at 1216.

143. *See* U.S. SENT'G GUIDELINES MANUAL § 1.3 (U.S. SENT'G COMM'N 1987).

144. *Id.*

145. *Former Commissioner Information*, *supra* note 140.

146. Off. of the Press Sec'y, *Background on Judge Sonia Sotomayor*, THE WHITE HOUSE PRESIDENT BARACK OBAMA (May 26, 2009), https://obamawhitehouse.archives.gov/the-press-office/background-judge-sonia-sotomayor.

147. *About the Court: Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Nov. 15, 2022).

148. *See, e.g.*, Nina Totenberg, *A Supreme Court Justice Visits Campus: A Look Behind the Scenes*, NPR (Mar. 30, 2020, 5:00 AM), https://www.npr.org/2020/03/30/823324538/a-supreme-court-justice-visits-a-look-behind-the-scenes; *News Media: Speeches*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/publicinfo/speeches/speeches.aspx (last visited Nov. 15, 2022).

specific occasion for the Justices to speak, and the particulars of the case may help sharpen the Justices' thoughts on a given aspect of federal sentencing.[149]

Second, the status of the Court itself lends exceptional importance to the Justices' views on federal sentencing. The Court necessarily sets the outer bounds within which the legal system may operate.[150] When the Justices write their opinions, the Justices are giving expression to and notice of those limits. The criminal justice system—including all those who live within it—is at a distinct disadvantage when the parameters of federal criminal sentencing are unclear and unknown but the lines for all other areas of law are being drawn and delineated. Criminal sentencing entails whether, and to what extent, the liberty of another may be restricted, and as such, whether, and to what extent, the individual is to face the stigma of punishment and suffer the collateral consequences of such punishment.[151] For the Court to surrender that duty to the Commission, which lacks the final authority to bind, and which, at times, is practically incapable of acting in a timely fashion or at all,[152] is to leave the bounds of the criminal justice space in a relatively precarious and unstable state.

In sum, the Court's stance of abstaining from federal sentencing cases that present clear splits among the federal appeals courts is inconsistent with the Court's own stated criteria for when the Court is to accept certiorari, frustrates the sound development of federal sentencing law, and denies all interested in the criminal justice system with the knowledge of the legal bounds of that system, effectively leaving the Commission with the mismatched duty to pencil in those lines instead.

C. Sentencing Abstention Is Inconsistent with Congressional Intent and with Administrative Law Principles

As the Commission is somewhat unique as a decisional body, being an independent agency within the federal judiciary,[153] the Court has struggled to make sense of the agency and has sought to analogize the Commission to other components of the federal government. Unable to readily categorize the Commission, the Court has had difficulty in figuring out how to legally handle the Commission and,

---

149. *Cf.* City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983) (observing that "concrete adverseness," as opposed to "abstract" or "hypothetical" claims, "sharpens the presentation of issues" (citations omitted)); Baker v. Carr, 369 U.S. 186, 204 (1962) ("[T]he court so largely depends [on "concrete adverseness"] for illumination of difficult constitutional questions[.]").

150. *See* STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 38 (2021) ("[P]olicing the limits [set by the Constitution], the Court is a kind of 'border patrol.'").

151. *See* Norval Morris, *Towards Principled Sentencing,* 37 MD. L. REV. 267, 268 (1977) ("The criminal justice system controls the largest power the government exercises over its citizens and is of central constitutional importance."); Herbert Wechsler, *The Challenge of a Model Penal Code,* 65 HARV. L. REV. 1097, 1098 (1952) ("[P]enal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy . . . Nowhere in the entire legal field is more at stake for the community or for the individual.")

152. *See infra* Part III.D.

153. Mistretta v. United States, 488 U.S. 361, 368 (1989).

in the conceptual confusion, has landed somehow on the unprecedented and remarkable proposition that the Court has no business resolving circuit conflicts involving the Commission's work product.

Congressional intent and the SRA both support treating the Commission like Congress, and ordinary administrative law principles suggest that the Commission is like any executive agency. Whether the Commission is considered akin to Congress or an executive agency, abstention by the Court is unwarranted. As the Court has recognized, Congress and agencies can resolve splits through revised statutes or amended regulations,[154] and as Supreme Court practice shows, the Court nonetheless resolves ripe conflicts involving statutes and regulations.[155] Finally, there is simply nothing in the legislative history or the SRA to suggest that Congress intended for the Court to completely surrender its traditional role to the Commission or for the Court to do anything different than it does for Congress or agencies in the context of relevant splits.

1. Assuming that Congress Intended for the Commission to Be an Extension of Congress, the Court Does Not Abstain Vis-à-vis Congress

There is support for the notion that the Commission was designed to be an extension of Congress. In the SRA, Congress created the Commission and gave the Commission comprehensive instructions on how it was to achieve its mandate of developing national norms for federal sentencing decisions. The very first Chairman of the Commission, Judge William W. Wilkins, acknowledged that "we were told to develop this new system of justice, yet the statute told us how to do it."[156] His colleague on the inaugural Commission, Judge George E. MacKinnon, similarly observed "that the 'policy' of the Commission is in the [SRA]."[157] He further noted that he "followed legislation for over 60 years," and the SRA "was the most complete set of legislative directives that I have ever seen in a statute."[158] In political and practical terms, Congress established an entity, largely directed how the entity was to fulfill its mandate, and insulated itself from any backlash from the

154. *See* Braxton v. United States, 500 U.S. 344, 347–48 (1991) ("Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations.").

155. *See infra* notes 156–69 and accompanying text (Congress); *infra* notes 170–77 and accompanying text (administrative agencies).

156. Newton & Sidhu, *supra* note 38, at 1210–11 (quoting Interview with William W. Wilkins, Jr., Judge, Chairman, U.S. Sent'g Comm'n, 2-3 (Sept. 20, 1994) (on file with author)); *see also Mistretta*, 488 U.S. at 379 ("The statute outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations." (quoting United States v. Chambless, 680 F. Supp. 793, 796 (E.D. La. 1988)).

157. Meeting Minutes, U.S. Sent'g Comm'n 4 (Mar. 10, 1986) (on file with author).

158. Newton & Sidhu, *supra* note 38, at 1210 (quoting Interview with George MacKinnon, Judge, Comm'r., U.S. Sent'g Comm'n (Oct. 28, 1994) (on file with author)).

Commission's work. Another initial Commissioner, Professor Ilene Nagel, admitted that Congress deliberately established the Commission to "take all the heat."[159]

The congressional nature of the Commission's work is further reflected in the status of the Guidelines. The Guidelines are not self-executing. Rather, Congress may modify or reject the Guidelines and any proposed amendments thereto, thereby holding a veto power over the Commission's substantive work.[160] For example, Congress approved the initial Guidelines manual.[161] And the amendment cycle ends with Congress: the Commission submits proposed amendments to Congress, and Congress must accept (affirmatively or by allowing the 180 day-period to pass) or reject the proposed amendments.[162] In this respect, the work of the Commission more closely resembles congressional rulemaking than administrative rulemaking in that executive agencies can publish regulations without needing congressional approval.[163] (Congress, of course, can respond to the regulations by statute,[164] but the regulations may take effect in the absence of any congressional involvement or expiration of any congressional review period.)

To the extent that the Commission is an extension of Congress, or what Justice Scalia called a "junior-varsity Congress,"[165] there is no basis for the Court to abstain from matters that the Commission could resolve by way of its amendment process, as the Court does not abstain from conflicts that Congress can moot through enacting new legislation. The Court has resolved splits as to criminal statutes, such as the Armed Career Criminal Act,[166] even though it is beyond question that Congress had the independent authority to moot the split by amending the statute.[167] Moreover, the Court has resolved splits concerning the Federal Rules of Civil Procedure,[168] even though Congress has "ultimate authority over" these rules and can "create exceptions to an individual rule as it sees fit—either by directly

159. *Id.* at 1217 (quoting Interview with Ilene H. Nagel, Comm'r, U.S. Sent'g Comm'n, 7–9 (June 22, 1994) (on file with author)).

160. *See* 28 U.S.C. § 994(p).

161. U.S. SENT'G GUIDELINES MANUAL app. C, amend. 717 (U.S. SENT'G COMM'N 2011) ("The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987.").

162. *See* FEDERAL SENTENCING: THE BASICS, *supra* note 11, at 35; *see also* Mistretta v. United States, 488 U.S. 361, 393–94 (1989) ("[T]he Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit either within the 180-day waiting period . . . or at any time." (citing Sentencing Reform Act of 1984, Pub. L. No. 98–473, § 235(a)(1)(B)(ii)(II), 98 Stat. 1987 (1984))).

163. *See* CONG. RSCH. SERV., IF10003, AN OVERVIEW OF FEDERAL REGULATIONS AND THE RULEMAKING PROCESS (2021).

164. *Id.*

165. *Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting).

166. *See* Mathis v. United States, 579 U.S. 500, 508 (2016).

167. *See id.* at 521 (Kennedy, J., concurring) ("Congress is capable of amending the ACCA to resolve these concerns."). In addition to responding to Court decisions, Congress can amend statutes following requests from the Executive. *See* Breyer, *supra* note 150, at 35 ("[I]f a president very much disagrees with the Court about the interpretation of a statute, the president can always ask Congress for a new law.").

168. *See* Henderson v. United States, 517 U.S. 654, 660 (1996).

amending the rule or by enacting a separate statute overriding it in certain instances."[169]

In short, the Court does not practice abstention when it comes to splits that implicate substantive law that Congress has the independent power to moot. To the extent that the Commission is akin to Congress, there is no principled basis for the Court's abstention in the sentencing guidelines area.

2. Assuming the Commission Is Treated as an Administrative Agency, the Court Does Not Abstain Vis-à-vis Administrative Agencies

Alternatively, there is support for treating the Commission as an executive agency. The Court has noted that "the guidelines are the equivalent of legislative rules adopted by federal agencies," and that the Commission's "commentary [to the guidelines are to] be treated as an agency's interpretation of its own legislative rule."[170] The Commission's interpretations of the Guidelines are entitled to deference, just as courts generally defer to an agency's interpretation of its regulations.[171] Accordingly, the Commission's interpretation of the Guidelines must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[172]

In the administrative law context, the Court has recognized Congress' preference for agencies to resolve any regulatory ambiguities and for courts to defer to an agency's interpretation of its own rules. In particular, the Court has stressed that Congress expects agencies to "play the primary role in resolving regulatory ambiguities," as the agency is in a "better position," relative to the courts, to understand the intent and meaning of the regulation and to consider and balance any political considerations.[173]

But such deference is not a basis for wholesale abstention. For example, in *Auer v. Robbins*,[174] a major case on administrative deference, the Court confronted a circuit court split on the meaning of the Department of Labor's regulations implementing the Fair Labor Standards Act and determined that the agency's interpretations of the regulations were reasonable.[175] The Court later observed that, if the Department of Labor had exercised its "primary role" of resolving the split involving these regulations, the split could have been averted, negating the need for the Court to resolve a split.[176] As the agency did not fix the split, the Court went on to resolve the split itself.

169. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 400 (2010).

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

171. *Id.* at 45; *see also* Paul J. Larkin, Jr., *The Future of Presidential Clemency Decision-Making*, 16 U. ST. THOMAS L.J. 399, 421 n.97 (2020).

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

173. Kisor v. Wilkie, 139 S. Ct. 2400, 2412 (2019) (quoting Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 152 (1991)).

174. 519 U.S. 452 (1997).

175. *Auer*, 519 U.S. at 457–58, 460–61.

176. *Kisor*, 139 S. Ct. at 2412–14 (discussing *Auer*, 519 U.S. at 460).

It is unclear why the Court would generally defer to agency interpretations and resolve splits involving administrative regulations but abstain completely from splits involving the Guidelines. To the extent that the Commission is more like an agency, such as the Department of Labor, there is no justification for the Court to entertain splits implicating all agencies except the Commission.

3. Even Assuming that the Commission Is Unlike Congress or an Administrative Agency, There Is No Basis for the Court to Abstain Vis-à-vis the Commission

The Court latched on to two provisions in the SRA to arrive at the conclusion that Congress intended for the Commission to resolve federal circuit court disagreements related to the sentencing guidelines: first, that the Commission possesses the authority to amend the Guidelines, and second, that the Commission can decide whether to make any such amendments retroactive.[177]

These rationales for abstention rest on flimsy grounds. The exhaustive legislative history of the SRA[178] provides no support whatsoever for the notion that these two features of the Commission's power—to amend the Guidelines and determine their retroactive effect—have anything to do with the Court, let alone indicate that the Court should be displaced completely by the Commission when it comes to resolving circuit conflicts.[179] The SRA says nothing about the Court's role when discussing the amendment or the retroactivity authority of the Commission. Even to the extent that Congress tasked the Commission to respond to these splits by requiring them to periodically review and revise the Guidelines,[180] there is not a word in the text or legislative history of the SRA to suggest, as the Court concluded, that Congress intended for the Commission to be the exclusive body responsible for resolving relevant splits.

---

177. Braxton v. United States, 500 U.S. 344, 348 (1991) (citing 28 U.S.C. §§ 994(o), (u)).

178. *See infra* notes 179–94.

179. *See* S. REP. NO. 98-225, *supra* note 22, at 178, 180 (1983).

> Subsection (o) requires that proposed amendments to the Guidelines be reported, along with a report of the reasons for the recommended amendments, to the Congress at or after the beginning of a session of Congress but no later than the first of May, and provides that the amendments are to take effect 180 days after they have been reported to Congress unless the effective date is enlarged or the Guidelines are disapproved or modified by an act of Congress . . . . Subsection (u) provides that the policy statements issued by the Sentencing Commission shall include a policy limiting consecutive terms for an offense involving violation of a general prohibition and an offense involving a specific prohibition contained within the general prohibition. The policy is intended to apply to those offenses which in effect are 'lesser included offenses' in relation to other, more serious ones, but which for merely technical reasons do not quite come within the definition of a lesser included offense. The limitation need not be a complete prohibition (except when sentencing for both offenses would be barred by law); its extent is to be determined by the Commission.

Id.

180. *See* 28 U.S.C. § 994(o).

To be sure, the Court following *Braxton* highlighted the fact that the Commission may be in a better position to resolve the conflict because the Commission can take its time in formulating a possible resolution and can take a more comprehensive view of the relevant sentencing matter, as opposed to a case-specific one:

> [T]he Sentencing Commission itself gathers information on the sentences imposed by different courts, it views the sentencing process as a whole, it has developed a broad perspective on sentencing practices throughout the Nation, and it can, by adjusting the Guidelines or the application notes, produce more consistent sentencing results among similarly situated offenders sentenced by different courts.[181]

But the ability to engage in a more exhaustive amendment process that reflects a wider perspective is no justification for sentencing guidelines abstention. First, what the Court said here could apply to Congress or to any agency. Both Congress and agencies conduct hearings, confer with multiple stakeholders, consider public comment, and attempt to develop laws or regulations that are good for most circumstances, not just a particular case. Where Congress, agencies, and the Commission all take a long view in their respective amendment processes, it makes little sense for the Court to resolve the split as to a statutory or regulatory question, but decline a Guidelines question.

Second, when a particular case does make its way to the Court, it is the responsibility of counsel to bring relevant perspectives to the Court's attention such that the Court can make the most informed decision possible. Experts and agencies are able to participate in this process as amicus, thus enriching the Court's decisions and apprising the Court of the broader implications of any proposed holdings. The Commission itself has served as amicus in cases before the Court.[182]

As to the Commission's own sense as to where it fits structurally, whether the Commission views itself as a mini-Congress, an executive agency, or neither, it is clear that the Commission still considers the resolution of ripe Guideline splits to be a responsibility possessed by the Court. In *Braxton*, the Solicitor General represented to the Court that the Commission was prepared to pause its amendment process in deference to a Court decision on the split,[183] indicating that the Commission itself held the view that it was subordinate to the Court and that the Court was in a rightful place to resolve a ripe split involving the Guidelines.

---

181. Buford v. United States, 532 U.S. 59, 66 (2001); *see also* William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 73 (1993) ("*Braxton* represents a fundamentally pragmatic view that the Commission, as the source of the sentencing law embodied in the guidelines, ultimately is in the best position to know how it intended that law to be interpreted and applied, and to take amendment action to implement its intent.").

182. *See, e.g.*, Brief for the United States Sentencing Commission as Amici Curiae Supporting Petitioners, United States v. Booker, 543 U.S. 220 (2005) (No. 04–104, 04–105).

183. Oral Argument at 31:54, Braxton v. United States, 500 U.S. 344 (1991) (No. 90-5358), https://www.oyez.org/cases/1990/90-5358.

In sum, whether the Commission is construed as an arm of Congress, an executive-like agency, or an administrative unicorn, there is no basis for the Commission to be afforded the exclusive authority to resolve splits involving the guidelines.

D. The Sentencing Commission Is Incapable of Timely Resolving Circuit Splits

1. The Commission Often Lacks a Quorum Necessary to Resolve Any Disputes

For over three years, 2019–2022, the Commission was without a quorum and thus was unable to resolve, let alone begin the lengthy process to resolve, any of the splits that the Court has handed over to the Commission.[184]

Under the SRA, the Commission may have no more than seven Commissioners and requires at least four Commissioners to have a quorum to conduct official business, including amending the Guidelines.[185] From January of 2019 until August of 2022, however, the Commission lacked a quorum.[186] During this time, the Commission had only one Commissioner, Acting Commissioner Judge Charles R. Breyer.[187] Accordingly, the Court had ceded its authority to an agency that was dormant for all intents and purposes. Remarkably, the Justices invoked *Braxton*, refusing to resolve a clear split, knowing that the Commission had been without a quorum.[188] It is as if the Court ceded its power to an empty Congress or closed administrative agency.[189]

This was not the first time that the Commission was unable to act for lack of quorum.[190] From October 1998 to November 1999, the Commission was without a quorum.[191] Interestingly, Smita Ghosh (also a former Supreme Court Fellow assigned to the Commission) suggests that Congress may have slow-played the Commission nominees and slashed the Commission's budget for political

184. *See* Nate Raymon, *U.S. Sentencing Panel's Last Member Breyer Urges Biden to Revive Commission*, REUTERS (Nov. 11, 2021, 8:27 PM), https://www.reuters.com/legal/government/us-sentencing-panels-last-member-breyer-urges-biden-revive-commission-2021-11-11/ (explaining the Commission lost its quorum in January 2019); *Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners*, U.S. SENT'G COMM'N (Aug. 5, 2022), https://www.ussc.gov/about/news/press-releases/august-5-2022 [hereinafter *Senate Confirmation of New Commissioners*] (explaining a new, full slate of Commissioners would arrive in 2022).

185. *See* U.S. SENT'G COMM'N, ANNUAL REPORT 2–3 (2019).

186. Raymon, *supra* note 184; *Senate Confirmation of New Commissioners*, *supra* note 184.

187. Raymon, *supra* note 184.

188. *See* Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., statement respecting denial of certiorari); Guerrant v. United States, 142 S. Ct. 640, 640–41 (2022) (Sotomayor, J., statement respecting denial of certiorari).

189. The Commission's outstanding career staff continued to perform important functions, such as training judges and probation officers on the Guidelines, responding to questions from judges on the application of the Guidelines to specific cases, and releasing data through comprehensive reports and accessible brochures. But the function of the Commission that is relevant to *Braxton*, to amend the Guidelines, could not be performed at all due to an absence of sufficient Commissioners.

190. *See* Diana E. Murphy, *The United States Sentencing Commission: Starting Up Again*, 44 ST. LOUIS U. L.J. 279, 281 (2000).

191. *See id.*

reasons.[192] (Congress had enacted a one-hundred-to-one crack to powder cocaine ratio and apparently was displeased that the Commission broke the line by recommending that a more proportionate ratio was appropriate.)[193] These actions—holding nominees and reducing budgets—are nothing unusual; they are a standard mechanism of congressional oversight, if not control, as the scholarship of Professors Anne O'Connell and Gillian Metzger suggest.[194] This is not to question Congress's retributive decisions, but to point out that the Commission can be rendered inactive as a matter of course, as is Congress' prerogative.

The reality is that the Commission has been without a quorum, unable to take any official action, including amending the Guidelines in response to any circuit court conflicts, for four of its thirty-eight years (over 10%) of its existence.

2. Even with a Quorum, It Could Take the Commission Years to Resolve a Split

Even if the Commission is functioning, the amendment process is lengthy, meaning that by practicing abstention the Court would be knowingly delaying the resolution of a ripe split and extending sentencing disparities in the federal system.

Congress gave the Commission the authority to amend the Guidelines.[195] When the Commission promulgated the first guidelines manual in 1987, it cautioned that the experiment with coordinated federal sentencing is an "evolutionary" one, reflecting the expectation that the Guidelines would be revised and updated from time to time.[196] Sentencing guidelines abstention could be perceived as the Court's effort to pay tribute to the Commission's authority to amend the Guidelines, and to Congress' decision to provide that amendment authority to the Commission.[197] Or, in view of the work by Professors David Fontana and Aziz Huq on institutional loyalties, the Court may have attempted to boost its credibility by trimming its own role.[198]

But the Commission, even when fully staffed, may not amend the Guidelines for years or decades and may not amend the relevant guideline at all. If the Commission elected to address a particular split by way of an amendment, it would need to consider and propose an amendment as part of its annual priorities, seek input from a

192. *See* Smita Ghosh, *Congressional Administration During the Crack Wars: A Study of the Sentencing Commission*, 23 U. PA. J.L. & SOC. CHANGE 119, 146–47 (2020).

193. *Id.*

194. *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 962–63 (2009); Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1625–26 (2015).

195. *See* 28 U.S.C. § 994(o)–(p) (describing the amendment process); *see also* 28 U.S.C. § 991(b)(1)(C) (stating that the work of the Commission should "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process").

196. *See* U.S. SENT'G GUIDELINES MANUAL § 1.2 (U.S. SENT'G COMM'N 1987); *see also* Rita v. United States, 551 U.S. 338, 350 (2007) ("The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process . . . . [The Commission] can revise the Guidelines accordingly.").

197. *See supra* notes 160–64 and accompanying text.

198. *See* David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 15 (2018).

variety of stakeholders, hold public hearings and receive written testimony, confer with key leaders in Congress to gauge their receptiveness to any amendments, and engage in an extensive research and drafting process involving Commission staff and the Commissioners, who only meet once a month.[199] The amendment cycle would take an entire year, and the proposal would then be sent to Congress, which has 180 days to decide whether to modify or disapprove them.[200] Professors Rachel Barkow and Brent Newton, a former Commissioner and senior counsel at the Commission, respectively, note that "[i]n the ordinary course, it thus takes at least a year and a half for a provision of the *Guidelines Manual* to be amended."[201]

The amendment process can take much longer. For example, it took the Commission four years to reduce the penalties for federal drug penalties by two levels,[202] a process that required six public meetings and hearings and produced more than 60,000 letters during the public comment period.[203] Additionally, while Congress instructed the Commission to create a policy statement for the compassionate-release program, the Commission did not do so until twenty-two years later.[204] The evils associated with and stemming from a conflict in federal sentencing—specifically sentencing disparities and exposure to significant penalties—would be prolonged by the Court's decision to punt the conflict to the Commission.

Moreover, the Court's exercise of sentencing guidelines abstention is predicated on the assumption that the Commission will address the conflict in question. But the Commission does nothing about most of the conflicts that it admits exists. As Professors Barkow and Newton share from their first-hand experience at the Commission, "[t]he Commission . . . may decide at any particular juncture not to pursue amendment" of the provision giving rise to the conflict.[205] As they warned, "[t]here is no guarantee that the Commission . . . would opt to amend its policy statement," as the Court assumes.[206] For example, in 2000, the Commission resolved only five conflicts, but identified an additional forty unresolved conflicts.[207] On more than one occasion, Justice Byron White urged the Court to take

---

199. *See Rita*, 551 U.S. at 350 ("The Commission will collect and examine the results [from the courts]. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others.").

200. *See* FEDERAL SENTENCING: THE BASICS, *supra* note 11, at 35.

201. Brief for Rachel E. Barkow & Brent E. Newton as Amicus Curiae in Support of Petitioner at 11, Bryant v. United States, 142 S. Ct. 583 (2021) (No. 20-1732). *But see* Karen R. Smith, United States v. Johnson: *The Second Circuit Overcomes the Sentencing Guidelines' Myopic View of "Not Ordinarily Relevant" Family Responsibilities of the Criminal Offender*, 59 BROOK. L. REV. 573, 583–84 (1993) (claiming that the Commission's amendment process is "swift").

202. *See* Chief Judge Patti B. Saris, Chair of the U.S. Sent'g Comm'n, Remarks for Public Meeting (Apr. 10, 2014).

203. Brief for Rachel E. Barkow & Brent E. Newton as Amicus Curiae in Support of Petitioner, *supra* note 201, at 18–19.

204. *See* United States v. Jones, 980 F.3d 1098, 1104 (6th Cir. 2020).

205. Brief for Rachel E. Barkow & Brent E. Newton as Amicus Curiae in Support of Petitioner, *supra* note 201, at 16–17.

206. *Id.* at 18.

207. Diana Murphy, *The Murphy Commission's First Oversight Hearing*, 13 FED. SENT'G REP. 98, 103 (2000). Of the remaining forty, the Commission took up only eleven in the next amendment cycle. *Id.*; *see* Amy

up a Guidelines split precisely because the Commission had failed to resolve the conflict.[208]

In one of the system's most conspicuous failures, the child pornography guidelines are perhaps the most broken in all of federal sentencing, beset by high departure rates[209] and multiple circuit splits.[210] The circuits are mired in a deep split as to the scope of a district court's discretion to vary based on a policy disagreement with the child pornography guidelines—a split identified by the circuits themselves.[211] The Commission noted the split almost ten years ago,[212] but neither the Commission nor Congress has done anything to address the split. Nor is there any indication that either Congress or the Commission has any active interest in resolving the split.[213]

To give another example, then-U.S. District Judge John Gleeson identified a split between the First and Sixth Circuits, on one hand, and the D.C. and Seventh Circuits, on the other, as to sentencing bargains under the Guidelines Section 6B1.2.[214] Judge Gleeson observed that the Commission "has ignored the split on this important issue for more than a decade."[215]

As the Commission's own data and these examples make clear, the Commission does not resolve most of the circuit conflicts that exist involving the Guidelines.[216]

Levin Weil, *A Step Toward Simplification*, 8 FED. SENT'G REP. 21, 22 (1995) (urging the Commission take up more Guideline conflicts, particularly after *Braxton*, to promote "uniformity and predictability in sentencing").

208. *See* Kinder v. United States, 504 U.S. 946, 947 (1992) (White, J., dissenting from denial of certiorari); Early v. United States, 502 U.S. 920, 920 (1991) (White, J., dissenting from denial of certiorari).

209. Nationally, district judges varied in approximately sixty-three percent of child pornography cases, far more than any other offense type. *See* U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2018, EIGHTH CIRCUIT 16 tbl. 10 (2018).

210. *See* Carissa Byrne Hessick, *The Sixth Amendment Sentencing Right and its Remedy*, 99 N.C. L. REV. 1195, 1219 & n.153 (2021) (recognizing that "the Court recently denied certiorari in a case that squarely presented two appellate review circuit splits"); Petition for Writ of Certiorari at i, Demma v. United States, 141 S. Ct. 620 (2020) (No. 19-1260) (identifying the two circuit splits).

211. *See* United States v. Miller, 665 F.3d 114, 120–21 (5th Cir. 2011) (expressly disagreeing with the Second Circuit on the scope of discretion question); U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 14 n.73 (2012) [hereinafter U.S. SENT'G COMM'N, CHILD PORNOGRAPHY OFFENSES]. Since then, the split has only deepened, see Petition for Writ of Certiorari at i, *Demma*, 141 S. Ct. 620 (No. 19-1260) (identifying six circuit courts involved in the splits).

212. *See* U.S. SENT'G COMM'N, CHILD PORNOGRAPHY OFFENSES, *supra* note 211, 14 n.73 ("[A]ppellate courts have taken inconsistent approaches in child pornography cases," contrasting the Second, and Ninth Circuits' position with that of the Fifth and Sixth and Circuits).

213. *See* Brent Newton, *A Partial Fix of a Broken Guideline: A Proposed Amendment to § 2G2.2 of the United States Sentencing Guidelines*, 70 CASE W. RES. L. REV. 53, 62–63 (2019) ("Congress has not given any indication that it intends either to amend the penal statutes governing child-pornography offenses or to give the Commission authority to amend the provisions" of the child pornography guidelines.). Professor Newton further suggests that Congress may be avoiding the child pornography context because there is no "political capital" to be gained from reforming this area of criminal law. *Id.* at 63.

214. John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Court in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 647 (2008).

215. *Id.*

216. A former Chair of the Commission disclosed the criteria that the Commission utilizes to pick which conflicts to resolve: "the number of court decisions involved in the conflict and the variation in holdings; the ease

This is likely due to the intensive nature of resolving conflicts,[217] the limited resources available to the Commission to dedicate to such amendments,[218] and political realities. Whatever the reasons, sentencing guidelines abstention amounts to sending a live conflict to an agency that necessarily takes years to address a conflict and that may not want to, or be able to, address that conflict at all.

CONCLUSION

The Supreme Court has ceded its responsibility to resolve disagreements among the federal appeals courts on questions involving the federal sentencing guidelines —which serve as the starting point for the almost 2 million sentences imposed on defendants across the country—to the U.S. Sentencing Commission. In making the Commission the Supreme Court for Guideline purposes, the Court has given the Commission an authority that no other part of the federal government possesses. Remarkably, the Court has categorically punted cases in one of the most critical and impactful parts of the legal landscape, one that affects the liberty of individuals and determines whether and to what extent one will be incarcerated and suffer the collateral consequences and stigma of criminal sanction.

This Article aimed to highlight and challenge this "usual practice" of sentencing guidelines abstention. This Article argued that sentencing guidelines abstention is inconsistent with *Braxton* and other key markers of principled law—including statutory text, legislative history, administrative jurisprudence, and practical considerations. It also is harmful to the criminal justice system, perpetuating undue sentencing disparities and confusion among the circuit courts.

The broader ambition of this Article is to convince the Court, scholars, and practitioners that the Court's inactivity in the area of federal sentencing policy is unjustified. Accordingly, the Court should assume its traditional role of resolving disagreements among the federal courts of appeal. As such, this Article calls for an end to sentencing abstention and the disparities and uncertainty that it perpetuates.

---

of resolution, both as a discrete issue and in the context of other agenda matters scheduled for consideration during the amendment cycle; the potential impact on sentencing disparity; and the potential defendant impact." Murphy, *supra* note 207, at 105.

217. *See id.* ("Circuit conflicts present difficult, time consuming issues for the Commission; judges on the various courts of appeal have thought long about the issues and raised sometimes conflicting policy concerns and reached different conclusions."); Diana E. Murphy, *Inside the United States Sentencing Commission: Federal Sentencing Policy in 2001 and Beyond*, 87 IOWA L. REV. 359, 377 (2002) ("Because many conflicts are very time consuming to resolve, only a limited number may be addressed in any given year.").

218. *See supra* note 128 and accompanying text.

APPENDIX: THE SOLICITOR GENERAL'S USE OF SENTENCING ABSTENTION IN BRIEFS IN OPPOSITION TO BLOCK CERTIORARI GRANTS IN GUIDELINE SPLITS

Writs of Certiorari Raising Circuit Splits Denied		
	Brief for the United States in Opposition	Question(s) presented in Brief in Opposition
1.	Jarvis v. United States, 142 S. Ct. 760 (2022) (No. 21-568). *Fourth and Tenth Circuits disagreeing with the Third, Sixth, and Seventh Circuits	Whether the district court abused its discretion in finding that "extraordinary and compelling reasons" did not support reducing petitioner's preexisting sentence under 18 U.S.C. 3582(c)(1)(A), where his motion centered on a statutory sentencing amendment to 18 U.S.C. 924(c) that specifically does not apply to preexisting sentences.
2.	Janis v. United States, 142 S. Ct. 483 (2021) (No. 21-68). *Eighth and Ninth Circuits disagreeing with the Second, Tenth, and Seventh Circuits	Whether the supervised-release condition recommended in Sentencing Guidelines § 5D1.3(c)(12) impermissibly delegates judicial authority or is unconstitutionally vague.
3.	Broadway v. United States, 141 S. Ct. 2792 (2021) (No. 20-836). *Eighth, First, Second, Seventh, Ninth, Tenth, and Eleventh Circuits disagreeing with the Third, Sixth, and D.C. Circuits	Whether the court of appeals correctly determined that petitioner's prior Arkansas conviction for attempted delivery of a controlled substance is a "controlled substance offense" under Section 4B1.2(b) of the advisory Sentencing Guidelines.
4.	Lovato v. United States, 141 S. Ct. 2814 (2021) (No. 20-6436). *Tenth, First, Second, Eighth, Ninth, and Eleventh Circuits disagreeing with Sixth and D.C. Circuits	Whether the court of appeals correctly determined that petitioner's prior Colorado conviction for attempted second-degree assault is a "crime of violence" under Section 4B1.2(a) of the advisory Sentencing Guidelines.
5.	Tabb v. United States, 141 S. Ct. 2793 (2021) (No. 20-579). *Second, First, Seventh, Eighth,	Whether the court of appeals correctly determined that petitioner's prior conviction for conspiring to

	Ninth, Tenth and Eleventh Circuits disagreeing with the Sixth and D.C. Circuits	distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841 (a)(1) and (b)(1)(C) and 846, is a "controlled substance offense" under Section 4B1.2(b) of the advisory Sentencing Guidelines.
6.	Bryant v. United States, 142 S. Ct. 583 (2021) (No. 20-1732). *Eleventh Circuit disagreeing with the Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits	Whether the district court abused its discretion in finding that "extraordinary and compelling reasons did not support reducing petitioner's sentence under 18 U.S.C. 3582(c)(1)(A), where his motion was substantially premised on statutory sentencing amendments that specifically do not apply to defendants with preexisting sentences.
7.	Aldissi v. United States, 140 S. Ct. 1129 (2020) (No. 19-5805). *Eleventh, Fourth, and Seventh Circuits disagreeing with the Third, Fifth, and Ninth Circuits	Whether the district court permissibly calculated the loss attributable to petitioners for purposes of their Guidelines calculation and the amount of restitution.
8.	Vico v. United States, 138 S. Ct. 1984 (2018) (No. 17-685). *Eleventh Circuit disagreeing with the First, Seventh, and Ninth Circuits	Whether the district court correctly determined the scope and duration of petitioner's fraud for purposes of sentencing and the court's order of forfeiture.
9.	Samuel v. United States, 138 S. Ct. 65 (2017) (No. 16-1200). *Ninth, Fifth, and Eighth disagreeing with the Second, Fourth, Seventh, Tenth, and Eleventh Circuits	Whether the district court erred in applying the enhancement for abuse of a position of trust under Sentencing Guidelines § 3B1.3.
10.	Wilson v. United States, 137 S. Ct. 1064 (2017) (No. 16-326). *Eleventh Circuit disagreeing with the Fourth, Seventh, and Eighth Circuits	Whether the court of appeals correctly concluded that petitioner qualified for a two-level enhancement under Sentencing Guidelines § 2B1.1(b)(11)(B)(i) because her offense involved the production of unauthorized access devices.

11.	Serrano-Mercado v. United States, 137 S. Ct. 812 (2017) (No. 16-237). *First, Third, Tenth, and D.C. Circuits disagreeing with the Second, Fourth, Fifth, Eighth, and Ninth Circuits	Whether, on review for plain error, a defendant who challenges the classification of a prior offense as a crime of violence under Sentencing Guidelines § 4B1.2(a) must make some showing that the offense was not, in fact, a crime of violence.
12.	Tuma v. United States, 573 U.S. 957 (2014) (No. 13-1152). *Fifth, Second, Tenth, and Eleventh Circuits disagreeing with the Third and Ninth Circuits (first question) *Fifth, Third, Eighth, Eleventh, and D.C. Circuits disagreeing with the First, Sixth and Tenth Circuits, and with the Seventh and Ninth Circuits (second question)	(1) Whether the six-level enhancement under Sentencing Guidelines § 2Q1.3(b)(1)(A) for offenses that resulted in ongoing, continuous, or repetitive discharges of pollutants into the environment requires a showing of actual harm to the environment. (2) Whether a court of appeals may review a district court's discretionary decision not to depart from the Sentencing Guidelines, apart from its review of a sentence's substantive reasonableness.
13.	Psihos v. United States, 568 U.S. 1086 (2013) (No. 12-328). *Seventh, Fourth, Fifth, Ninth, and Eleventh Circuits disagreeing with Second, Third, Eighth, and Tenth Circuits	Whether a defendant can use undocumented deductions that he never claimed on any tax return to reduce the amount of tax loss under Section 2T1.1 of the Sentencing Guidelines.
14.	Padilla v. United States, , 567 U. S. 946 (2012) (No. 11-1194). *Eleventh, Sixth, and Ninth Circuits disagreeing with the Third, Fifth, Tenth, and D.C. Circuits	Whether the court of appeals erred in concluding that the district court's sentence for petitioner Padilla was substantively unreasonable.
15.	Rigas v. United States, 562 U.S. 957 (2010) (No. 09-1456). *Second and Fifth Circuits disagreeing with the Ninth Circuit	Whether the district court erred in determining that the amount of loss attributable to petitioners for purposes of Sentencing Guidelines § 2B1.1(b) exceeded $100 million.

16.	Rollins v. United States, 558 U. S. 969 (2009) (No. 08-1453). *Eighth, Fifth, Tenth, and Eleventh Circuits disagreeing with the Second, Fourth, Sixth, Seventh, and Ninth Circuits	Whether the district court directed that petitioner's federal sentence run consecutively to a state sentence that had not yet been imposed, and, if so, whether the court thereby committed reversible plain error.
17.	Masferrer v. United States, 555 U.S. 1136 (2009) (No. 08-118). *Eleventh, Third, Sixth, and Seventh Circuits disagreeing with the Eighth and Ninth Circuits (first question) *Eleventh and Eighth Circuits disagreeing with the Second, Fifth, and Ninth Circuits (second question)	(1) Whether the district court plainly erred in finding facts by a preponderance of evidence in calculating petitioner's advisory Sentencing Guidelines range. (2) Whether the district court clearly erred in calculating the loss caused by petitioner's fraud under the Sentencing Guidelines.
18.	Delfino v. United States, 555 U. S. 812 (2008) (No. 07-1273). *Fourth, Seventh, and Tenth Circuits disagreeing with the Second Circuit	Whether, in calculating the "tax loss" for purposes of determining a defendant's base offense level for tax evasion under United States Sentencing Guidelines § 2T1.1(c)(1), a district court should consider deductions and credits that the defendant could have claimed.
19.	Phelps v. United States, 552 U. S. 973 (2007) (No. 06-1667). *Fifth Circuit disagreeing with the Second Circuit, and with the Seventh and Tenth Circuits	Whether, under Sentencing Guidelines § 2T1.1, the amount of income tax loss a defendant intends to cause by a scheme to defraud should be reduced to the extent that he inadvertently causes payment of excess social-security taxes.
20.	Duff v. United States, 552 U.S. 811 (2007) (No. 06-1347). *Seventh, Fourth, Fifth, Sixth, Eighth, Tenth, and D.C. Circuits disagreeing with the First, Second, Third, and Ninth Circuits	Whether the court of appeals properly accorded a presumption of reasonableness to the sentence imposed by the district court, which was within the applicable range under the Sentencing Guidelines.

21.	Hernandez-Castillo v. United States, 549 U.S. 1111 (2007) (No. 06-432). *Tenth Circuit disagreeing with the Fifth Circuit	Whether petitioner's prior felony conviction under California law for sexual intercourse with a minor three years younger was a felony conviction for a "crime of violence" for purposes of Section 2L1.2(b)(1)(A)(ii) of the Sentencing Guidelines, which provides for a 16-level enhancement for defendants convicted of illegally reentering the United States following deportation after having been convicted of a crime of violence.
22.	Sanchez-Villalobos v. United States, 546 U.S. 1137 (2006) (No. 05-484). *Fifth, First, Second, and Eighth Circuits disagreeing with the Third and Ninth Circuits	Whether petitioner's prior state conviction for possession of a controlled substance was an "aggravated felony" triggering a recommended sentence enhancement under Section 2L1.2(b)(1)(C) of the Sentencing Guidelines.
23.	Bhutani v. United States, 536 U.S. 922 (2002) (No. 01-1188). *Seventh Circuit disagreeing with the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits (first question) *Seventh Circuit disagreeing with the Third, Fourth, Fifth, Ninth, and Tenth Circuits (second question)	(1) Whether the district court's use of Sentencing Guidelines § 2F1.1 violated the Ex Post Facto Clause. (2) Whether the district court correctly determined that there was a fraud under Guidelines § 2F1.1.
24.	Alanis v. United States, 535 U.S. 1095 (2002) (No. 01-904). *Seventh Circuit disagreeing with the Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits	Whether the district court committed reversible error under Apprendi, in sentencing petitioner to 468 months' imprisonment for drug trafficking offenses, when the quantity of drugs involved in those offenses was not proved to the jury beyond a reasonable doubt.

25.	Lopez v. United States, 532 U.S. 971 (2001) (No. 00-1086). *Seventh Circuit disagreeing with the Fourth and Tenth Circuits	Whether, in sentencing petitioner for embezzlement under the Sentencing Guidelines, the district court properly determined the amount of the victim's loss by reference to the gains realized by petitioner and his co-conspirator.
26.	Riley v. United States, 529 U.S. 1017 (2000) (No. 99-920). *Eighth Circuit disagreeing with the Sixth, Seventh, and Ninth Circuits	Whether the district court committed clear error at sentencing in calculating the amount of loss attributable to petitioners under Sentencing Guidelines § 2F1.1.
27.	Sablan v. United States, 522 U. S. 1075 (1998) (No. 97-382). *Ninth and First Circuits disagreeing with the Second, Third, Seventh, and Tenth Circuits	Whether a district court is required to determine the extent of a departure from the Sentencing Guidelines by analogy to other Guidelines provisions.
28.	Haversat v. United States, 516 U.S. 1027 (1995) (No. 95-226). *Eighth, Fourth, Fifth, and Sixth Circuits disagreeing with the First and Ninth Circuits (first question) *Eighth Circuit disagreeing with the First, Fourth, and Sixth Circuits (second question) *Eighth and Ninth Circuits disagreeing with the Second and Sixth Circuits (third question)	(1) Whether petitioner should be compared with other antitrust defendants, rather than all criminal defendants, in determining whether his charitable activities were "atypical" and thus a permissible ground for departure under the Sentencing Guidelines. (2) Whether the court of appeals impermissibly limited the circumstances that would justify a departure for good character to those in which a defendant struggles to overcome obstacles. (3) Whether a court may depart on the basis of a defendant's assistance to the administration of justice when the defendant is not eligible for a departure for acceptance of responsibility under Guidelines § 3E1.1, and the government has not requested a departure for assistance to the prosecution under Guidelines § 5K1.1.

29.	Jekot v. United States, 516 U.S. 913 (1995) (No. 95-39). *Ninth Circuit disagreeing with the Fourth and Seventh Circuits	Whether the district court erred in increasing petitioner's base offense level pursuant to Sentencing Guidelines § 2F1.1(b)(1) to account for the dollar value of the prescription drugs that petitioner unlawfully distributed.
30.	Koehler v. United States, 513 U. S. 1077 (1994) (No. 94-580). *Sixth and Fifth Circuits disagreeing with the First, Second, Third, and Fifth Circuits	Whether the district court correctly applied Sentencing Guidelines § 2B1.2(b)(4)(A), which provides a four-level increase to the base offense level for offenses involving stolen property "[i]f the offense was committed by a person in the business of receiving and selling stolen property."
31.	Goff v. United States, 513 U.S. 987 (1994) (No. 94-371). *Eighth Circuit disagreeing with the First, Fourth, Seventh, Ninth, and Tenth Circuits	Whether the court of appeals erred in reviewing de novo the district court's determination that petitioner's family situation constituted an extraordinary circumstance warranting a downward departure from petitioner's sentencing range under the Sentencing Guidelines.
32.	Jacobson v. United States, 511 U.S. 1069 (1994) (No. 93-1275). *Fourth, Second, Fifth, Seventh, Ninth and Tenth Circuits disagreeing with the First Circuit (first question) *Fourth Circuit disagreeing with the Ninth Circuit (second question)	(1) Whether the district court improperly departed upwards from petitioner's Sentencing Guidelines range. (2) Whether the district court's reliance on the same relevant conduct in imposing concurrent terms of five years' imprisonment for 35 pre-Guidelines counts and 17 Guidelines counts violated the Double Jeopardy Clause.
33.	Frieson v. United States, 502 U. S. 967 (1991) (No. 91-377). *Fourth Circuit disagreeing with the Ninth Circuit	Whether, in view of petitioner's untruthful assertions to government officers and the district court regarding "related conduct" the district court properly denied him a reduction in offense level for

		acceptance of responsibility under Sentencing Guidelines § 3E1.1 despite his acknowledgement of culpability for the offense of conviction.
34.	Thomas v. United States, 502 U. S. 857 (1991) (No. 91-28). *Seventh Circuit disagreeing with the Fourth Circuit (first question) *Seventh Circuit disagreeing with the Fourth Circuit (second question) *Seventh Circuit disagreeing with the Fourth, Fifth, Sixth and Eighth Circuits (third question)	(1) Whether the district court had authority to impose a sentence of probation pursuant to a "substantial assistance" motion by the government under 18 U.S.C. 3553I, despite the absolute bar on probationary sentences contained in 21 U.S.C. 841(b)(1)(A)(i). (2) Whether the district court properly relied on factors unrelated to the quality of petitioner's assistance to the government in determining what sentence to impose in response to a "substantial assistance" motion by the government pursuant to 18 U.S.C. 3553(e). (3) Whether petitioner's family responsibilities justified a departure under Sentencing Guidelines § 5H1.6 from the ten-year mandatory minimum sentence imposed by 21 U.S.C. 841(b)(1)(A)(i).
35.	Marzouca v. United States, 502 U.S. 817 (1991) (No. 90-1869). *Second Circuit disagreeing with the Fifth, Seventh, and D.C. Circuits	Whether petitioner's offense level was properly increased by two points under Sentencing Guidelines § 2D1.1(b)(1), which provides for such an increase if a firearm "was possessed during commission of the offense."