Post-Chevron, Good Riddance To The Sentencing Guidelines

By **Mark Allenbaugh, Doug Passon and Alan Ellis** (July 15, 2024)

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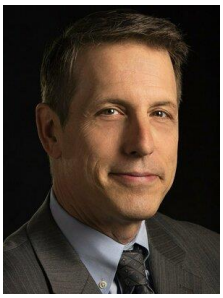

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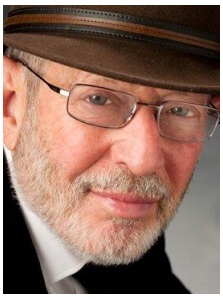

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Over 30 years ago, in Stinson v. U.S.,[1] the U.S. Supreme Court answered the question of what deference is owed to the U.S. Sentencing Commission's commentary to the U.S. sentencing guidelines. But what the Supreme Court has never directly addressed is the deference owed to the guidelines themselves.[2]

However, the Supreme Court's decision in Loper Bright Enterprises v. Raimondo,[3] overturning the Chevron doctrine, raises a critical and long overlooked question: What, if any, deference is now owed to the guidelines themselves?

Over the past few years, significant splits have developed among many federal district courts and appeals courts with respect to the deference courts should afford both to the guidelines proper, and to their commentary.

Loper Bright is certain to add to the disarray. Accordingly, it is imperative that the court step in quickly to resolve this building crisis.

We argue that, in their current form, the guidelines should not be afforded any deference for two primary reasons.

First, although the guidelines were originally designed to be binding, their binding nature has since been ruled unconstitutional. Yet the commission has not revised the guidelines to account for their now-advisory nature.

Second, in their current form, they actually promote the exact opposite of the various policy goals they were intended to achieve — namely, to provide certainty, proportionality and uniformity in sentencing, while taking into account the population capacity of the Federal Bureau of Prisons.

Thus, what Loper Bright may ultimately signal is the death of the guidelines as we currently know them, which we believe is a very good thing, as it should finally spur Congress and the commission into developing a wholly new guidelines regime that will effectively promote its purposes.

In the meantime, practitioners may be able to take advantage of the uncertainty.

What does the commission do, and what have courts held regarding guidelines deference?

The U.S. Sentencing Commission was created in 1984 by the Sentencing Reform Act. As articulated by the Supreme Court in its 1996 decision in Neal v. U.S., the commission

> was born of congressional disenchantment with the vagaries of federal sentencing and of the parole system. ... The Commission is directed to "establish sentencing policies and practices for the Federal criminal justice system" that meet congressional goals [of just punishment, adequate deterrence, incapacitation, and rehabilitation] and that, within a regime of individualized sentencing, eliminate unwarranted disparities in punishment of similar defendants who commit similar crimes. ...
>
> In fulfilling its mandate, the Commission has the authority to promulgate, review, and revise [formerly] binding guidelines to "establish a range of determinate sentences for categories of offenses and defendants according to various specified factors, among others."[4]

While the guidelines were originally binding on federal judges, as Congress intended when it passed the SRA,[5] the Supreme Court found that their mandatory nature violated the Fifth and Sixth Amendments. And so, the court held in its 2005 decision in U.S. v. Booker that the guidelines may only be considered "merely advisory" from that point forward.[6]

Notwithstanding their advisory nature, however, the Supreme Court held in its 2016 decision in Molina-Martinez v. U.S. that sentencing courts must still use the guidelines as their "'starting point and ... initial benchmark.' Federal courts ... 'must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.' The Guidelines are 'the framework for sentencing' and 'anchor ... the district court's discretion.'"[7]

Accordingly, a sentence based on an incorrect guidelines calculation will still be set aside regardless of the ultimate sentence imposed.[8]

With respect to the commission, it sits as the only independent agency within the judicial branch of government.[9] It is composed of seven voting members appointed by the president on advice and consent of the U.S. Senate, three of whom must be active federal judges, and no more than four may be of the same political party.[10]

As it is unlike the vast majority of federal agencies, which sit in the executive branch, the Supreme Court in its 1989 Mistretta v. U.S. decision rightly described the commission as having a "unique composition and responsibilities."[11]

In addition to the guidelines themselves, the commission also promulgates policy statements and application notes, which are intended to assist judges in the application of the guidelines.

In 1993, in Stinson v. U.S., the Supreme Court characterized these as "three varieties" of text within the U.S. Sentencing Guidelines Manual.[12] The first variety, of course, is the "guideline provision itself."[13] These "are the equivalent of legislative rules adopted by federal agencies."[14]

As noted above, the court has never determined what level of deference courts are to give the actual guidelines text,[15] although several members of the court, as well as some circuit courts of appeal,[16] have suggested over the years that the guidelines be afforded Chevron deference.[17]

The second variety of text in the guidelines manual consists of the commission's policy statements, which are treated much the same way as the guidelines themselves.[18]

The third variety is the commission's commentary in the form of application notes, which interpret the guidelines and explain how they are to be applied.[19] The application notes thus are similar to an agency's interpretation of its own legislative rules.[20]

According to the court in Stinson, an application note has "controlling weight unless it is plainly erroneous or inconsistent with" the text of the guideline it interprets.[21]

This type of deference is identical to so-called Auer deference, which the court identified just four years after Stinson in the context of deference to be given to executive agency interpretation of their legislative rules.[22]

But all of that may have just fundamentally changed in light of Loper Bright. This is especially problematic for the commission given its traditional role in resolving circuit splits regarding the application of the guidelines.[23]

Does Loper Bright signal the death of guidelines deference?

Chevron deference is now dead. According to the Supreme Court in Loper Bright, "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority. ... [Courts] may not defer to an agency interpretation of the law simply because a statute is ambiguous."[24]

Now, with the death of Chevron, the commission's traditional role in resolving circuit splits regarding the guidelines has effectively evaporated.[25] As no deference is to be afforded commission interpretations, circuit precedent to the contrary will necessarily always control.

But what about Stinson? As noted above, Stinson held that courts are to defer to the guidelines' commentary unless that commentary is plainly erroneous or inconsistent with the text of the guideline it interprets.

For example, under the fraud guideline at Section 2B1.1, courts should use loss in calculating the advisory sentencing range. The guideline itself does not define "loss." However, the commentary does: "[L]oss is the greater of actual loss or intended loss."[26]

The commentary further defines "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense," and "intended loss" as "the pecuniary harm that the defendant purposely sought to inflict."[27]

Accordingly, defendants are often sentenced based upon the pecuniary harm they intended, and not the pecuniary harm that actually resulted, because the former is greater than the latter.

Recently, however, a split in the circuit courts arose regarding whether courts may defer to the definition of loss in the commentary, notwithstanding Stinson.

In Kisor v. Wilkie,[28] the court in 2019 considered whether to overturn its 1997 decision in Auer v. Robbins,[29] which provided that courts are to largely defer to agency interpretations of their own regulations, as opposed to statutes — the domain of Chevron.

Rather than overturning Auer, the court narrowed it, holding that courts may only defer to an agency's interpretation of its own regulations where the underlying "regulation is genuinely ambiguous," and even then the interpretation must reflect the "agency's

authoritative, expertise-based, fair, or considered judgment."[30]

Since then, the circuit courts have split as to whether Kisor applies to the guidelines, and therefore limits when a court may defer to the commission's application notes.

In circuits that hold Kisor does not apply to the guidelines, the commentary's definition of loss to include intended loss still remains valid.

However, in circuits that do apply Kisor to the guidelines, an additional circuit split has developed as to whether the term "loss" is genuinely ambiguous, which, in turn, determines whether deference to the application notes is permitted. In circuits that have determined that loss is genuinely ambiguous, intended loss remains valid.

Thus, whether intended loss remains a valid method for calculating the fraud guidelines depends on which side of a two-level circuit split the district court sits.

To address these various circuit splits, the commission has amended the fraud guideline by moving the definition of loss from the application notes into the guideline itself.[31] This amendment, which takes effect on Nov. 1, would presumably resolve all the circuit splits regarding whether intended loss remains a valid measure of pecuniary harm.

This is so because the definition of loss is no longer in commentary, thus rendering irrelevant the questions of whether Kisor applies to the guidelines and whether loss is genuinely ambiguous.

But as the definition of loss will now reside in the guideline proper — and thus must be considered an interpretation of a statute, i.e., the SRA — it would seem that no deference may be given it in light of Loper Bright.

Thus, courts will be left to independently address whether intended loss is a permissible exercise of the commission's statutory authority. Of course, there are reasons why it is not.

In fact, as the next sections discuss, there are reasons why the guidelines, individually and as a whole, should be found to no longer be a permissible exercise of the commission's statutory authority.

Sentencing statistics suggest that judges have largely rejected the guidelines.

In practice, federal judges have largely rejected the guidelines. Prior to Booker, courts sentenced within the applicable guidelines range over 72% of the time across all offenses, with departures for reasons other than providing substantial assistance in the prosecution of another a rarity.[32] After Booker, the compliance rate dropped significantly, with only 42.4% of sentences imposed within the applicable guidelines range in 2023.[33]

For some offenses, like drug trafficking, courts sentenced within the guidelines range just 26.6% of time, and just 37.5% of the time for economic offenses.[34]

Such an enormous drop in compliance rates in the advisory era, coupled with the disparate compliance rates among offense categories — which also vary dramatically among the district courts[35] — directly undermine the guidelines' ability to provide certainty and uniformity in sentencing. The high rates of downward variance also demonstrate that the guidelines do not promote proportionality, either.

In sum, as presciently predicted by the late Justice Antonin Scalia in his dissent in Booker, the advisory guidelines have led to a "a discordant symphony of different standards, varying from court to court and judge to judge" that contribute to "excessive sentencing disparities."[36]

The guidelines were deemed by some to be a failed experiment[37] before they became merely advisory, and they certainly are a failed experiment now. They were designed to be binding on federal courts. But despite the Supreme Court rendering them merely advisory nearly 20 years ago, the commission has failed to redesign them to address their now-advisory nature.

Forcing the guidelines to do the work for which they manifestly were not designed to do has indeed — and inevitably — led to a discordant symphony in sentencing.

The guidelines lack empirical support and fail to embody many congressional directives.

In addition to the judicial dissatisfaction with the guidelines, as demonstrated by the fact sentences are more often imposed outside the guidelines' range than within, courts have also criticized the commission directly for promulgating guidelines largely unmoored from empirical evidence.

As the Supreme Court observed in its 2007 Kimbrough v. U.S. decision, the "[c]ommission fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'"[38]

But in many cases, it has failed in that role.

For example, the court noted in its Kimbrough decision, the commission failed to "use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses."[39] Therefore, held the court, "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessar'y to achieve § 3553(a)'s purposes, even in a mine-run case."[40]

This is especially appropriate for this guideline in particular, which has long been criticized as draconian.[41]

The lack of an empirical basis has also been leveled against the fraud guidelines. According to the U.S. Court of Appeals for the Sixth Circuit in its 2016 U.S. v. Musgrave decision, "there is reason to believe that, because the [fraud] Guidelines were not developed using an empirical approach based on data about past sentencing practices, it is particularly appropriate for variances."[42]

Likewise, in its 2010 decision in U.S. v. Dorvee, the U.S. Court of Appeals for the Second Circuit criticized the guideline for child pornography at Section 2G2.2 of the guidelines as exhibiting "irrationality"[43] because the commission failed "to use th[e] empirical approach in formulating the Guidelines for child pornography."[44]

In addition to lacking an empirical basis, specific guidelines and amendments have also been invalidated for failing to address congressional directives set forth in the SRA.[45]

In this regard, it is interesting to recall the U.S. District Court for the Western District of Missouri's observation in its 1988 ruling in U.S. v. Terrill, at the dawn of the guidelines' era, that now may well apply to the guidelines as a whole: "The obvious question that will undoubtedly be presented in some future case is whether the Sentencing Commission correctly construed the limitations imposed on it by Section 994(g) [directing the Commission to take into consideration the population limits of federal prisons] or whether it, in fact, disregarded the Congressional mandate."[46]

Given that the Bureau of Prisons has long been plagued by populations well beyond their facilities' rated capacities, and that the guidelines do not account for such, it does seem that this congressional mandate has been disregarded.

Conclusion

Since the guidelines were first promulgated nearly 40 years ago, more than 2 million defendants have been sentenced under them for collective service of over 8.5 million years' of imprisonment, at a cost of more than a quarter of a trillion dollars.[47] No other federal agency exercises more power over the liberty of so many.

Yet, far from advancing Congress' original intent to bring certainty, proportionality and uniformity to sentencing within the practical limits of the Bureau of Prisons, the guidelines have done the exact opposite. And this is not surprising, because they are still designed for an unconstitutional purpose — binding federal judges' sentencing discretion — and because they otherwise lack empirical bases and disregard core congressional directives.

In light of the fact that the guidelines are the very impediment to the purpose they purport to advance, courts should no longer give the guidelines and their attendant commentary any deference, especially now that the Supreme Court has sentenced deference to death in both Loper Bright, and, to a large degree, in Kisor. It's far past time to close the curtain on this theater.

But the commission is not solely responsible for fixing this mess. Congress must act, as well. As the court observed in Booker, "[o]urs, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."[48]

The court reiterated this message in Kisor, writing, "Our deference decisions are balls tossed into Congress's court, 'for acceptance or not as that branch elects.' And so far, at least, Congress has chosen acceptance."[49]

Booker placed the guidelines on life support. Loper Bright has pulled the plug. Until Congress and the commission act to promulgate a sentencing guidelines system that not only comports with the Constitution, but also takes into substantive consideration their advisory nature, as well as the empirical and statutory factors discussed above, courts should find that the guidelines as a whole are so flawed as to be unworthy of any deference. In fact, it would seem, they must.

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[1] 508 U.S. 36 (1993).

[2] DePierre v. United States, 564 U.S. 70, 87 (2011) ("We have never held that, when interpreting a term in a criminal statute, deference is warranted to the Sentencing Commission's definition of the same term in the Guidelines. And we need not decide now whether such deference would be appropriate.") (Citations omitted).

[3] 603 U.S. __, 2024 U.S. LEXIS 2882 (June 28, 2024).

[4] Neal v. United States, 516 U.S. 284, 290-291 (1996) (cleaned up).

[5] See 18 U.S.C. § 3553(b)(1) ("the court shall impose a sentence . . . within the [Guidelines' sentencing] range"). While subsection (b)(1) has since been overruled by United States v. Booker, 543 U.S. 220, 245 (2005), it remains part of the U.S. Code to this day.

[6] United States v. Booker, 543 U.S. 200, 233 (2005).

[7] Molina-Martinez v. United States, 578 U.S. 189, 198-199 (2016) (cleaned up).

[8] Rosales-Mireles v. United States, 585 U.S. 129 (2018).

[9] 28 U.S.C. § 991(a).

[10] 28 U.S.C. § 991(a).

[11] Mistretta v. United States, 488 U.S. 361, 384 (1989).

[12] Stinson, 508 U.S. at 41.

[13] Id.

[14] Id. at 45.

[15] DePierre, 564 U.S. at 87.

[16] See, e.g., United States v. Santoyo, 146 F.3d 519, 524 (7th Cir. 1998).

[17] United States v. Labonte, 520 U.S. 751, 763 (1997) (Breyer, J., dissenting with whom Stevens and Ginsburg, JJ., join) ("we should defer to the Commission's views about what Guideline the statute permits it to write; and we should uphold the Guideline the Commission has written because it 'is based on a permissible construction of the statute'") (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)); United States v. Shabazz, 933 F.2d 1029, 1035 (D.C. Cir. 1991) (Thomas, J.) ("We may set aside the guideline, therefore, only if it contravenes an 'unambiguously expressed intent of Congress' or is unreasonable.") (Quoting Chevron).

[18] Stinson, 508 U.S. at 41-42 (citing 28 U.S.C. § 994(a)(2)).

[19] Id. at 42.

[20] Id. at 44.

[21] Id. at 45 (quotation marks omitted).

[22] Auer v. Robbins, 519 U.S. 452 (1997).

[23] Braxton v. United States, 500 U.S. 344, 348-349 (1991) (discussing Commission's statutory authority to resolve circuit conflicts regarding Guidelines application).

[24] Loper Bright, 2024 U.S. LEXIS 2882, *61-62.

[25] During the pandemic, a circuit split developed regarding whether an intervening, non-retroactive change in law that would substantially reduce an inmate's sentence had the inmate been sentenced today could serve as a ground for a sentence reduction. The Tenth Circuit held that it could, the Sixth Circuit held that it could not. As the Commission has the statutory duty to identify grounds for sentence reductions, 28 U.S.C. § 994(t), it decided to address this circuit split and resolved it in favor of the Tenth Circuit when it promulgated USSG §1B1.13(b)(6) (effective Nov. 1, 2023). That "policy statement" provides that a non-retroactive change in law that would result in a substantially lower sentence today could serve as a basis for a sentence reduction for defendants who otherwise had served at least 10 years of their sentence.

Since then, courts in the Tenth Circuit have upheld the validity of §1B1.13(b)(6). For example, in United States v. Brooks, No. 08-CR-0061-TCK-1, 2024 U.S. Dist. LEXIS 28316, __ F.Supp.3d __ (N.D. Okla. Feb. 20, 2024), the defendant had been sentenced to 435 months' imprisonment for various robberies and firearms offenses. But due to an intervening change in law, had he been sentenced today, his sentence would have been far shorter. Accordingly, the defendant brought a motion for reduction in sentence pursuant to USSG §1B1.13(b)(6).

The Government opposed arguing that §1B1.13(b)(6) exceeded the Commission's statutory authority to define the grounds for a sentence reduction. The district court disagreed. Relying on Chevron, the district court noted that Congress delegated "broad authority" to the Commission to describe grounds for a sentence reduction, and sentence length was a reasonable ground especially in light of circuit precedent that a change in law can serve as a ground for sentence reduction.

In contrast, courts in the Sixth Circuit have continued to invalidate §1B1.13(b)(6) notwithstanding the Commission's express resolution of the circuit split. In United States v. Hill, No. 11-CR-536, 2024 U.S. Dist. LEXIS 84182, 2024 WL 2089011 (N.D. Oh. May 9, 2024), the defendant was convicted of various drug trafficking offenses and sentenced to a mandatory minimum 240 months' imprisonment. A non-retroactive change in law would have resulted in a sentence of only 180 months today. Citing prior circuit precedent that non-retroactive changes in law could not serve as a basis for a sentence reduction, the district court held that §1B1.13(b)(6) was still invalid even after applying Chevron deference.

[26] USSG §2B1.1, comment. (n.3).

[27] Id.

[28] 588 U.S. 558 (2019).

[29] 519 U.S. 452 (1997).

[30] Kisor, 588 U.S. at 573 (cleaned up).

[31] U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines, 6 (Apr. 30, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf.

[32] In fiscal year 2004, the last full year the Guidelines remained binding on judges, 72.1% of all sentences were imposed within the mandatory range. U.S. Sentencing Comm'n, 2004 Sourcebook of Federal Sentencing Statistics, Tbl. 27, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2004/table27pre_0.pdf. The bulk of the remaining sentences received a USSG §5K1.1 government motion for a downward departure due substantial assistance or an early disposition departure pursuant to USSG §5K3.1. Looking at compliance rates by major offense categories, 64.0% of drug trafficking cases were sentenced within the mandatory range, as were 79.6% of firearms cases, 76.0% of fraud cases, and 73.6% of immigration cases. These four offense categories covered just over 80% of all federal sentences imposed that year. That sentences fell within the Guidelines sentencing range the vast majority of the time is not surprising given their then-binding nature.

[33] Since 2005, however, the rates of sentences within the now-advisory range have continued their post-Booker plummet. In fiscal year 2023, only 42.4% of sentences overall were imposed within the advisory range while 30.1% received downward variances — a sentencing option that did not even exist in 2004. U.S. Sentencing Comm'n, 2023 Sourcebook of Federal Sentencing Statistics, Tbl. 29 (hereinafter Sourcebook), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf. Most of the remaining sentenced individuals received either a USSG §5K1.1 downward departure for substantial assistance (10.2%) or an early disposition departure pursuant to USSG §5K3.1 (10.0%). Id. Thus, sentences are now being imposed outside the advisory range more often than not.

[34] This is even more so with respect to the same major offense categories. Drug offenses, economic offenses, firearms offenses, and immigration offenses together comprised approximately 85% of all federal offenses in 2023. Sourcebook, Tbl. 15. Beginning again with drug offenses, only 26.6% were sentenced within the advisory sentencing range in 2023, whereas 41.1% — a plurality — received a downward variance. Sourcebook, Tbl. D-

14. Similarly, only 37.5% of economic offenders were sentenced within the advisory range with 44.0%—also a plurality—receiving a downward variance. Sourcebook, Tbl. E-7. Barely half of firearms offenders — 50.3% — received a sentence within the advisory range with a downward variance rate of 40.1%. Sourcebook, Tbl. F-6. In contrast, 55.9% of immigration offenders were sentenced within the advisory sentencing — the highest compliance rates among major offense categories but still significantly less than 20 years ago. While only 13.1% receiving a downward variance, Sourcebook, Tbl. I-7, that is largely explained by the fact that the average immigration sentence is just 12 months. Sourcebook, Tbl. 27. With such low sentences to begin with, there is neither the room nor the incentive to vary downward.

[35] Sourcebook, Tbl. 30. Guidelines' compliance rates ranged from a low of 27.5% in the Second Circuit to a high of 63.9% in the Fifth Circuit. Id. In the Second Circuit, compliance rates range from a low of 19.6% in the Southern District of New York, to a high of 52.5% in the Northern District of New York. Id. In the Fifth Circuit, compliance rates ranged from a low of 38.9% in the Northern District of Mississippi to 75.5% in the Western District of Texas (most likely due to the high number of immigration cases brought in that district). Id.

[36] United States v. Booker, 543 U.S. 220, 312 (2005) (Scalia, J., dissenting).

[37] United States v. Silverman, 976 F.2d 1502, 1535 (6th Cir. 1992) (Merrit, C.J., dissenting) ("I still believe that sentencing throughout the federal system should be as uniform as possible. However, the guidelines disregard fundamental notions of due process and create a slip-shod system of sentencing in which the only thing that matters is the maximization of prison sentences. 'The best we can say about [the sentencing guidelines] is what Herbert Hoover said of Prohibition: that this has been a 'great . . . experiment, noble in motive [and] far-reaching in purpose.' But like that earlier experiment, this one has failed.' Jose A. Cabranes, A Failed Utopian Experiment, Nat. L. J., July 27, 1992, at 17, 18 (U. S. District Judge Cabranes based the article on a speech he delivered at the University of Chicago). As with any failed experiment, it is now time that we rid ourselves of the experiment and move on to a new, improved system.

[38] Kimbrough v. United States, 552 U.S. 85, 109 (2007) (citation omitted).

[39] Id.

[40] Id. 110.

[41] United States v. Wade, 114 F.3d 103, 105 (7th Cir. 1997).

[42] United States v. Musgrave, 647 Fed. Appx. 529, 538-539 (6th Cir. 2016) (quoting inter alia Mark H. Allenbaugh, "Drawn from Nowhere": A Review of the U.S. Sentencing Commission's White-Collar Sentencing Guidelines and Loss Data, 26 Fed. Sent'g Rep. 19,19 (2013) ("[T]he data suggest that loss is an unsound measure of the seriousness of many offenses, with the result that judges are increasingly willing to go below the Guidelines when they impose sentences in white-collar cases.")).

[43] United States v. Dorvee, 616 F.3d 174, 187 (2d Cir. 2010).

[44] Id. at 184.

[45] For example, the Eighth Circuit long ago invalidated USSG §2J1.6 because it "ignores the significant difference in circumstances between failing to report for trial or sentencing,

when a real possibility exists that the maximum sentence will be imposed, and failing to report for service after sentencing where the sentence to be served is but a fraction of the maximum." United States v. Lee, 887 F.2d 888, 892 (8th Cir. 1989). Citing statutory requirements that the Guidelines be proportional to offense seriousness, the Eighth Circuit found "that Congress intended courts to consider this significant difference when sentencing a defendant for failure to appear" for a relatively short sentence and a very long one, and so held "that the application of section 2J1.6 in this case is not sufficiently reasonable and violates the statutory mandate given to the Sentencing Commission. We conclude that the appropriate remedy is to invalidate the application of section 2J1.6 . . . [and] resentenc[e] as if there were no guideline applicable to this offense." Id.

Similarly, the Supreme Court invalidated an amendment to the drug guidelines that it found ran afoul of a Congressional directive at 28 U.S.C. § 994(h) requiring that certain drug offenders be sentenced to a term of imprisonment at or near the statutory maximum. United States v. Labonte, 520 U.S. 751, 757 (1997) ("Congress has delegated to the Commission 'significant discretion in formulating guidelines' for sentencing convicted federal offenders. Broad as that discretion may be, however, it must bow to the specific directives of Congress. In determining whether Amendment 506 accurately reflects Congress' intent, we turn, as we must, to the statutory language. If the Commission's revised commentary is at odds with § 994(h)'s plain language, it must give way.") (Citation omitted). The Court also has invalidated an amendment to the drug guidelines that ran afoul of 21 U.S.C. 841(b)(1), which required drug sentencing to be based on the total weight of a drug, which in the case of LSD, includes blotter paper. Neal v. United States, 516 U.S. 284, 296 (1996) ("We hold that § 841(b)(1) directs a sentencing court to take into account the actual weight of the blotter paper with its absorbed LSD, even though the Sentencing Guidelines require a different method of calculating the weight of an LSD mixture or substance.").

[46] United States v. Terrill, 688 F. Supp. 542, 546 (W.D. Mo. 1988).

[47] United States Sentencing Comm'n, Federal Sentencing: The Basics, 7 (Sept. 2020) (reporting that through 2019 "over 1.9 million defendants have been sentenced under the guidelines"), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf. Since 2020, over 250,000 individuals have been sentenced under the Guidelines. U.S. Sentencing Comm'n, Sourcebook of Federal Sentencing Statistics, Tbl. 27 (2020-2023), https://www.ussc.gov/research/sourcebook-2023. Total cost of imprisonment was estimated by adding the actual annual budget expenditures of the BOP from 1986 through 2023 adjusted to 2023 dollars. See Dept. of Justice, Federal Prison System (BOP) Budget Request (FY 2024), https://www.justice.gov/d9/2023-03/29-bop_bs_section_ii_chapter_omb_cleared_3.8.23_1045.pdf.

[48] United States v. Booker, 543 U.S. 220, 265 (2005).

[49] Kisor v. Wilkie, 588 U.S. 558, 587-588 (2019).