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LEGISLATING THROUGH THE USE OF COMMENTARY: THE SENTENCING COMMISSION'S INTERPRETATION OF § 994(h) OF THE SENTENCING REFORM ACT

United States v. LaBonte, 117 S. Ct. 1673 (1997)

I. INTRODUCTION

In *United States v. LaBonte*,¹ the United States Supreme Court held that 28 U.S.C. § 994(h) unambiguously requires a court, when sentencing a third-time drug or violent felon, to impose the maximum prison term available for the offense of conviction, including all applicable statutory enhancements.² As a result, the Court invalidated the United States Sentencing Commission's promulgation of commentary added by Amendment 506, which instructed sentencing courts to apply *unenanced* statutory maximums when sentencing career offenders.³ This Note concludes that, while the Court reached the correct outcome, its analysis overlooked an important procedural error in the Commission's adoption of Amendment 506.⁴ First, this Note establishes that the commentary added by Amendment 506 is not a permissible function of Sentencing Guidelines commentary.⁵ Next, it argues that the Court's application of the *Stinson* standard⁶ to determine whether Amendment 506 is bind-

¹ 117 S. Ct. 1673 (1997).

² *Id.* at 1675.

³ *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 4B1.1, cmt., n.2 (1994) [hereinafter USSG].

⁴ See *infra* notes 161-67 and accompanying text.

⁵ See USSG § 1B1.7 (specifying that the three permissible functions are to (1) "interpret the guideline or explain how it is to be applied," (2) "suggest circumstances which . . . may warrant departure from the guidelines," and (3) "provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline").

⁶ *Stinson v. United States*, 508 U.S. 36, 38 (1993) (holding that commentary that "interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of that guideline").

ing on federal judges was incorrect.⁷ *Stinson's* holding is limited to commentary that interprets guidelines.⁸ Given that Amendment 506 interprets a federal statute⁹ rather than a guideline, it falls outside of *Stinson's* purview.¹⁰

Further, this Note contends that application of the *Chevron* standard to determine whether Amendment 506 binds federal judges also would be incorrect.¹¹ The *Chevron* standard applies to guidelines, not commentary.¹² This Note concludes that Amendment 506 is invalid, irrespective of its plausibility or the Sentencing Reform Act's ambiguity.¹³ Finally, this Note discusses the long-term implications of the Court's failure to address the Commission's use of commentary to legislate.¹⁴

II. BACKGROUND

A. THE SENTENCING REFORM ACT OF 1984

Prior to 1984, a three-way sharing of federal sentencing responsibilities existed among Congress, federal judges, and the federal parole board.¹⁵ Congress passed statutes specifying maximum penalties for crimes, judges had discretion in deciding what sentence to impose, and the federal parole board—an agency within the executive branch—determined the actual duration of imprisonment.¹⁶ As a result, similar offenders often served vastly different terms for similar crimes, depending upon the particular sentencing judge and parole board.¹⁷

In response to widespread criticism of this indeterminate and uncertain sentencing system, Congress implemented the Sentencing Reform Act of 1984 (the Act).¹⁸ In addition to abol-

⁷ *LaBonte*, 117 S. Ct. at 1677.

⁸ *Stinson*, 508 U.S. at 38.

⁹ See *LaBonte*, 117 S. Ct. at 1677, 1680.

¹⁰ See *Stinson*, 508 U.S. at 38.

¹¹ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1988) (establishing the degree of judicial deference owed to federal agency rules).

¹² *Stinson*, 508 U.S. at 44-45.

¹³ *LaBonte*, 117 S. Ct. at 1677.

¹⁴ See *infra* Part V.D.

¹⁵ *Mistretta v. United States*, 488 U.S. 361, 364-65 (1989) (upholding the constitutionality of the Sentencing Reform Act).

¹⁶ *Id.* at 365.

¹⁷ *Id.*

¹⁸ See 28 U.S.C. § 991 (1994).

ishing parole,¹⁹ mandating determinate sentences,²⁰ and authorizing limited appellate review,²¹ the Act consolidated the sentencing judge and Parole Commissioner's powers in the United States Sentencing Commission (the Commission).²² Congress directed the Commission to formulate federal sentencing guidelines that would balance Congress' general goals of "reduction of disparity, proportionality and administrability."²³ The Commission, an eight-member independent body within the judicial branch,²⁴ attempted to implement these "sometimes conflicting"²⁵ goals through its promulgation of the United States Sentencing Guidelines.²⁶

B. UNITED STATES SENTENCING GUIDELINES

1. General Methodology

In the Sentencing Reform Act, Congress directed the Commission to "promulgate and distribute to all courts of the United States . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case."²⁷ The Sentencing Guidelines, the product of this directive, establish determinate sentencing ranges that reflect a federal criminal offender's prior criminal record and offense characteristics.²⁸ Pursuant to the Guidelines, a judge determines

¹⁹ *Id.*

²⁰ 18 U.S.C. §§ 3624(a)-(b) (1994).

²¹ *Id.* §§ 3742(a)-(b).

²² 28 U.S.C. §§ 991, 994, 995(a)(1) (1994).

²³ *United States v. LaBonte*, 117 S. Ct. 1673, 1687 (1997). *See also* 28 U.S.C. § 994 (1994).

²⁴ 28 U.S.C. § 991(a) (1994). The Commission is an "independent commission in the judicial branch," comprised of seven voting members (appointed by the President "by and with the advice and consent of the Senate"), and one non-voting member (the Attorney General or her designee). *Id.* No more than four may belong to the same political party, and at least three must be federal judges. *Id.* Voting members serve six-year terms, *id.* §§ 992(a)-(b), and the President may remove members "only for neglect of duty or malfeasance in office or for other good cause shown." *Id.* § 991(a).

²⁵ *LaBonte*, 117 S. Ct. at 1680 (Breyer, J., dissenting).

²⁶ 28 U.S.C. § 994(a) (1994).

²⁷ *Id.*

²⁸ *Id.* § 994(b)(1). This format is the result of the Sentencing Reform Act's directive to the Commission to create categories of offense behavior and offender characteristics, and to establish sentencing ranges "for each category of offense involving each category of defendant." *Id.*

a federal offender's sentence through a three-step process.²⁹ First, following conviction, the sentencing judge assigns the offender one of six "criminal history categories," which reflects the offender's prior criminal record, and one of forty-three "offense levels," which accounts for particular offense characteristics.³⁰ The Guidelines direct the judge as to the appropriate "category" and "level."³¹ Second, the judge consults the sentencing table, a grid composed of forty-three rows (offense levels) and six columns (criminal history categories).³² The intersection of the offender's category and level specifies a range of months of imprisonment.³³ Finally, the judge sentences the offender within the range, unless there exists an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."³⁴ Should this occur, the judge has the "departure authority" to sentence outside of the range through either downward or upward departures.³⁵

2. Career Offender Methodology

While Congress granted the Sentencing Commission broad discretion in establishing sentencing ranges for federal offenders, it expressly limited this discretion with respect to sentencing "career offenders."³⁶ Section 994(h) of the Sentencing Reform

²⁹ *LaBonte*, 117 S. Ct. at 1680.

³⁰ USSG § 1B1.1.

³¹ *Id.* First, the judge assigns the offender a "base offense level," based on the offense of conviction. *Id.* Chapter Two of the Guidelines specifies these base levels, including, for example, first degree murder (base level 43), *id.* § 2A1.1, second degree murder (base level 33), *id.* § 2A1.2, and voluntary manslaughter (base level 25), *id.* § 2A1.3. The judge then adjusts the base level upward or downward for certain aggravating or mitigating features of the crime ("specific offense characteristics"). *Id.* § 1B1.1. For example, the judge increases the base level by two levels if the victim was "unusually vulnerable," *id.* § 3A1.1, and by three levels if the victim was a Government or law enforcement officer, *id.* § 3A1.2. There are also "role in the offense" adjustments and "mitigating role" adjustments. *Id.* § 3B1.2.

The judge determines the offender's "criminal history category" by adding up her total "points" specified in Chapter Four of the Guidelines. *Id.* § 4A1.1.

³² *Id.* § 5A (tbl.).

³³ *Id.*

³⁴ 18 U.S.C. § 3553(b) (1994).

³⁵ *Id.*

³⁶ 28 U.S.C. § 994(h) (1994). A defendant is a "career offender" if:

(1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or

Act directs the Commission to assure that the Guidelines specify prison sentences “at or near the maximum term authorized for categories” of adult offenders convicted of their third felony violent crime or drug offense.³⁷ In response, the Commission promulgated the Career Offender Guideline, which dictates the method for assigning a “career offender’s” criminal history category and offense level.³⁸ Specifically, the Guideline instructs the sentencing judge to assign a career offender a criminal history category of VI (the highest level), and to identify the offender’s “offense statutory maximum” in order to set his offense level.³⁹ The judge then consults the sentencing table to determine the applicable range.⁴⁰

TABLE 1
CAREER OFFENDER GUIDELINES

Offense Statutory Minimum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

USSG § 4B1.1.

³⁷ 28 U.S.C. § 994(h) (1994). Specifically, the directive provides:

The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [(1) has been convicted of a felony that is a crime of violence or a drug trafficking crime, and (2) has two prior felony convictions involving crimes of violence or drug trafficking crimes].

Id.

³⁸ USSG § 4B1.1.

³⁹ *Id.* Absent the Career Offender Guideline, the offense itself—rather than the penalty associated with it—would determine the offense level.

⁴⁰ *Id.* § 5A (tbl.).

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

C. SENTENCING GUIDELINES, POLICY STATEMENTS, AND COMMENTARY

The Guidelines Manual consists of three kinds of text: guidelines; policy statements; and commentary.⁴¹

1. Guidelines

As noted previously, guidelines direct the sentencing court as to the appropriate type of punishment and length of sentence to impose in a federal criminal case.⁴² Guidelines are constitutional under *Mistretta v. United States*.⁴³

The Sentencing Commission's promulgation of guidelines is equivalent to an administrative agency's promulgation of "legislative rules."⁴⁴ That is, guidelines are the product of an "express congressional delegation of authority for rulemaking,"⁴⁵ and represent the Commission's interpretation of the federal statute it administers (the Sentencing Reform Act).⁴⁶ Additionally, Congress subjects both guidelines and legislative rules to review and scrutiny prior to their becoming law.⁴⁷ Similar to legislative rules, Congress subjects guidelines to the "notice and comment" provisions of the Administrative Procedure Act.⁴⁸ "Notice and comment" requires the promulgating agency to give public notice of its proposed rulemaking and allow for public comment.⁴⁹ If the agency decides to promulgate the rules af-

⁴¹ *Stinson v. United States*, 508 U.S. 36, 41 (1993). See also 28 U.S.C. § 994(a) (1994) (directing the Commission to promulgate guidelines and policy statements).

⁴² See *supra* note 27 and accompanying text.

⁴³ 488 U.S. 361, 412 (1989) (upholding the constitutionality of the Sentencing Commission and the Sentencing Guidelines). Petitioner *Mistretta*—who had been sentenced under the Guidelines to 18 months imprisonment for conspiracy to distribute cocaine—claimed that the Commission was constituted in violation of separation of powers, and that Congress had delegated excessive authority to the Commission to structure the Guidelines. *Id.* at 370. In an opinion authored by Justice Blackmun, the Court held that, in creating the Sentencing Commission, "Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches." *Id.* at 412. Specifically, Justice Blackmun concluded that the Constitution does not prohibit Congress from "delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here." *Id.*

⁴⁴ *Stinson*, 508 U.S. at 45.

⁴⁵ *Id.* at 44.

⁴⁶ *Id.*

⁴⁷ 28 U.S.C. § 994(p) (1994); 5 U.S.C. §§ 553(b)-(c) (1994).

⁴⁸ 28 U.S.C. § 994(x) (1994); 5 U.S.C. §§ 553(b)-(c) (1994).

⁴⁹ 5 U.S.C. §§ 553(b)-(c) (1994).

ter receiving the comments, it must set forth the rule's basis and purpose in a public statement.⁵⁰ To further assure accountability, Congress requires the Sentencing Commission to submit proposed guidelines (and amendments), accompanied by explanatory statements, to Congress itself.⁵¹ The guidelines automatically take effect 180 days after submission, unless Congress modifies or disapproves them.⁵²

Given these similarities, the Supreme Court has extended the two-part standard governing the degree of judicial deference owed to legislative rules, to guidelines.⁵³ Under this standard, guidelines are binding on judges if (1) the congressional authorizing statute is "silent or ambiguous" on the pertinent issue, and (2) the Commission's *interpretation* is based on a permissible construction of the statute.⁵⁴

2. Policy Statements

In addition to guidelines, the Sentencing Reform Act directs the Commission to adopt "general policy statements regarding application of the guidelines or any other aspect of sentencing . . . [that] would further the purposes" of the Act.⁵⁵ Policy statements are binding on federal judges,⁵⁶ and amendments thereof are not subject to congressional review.⁵⁷

⁵⁰ *Id.*

⁵¹ 28 U.S.C. § 994(p) (1994).

⁵² *Id.*

⁵³ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1991). The specific language of the standard is as follows:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the . . . question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id.

⁵⁴ *Stinson v. United States*, 508 U.S. 36, 44 (1993) (quoting *Chevron*, 467 U.S. at 842-43).

⁵⁵ 28 U.S.C. § 994(a)(2) (1994).

⁵⁶ *Williams v. United States*, 503 U.S. 193, 201 (1992) (holding that failure to follow a policy statement renders a sentence an "incorrect application" of the guidelines and subject to reversal on appeal).

⁵⁷ See 28 U.S.C. § 994(p) (1994).

3. Commentary

Within the Guidelines Manual, both guidelines and policy statements are accompanied by extensive commentary.⁵⁸ Although the Sentencing Reform Act does not expressly authorize the issuance of commentary,⁵⁹ it refers to it,⁶⁰ and the Supreme Court has endorsed its use in interpreting the guidelines.⁶¹ The Commission has established that commentary may serve three functions: (1) to “interpret the guideline or explain how it is to be applied;” (2) to “suggest circumstances which . . . may warrant departure from the guidelines;” and (3) to “provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline.”⁶²

In *Stinson v. United States*, the Court concluded that commentary is the equivalent of an “interpretive rule,” i.e., an agency’s interpretation of its own legislative rule.⁶³ The Court reasoned as follows: Given that guidelines are the equivalent of legislative rules adopted by agencies, and the functional purpose of commentary is to “assist in the interpretation and application” of guidelines, “commentary is akin to an agency’s interpretation of its own legislative rules.”⁶⁴ Consequently, the Court extended the standard of judicial deference owed to interpretive rules to commentary, holding that commentary that “interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of that guideline.”⁶⁵

⁵⁸ *Stinson*, 508 U.S. at 41.

⁵⁹ *Id.* As previously noted, *see supra* text accompanying notes 27 and 55, § 994(a)(1) directs the Commission to promulgate guidelines and policy statements. 28 U.S.C. § 994(a)(1) (1994). There is no such directive with respect to commentary.

⁶⁰ Section 3553(b) provides that, in determining whether to depart from a guidelines range, “the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.” 18 U.S.C. § 3553(b) (1994).

⁶¹ *Stinson*, 508 U.S. at 41.

⁶² USSG § 1B1.7. *See also Stinson*, 508 U.S. at 45 (noting that “[t]he functional purpose of commentary . . . is to assist in the interpretation and application” of the Commission’s guidelines).

⁶³ *Stinson*, 508 U.S. at 44. Two additional analogies offered in an attempt to characterize the commentary’s legal force on judges were commentary as equivalent to legislative history, and commentary as equivalent to an agency’s legislative rule. *Id.* at 45. The Court rejected both. *Id.* at 43-44.

⁶⁴ *Id.* at 45.

⁶⁵ *Id.* at 38.

At issue in *Stinson* was the Commission's interpretation of "crime of violence" in the Career Offender Guideline. As noted, Congress directed the Commission to assure that the Guidelines specified sentences at or near statutory maximums for third-time felons convicted of drug trafficking crimes or "crimes of violence."⁶⁶ In guideline § 4B1.2, which was subject to "notice and comment" and congressional review, the Commission defined "crime of violence" as including "conduct that presents a serious potential risk of physical injury to another."⁶⁷ After a sentencing judge interpreted this definition as including the offense of unlawful possession of a firearm by a felon, the Commission issued commentary—via Amendment 433—specifying that the definition does *not* include that offense.⁶⁸ The Court upheld the amendment.⁶⁹

D. AMENDMENT 506

Following the Court's validation in *Stinson* of the commentary interpreting the definition of "crime of violence,"⁷⁰ the Commission issued additional commentary defining the phrase "offense statutory maximum" in the Career Offender Guideline.⁷¹ As previously noted, a judge sentencing a career offender must determine the offender's "offense statutory maximum" in order to set his "offense level."⁷² While the Career Offender Guideline does not define offense statutory maximum,⁷³ prior commentary specified that the phrase refers to the "maximum term of imprisonment authorized for the offense of conviction."⁷⁴

⁶⁶ 28 U.S.C. § 994(h) (1994).

⁶⁷ *Id.* § 4B1.2(1)(ii).

⁶⁸ USSG § 4B1.2, cmt., n.2 (1992). Following promulgation of Amendment 433, defendant *Stinson* sought resentencing, but the Eleventh Circuit held that federal courts are not bound by commentary. *United States v. Stinson*, 957 F.2d 813, 815 (11th Cir. 1992) (per curiam). The Supreme Court vacated and remanded. *Stinson*, 508 U.S. at 48. Observing that the commentary added by Amendment 433 "interpreted and explained" the Commission's guideline defining "crime of violence," the Court equated commentary to an agency's "interpretive rule." *Id.* at 42-43.

⁶⁹ *Stinson*, 508 U.S. at 38.

⁷⁰ See *supra* note 66-69 and accompanying text.

⁷¹ USSG § 4B1.1, cmt., n.2 (1994).

⁷² See *supra* note 39 and accompanying text.

⁷³ USSG § 4B1.2. It should be noted that the Guideline *does* define the terms "crime of violence," "controlled substance offense," and "two prior felony convictions," but fails to define "offense statutory maximum."

⁷⁴ *Id.* § 4B1.1, Application n.2 (Nov. 1, 1993).

However, neither the Guideline nor its accompanying commentary designated *which* "maximum term" should apply where federal law established a basic statutory maximum for a particular offense and also provided an enhanced statutory maximum for repeat offenders.⁷⁵ For example, the penalty provision for the offense of possession of a controlled substance with intent to distribute provides,

[S]uch person shall be sentenced to a term of imprisonment of not more than 20 years If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years⁷⁶

The issue in doubt was whether the judge should apply 20 or 30 years as the "offense statutory maximum" when determining the offender's offense level. The federal appellate courts faced with this choice uniformly concluded that "offense statutory maximum" encompasses the enhanced maximum, i.e., 30 years.⁷⁷

In 1994, the Commission issued Amendment 506, which redefined the phrase "offense statutory maximum" in Career Offender Guideline commentary as "the maximum term of imprisonment authorized for the offense of conviction . . . *not including* any increase in that maximum term under a sentencing enhancement that applies because of the defendant's prior criminal record."⁷⁸ In addition, the Commission opted to give Amendment 506 retroactive effect.⁷⁹ The Commission justified Amendment 506 as a means of "avoiding unwarranted double-counting as well as unwarranted disparity associated with varia-

⁷⁵ *Id.* Imposition of the enhanced penalty requires the Government to file an information notifying the defendant in advance of trial that it will rely on his prior convictions to seek a penalty enhancement. 21 U.S.C. § 851(a)(1) (1994). If the Government does not file notice, the lower sentencing range will be applied. *Id.*

⁷⁶ 21 U.S.C. § 841(b)(1)(C) (1994).

⁷⁷ See *United States v. Smith*, 984 F.2d 1084, 1087 (10th Cir. 1993) (upholding the district court's calculation of the defendant's sentencing range using the enhanced statutory maximum), *cert. denied*, 510 U.S. 873 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C. Cir. 1992) (holding that application of the Guidelines' career offender provision to the heightened maximum "does not add to the penalty authorized by Congress because it did not increase Garrett's sentence beyond the maximum authorized by subsection 841(b)(1)(B)"); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir. 1991) (holding that the defendant, whose conviction for drug offenses was subject to statutory enhancement, could also be treated as a career offender); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-60 (9th Cir. 1989) (holding that there is no impermissible double enhancement in the career offender provision of the Sentencing Guidelines).

⁷⁸ USSG § 4.B1.1, Application n.2 (1994) (emphasis added).

⁷⁹ *Id.* This authority is pursuant to 28 U.S.C. § 994(u) (1994).

tions in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions.”⁸⁰ Additionally, the Commission noted that the laws providing enhanced maximum sentences for repeat drug offenders did not exist at the time of the Sentencing Reform Act’s enactment.⁸¹

III. FACTS AND PROCEDURAL HISTORY

The United States District Court for the District of Maine convicted George LaBonte, Alfred Lawrence Hunnewell and Steven Dyer of possession of controlled substances with intent to distribute in violation of 21 U.S.C. § 841(a)(1).⁸² Based on their prior felony drug convictions, the prosecution filed timely notice under § 851 of its intention to seek enhanced penalties.⁸³ As a result, the court classified each as a “career offender,” and calculated sentences according to the Career Offender Guideline.⁸⁴

In accordance with the Guideline, the district court identified each offender’s offense statutory maximum to determine his offense level.⁸⁵ In each case, the court used the enhanced maximum, thirty years, as the offense statutory maximum.⁸⁶ Accordingly, the court assigned each offender a preliminary of-

⁸⁰ USSG § 4B1.1, cmt., n.2 (1994) (Background).

⁸¹ *Id.*

⁸² *United States v. LaBonte*, 70 F.3d 1396, 1402-03 (1st Cir. 1995). Section 841 provides in pertinent part: “Except as otherwise authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—to manufacture, distribute, or dispense, a controlled substance.” 21 U.S.C. § 841(a) (1994). Specifically, the district court convicted LaBonte of one count of possession of cocaine with intent to distribute, Hunnewell of two counts of possessing controlled substances with intent to distribute, and Dyer of conspiracy to possess controlled substances with intent to distribute. Petitioner’s Brief at 7, *United States v. LaBonte*, 117 S. Ct. 1673 (1997) (No. 95-1726).

⁸³ 21 U.S.C. § 851(a) (1994).

⁸⁴ *LaBonte*, 70 F.3d at 1402.

⁸⁵ *Id.* For the offense of possession with intent to distribute, the statute provides: Such person shall be sentenced to a term of imprisonment of not more than 20 years If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years.

21 U.S.C. § 841(b)(1)(C) (1994).

⁸⁶ *LaBonte*, 70 F.3d at 1402.

fense level of 34.⁸⁷ Further, pursuant to the Guideline, the court assigned each a criminal history category of VI.⁸⁸

For LaBonte and Hunnewell, the court deducted three levels for acceptance of responsibility, thereby reducing their offense levels to 31.⁸⁹ The intersection of level 31 and category VI in the sentencing table produces a range of 188 to 235 months, and the court sentenced each to 188 months imprisonment.⁹⁰ For respondent Dyer, the court refused an acceptance of responsibility deduction.⁹¹ Using 34 as the offense level, the court arrived at a range of 262 to 327 months and imposed a 262 month sentence.⁹² In all three cases, the United States Court of Appeals for the First Circuit affirmed the convictions and sentences.⁹³

In 1994, the year following the district court's decisions, the Sentencing Commission redefined "offense statutory maximum" to exclude statutory enhancements, and gave the Amendment retroactive effect.⁹⁴ LaBonte, Hunnewell and Dyer each sought resentencing. The district court granted LaBonte's motion, and, using its authority to retroactively apply Amendment 506, reduced his sentence to 151 months imprisonment.⁹⁵ The Government appealed to the First Circuit.⁹⁶

Meanwhile, a different district court judge denied Hunnewell's and Dyer's motions for resentencing, concluding that the Sentencing Commission lacked authority to adopt Amendment 506.⁹⁷ Hunnewell and Dyer appealed to the First Circuit.⁹⁸

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1403.

⁹² *Id.*

⁹³ *LaBonte v. United States*, 19 F.3d 1427 (1st Cir. 1994); *United States v. Hunnewell*, 10 F.3d 805 (1st Cir. 1993); *United States v. Dyer*, 9 F.3d 1 (1st Cir. 1993).

⁹⁴ See *supra* note 79 and accompanying text.

⁹⁵ *LaBonte*, 70 F.3d at 1402. The judge recalculated LaBonte's sentence applying the unenhanced maximum. The judge set LaBonte's offense level at 32, deducted three levels for acceptance of responsibility, and arrived at a range of 151 to 188 months.

⁹⁶ *Id.*

⁹⁷ See *id.* at 1403 (discussing the denial of these motions).

⁹⁸ *Id.*

The First Circuit consolidated the *LaBonte*, *Hunnewell*, and *Dyer* appeals.⁹⁹ Applying the two-prong *Chevron* standard,¹⁰⁰ a divided panel held that Amendment 506 is a reasonable interpretation of the Sentencing Reform Act's directive to designate career offenders' sentences "at or near the maximum term authorized" and therefore is binding on federal courts.¹⁰¹

Regarding *Chevron*'s first prong, the court concluded that § 994(h) of the Act is "ambiguous" as to the meaning of "maximum term authorized for categories of offenders."¹⁰² The First Circuit reasoned that the phrase could be construed as either: (1) the enhanced maximum applicable to the "category" of repeat offenders for whom the prosecution filed notice of prior crimes; or (2) as "including all offenders (or all repeat offenders) charged with transgressing the same criminal statute, regardless of whether the prosecution chooses to invoke the sentence-enhancing mechanism against a particular defendant."¹⁰³ Under the second construction, "maximum" refers to the unenhanced maximum sentence.¹⁰⁴

Given this ambiguity, the court applied *Chevron*'s second prong, which requires examining the plausibility of the Commission's interpretation.¹⁰⁵ The First Circuit concluded that the Career Offender Guideline, "read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests."¹⁰⁶ Accordingly, the court validated the revised commentary.¹⁰⁷

The Government appealed to the United States Supreme Court, which granted certiorari¹⁰⁸ to resolve the conflict between circuits as to whether the Sentencing Commission's implementation of Amendment 506 conflicts with its obligation to "assure that the guidelines specify a sentence to a term of imprisonment

⁹⁹ *Id.* at 1400.

¹⁰⁰ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1988); see also *supra* note 53 (discussing *Chevron*).

¹⁰¹ *LaBonte*, 70 F.3d at 1407.

¹⁰² *Id.* at 1406.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1407.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *United States v. LaBonte*, 116 S. Ct. 2545 (1996). See *supra* note 77 (citing conflicting cases).

at or near the maximum term authorized for categories of [career offenders].”¹⁰⁹

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

In an opinion authored by Justice Clarence Thomas,¹¹⁰ the Court invalidated Amendment 506.¹¹¹ The Court held that 28 U.S.C. § 994(h) unambiguously requires a court, when sentencing a career offender, to impose the maximum prison term available for the offense of conviction, including all applicable statutory enhancements.¹¹² In doing so, the Court reversed the decision of the First Circuit Court of Appeals.¹¹³

Justice Thomas acknowledged the broad discretion delegated to the Sentencing Commission in formulating sentencing guidelines.¹¹⁴ However, he noted that this discretion “must bow to the specific directives of Congress.”¹¹⁵ As such, Justice Thomas explained, if Amendment 506 is “at odds with § 994(h)’s plain language, it must give way.”¹¹⁶

Justice Thomas adopted the premise that, “in drafting this legislation, Congress said what it meant.”¹¹⁷ Citing *Webster’s* and *Black’s Law Dictionaries*, he determined that, under the “ordinary meaning” of “maximum term authorized,” the phrase should be construed as “requiring the ‘highest’ or ‘greatest’ sentence allowed by statute.”¹¹⁸ Given that Congress expressly provided enhanced maximums for certain repeat offenders “in an effort to treat them more harshly,” Justice Thomas reasoned it is insufficient merely to identify the basic penalty associated with an offense when calculating the highest sentence allowed by statute.¹¹⁹ Rather, he concluded, “[w]here Congress has en-

¹⁰⁹ *United States v. LaBonte*, 117 S. Ct. 1673 (1997).

¹¹⁰ Justice Thomas was joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy and Souter.

¹¹¹ *LaBonte*, 117 S. Ct. at 1675.

¹¹² *Id.*

¹¹³ *Id.* at 1677.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

acted a base penalty for first-time offenders or nonqualifying repeat offenders, and an enhanced penalty for qualifying repeat offenders, the 'maximum term authorized' for the qualifying repeat offender is the enhanced, not the base, term."¹²⁰

Justice Thomas then discredited the respondents' arguments.¹²¹ First, he rejected the respondents' attempt to broadly construe the phrase "categories of defendants" as encompassing all repeat offenders, including those who are ineligible for sentence enhancements.¹²² According to Thomas, the statute contemplates two distinct categories of repeat offenders for each possible crime: those who receive notice under 21 U.S.C. § 851(a) and those who do not.¹²³ Under this construction, the maximum term for the category of defendants who receive notice is the enhanced term.¹²⁴ By contrast, the respondents' reading essentially precludes a sentencing court from ever imposing the enhanced maximum penalty, thereby rendering the enhanced penalty provisions a "virtual nullity."¹²⁵

Next, Justice Thomas considered the statutory phrase "at or near the maximum."¹²⁶ Respondents claimed the words "at or near" allow for flexibility in sentencing, and therefore justified the Sentencing Commission's reliance on the unenhanced statutory maximum.¹²⁷ While acknowledging that the phrase does afford latitude in deciding how "near" the sentence must be to the enhanced maximum, Thomas argued that it does not "license the Commission to select as the relevant 'maximum term' a sentence that is different from the congressionally authorized maximum term."¹²⁸

Finally, Justice Thomas discounted the respondents' reliance on the Sentencing Commission's stated justifications¹²⁹ for

¹²⁰ *Id.* at 1677-78.

¹²¹ *Id.* at 1678-79.

¹²² *Id.* at 1678.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* Justice Thomas believed the pertinent issue "is not how close the sentence must be to the [enhanced] statutory maximum, but to which statutory maximum it must be close." *Id.* (quoting *United States v. Fountain*, 83 F.3d 946, 952 (8th Cir. 1996)).

¹²⁹ See *supra* notes 80-81 and accompanying text.

Amendment 506.¹³⁰ In response to the Commission's assertion that applying the unenhanced maximum "avoids unwarranted double counting" of the offender's prior convictions, Justice Thomas stated that, as long as the Commission's mechanism "results in sentences 'at or near' the 'maximum term authorized,'" the number of steps required to achieve this is unimportant.¹³¹ Likewise, he found unavailing the Commission's contention that Amendment 506 "eliminates 'unwarranted disparity associated with variations in . . . seeking enhanced penalties.'" ¹³² The Commission noted that two defendants with identical criminal records and identical offense characteristics could be subject to two different sentences, depending on whether the prosecution filed notice of its intention to seek enhanced penalties.¹³³ In response, Justice Thomas reasoned that such discretion is similar to the discretion a prosecutor exercises when deciding what charges to file, and is therefore "an integral feature of the criminal justice system."¹³⁴ For these reasons, Justice Thomas invalidated Amendment 506.¹³⁵

B. JUSTICE BREYER'S DISSENTING OPINION

Writing for the dissent,¹³⁶ Justice Breyer found the statutory words of 28 U.S.C. § 994(h) ambiguous, and thus deferred to the Sentencing Commission's interpretation.¹³⁷ Justice Breyer concluded that § 994(h) does not "directly [speak] to the precise . . . question at issue."¹³⁸ Therefore, Amendment 506 should be upheld because it is based upon a "permissible construction of the statute."¹³⁹

Justice Breyer analyzed § 994(h) and Amendment 506 from the perspective that the Commission is faced with the "sometimes conflicting" goals of reducing disparity, achieving propor-

¹³⁰ *Labonte*, 117 S. Ct. at 1679.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Justice Breyer was joined by Justices Stevens and Ginsberg.

¹³⁷ *LaBonte*, 117 S. Ct. at 1679-80 (Breyer, J., dissenting).

¹³⁸ *Id.* (Breyer, J., dissenting). That is, the phrase "at or near the statutory maximum" demands an answer to the question, "authorized by what?" See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1991).

¹³⁹ *LaBonte*, 117 S. Ct. at 1680 (Breyer, J., dissenting).

tionality in sentencing, and creating an administrable system.¹⁴⁰ Further, he observed that, under the rule established in *Chevron*, it is not the Court's duty to question the wisdom of the Commission's interpretation.¹⁴¹ Rather, the Court must determine only whether the statute's words are open to this interpretation.¹⁴²

In this context, Justice Breyer analyzed the words of the Career Offender Guideline to determine whether they "unambiguously forbid" the Commission's implementation of Amendment 506.¹⁴³ Observing that the phrase "maximum term authorized" does not indicate the specific sentencing statute to which it refers,¹⁴⁴ Justice Breyer mentioned several theoretical possibilities. He noted, for example, that the statute authorizing a sentence for a probation-violator up to the maximum initially available for the underlying crime¹⁴⁵ could theoretically apply, as could the statute authorizing a sentencing judge to "run" multiple sentences consecutively rather than concurrently.¹⁴⁶ Therefore, Justice Breyer concluded that the words *are* ambiguous because they require statutory interpretation to determine their meaning.¹⁴⁷

In addition, neither the Act's background nor § 994(h)'s legislative history gives meaning to the words "maximum term authorized."¹⁴⁸ By abolishing parole, the Act "transformed the sentence the judge pronounced from an enormous overstatement into *real-time* years almost all of which the offender would actually spend in prison."¹⁴⁹ To compensate for this discrepancy, Congress directed the Commission to adjust the sentences to reflect the fact that parole had been abolished.¹⁵⁰ Given this context, Justice Breyer found it entirely plausible that "Congress *might* indeed have expected that the Commission would read the career offender subsection to refer to statutory offenses plus

¹⁴⁰ *Id.* (Breyer, J., dissenting).

¹⁴¹ *Id.* (Breyer, J., dissenting).

¹⁴² *Id.* (Breyer, J., dissenting).

¹⁴³ *Id.* at 1682-83 (Breyer, J., dissenting).

¹⁴⁴ *Id.* at 1682 (Breyer, J., dissenting).

¹⁴⁵ *Id.* See 18 U.S.C. § 3565(a)(2) (1994).

¹⁴⁶ *LaBonte*, 117 S. Ct. at 1683. See 18 U.S.C. § 3584(a) (1994).

¹⁴⁷ *LaBonte*, 117 S. Ct. at 1682 (Breyer, J., dissenting).

¹⁴⁸ *Id.* at 1683-86 (Breyer, J., dissenting).

¹⁴⁹ *Id.* at 1684 (Breyer, J., dissenting) (internal parenthetical phrase omitted).

¹⁵⁰ *Id.* (Breyer, J., dissenting). See 28 U.S.C. § 994(m).

conduct-based [sentence] enhancements alone (without recidivism-based sentence enhancements)."¹⁵¹

Regarding § 994(h)'s legislative history, Justice Breyer argued that its examination is pointless.¹⁵² He noted that the word "authorized" was originally cross-referenced with another section of the Code which specified the "authorized terms of imprisonment."¹⁵³ However, Congress later enacted a technical amendment eliminating the cross-reference, leaving the word "authorized" without a specific reference.¹⁵⁴ Consequently, Justice Breyer concluded, it became impossible to determine with any certainty what "authorized" meant.¹⁵⁵

In closing, Justice Breyer asserted that the structure of the Act demonstrates congressional intent to delegate to the Commission "the job of interpreting, and harmonizing, the authorizing Act's specific statutory instructions."¹⁵⁶ As such, the Commission is free to consider various guidelines in light of the Act's underlying goals.¹⁵⁷ Given the Commission's expertise in maneuvering the complexities of the United States Criminal Code, its decisions merit respect.¹⁵⁸ Accordingly, in Justice Breyer's view, the Sentencing Commission is owed deference under *Chevron*,¹⁵⁹ and Amendment 506 should be upheld.¹⁶⁰

V. ANALYSIS

While the Court's invalidation in *United States v. LaBonte* of Amendment 506 is the correct outcome,¹⁶¹ this Note argues that its analysis and reasoning overlooked a procedural error having important ramifications.

Acknowledged and undisputed by the Court, the commentary added by Amendment 506 represents the Sentencing Commission's *interpretation* of the *statutory phrase* "maximum

¹⁵¹ *LaBonte*, 117 S. Ct. at 1684 (Breyer, J., dissenting).

¹⁵² *Id.* at 1685 (Breyer, J., dissenting).

¹⁵³ *Id.* (Breyer, J., dissenting). See 18 U.S.C. § 3581(b).

¹⁵⁴ *LaBonte*, 117 S. Ct. at 1685 (Breyer, J., dissenting).

¹⁵⁵ *Id.* at 1686 (Breyer, J., dissenting).

¹⁵⁶ *Id.* at 1687 (Breyer, J., dissenting).

¹⁵⁷ *Id.* (Breyer, J., dissenting).

¹⁵⁸ *Id.* at 1688 (Breyer, J., dissenting).

¹⁵⁹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1991).

¹⁶⁰ *LaBonte*, 117 S. Ct. at 1688 (Breyer, J., dissenting).

¹⁶¹ *Id.* at 1675.

term authorized.”¹⁶² This obvious and seemingly irrelevant observation is important for three reasons: (1) Amendment 506 amounts to a misuse of commentary and may be invalidated as such;¹⁶³ (2) Amendment 506 does not bind federal judges under *Stinson* because it cannot be classified as an “interpretive rule;”¹⁶⁴ and (3) although Amendment 506 is substantively analogous to a “legislative rule,”¹⁶⁵ it is not binding on federal judges under *Chevron* because it was not required to comply with the Administrative Procedure Act’s “notice and comment” provision, and was not subject to congressional invalidation.¹⁶⁶ As such, the revised commentary is invalid and non-binding, irrespective of Amendment 506’s plausibility or § 994(h)’s ambiguity.¹⁶⁷

A. COMMENTARY CANNOT INTERPRET FEDERAL STATUTES

As stated by Justice Breyer in the first sentence of his dissent, “[t]he United States Sentencing Commission has *interpreted three statutory words*—the words ‘maximum term authorized’—to mean ‘maximum term of imprisonment authorized for the offense of conviction, not including . . . sentencing enhancement provision[s]’ for recidivists.”¹⁶⁸ Justice Thomas also acknowledged in the majority opinion that the commentary interpreted § 994(h), concluding that the Commission’s “*interpretation* is inconsistent with § 994(h)’s plain language.”¹⁶⁹ However, neither Justice Breyer nor Justice Thomas addressed the Commission’s procedural error in implementing Amendment 506: interpreting a federal statute is not one of the three permissible functions of commentary.¹⁷⁰

Though not suggested by either the majority or dissent, it could be argued that Amendment 506 is the Commission’s interpretation of the Career Offender Guideline phrase “offense statutory maximum,” rather than § 994(h). Under this conten-

¹⁶² *Id.* at 1677.

¹⁶³ See *infra* note 170 and accompanying text.

¹⁶⁴ *Stinson v. United States*, 508 U.S. 36, 44-45 (1993).

¹⁶⁵ *Id.* at 45.

¹⁶⁶ 28 U.S.C. §§ 994(p), (x) (1994). See *supra* note 48 and accompanying text.

¹⁶⁷ See *infra* note 182 and accompanying text.

¹⁶⁸ *LaBonte*, 117 S. Ct. at 1679 (quoting USSG § 4B1.1, cmt., n.2) (emphasis added).

¹⁶⁹ *Id.* at 1675 (emphasis added).

¹⁷⁰ USSG § 1B1.7. As noted, commentary’s three functions are: interpreting or explaining a guideline; suggesting circumstances which warrant a departure from a guideline; and providing background information. See *supra* note 62.

tion, the commentary serves a permissible function—interpreting a guideline.¹⁷¹ However, this argument is incorrect: The commentary *defines* “offense statutory maximum;” it does not *interpret* it. This distinction is important. Whereas interpretation implies ascertaining meaning “from” something,¹⁷² definition implies providing meaning “to” something.¹⁷³ The former is explanation,¹⁷⁴ the latter is legislation. Legislating is reserved for the Guidelines.¹⁷⁵

Put another way, Amendment 506 amounts to a “legislative rule” rather than an “interpretive rule” because it interprets a federal statute rather than the Commission’s own Guideline.¹⁷⁶ When a statute authorizes an agency to impose a duty, “the formulation of that duty becomes a legislative task entrusted to that agency.”¹⁷⁷ Clearly, § 994(h)—the Commission’s authorization to impose a sentencing duty on judges¹⁷⁸—and the commentary added by Amendment 506 is the “formulation of that duty.”¹⁷⁹ That is, Amendment 506 imposes a duty on judges to sentence career offenders at or near the unenhanced statutory maximum.¹⁸⁰ Therefore, because the commentary is intended to bind federal judges, it is “the clearest possible example of a legislative rule.”¹⁸¹

The Court could have (and should have) ended its analysis at this point, and invalidated the revised commentary as an impermissible use of commentary, regardless of its reasonableness or § 994(h)’s ambiguity.¹⁸²

¹⁷¹ USSG § 1B1.7.

¹⁷² The word “interpret” means “to explain the meaning” of something. WEBSTER’S NEW WORLD DICTIONARY 706 (3d College ed. 1988).

¹⁷³ The word “define” means “to state the meaning” of something. *Id.* at 362.

¹⁷⁴ See *supra* note 172.

¹⁷⁵ See *Stinson v. United States*, 508 U.S. 36, 44-45 (1993); see also *supra* notes 44-46 and accompanying text.

¹⁷⁶ *Stinson*, 508 U.S. at 44-45.

¹⁷⁷ *Hector v. United States Dep’t of Agric.*, 82 F.3d 165, 169 (7th Cir. 1996).

¹⁷⁸ 28 U.S.C. § 994(h) (1994). The Commission is authorized to impose a duty on judges to sentence career offenders “at or near” the statutory maximum. *Id.*

¹⁷⁹ See USSG § 4B1.1, cmt., n.2 (1994).

¹⁸⁰ *Id.*

¹⁸¹ *Hector*, 82 F.3d at 169.

¹⁸² See *Stinson v. United States*, 508 U.S. 36, 44-45 (1993).

B. *STINSON* SHOULD NOT BE CONTROLLING

The Court's holding in *Stinson v. United States*—commentary which “interprets or explains a guideline” is authoritative unless it violates or is inconsistent with the Constitution or a federal statute¹⁸³—is limited to “interpretive rules.”¹⁸⁴ As such, the Commission's promulgation of a legislative rule through commentary has an additional consequence: Justice Thomas should not have applied the *Stinson* rule in assessing the validity of Amendment 506.¹⁸⁵ While Amendment 506 is undoubtedly commentary,¹⁸⁶ it interprets a federal statute (28 U.S.C. § 994(h)) rather than a guideline. Therefore, Amendment 506 falls outside *Stinson*'s purview.¹⁸⁷

The Court's analysis of Amendment 433 in *Stinson* buttresses this point.¹⁸⁸ The primary rationale for according “controlling weight” to the Commission's interpretation of its own guidelines is that the Commission “is in a superior position to determine what it intended when it issued a [guideline], how and when it intended the [guideline] to apply, and the interpretation of the [guideline] that makes the most sense given the [Commission's] purposes in issuing the [guideline].”¹⁸⁹

In *Stinson*, the Court determined that the Sentencing Commission, as the drafter of the guideline defining “crime of violence,”¹⁹⁰ was in a superior position to determine whether the offense of unlawful possession of a firearm by a felon¹⁹¹ was intended to fit within the definition of crime of violence.¹⁹² In contrast, the commentary added by Amendment 506 interprets language drafted by Congress (the words “at or near the offense statutory maximum”).¹⁹³ Obviously, the Commission is not in a

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 45.

¹⁸⁵ See *United States v. LaBonte*, 117 S. Ct. 1673, 1677 (1997).

¹⁸⁶ USSG § 4B1.1, cmt., n.2 (1994).

¹⁸⁷ *Stinson*, 508 U.S. at 44-45.

¹⁸⁸ *Id.* at 42-47.

¹⁸⁹ *Id.* at 45. See KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10, at 282 (3d ed. 1994); see also John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614 (1996).

¹⁹⁰ *Stinson*, 508 U.S. at 44; see also USSG § 4B1.2(1)(ii).

¹⁹¹ See 18 U.S.C. § 922(g) (1994).

¹⁹² *Stinson*, 508 U.S. at 47.

¹⁹³ 28 U.S.C. § 994(h) (1994).

superior position to determine what *Congress* intended. Consequently, the rationale for giving “controlling weight” to commentary does not apply to the commentary added by Amendment 506.¹⁹⁴

C. COMMENTARY AS A “LEGISLATIVE RULE”: THE PROBLEM WITH *CHEVRON*

The commentary added by Amendment 506 assumes the role of a Guideline: It represents the Commission’s “construction of a federal statute it administers.”¹⁹⁵ As such, it functions as a legislative rule.¹⁹⁶ Under this analogy, judicial deference would be governed by the two-part *Chevron* standard.¹⁹⁷ Though Justice Breyer applied the *Chevron* standard in his *LaBonte* dissent,¹⁹⁸ this approach is implausible.

Chevron deference is accorded only if the agency rule is procedurally valid.¹⁹⁹ A rule is procedurally valid only if it complies with the Administrative and Procedure Act’s “notice and comment” requirement,²⁰⁰ which allows interested persons to “communicate their concerns in a comprehensive and systematic fashion to the legislating agency.”²⁰¹ Since Congress subjects Guidelines to “notice and comment,” it follows that if the commentary added by Amendment 506 is to be treated as a Guideline, it must observe this requirement.²⁰² The Amendment did not observe this requirement, as commentary is exempt from “notice and comment.”²⁰³ Therefore, the commentary cannot

¹⁹⁴ See *Stinson*, 508 U.S. at 45.

¹⁹⁵ *Id.* at 44.

¹⁹⁶ *Id.*

¹⁹⁷ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1991); see *supra* note 53 for the two-part standard.

¹⁹⁸ *United States v. LaBonte*, 117 S. Ct. 1673, 1680 (1997) (Breyer, J., dissenting).

¹⁹⁹ *Hector v. United States Dep’t of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996) (noting that the “notice and comment” procedure is *mandatory* for legislative rules).

²⁰⁰ 5 U.S.C. §§ 553(b)-(c). “Notice and comment” requires a promulgating agency to give public notice of its proposed rulemaking and allow for public comment. *Id.* § 553(b). If the agency decides to promulgate the rule after receiving the comments, it must set forth the rule’s basis and purpose in a public statement. *Id.* § 553(c).

²⁰¹ *Hector*, 82 F.3d at 171.

²⁰² *Id.*

²⁰³ 28 U.S.C. § 994(x) (1994).

be treated analogously to a Guideline,²⁰⁴ and a court should not accord it *Chevron* deference.²⁰⁵

Viewed in isolation, allowing the Commission to implement Amendment 506 without this "procedural formality" seems innocuous "in a world in which life is short, resources are limited, and agencies must address complex issues that have unpredictable twists and turns."²⁰⁶ However, Amendment 506 cannot be viewed in isolation. Its validity must be assessed in light of its overarching effect.²⁰⁷ The Commission, while well-intentioned, consciously and deliberately decided to disregard statutory sentence enhancements in interpreting "at or near the maximum term authorized."²⁰⁸ As a consequence, a sentencing court is precluded from imposing the enhanced maximum penalty.²⁰⁹ This action renders the enhanced penalty provisions a "virtual nullity."²¹⁰

Furthermore, whether the Commission's stated justifications for disregarding the enhancement provisions are reasonable is entirely beside the point.²¹¹ What is important is the fact that the Commission effectively invalidated Congress' enhancement provisions without giving the public an opportunity to respond.²¹² As long as their actions can be considered plausible,²¹³ the Commission is accountable to no one. This is precisely the situation where public oversight is imperative if the Commission is to maintain any semblance of credibility.

D. LONG-TERM IMPLICATIONS OF *LABONTE*

The lasting impact of *LaBonte* may stem more from what the Court did not hold than from what it did. Because of the Court's failure to strike down the revised commentary on procedural grounds, the Court effectively endorsed the Commission's use of commentary to interpret federal statutes. As long

²⁰⁴ *Stinson v. United States*, 508 U.S. 36, 44 (1993).

²⁰⁵ *See Hootor*, 82 F.3d at 171.

²⁰⁶ *Manning*, *supra* note 189, at 616-17.

²⁰⁷ *Id.*

²⁰⁸ *See United States v. LaBonte*, 117 S. Ct. 1673, 1678 (1997).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See id.* at 1679. Justice Breyer focused on this issue in his analysis of Amendment 506.

²¹² *See supra* notes 200-01.

²¹³ *See Stinson v. United States*, 508 U.S. 36, 38 (1993).

as the federal statute is “ambiguous” and the Commission’s interpretation is “plausible,”²¹⁴ the Commission—or any agency for that matter—may issue this interpretation through commentary. Essentially, this means that the Commission can issue what amounts to Guidelines in substance, without complying with the “notice and comment” requirement or obtaining congressional approval.

This paves the way for the following scenario: The Commission may issue a vague and uncontroversial regulation that survives the six-month congressional review period and “notice and comment” for the very reason that it lacks controversy. After surviving the review period, the Commission then may give substantive and controversial meaning to the regulation through commentary. Absent a “plainly erroneous” reading of the guideline or violation of a statute, neither Congress nor courts nor the public can question the Commission’s policy choice.²¹⁵

Sound far-fetched? This is precisely what the Commission attempted in the Career Offender Guideline.²¹⁶ Had 28 U.S.C. § 994(h) been somewhat more ambiguous, it would have succeeded.

VI. CONCLUSION

In *United States v. LaBonte*, the Court concluded that Amendment 506 violates Congress’ specific directive to sentence repeat offenders “at or near the maximum term authorized.”²¹⁷ The opinion, while decided correctly, overlooked the important fact that commentary, no matter how reasonable, cannot be used to interpret a federal statute. As such, it left open the door for further abuses by agencies who seek to avoid accountability by implementing substantive “legislative rules” under the guise of “interpretive rules.” The Court should close this loophole it has implicitly created.

JEFFREY H. KNOX

²¹⁴ *Id.* at 44.

²¹⁵ *Id.* at 38.

²¹⁶ See USSG §§ 4B1.1-1.2.

²¹⁷ *United States v. LaBonte*, 117 S. Ct. 1673, 1679 (1997).