New Civil Liberties Alliance

February 19, 2019

VIA *Public_Comment@ussc.gov*

Honorable Charles R. Breyer, Commissioner
Honorable Danny C. Reeves, Commissioner
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs—Proposed Amendments

Re: Sentencing Guidelines for the Court; Proposed Amendment 2018-27505 Amending § 4B1.2

Dear Commissioner Breyer and Commissioner Reeves,

The New Civil Liberties Alliance (NCLA) submits the following comments in response to the United States Sentencing Commission's Proposed Amendment 2018-27505, Sentencing Guidelines for the Court, which was proposed on December 20, 2018. 83 Fed. Reg. 65400-01. More specifically, NCLA submits its comments concerning Proposed Amendment 2, Career Offender, (C), Inchoate Offenses, relating to § 4B1.2 of the Guidelines. *See id.* at 65412-13. NCLA sincerely appreciates this opportunity to comment and explain the constitutional need for the Commission to adopt the Proposed Amendment.

I. Introduction and Summary

NCLA applauds the Sentencing Commission's desire to rectify serious issues pertaining to the Guidelines. NCLA does not take a position regarding the appropriate definition of the terms "crime of violence" or "controlled substance offense" or whether a categorical approach should be utilized. *Id.* at 65401. Instead, NCLA agrees that the amendment correctly proposes to move the inchoate offenses provision from the Commentary to § 4B1.2 to the Guidelines themselves as a new subsection (c). *Id.* at 65413. NCLA writes to stress that this change is constitutionally required and therefore ought to be adopted by the Commission.

The hybrid nature of the Sentencing Commission implicates limits set by the Constitution, Congress, and the courts. As an administrative agency, the Commission has no lawmaking power under Article I of the Constitution. Thus, under the agency's specified authority, any expansion or amendment of the Guidelines must be approved by Congress. Furthermore, congressional oversight with a notice-and-comment period is necessary when adding offenses to the Guidelines to insure compliance with the Administrative Procedure Act (APA). Finally, the Commission has no judicial function, under Article III of the Constitution, and thus the Commentary may only interpret the Guidelines, not define them.

The Commission violates and ignores theses limits when attempting to add offenses by changing the Commentary instead by adding provisions to the congressionally-approved

Guidelines text. And, as Courts have recognized, the Commission effectively broadened the scope of the Guidelines text in Application Note 1 to § 4B1.2. Thus, if the Commission wishes to include inchoate offenses under § 4B1.2's reach, the Commission should propose to move the inchoate offenses provision from the Commentary to the Guidelines text and submit the amendment for congressional approval. The Commission must also ensure that all future amendments to the Guidelines are located within the Guidelines' text, not relegated to the Commentary.

II. NCLA's Statement of Interest

The New Civil Liberties Alliance is a nonprofit civil rights organization founded to defend constitutional rights through public-interest litigation, amicus curiae briefs, the filing of regulatory comments, and other means. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the due process of law, the right to trial by jury, the right to live under laws made by elected lawmakers rather than by prosecutors or bureaucrats, and the right to be tried in front of an impartial and independent judge whenever the government brings cases against private parties. Civil liberties are particularly threatened where, as here, administrative action threatens enhanced criminal punishment without lawful authority.

NCLA defends civil liberties by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution's design sought to prevent. This unconstitutional administrative state within the Constitution's United States violates more rights of more Americans than any other aspect of American law, and it is thus the focus of NCLA's efforts.

Even where NCLA has not yet brought suit to challenge an agency's unconstitutional exercise of administrative power, it encourages agencies themselves to curb their own unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance. NCLA therefore advises that all agencies and agency heads must examine whether their modes of rulemaking, enforcement, and adjudication comply with the APA and with the Constitution.

III. The Role of the Sentencing Commission

Congress created the Sentencing Commission in 1984 as an independent, hybrid agency not truly fitting within any of the three branches of government. *See* 28 U.S.C. § 991. While the agency is formally within the judicial branch, its job is not to exercise judicial power as defined by Article III of the Constitution; rather, it is within this branch for administrative purposes and to make policy judgments about criminality by promulgating the Guidelines. *Id.* Accordingly, the Sentencing Commission is not controlled by the judicial branch and, thus, maintains its independent nature.

The Constitution created a barrier to an exercise of legislative power by an agency. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress, and "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). Further, "an agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv.*

Comm'n v. F.C.C., 476 U.S. 355, 374 (1986). Thus, even if the Commission could constitutionally exercise legislative power, it cannot attempt to bind anyone without congressional approval.

Instead of conferring such power, Congress categorically prohibited the issuance of binding guidance by agencies. Congress passed the APA in 1946 in order "to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950), *modified,* 339 U.S. 908 (1950). Consequently, the APA set out a comprehensive set of rules governing administrative action. *See* 5 U.S.C. § 551(4).

The Supreme Court has outlined limitations on the power of the Sentencing Commission. In *Mistretta v. United States*, 488 U.S. 361 (1989), the Supreme Court explained that Congress limited the Sentencing Commission's power to promulgate the Guidelines, and the Commission violates the separation of powers doctrine when employing both judicial and legislative functions. *See id.* at 408. These limits are twofold: first, Congress must have a chance to review amendments to the Guidelines' text before they take effect. 28 U.S.C. § 994(a), (p); *Mistretta*, 488 U.S. at 393–94. And second, the Sentencing Commission must comply with the notice-and-comment requirements in the Administrative Procedure Act. 5 U.S.C § 553; 28 U.S.C. § 994(x); *Mistretta*, 488 U.S. at 394. Without these limits, the Sentencing Commission would enjoy "the power of judging joined with the legislative," *Mistretta*, 488 U.S. at 394 (quoting The Federalist No. 47, at 326 (James Madison) (J. Cooke ed., 1961)), and would possess a great deal more legislative power than envisioned, *See United States v. Havis*, 907 F.3d 439, 443 (6th Cir. 2018). Thus, adherence to the limits set out in *Mistretta* ensures the constitutionality of the Sentencing Commission.

IV. The Proposed Amendment Fixes a Constitutional Defect in the Commentary

NCLA appreciates the Commission's efforts to remedy its unconstitutional Commentary of the past by proposing to move the inchoate offenses provision from the Commentary to § 4B1.2 to the Guidelines themselves as a new subsection (c). 83 Fed. Reg. at 65413. If the Commission wishes for inchoate offenses to be included as a basis for sentencing enhancement, then it must submit the provision for congressional approval.

A. Commentary that Bypasses Congressional Review or Notice-and-Comment Procedures Violates Article I of the Constitution

The Supreme Court in *United States v. Booker*, 543 U.S. 220, 245 (2005), ruled the Guidelines are advisory; however, because the Guidelines represent the starting point for all federal sentencing decisions, allowing the Sentencing Commission to add definitions via Commentary still violates Article I. And while the Commission's own written policy states that the Commission should "include amendments to policy statements and commentary in any submission of guideline amendments to Congress," U.S. Sentencing Comm'n, Rules of Practice and Procedure, Rule 4.1 (2016), the Commentary still does not go through a formal congressional review or the notice and comment procedures that the text of the Guidelines must withstand. *See Stinson v. United States*, 508 U.S. 36, 40–41 (1993); *see also United States v. Rollins*, 836 F.3d 737, 742–43 (7th Cir. 2016) (en banc). Accordingly, the Commentary does not carry the force of congressional approval that the Guidelines' text carries.

A recent decision from the D.C. Circuit Court of Appeals admonished the Commission for its inappropriate use of the Commentary to expand the actual text of the Guidelines. In *United States v.*

Winstead, 890 F.3d 1082, 1092 (D.C. Cir. 2018), the court held that the Sentencing Commission was without power to add attempts of controlled substance offenses to § 4B1.2 via Commentary. The court noted that § 4B1.2 includes a detailed "definition" of controlled substance offenses that excludes inchoate offenses, thereby showing that the Commission can include the desired definition when intended. *Id.* at 1091.

While the D.C. Circuit Court of Appeals is the first court to reprimand the Commission for its introduction of amendments via Commentary, other courts have criticized the practice. *See Havis*, 907 F.3d 439 (supporting the argument that the Commission violates the separation of powers doctrine when adding offenses to the Commentary that bypass congressional review and notice and comment procedures). Thus, the inchoate offenses, and any future amendments to the Guidelines must be placed into the Guidelines themselves, not in the Commentary.

B. Using Commentary to Amend, Instead of Interpret, the Guidelines Violates Article III of the Constitution

The distinction between interpretation and expansion of the Guidelines by the Commentary is essential to understanding the Article III limits placed on the Commission. The Sentencing Commission Guidelines provide that Commentary may act to "interpret [a] guideline or explain how it is to be applied," "suggest circumstances which ... may warrant departure from the guidelines," or "provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline." U.S. Sentencing Guidelines Manual § 1B1.7 (U.S. Sentencing Comm'n 2004). In addition to these limits, the Supreme Court in *Stinson v. United States*, 508 U.S. 36, 42-43, 47 (1993), held that the Commission may only use Commentary to interpret the standing text. Allowing the Commission to interpret the Guidelines by adding to the Commentary directly violates Article III of the Constitution. *See Havis*, 907 F.3d at 450 (using an analogy to explain that if one interprets "a menu of 'hot dogs, hamburgers, and bratwursts' to include pizza, it is nonsense.")

Also, unlike an agency's legislative rule, Commentary does not originate from delegated authority for rulemaking, which must accord with the clear meaning of a statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n.9 (1984). Instead, Commentary explains and provides concrete guidance as to how even unambiguous Guidelines are to be applied in practice. *Stinson*, 508 U.S. at 44. Thus, any expansion of offenses to the Guidelines via Commentary rather than through an amendment circumvents the intended limits and purposes of the Commentary and moves beyond interpretation. *Winstead*, 890 F.3d at 1090-91.

But the constitutional problem is magnified by judicial deference to the Commentary. The Supreme Court instructed courts to defer to the Commission's Commentary when interpreting the text of the Guidelines; however, this continued deference raises constitutional concerns that the Supreme Court has never considered. *See Stinson*, 508 U.S. at 36 (instructing federal courts to treat the Sentencing Commission's Commentary as "authoritative," without ever considering or discussing the constitutional problems that arise from a mandatory deference regime of this sort). [1] Under Stinson, Article III judges must abandon their duty of independent judgment by deferring to the Commission. Such deference enables the Commission

[1] Deferring to the Sentencing Commission's interpretation of the Guidelines originates from the principle that courts should defer to agencies' interpretations of their own regulations. *Stinson*, 508 U.S. at 45 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *see Auer v. Robbins*, 519 U.S. 452, 461 (1997). Yet, when Commentary expands, instead of interprets, the text, *Auer* does not mandate deference.

to make substantive criminal rules through binding "interpretive" Commentary. So, when the Commentary is misused by disregarding the "interpretative" limitation, the Commission can unconstitutionally violate Article III by saying what the law is and avoiding the judiciary's ability to check the Commission's exercise of power.

When Drafters and then a congressional review exclude a specific definition in the standing text of legislation, the Commission cannot add to the text via Commentary. The Supreme Court clearly explained that "a definition which declares what a term 'means' ... excludes any meaning that is not stated" within a statute. *Stinson*, 508 U.S. at 1091 (quoting *Burgess v. United States*, 553 U.S. 122, 130 (2008). Hence, it is crucial that the Guidelines' text and Commentary remain "in their respective lanes." *Havis*, 907 F.3d at 443.

Additionally, the First, Fourth, Seventh, Eighth, and D.C. Circuits recognize that the Commentary has no definitional power on its own. *See United States v. Soto-Rivera*, 811 F.3d 53, 58-62 (1st Cir. 2016); *United States v. Shell*, 789 F.3d 335, 345 (4th Cir. 2015); *Rollins*, 836 F.3d at 742); *United States v. Bell*, 840 F.3d 963, 967 (8th Cir. 2016); *Winstead*, 890 F.3d at 1082. Therefore, the Commentary cannot expand the Guidelines even if the Commentary passes congressional review and goes through notice and comment procedures.

It is vital that the United States Sentencing Commission end the expansion, through Commentary, of the provisions of the Guidelines. This practice clashes with the separation of powers principles that the Commission should be upholding. The D.C. Circuit Court of Appeals held that expanding the class of crimes via Commentary clashes with separation of powers principles. The Commission can avoid future constitutional problems and additional adverse circuit court rulings by placing the inchoate offenses, and all similar changes in the future, within the Guidelines text as proposed.

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Thank you again for the opportunity to provide NCLA's perspective on this important issue. If you have any questions, comments or concerns, please feel free to contact Caleb Kruckenberg, Litigation Counsel, at caleb.kruckenberg@ncla.legal.

Respectfully submitted,

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