New Civil Liberties Alliance

October 17, 2022

VIA REGULATIONS.GOV

United States Sentencing Commission
One Columbus Circle, Northeast
Suite 2-500
Washington, DC 20002
Attention: Public Affairs—Priorities Comment

Re: *Proposed 2022-2023 Priorities for Amendment Cycle*

Dear Ms. Dukes:

The New Civil Liberties Alliance (NCLA) submits the following comments in response to the U.S. Sentencing Commission's *Proposed 2022-2023 Priorities*.

NCLA sincerely appreciates this opportunity to comment on the Proposed Priorities, especially as to paragraph 10: "Multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of the guideline commentary." As NCLA has argued numerous times in amicus curiae briefs and a petition for writ of certiorari, our organization is disturbed by the widespread practice of extending judicial "deference" to the United States Sentencing Commission's Commentary ("Commentary") on the U.S. Sentencing Guidelines ("Guidelines").

This deference regime, which originated with *Stinson v. U.S.*, 508 U.S. 36 (1993), raises grave constitutional concerns, because it forces Article III judges to abandon their duty of independent judgment by deferring to others' views when it comes to interpreting criminal laws—here, in the sentencing context. Indeed, the Supreme Court recognized as much in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), when it substantially limited deference to genuinely ambiguous rules and regulations. In following *Kisor*, many federal courts are moving away from exercising *Stinson* deference—as they should. But others have failed to do so and as a result, the circuits are fractured, leading to unjust sentencing disparities: a defendant's sentence can vary drastically simply because of the jurisdiction in which he was prosecuted.

NCLA encourages the Sentencing Commission to take this opportunity to resolve these issues by underscoring that federal judges are never obliged to defer to the Commentary when doing so would result in a harsher sentence.

## I. Statement of Interest

NCLA is a nonpartisan, nonprofit civil rights organization founded for the purpose of protecting constitutional freedoms from violations by the administrative state. NCLA's original

litigation, amicus curiae briefs, regulatory comments, and other means of advocacy strive to tame agencies' exercise of unlawful power.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to be tried in front of impartial judges who provide their independent judgments on the meaning of the law. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and even courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

## II. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court Eschewed Exercise of *Stinson* Deference that Results in Heightened Criminal Sentences

In *Stinson*, the Supreme Court extended *Bowles v. Seminole Rock*, 325 U.S. 410 (1945), deference to the U.S. Sentencing Commission's Commentary interpreting the U.S. Sentencing Guidelines and requiring courts to defer unless the Commentary "run[s] afoul of the Constitution or a federal statute" or is "plainly erroneous or inconsistent" with the Guidelines. 508 U.S. 36, 47 (quoting *Seminole Rock*, 325 U.S. at 414). Decisions like *Stinson* "[we]re legion" for 60 years, as courts applied *Seminole Rock* deference (eventually known as *Auer* deference) in various circumstances, often without considering whether the challenged regulation was ambiguous. *See Kisor*, 139 S. Ct. at 2414 & n.3.

Every Justice in *Kisor* agreed that the Court needed to "reinforce" and "further develop" the limitations on the deference that courts owe to an agency's interpretation of its own rules. 139 S. Ct. at 2408, 2415; *id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Gorsuch, J., concurring in judgment); *id.* at 2448-49 (Kavanaugh, J., concurring in judgment). The Court "cabined *Auer*'s scope in varied and critical ways" to "maintain[] a strong judicial role in interpreting rules." *Id.* at 2418. Following *Kisor*, courts may defer to an agency's interpretation of its own regulation *only* after (1) exhausting their interpretive toolkit and concluding the text is "genuinely ambiguous"; (2) determining that the agency interpretation is "reasonable"; and (3) conducting an "independent inquiry" confirming that "the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2415-16.

*Kisor*'s refinement to the *Seminole Rock*/*Auer* framework requires courts to "turn to the 'traditional tools' of statutory construction to determine if [a Guideline] is 'genuinely ambiguous'" *before* deferring to Commission Commentary. *U.S. v. Campbell*, 22 F.4th 438, 445 (4th Cir. 2022); *see also U.S. v. Nasir*, 17 F.4th 459, 469-72 (3d Cir. 2021) (*en banc*); *U.S. v. Riccardi*, 989 F.3d 476, 484-86 (6th Cir. 2021). As *Campbell* recognizes, the concerns that *Kisor* identified "are even more acute in the context of the Sentencing Guidelines, where individual liberty is at stake." 22 F.4th at 446.

The Commission and its Guidelines are constitutional only because: (1) the Commission promulgates them and any amendments thereto through notice-and-comment rulemaking; and (2) Congress reviews every Guideline before it takes effect. *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989). By contrast, the Sentencing Reform Act permits Commission Commentary by implication only, and it is not subject to congressional review or notice and comment. *See Stinson*, 508 U.S. at 41. Some courts that have

continued to find *Kisor* inapplicable to the Guidelines Commentary downplay these legal distinctions based on Commission assurances that its "practice" is to "generally" put Commentary through "the notice-and-comment and congressional-submission procedure." *U.S. v. Moses*, 23 F.4th 347, 355 (4th Cir. 2022).[1] But neither the Commission's intentions nor its procedures elevate Commentary to Guidelines status as a matter of law. The Fourth Circuit recognized as much in *Campbell*, warning that "the Commission acts unilaterally" when it issues Commentary, "without that continuing congressional role so vital to the Sentencing Guidelines' constitutionality." 22 F.4th at 446. Hence, holdings that increase the scope of the Guidelines "would [impermissibly] 'allow circumvention of the checks Congress put on the Sentencing Commission[.]'" *Id.* (citation omitted). Continued reliance on *Stinson* deference without consideration of *Kisor*'s refinements undermines the judiciary's crucial constitutional role in criminal sentencing, and doing so will inevitably and unlawfully deprive countless criminal defendants of their liberty.

## III. Increasing Criminal Sentences Based on Deference Is Unconstitutional

Criminal sentences that are levied using deference violate the Constitution. *See Stinson*, 508 U.S. at 47 (deference to Commentary should not be exercised when doing so would "run afoul of the Constitution"). The rule of lenity, principles of due process, and the independence of the judicial office all require courts to interpret the Guidelines for themselves, without deference to the Commission's interpretation. The Sentencing Commission should clarify that it does not advocate for judges to abandon their obligation to act within the bounds of the United States Constitution; therefore; judges should not defer to the Commentary when doing so would violate the rule of lenity and principles of due process.

### A. Deference Resulting in a Harsher Sentence Violates the Rule of Lenity

"[W]hen liberty is at stake," deference "has no role to play." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari). As six Third Circuit judges recognized, "[p]enal laws pose the most severe threats to life and liberty, as the Government seeks to brand people as criminals and lock them away." *Nasir*, 17 F.4th at 473 (Bibas, J., concurring). The rule of lenity dictates that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. U.S.*, 561 U.S. 358, 410 (2010). This concept is not new; few interpretive tools boast lenity's pedigree. *See U.S. v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also Bray v. Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) ("a penal law [] must be construed strictly"). Lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. U.S.*, 447 U.S. 381, 387 (1980). It requires courts to resolve ambiguous Guidelines—which "exert a law-like gravitational pull on sentences"—in a defendant's favor. *Nasir*, 17 F.4th at 474.

*Any* increase in criminal sentencing must comport with due process. "[I]t is crucial that judges give careful consideration to *every minute* that is added to a defendant's sentence." *U.S. v. Faison*, 2020 WL 815699, *1 (D. Md. Feb, 18, 2020). "The critical point is that criminal laws are for courts, not for

[1] *Moses* was a split decision issued 15 days after *Campbell*. *See Moses*, 23 F.4th at 359 (King, J., dissenting in part and concurring in the judgment). The defendant in *Moses* filed a petition for *certiorari* on May 6, 2022. On September 20, 2022, the Supreme Court requested that the government respond to the petition. *See Moses v. U.S.*, No. 22-163 (filed May 6, 2022).

the Government, to construe." *Abramski v. U.S.*, 573 U.S. 169, 191 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

Three "core values of the Republic" compel the rule of lenity: (1) due process; (2) the separation of governmental powers; and (3) "our nation's strong preference for liberty." *Nasir*, 17 F.4th at 473 (Bibas, J.). By construing ambiguities in the defendant's favor, lenity precludes criminal punishment without a fair warning through clear statutory language. *See McBoyle v. U.S.*, 283 U.S. 25, 27 (1931) (due process requires the law to draw as clear a line as possible). Lenity also preserves the separation of powers: the legislature criminalizes conduct and sets statutory penalties; the executive prosecutes crimes and can recommend a sentence, while the judiciary imposes sentences within the applicable statutory framework. *U.S. v. Bass*, 404 U.S. 336, 348 (1971). The rule "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. U.S.*, 471 U.S. 419, 427 (1985). Finally, and "perhaps most importantly," "'lenity expresses our instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Nasir*, 17 F.4th at 473 (Bibas, J.) (citation omitted).

### B. Deference to Commentary of Unambiguous Guidelines Violates Judicial Independence and Due Process

The judicial office includes a duty of independent judgment. *See* James Iredell, To the Public, *N.C. Gazette* (Aug. 17, 1786) (describing the duty of judges as "[t]he duty of the power"). Through the independent judicial office, the Founders ensured that judges would not administer justice based on someone else's interpretation of the law. *See* 2 Records of the Federal Convention of 1787, 79 (Nathaniel Gorham); The Federalist No. 78 (Alexander Hamilton) ("The interpretation of laws is the proper and peculiar province of the courts."). The opinions of the founding era's finest jurists recognized this obligation of independence. *See, e.g.*, *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 415, 416 (1793) (Iredell, J., dissenting); *The Julia*, 14 F. Cas. 27, 33 (C.C.D. Mass. 1813) (Story, J.); *U.S. v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (Marshall, J.).

The principle of judicial independence is so axiomatic that it seldom appears in legal argument; the mere suggestion that a judge might breach the duty of independent judgment is scandalous. But that is exactly what applying deference under *Stinson* requires: judicial dependence on a non-judicial entity's interpretation of the law.[2]

Continued exercise of *Stinson* deference to Guidelines Commentary—when such deference results in a higher sentence—requires judges to abdicate the duty of their office by forgoing their independent judgment in favor of an agency's legal interpretation. *See Perez v. Mortgage Bankers Ass'n*, 572 U.S. 92, 110 (2015) (Scalia, J., concurring in judgment) (deference requires courts "to 'decide' that the text means what *the agency* says")(emphasis added). This practice diminishes the judicial office and with it, a key structural safeguard the Framers erected against tyranny. *Cf. Miller v. Johnson*, 515 U.S. 900, 922-23 (1995) (holding that deferring to an agency's statutory interpretation impermissibly "surrender[s] to the Executive Branch [the Court's] role in enforcing the constitutional limits [at issue]"). This is especially true when "a sentence enhancement potentially translates to additional years or decades in federal prison" as "we cannot forget that '[t]he structural principles secured by the separation of powers protect the individual as well.'" *Campbell*, 22 F.4th at 446-47 (quoting *Bond v.*

[2] Judges serving on the Commission are not acting as judges but as part-time Commissioners. *See Havis*, 907 F.3d at 451 (Thapar, J.).

*U.S.*, 564 U.S. 211, 222 (2011)). "In such circumstances, 'a court has no business deferring to any other reading, no matter how much the [Government] insists it would make more sense.'" *Id.* (quoting *Kisor*, 139 S. Ct. at 2415).

### C. Deference Violates Due Process by Institutionalizing Judicial Bias

Reflexive deference jeopardizes judicial impartiality. *Com. Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (judicial bodies "must avoid even the appearance of bias"); *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Kagan, J., concurring) (the Constitution forbids proceedings "infected by … bias"). Judicial bias need not exist at a personal level to violate due process. Such bias can also be institutional. Indeed, institutionalized judicial bias is more pervasive, as it systematically infects the fairness of the legal system as a whole rather than just an individual party before a particular judge. Most judges recognize that personal bias requires recusal. Likewise, it should be axiomatic that recusal is warranted when deference regimes require judges to favor one party's legal position—the government's.[3] *See In re Murchison*, 349 U.S. 133, 136 (1955) (reasoning that the "stringent" due-process requirement of impartiality may require recusal by "judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties").

Reliance on *Stinson* institutionalizes bias by continuing to "defer" to the government's legal interpretation in violation of a defendant's right to due process. *Cf.* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). Under such deference regimes, a judge cannot simply find the defendant's reading of the law more plausible or think the government's reading is wrong—the government must be *plainly* wrong. In short, instead of exercising their own judgment about the law, judges are required, under *Stinson*, to defer to the judgment of the government litigant, so long as the Commentary "is not plainly erroneous or inconsistent with" the Guidelines. *Stinson*, 508 U.S. at 47 (cleaned up). No rationale can defend a practice that thus weights the scales in favor of the most powerful of parties—a *government* litigant——and commands systematic bias in favor of the government's preferred interpretations of the Guidelines. Thus, doctrines like *Stinson* deference deny due process to criminal defendants by favoring the government prosecutor's position. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

### D. The Circuits Are Split on this Issue, Resulting in Unjust Sentencing Disparities

With each passing Term, district courts will apply the Guidelines to about 75,000 more criminal defendants. *See* U.S. Sentencing Comm'n, *Sentences Under the Guidelines Manual & Variances Over Time: Fiscal Years 2010-2019*.

Lower-court judges are divided about whether *Kisor* limited *Stinson* and how rigorously judges must analyze the Guidelines' text before deferring to Commentary. Such a disparity in how judges interpret text would be unacceptable for any federal rules that require uniformity, but it is singularly inexcusable in the case of criminal sentencing, when liberty is at stake. The very purpose of the Guidelines is to promote uniformity in sentencing. And the Constitution requires that judges interpret those Guidelines independently.

---

[3] If precedent compels deference, a judge could also issue a *dubitante* opinion. *Cf. Am. Inst. for Int'l Steel, Inc. v. U.S.*, 376 F. Supp. 3d 1335, 1345 (Ct. Int'l Trade 2019) (Katzmann, J., *dubitante*) (collecting *dubitante* opinions).

The unanimity with which circuits applied *Stinson* began to fracture when the D.C. Circuit consciously split with its sister circuits and refused to defer to Application Note 1 in *United States v. Winstead*, 890 F.3d 1082, 1090-91 (D.C. Cir. 2018). The court in *Winstead* applied the statutory canon *expressio unius est exclusio alterius* to determine that "Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses." *Id.* at 1091.

The Sixth Circuit then sat *en banc* to reconsider *Stinson*'s application to the Career Offender Guideline precedent after a three-judge panel in *Havis v. United States* produced four separate opinions on the issue. 907 F.3d 439, 459 (6th Cir. 2018); *id.* at 448 (Stranch, J., concurring); *id.* at 450 (Thapar, J., concurring); *id.* at 452 (Daughtrey, J., dissenting). In a concise *per curiam* opinion, the unanimous Sixth Circuit ruled that "[t]he Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference." *Havis*, 927 F.3d 382, 387 (6th Cir. 2019) (*en banc*). The *en banc* court underlined the fact that "commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment." *Id.* at 386. Given the separation-of-powers issues that deference would create, the Sixth Circuit concluded that the career-offender enhancement did not apply to inchoate crimes because Commentary may not "replace or modify" the Guidelines. *Ibid.*

After *Kisor*, every other circuit should have followed suit. The Third Circuit recognized as much and convened *en banc* on its own initiative to reconsider its pre-*Kisor* deference to Application Note 1. *Nasir*, *Sua Sponte* Order, No. 18-2888 (3d Cir. Mar. 4, 2020). The full Third Circuit (plus two senior circuit judges) then ruled unanimously that "the plain language of the guidelines does not include inchoate crimes[.]" *Nasir*, 2020 WL 7041357, at *6; *id.* at *33 (Porter, J., concurring in part). The court explained that its former precedent likely went "too far" based on the "then-prevailing understanding of the deference that should be given to agency interpretations of their own regulations." *Id.* at *8. Then, *Kisor* made clear that the Third Circuit's prior deference to Application Note 1 was not justified. *Ibid.* As the court explained: "In *Kisor*, the Court cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations and explained that *Auer*, or *Seminole Rock*, deference should only be applied when a regulation is genuinely ambiguous." *Ibid.* "In light of *Kisor*'s limitations on deference to administrative agencies," the Third Circuit reversed its prior precedent and "conclude[d] that inchoate crimes are not included in the definition of 'controlled substance offenses' given in section 4B1.2(b) of the sentencing guidelines." *Id.* at *9.

Yet other circuits have expressly declined to revisit their pre-*Kisor* circuit precedent that applies *Stinson* deference reflexively to Commission Commentary. *See, e.g., United States v. Vargas*, 35 F.4th 936, 940 (5th Cir. 2022), *vacated by* 35 F.4th 936 (5th Cir. 2022) (granting rehearing *en banc*); *United States v. Cingari*, 952 F.3d 1301, 1308 (11th Cir. 2020) (doubting whether lenity applies to the interpretative Commentary to the Guidelines); *United States v. Crum*, 934 F.3d 963 (9th Cir. 2019) (searching beyond Guidelines' text to add crimes to the Career Offender Guideline, suggesting an anti-lenity approach); (*United States v. Mendoza-Figueroa*, 65 F.3d 691, 692 (8th Cir. 1995) (*en banc*) (deferring to Commission's Commentary over a dissent that advocated lenity).

Congress created the Guidelines to promote national uniformity in the way judges calculate criminal sentences. The courts of appeals, however, cannot agree on how to interpret the Guidelines—or whether judges must cede their interpretive authority to the Sentencing Commission.

The courts are at an impasse. Of course, NCLA believes that those circuits that have refused to continue exercising *Stinson* deference are in the right. In the absence of a Supreme Court decision addressing the issue, a clear statement from the Sentencing Commission that *Stinson* deference is inappropriate in this context would assist in resolving this fundamental disagreement, and would ensure that defendants are not

subject to harsher sentences simply because they were prosecuted in an unfavorable jurisdiction—*e.g.*, one that happened to have decided the *Stinson* deference question *en banc* before *Kisor* was handed down. It would also further Congress's aim of achieving uniformity in sentencing, the original goal of the Guidelines themselves.

## IV. Conclusions

In sum, NCLA is gratified that the Commission is considering this issue. For all of the reasons set out above, we urge the Sentencing Commission to state expressly that (i) *Stinson* deference does not apply when it would operate to increase a criminal defendant's sentence, and; (ii) the Constitution requires courts to exercise their own independent judgment when interpreting criminal laws.

Very truly yours,

/s/ Jenin Younes
Litigation Counsel

/s/ Mark Chenoweth
President and General Counsel
NEW CIVIL LIBERTIES ALLIANCE