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NCLA Asks Second Circuit Court of Appeals to Rehear Case Over Deference to Sentencing Guidelines Commentary

U.S. v. Zimmian Tabb

Washington, DC (May 6, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group filed an [amicus brief](#) yesterday in *U.S. v. Zimmian Tabb*, urging the U.S. Court of Appeals for the Second Circuit to abandon “*Stinson* Deference.” This judicial deference doctrine requires federal judges to defer to commentary the United States Sentencing Commission (U.S.S.C.) has written interpreting the U.S. Sentencing Guidelines (U.S.S.G.). A growing list of circuits are re-examining the unconstitutional application of deference to the U.S.S.C.’s commentary in imposing criminal sentences.

A 1993 Supreme Court decision, *Stinson v. United States*, commands federal judges to abandon their duty of independent judgment in violation of Article III and the judicial oath, and to assign weight to a non-judicial entity’s interpretation of the law when imposing criminal sentences. It also raises serious due-process concerns when it requires courts to display bias in favor of the government and against a defendant. Due process is usually thought to require lenity in the interpretation of criminal statutes, to ensure that criminal offenses are very well defined.

A three-judge panel for the Second Circuit in *Tabb* deferred to the U.S.S.C.’s commentary and increased the length of Mr. Tabb’s prison sentence. In cases like this, *Stinson* deference unjustly forces real people to spend more time in prison. NCLA is asking the full court to rehear the case *en banc* and overturn its use of *Stinson* deference.

Where the circuits were once unified in reflexively granting such deference, two circuits have now rethought that approach—the DC Circuit in *United States v. Winstead* (2018) and the Sixth Circuit in [United States v. Havis](#). NCLA filed an amicus brief in *Havis*. More recently, the Third Circuit in [U.S. v. Nasir](#) decided to grant *en banc* review of its precedent to re-examine whether “it remains appropriate to defer to the U.S. Sentencing Commission’s commentary.” NCLA told that court deference is not appropriate.

As this trend illustrates, the very idea of an Article III court “deferring” to mere commentary of the Sentencing Commission presents grave constitutional concerns, and none of these concerns has been considered or discussed in the Supreme Court rulings that established this type of deference. *Stinson* itself involved commentary that worked in the defendant’s favor, so the constitutional issues did not surface.

NCLA released the following statements:

“The major problem with *Stinson*—and reflexive deference to the Sentencing Commission—may, ironically, be the way out. In a rush to accept the Sentencing Commission’s legal interpretations, the *Stinson* progeny of cases failed to consider the 500-year-old rule of lenity. The Second Circuit now has an opportunity to rule that lenity takes priority over agency deference.” —**Jared McClain, Staff Counsel, NCLA**

“While judicial abdication of independence under deference regimes always violates due process, *Stinson* demands this violation in *criminal* proceedings. Over 500 years of law requires judges to interpret any ambiguity in criminal laws in favor of leniency. The Second Circuit would do well to join its sister circuits in rethinking its approach and reclaiming judicial independence.”

—**Kara Rollins, Litigation Counsel, NCLA**

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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