
RESPONSE

HOW THE U.S. SENTENCING COMMISSION CONSIDERS RETROACTIVITY

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In response to Leah M. Litman & Luke C. Beasley, *How the Sentencing Commission Does and Does Not Matter in Beckles v. United States*, 165 U. PA. L. REV. ONLINE 33 (2016), <http://www.pennlawreview.com/online/165-U-Pa-L-Rev-Online-33.pdf>.

INTRODUCTION

In a recent Essay, Professor Litman and Mr. Beasley provide a detailed discussion of how they believe the U.S. Sentencing Commission's data and recent actions relating to the career offender Guideline do and do not matter to the Supreme Court's consideration of the issues set forth in *Beckles v. United States*.¹ First, in support of retroactive application, the authors argue that lower court decisions invalidating the Guideline's residual clause have "uniformly" resulted in "less severe sentences."² Second, the authors contend that the Supreme Court should give little weight to the Commission's decision not to make retroactive its removal of the "residual clause" from the

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¹ 136 S. Ct. 2510 (2016) (mem.). While there are several complex legal questions raised in *Beckles*, the main issue before the Court is whether the guideline's "residual clause" was unconstitutionally vague. *See id.* Prior to Court's granting certiorari, the Commission promulgated an amendment eliminating the residual clause in the career offender Guideline definition of "crime of violence." U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 798 (U.S. SENTENCING COMM'N 2016).

² Leah M. Litman & Luke Beasley, *How the Sentencing Commission Does and Does Not Matter in Beckles v. United States*, 165 U. PA. L. REV. ONLINE 33, 38 (2016), <http://www.pennlawreview.com/online/165-U-Pa-L-Rev-Online-33.pdf>.

career offender Guideline.³ The authors support this contention with their misconception that the “Sentencing Commission opted not to investigate the possibility of making its amendment retroactive at all”⁴

This Response does not wade into the legal issues raised in the various briefs in *Beckles*, or respond to the authors’ arguments regarding the import of a small number of resentencings;⁵ it instead seeks to provide greater clarity on the Commission’s process for deciding whether to make amendment guidelines retroactive.

I. THE COMMISSION’S RETROACTIVITY ANALYSIS

Let me begin with those points where the Commission and the authors agree. First, the Commission has the authority to make retroactive any amendment to the guidelines that has the potential to reduce the applicable sentencing guideline range.⁶ In fact, in such instances, the Commission’s organic statute requires it to “specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”⁷ Congress constrained the courts’ ability to grant sentence reductions for retroactive guideline amendments by requiring that such reductions be “consistent with applicable policy statements issued by the Sentencing Commission.”⁸ The Supreme Court has upheld the Commission’s authority to make amendments retroactive as one part of the guidelines that

³ *See id.* at 43-46.

⁴ *Id.* at 44; *see also id.* at 36 (“But here, the Sentencing Commission matters little because the Commission never even investigated the extent of any possible burden on the federal courts.”). The authors may have drawn this conclusion, in part, from the absence of a Commission motion to instruct staff to prepare a retroactivity analysis. *See* U.S. SENTENCING COMM’N, PUBLIC MEETING MINUTES 6 (Jan. 8, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/meeting_minutes.pdf [<https://perma.cc/RQL3-RLA5>] [hereinafter Jan. 8, 2016 MINUTES].

⁵ The author notes, however, that the Commission would advise caution in relying on Professor Litman and Mr. Beasley’s analysis of sentencing data stemming from eight isolated cases. As discussed later, the invalidation of the “residual clause” in each of these cases resulted in the offenders no longer being designated as “career offenders.” It is therefore not surprising that sentences decreased given the mandate that career offenders be sentenced at or near the applicable statutory maximum. 28 U.S.C. § 994(h) (2012). By focusing on such a limited set of cases, the authors do not consider that invalidation of the “residual clause” will not always result in elimination of the career offender designation or lower sentences. *See, e.g.,* *United States v. Frazier*, 621 F. App’x 166, 168-69 (4th Cir. 2015) (explaining that even assuming the guidelines residual clause was unconstitutionally vague, the district court’s application of residual clause did not affect the defendant’s substantial rights because the district court rejected the defendant’s request for a downward variance and instead chose to vary upward to the statutory maximum).

⁶ 28 U.S.C. § 994(u) (2012).

⁷ *Id.*

⁸ 18 U.S.C. § 3582(c)(2) (2012).

remains mandatory by statute.⁹ The Commission exercises this authority sparingly, having done so only twenty-nine times since the guidelines were first promulgated in 1987.¹⁰

Second, although *Beckles* raises separate policy questions, the authors are correct that the Supreme Court has previously considered “the effect on the criminal justice system” in analyzing whether to apply a rule retroactively.¹¹ Thus, as the authors point out, it could be informative to the Court “[i]f the Sentencing Commission thought it burdensome to retroactively apply a rule invalidating the Guideline’s residual clause”¹²

So, why then do the authors suggest that the Commission’s decision to not apply the amendment to the guideline’s “residual clause” matters so little in this instance? They suggest that little deference is due because “the Commission never even investigated the extent of any possible burden on the federal courts.”¹³ This assertion is incorrect. I take this opportunity to explain the Commission’s procedures in deciding whether to make an amendment retroactive.

At the Commission’s public meeting in January, 2016, following the vote promulgating the changes to the career offender Guideline, I advised the Commission that the amendment may have the effect of reducing the term of imprisonment recommended in the guidelines for career offenders and, therefore, that the Commission has the statutory authority under 28 U.S.C. § 994(u) to make the amendment retroactive.¹⁴ I then inquired as to whether there was a motion to instruct staff to prepare a retroactivity impact analysis for the amendment.¹⁵ No such motion was made.¹⁶ The lack of such a request does not, however, tell the whole story of the Commission’s consideration of retroactive application, either generally or in this particular instance. In fact, the procedure followed at the January meeting was designed to signal to the criminal justice community that the Commission had considered and rejected retroactivity for the career offender amendment.¹⁷ It is ironic that a practice

⁹ See *Dillon v. United States*, 560 U.S. 817, 828-30 (2010) (finding the Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), inapplicable to §3582(c)(2) proceedings, and therefore noting that *Booker* does not require treating USSG §1B1.10(b) as advisory).

¹⁰ See U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(d) (U.S. SENTENCING COMM’N 2016) (listing amendments that apply retroactively).

¹¹ Litman & Beasley, *supra* note 2, at 43.

¹² *Id.* at 36.

¹³ *Id.*; see also *id.* at 44 (arguing that “the Sentencing Commission opted not to investigate the possibility of making its amendment retroactive at all”).

¹⁴ Jan. 8, 2016 MINUTES, *supra* note 4, at 6.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The same procedure was used at the April 9, 2015 meeting when several promulgated amendments had “the effect of lowering the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses.” U.S. SENTENCING COMM’N, PUBLIC

recently adopted by the Commission to provide greater transparency about its retroactivity decisions gives rise to a claim that the Commission failed to meaningfully consider retroactivity.

As a preliminary matter, a retroactivity impact analysis is just that—a study of how many offenders would be impacted and the potential effect on the prison population.¹⁸ An impact study is not, in and of itself, a study of the propriety of retroactivity of any given amendment. Instead, the Commission considers a number of factors when deciding whether an amendment should apply retroactively—including the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range.¹⁹

At the January meeting, the Chair of the U.S. Sentencing Commission, the Honorable Patti Saris, discussed each of these factors and provided a brief explanation regarding the Commission's decision.²⁰ Chair Saris explained that the purpose of the amendment is to address complexity and litigation associated with the crime of violence definition in the career offender guideline.²¹ Although not germane to the matters raised by the authors, the purpose of the amendment plays an important role in the Commission's retroactivity decisions. The Commission rarely gives retroactive effect to amendments designed to reduce complexity in guideline application—a central concern behind the career offender amendment.

While recognizing that an amendment to the career offender Guideline could lead to significant changes in the applicable guideline ranges for individual defendants, Chair Saris observed that it would be extremely difficult to identify those offenders who might be impacted by such a change.²² First, the sentencing documentation does not consistently report, and data available to the Commission does not include, information regarding

MEETING MINUTES 17 (Apr. 9, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150409/meeting-minutes.pdf> [https://perma.cc/NA53-F6PN].

18 For an example of such an analysis, see Memorandum from the Office of Research & Data, U.S. Sentencing Comm'n, to Chair Patti Saris (May 27, 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf [https://perma.cc/3NP5-ECNY].

19 U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. background (U.S. SENTENCING COMM'N 2016).

20 U.S. SENTENCING COMM'N, REMARKS FOR PUBLIC MEETING 4 (Jan. 8, 2016), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/remarks.pdf> [https://perma.cc/ZLV7-RWZN] [hereinafter REMARKS] (statement of Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n).

21 *Id.* The Chair specifically noted that *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held a clause in the Armed Career Criminal Act with identical wording to the career offender Guideline unconstitutionally vague, had exacerbated those problems. *Id.*

22 *Id.*

which prong of the “crime of violence” definition at §4B1.2²³ that sentencing courts applied.²⁴ Second, sentencing documentation does not consistently report which event or events in an individual’s criminal history a sentencing court used as a predicate or predicates when applying the career offender Guideline.²⁵ And third, a predicate that a court previously counted under the residual clause could still be counted under another prong of the crime of violence definition, leading to an identical guidelines range regardless of the amendment.²⁶ Thus, the Chair explained that these circumstances made ascertaining the overall effect of the amendments difficult, if not impossible, and would likely make retroactive application complex and time intensive.²⁷

Chair Saris’s statements were not delivered based on “incomplete reasoning and supposition.”²⁸ The Commission’s retroactivity decision was part of its overall decision to amend the career offender Guideline—a decision flowing from the Commission’s “multi-year study of statutory and guideline definitions relating to the nature of a defendant’s prior conviction.”²⁹ As part of this study, the Commission considered “feedback from the field,” a roundtable discussion, case law, and extensive comments about the complexity of applying the crime of violence definition.³⁰ The Commission also “analyzed a range of sentencing data,” including detailed studies regarding the criminal history of offenders who were subject to the career offender Guideline.³¹ Further, the Commission specifically sought and received feedback on possible retroactive application of any amendment. When the proposed amendment to the crime of violence definition was first published in August of 2015, the Commission included the following request for comment:

The Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), the proposed amendment published in this notice should be included in subsection (d) of § 1B1.10 (Reduction in

²³ Prior to the 2016 amendment, USSG §4B1.2(a)(1)–(2) defined “crime of violence” to mean “any offense under federal or state law, punishable by imprisonment for a term exceeding one year,” that *either* “has as an element the use, attempted use, or threatened use of physical force against the person of another,” *or* “is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM’N 2015).

²⁴ REMARKS, *supra* note 20, at 4.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Litman & Beasley, *supra* note 2, at 44.

²⁹ U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 798 (U.S. SENTENCING COMM’N 2016).

³⁰ *Id.*

³¹ *Id.*

Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in § 1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2). The background commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(d). To the extent practicable, public comment should address each of these factors.³²

This request did not go unheard.³³ The Commission received thousands of letters on the amendment, with many specifically discussing the issue of retroactivity.³⁴

The Commission also received oral testimony regarding retroactivity during the public hearing on the proposed amendments.³⁵ The authors, in

³² Sentencing Guidelines for United States Courts, 80 Fed. Reg. 49314 (Aug. 17, 2015).

³³ See REMARKS, *supra* note 20, at 4 (“I do want to briefly discuss the topic of retroactivity as I am aware that several commenters have asked the Commission to make any changes it makes in this area retroactive.”). For the public comment submitted to the Commission, see *Public Comment from November 25, 2015*, U.S. SENTENCING COMM’N (2015), <http://www.ussc.gov/policymaking/public-comment/public-comment-november-25-2015> [<https://perma.cc/GQK2-QPD3>].

³⁴ See, e.g., Letter from Families Against Mandatory Minimums to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n 2 (Nov. 25, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20151125/FAMM.pdf> [<https://perma.cc/L4AJ-2DZ7>] (“Finally, we encourage the Commission to make retroactive any changes that would lower sentences going forward.”); Letter from Fed. Def. Sentencing Guidelines Comm. to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n 17 (Nov. 25, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20151125/FPD.pdf> [<https://perma.cc/Y8WY-QHYV>] (“Defenders believe that all of the factors the Commission considers in deciding whether to make an amendment retroactive . . . support retroactivity.”); Letter from Prisology to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n 1 (Nov. 24, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20151125/prisology.pdf> [<https://perma.cc/F9G6-4VG5>] (“Finally, we respectfully urge the Commission to request the preparation of a retroactivity assessment for the crime of violence amendment, should it be adopted. The Commission’s experience with retroactive amendments to the Sentencing Guidelines demonstrate the ability of federal district judges to apply such changes in a manner consistent with the safety of the public and the interests of justice.”); Letter from U.S. Dep’t of Justice to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n 2 n.3 (Oct. 30, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/DOJ.pdf> [<https://perma.cc/VRV7-2W7L>] (“The Department does not support retroactive application of the amendment. We appreciate that this issue is not presently before the Commission and will address it further at the appropriate time, if necessary.”).

³⁵ See, e.g., *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm’n 29-32* (Nov. 5, 2015), http://www.ussc.gov/sites/default/files/transcript_4.pdf [<https://perma.cc/W3BT-BEUW>] [hereinafter TRANSCRIPT] (Statement of Hon. Irene M. Keeley, Chair, Comm. on Criminal Law of the Judicial Conference of the United States); *id.* at 36 (statement of Hon. Kathleen Cardone); *id.* at 37-38, 136-38 (statements of Hon. Charles R. Breyer, Vice Chair,

fact, rely on this testimony to suggest that the Commission was informed that the number of career offender designations that depended on the residual clause were far fewer than the thousands of defendants who were resentenced as a result of retroactive application of previous drug amendments.³⁶ The authors are mistaken about whether the testimony made the Commission aware of the number of career offender designations that depended on the residual clause. The testimony was not informative on that point.

The Commission did, however, have the ability to ascertain the broadest impact of the amendment using Commission and Bureau of Prisons data. At the time of the January 2016 vote, the Commission had identified the maximum number of offenders currently incarcerated whose guideline ranges were determined under a guideline using the crime of violence definition. What the Commission lacked was the ability to narrow down that list of offenders to those having a cognizable claim for retroactive application of the amendment. The Commission recognized that even if the number of impacted offenders is “far fewer” than previous retroactive amendments, numbers alone do not fully describe the potential burden on the courts.³⁷ As noted by Chair Saris, unlike the drug amendments, the changes to the career offender Guideline could require a resentencing court to make complex redeterminations as to whether specific defendants were originally sentenced on the basis of the residual clause, and if so, whether the predicate offense might nonetheless still qualify under the “elements” or “enumerated offenses” prongs of the crime of violence definition.³⁸

These difficulties and concerns were also expressly noted by the judges at the Commission’s hearing.³⁹ Although ultimately deferring opinion on retroactivity, the Criminal Law Committee of the Judicial Conference specifically noted that, in supporting retroactivity on prior occasions, “the Committee was influenced by the fact that the Commission was able to

U.S. Sentencing Comm’n); *id.* at 129-36 (statement of Zachary Margulis-Ohnuma, National Association of Criminal Defense Lawyers); *id.* at 178-79 (statement of T. Michael Andrews, Chair, Victims Advocacy Group).

³⁶ Litman & Beasley, *supra* note 2, at 45.

³⁷ See TRANSCRIPT, *supra* note 35, at 153-58 (transcribing the commissioners questioning a witness regarding the burden and complexity of retroactive application).

³⁸ See *id.* at 153-54 (statement of Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n) (discussing the necessity to conduct further analysis on the elements clause even if the residual clause is eliminated).

³⁹ See *id.* at 38 (statement of Hon. Charles R. Breyer, Vice-Chair, U.S. Sentencing Comm’n) (“[I]f we decide that it should have a retroactivity impact it’s got to be with such clarity that judges will find it relatively straightforward Otherwise, it’s a nightmare. Not only is it a nightmare but it creates a further disparity, a further disparity among the treatment of defendants and I think that that’s, we should avoid that if we can.”); *id.* at 153-54 (statement of Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n) (noting that retroactive application in this instance is “just not as simple as the drug[] amendment”).

identify eligible inmates and supply those names to each court,” and noted the “relative ease in applying the new guidelines based on the available record.”⁴⁰ Unlike those prior occasions, the Criminal Law Committee recognized that, based on available data, “it would be difficult to produce accurate estimates of the number of cases that would be impacted if these amendments under consideration are made retroactive,” a fact that “would be an important consideration for the Committee.”⁴¹ Notably, the Committee also recognized that “regardless of the number of cases that might be involved[,] . . . retroactively applying the proposed amendments would be considerably more complex than the recent amendments to the Drug Quantity Table and would require more effort and resources.”⁴²

Further, the burden created by a retroactive amendment is not limited to motions filed by eligible offenders. In the context of amendments to drug-related guidelines, Commission data shows that courts have denied more than 14,000 motions seeking sentence reductions under the amended guidelines.⁴³ More than half of those denials (58.6%) involved motions filed on behalf of offenders who were ineligible for relief under USSG §1B1.10, and another small percentage of motions (5.2%) were filed on behalf of offenders whose cases did not involve drugs at all.⁴⁴ This data highlights that the lack of a justiciable claim does not prevent ineligible offenders from filing a motion for a sentence reduction, which ultimately burdens courts. A similar problem could be expected in amending the career offender Guideline. This is especially true given the decreasing rate of within-range sentences for career offenders.⁴⁵ Because USSG §1B1.10(b)(2) limits the sentence reduction to a term that is not less than the minimum of the amended guideline range, any defendant who received a departure (other than for substantial assistance) or variance resulting in a sentence below the amended guideline range would not be eligible for retroactive relief.⁴⁶

⁴⁰ *Id.* at 30-31 (statement of Hon. Irene M. Keeley, Chair, Comm. on Criminal Law of the Judicial Conference of the United States).

⁴¹ *Id.* at 31.

⁴² *Id.* at 31; *see also id.* at 36 (statement of Hon. Kathleen Cardone) (“I think retroactivity is a concern, especially when you have a huge caseload, and we are talking about going back and looking at definitions of these cases and all of the different statutes in 50 states and so I really would echo what she said about the concern about retroactivity.”).

⁴³ U.S. SENTENCING COMM’N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT tbl.1 (Oct. 2016).

⁴⁴ *Id.* tbl.8.

⁴⁵ *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 798 (U.S. SENTENCING COMM’N 2016) (reporting that 27.5% of sentences fell within the applicable guidelines range in fiscal year 2014).

⁴⁶ U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(2) (U.S. SENTENCING COMM’N 2016).

II. CONCLUSION

Although opinions may vary about the Commission's decision not to make retroactive its amendment to the career offender Guideline, it is clear that the decision was made after careful consideration. The Commission devoted significant time and resources to studying the issue of retroactivity and made a determination based upon its expert judgment.

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