

**United States Sentencing Commission Public Meeting Minutes  
August 23, 2018**

Acting Chair William H. Pryor Jr., called the meeting to order at 11:00 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- William H. Pryor Jr., Acting Chair
- Rachel E. Barkow, Commissioner
- Danny C. Reeves, Commissioner
- David Rybicki, Commissioner Ex Officio

The following Commissioner was present via telephone:

- Charles R. Breyer, Commissioner

The following Commissioner was not present:

- Patricia Cushwa, Commissioner Ex Officio

The following staff participated in the meeting:

- Kathleen Grilli, General Counsel

Acting Chair Pryor welcomed the public attending the Commission's meeting, either in-person or watching via the livestream broadcast. He expressed the commissioners' appreciation for the public's significant public interest in federal sentencing issues and the work of the Commission.

Acting Chair Pryor introduced his fellow commissioners.

Commissioner Rachel Barkow is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law and is also the faculty director of the Center on the Administration of Criminal Law at the law school.

Judge Charles Breyer is a Senior District Judge for the Northern District of California and has served as a United States District Judge since 1998.

Judge Danny Reeves is a District Court Judge for the Eastern District of Kentucky and has served as a United States District Judge since 2001.

David Rybicki is the new Commissioner Ex Officio representing the Department of Justice. Commissioner Rybicki was appointed Deputy Assistant Attorney General for the Department of Justice's Criminal Division in 2017. Previously he served as counselor to the Attorney General and as an Assistant United States Attorney in the District of Columbia. Acting Chair Pryor

welcomed Commissioner Rybicki to the Commission.

Commissioner Patricia Cushwa is the new Commissioner Ex Officio representing the United States Parole Commission but was not able to attend the meeting. Commissioner Cushwa was nominated to the Parole Commission and confirmed to that position in 2004 and currently serves as Acting Chair of the Parole Commission. Commissioner Cushwa has a long tenure of public service including 12 years on the Maryland Parole Commission, seven of those years as Chair. Acting Chair Pryor stated that the commissioners look forward to working with her in the future.

Acting Chair Pryor noted that Commissioner Patricia Smoot, who previously served as the Parole Commission's ex officio, is no longer with the Parole Commission, and Commissioner Zachery Bolitho, who previously served as the Department of Justice's ex officio, has returned to teaching. He thanked both former commissioners for their contributions to the Commission.

Acting Chair Pryor called for a motion to adopt the April 12, 2018, public meeting minutes. Commissioner Barkow made a motion to adopt the minutes, with Commissioner Reeves seconding. Hearing no discussion, the Acting Chair called for a vote, and the motion was adopted by voice vote.

Acting Chair Pryor updated the public on the Commission's recent work. He noted how the Commission has the unique statutory responsibility to act at the intersection of all three branches of government as a clearinghouse of federal sentencing data. Since the April meeting, the Commission has published three new publications. In May, the Commission published a report titled The Criminal History of Federal Offenders. This publication, for the first time, provides complete information on the number of convictions and the types of offenses and the criminal histories of federal offenders sentenced in a fiscal year. One of the Commission's key findings is that 72 percent of federal offenders sentenced in fiscal year 2016 had been convicted of a prior offense.

In June, the Commission published its Fiscal Year 2017 Overview of Federal Criminal Cases. Over 66,000 original cases were reported to the Commission in fiscal year 2017, representing a 1.3 percent decrease from the previous year. The Commission also found that the total number of drug cases fell for the fifth consecutive year, while firearm cases increased by 10 percent from fiscal year 2016.

Finally, in July, the Commission published its report entitled, Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders. This report examines the use and impact of increased penalties for drug offenders who have a prior felony drug conviction. This publication is the fourth in a series of reports on mandatory minimum penalties, which builds on the Commission's 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System.

Acting Chair Pryor briefly highlighted two of the latter report's findings. First, the Commission found that section 851 enhancements were applied inconsistently, with wide geographic variation in filing, withdrawal, and ultimate application of the enhancement among eligible offenders. For

example, in five judicial districts, the government filed section 851 enhancements against more than 50 percent of eligible offenders. While in 19 districts, the government chose not to file any section 851 enhancements against eligible offenders. Second, the Commission found that the decision to file a section 851 enhancement significantly impacted an offender's average sentence. When the government chose to file a section 851 enhancement, offenders received an average sentence over five years longer than when a section 851 enhancement was not filed against an eligible offender.

Turning to the business of the day, Acting Chair Pryor expressed the Commission's thanks to the numerous individuals and groups who submitted thoughtful comments and recommendations during its most recent public comment periods.

Acting Chair Pryor called on the General Counsel, Kathleen Grilli, to advise the Commission on a possible vote regarding the policy priorities for the Commission's 2018-2019 amendment cycle.

Ms. Grilli stated that a notice of possible policy priorities for the amendment cycle ending May 21, 2019, was published in the Federal Register on June 28, 2018. The Commission has received and reviewed public comment pursuant to that notice.

Ms. Grilli advised that a motion to adopt and publish in the Federal Register the final notice of policy priorities for the Commission's 2018-2019 amendment cycle would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Reeves made a motion to adopt and publish the final notice of priorities, with Commissioner Breyer seconding. The Chair called for discussion on the motion.

Commissioner Barkow stated that she would vote for most of the priorities but will vote "no" on Priority 3(A).<sup>1</sup> Commissioner Barkow believed the Commission should not consider "allow[ing] courts to consider the actual conduct of the defendant," instead of the elements of the offense of conviction in determining whether an offense is a crime of violence or controlled substance offense. She provided several reasons for her position.

First, Commissioner Barkow believed the proposal was inconsistent with the Supreme Court's jurisprudence mandating the categorical approach and raised constitutional issues. Second, and relatedly, she believed the statutory language in 28 U.S.C. § 994(h) is comparable to the statutory language that was at issue in Taylor, the case where the Supreme Court concluded the categorical approach was appropriate.<sup>2</sup> In Taylor, the court stated that Congress in section

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<sup>1</sup> Priority 3 states: (3) Consideration of possible amendments to §4B1.2 (Definitions of Terms Used in Section 4B1.1) to (A) allow courts to consider the actual conduct of the defendant, rather than only the elements of the offense (i.e., "categorical approach"), in determining whether an offense is a crime of violence or a controlled substance offense; and (B) address various application issues, including the meaning of "robbery" and "extortion," and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance.

<sup>2</sup> See Taylor v. United States, 495 U.S. 575 (1990).

994(h) used the phrase “convicted of a felony” not “committed a felony” in a significant way to indicate that it was the language of conviction that mattered, suggesting an elements inquiry.

Third, Commissioner Barkow continued, when the Supreme Court in Taylor announced the categorical approach, it noted the practical difficulties and potential unfairness of a factual approach in this context. For example, how will a court figure out what the “actual conduct” of the defendant was in prior cases when that conduct may have occurred long ago, particularly where the defendant pleaded guilty? There will be no trial record or jury finding. And, as the Supreme Court noted in Descamps, statements of fact in plea colloquies or arrest records might be, in the Court’s words, “downright wrong” because a defendant has little incentive to contest facts that are not elements of the charged offense and may have good reason not to do that. At trial, extraneous facts and arguments may confuse a jury.<sup>3</sup> During plea hearings, the defendant may not want to wish to “irk” the prosecutor or court by squabbling about superfluous factual allegations, the Court stated.

Commissioner Barkow asserted that the Commission should not allow unreliable documents to be used to support a lengthy career offender enhancement. In her view, the initial Sentencing Commission went astray when it approached relevant conduct precisely because it allows a “free for all” inquiry into what “really happened” as opposed to what a defendant was actually charged with. She believed that the state sentencing commissions have rejected so-called real offense sentencing for good reason. But the proposed priority is even more disconcerting because the courts wouldn’t just be engaged in that kind of inquiry for the present offense and conduct but would be using it for things that happened long ago and in other jurisdictions.

Commissioner Barkow stated that reconsidering the categorical approach was not necessary to address the significant concerns raised by the Department of Justice because its concerns can be addressed by modifying the definitions of the enumerated crimes, which is why she supports Priority 3(B). She opined that the public may think that there is no harm in just considering this as a priority because it is not a vote to actually do it. But, she observed, the Commission’s time is limited and adding something as a priority means other things cannot be considered. This cycle, for example, the commissioners decided not to extend resources to consider the use of family ties and responsibilities at sentencing or to study the Bureau of Prison’s use of compassionate release. She noted that these issues were removed from the final priorities, even though they were initially listed, and even though the Commission received voluminous supportive comment to do so, and that at least one commissioner, and possibly two, were interested in looking at them further.

Commissioner Barkow asserted that deleting these issues from the priorities was a mistake. In her view, the Commission is well-situated to study family ties and responsibilities and how they relate to sentencing, both to understand what judges are actually doing with their departures and their variances, because we know they consider this factor, and to report to Congress about whether Congress’ initial decision to say family ties are not ordinarily relevant was in fact correct or needed to be modified given the consequences of incarceration on children.

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<sup>3</sup> See Descamps v. United States, 133 S. Ct. 2276 (2013).

Commissioner Barkow observed that the Commission also understands that there remains a tremendous problem with compassionate release decision-making at the Bureau of Prison, even after it promised that there would be changes when the Commission amended to the sentencing guidelines. As a result, she stated, the Commission should prioritize these issues.

Nevertheless, despite her disagreement with the deletion of those two proposed priorities, and the inclusion of Priority 3(A), Commissioner Barkow stated her support to publish the remaining priorities.

Commissioner Breyer expressed his general agreement with Commissioner Barkow's remarks regarding the categorical approach. Commissioner Breyer did not believe for the same reasons that Commissioner Barkow stated that it would be wise to change the categorical approach that the Commission has already examined on numerous occasions. Nevertheless, he would vote in favor of including Priority 3(A) because publication for comment is part of the process in which the Commission simply determines whether an issue should be studied. And in the context of Priority 3(A), he believed that it makes sense to include an examination of that issue.

Commissioner Breyer stated that an examination of the issue may confirm that his own views are correct, and no changes are required. On the other hand, he added, an examination of an issue may find that it ought to be changed; that he should change his position on the subject. And if that's the case, he believed, it would be his responsibility to consider whatever the findings are, the information from the Sentencing Commission and the public, and make some determination. So, he stated, he was in favor of listing Priority 3(A) as a priority with the reservations he identified.

Commissioner Breyer, turning to the topics of family ties and compassionate release, stated that not prioritizing these matters did not detract from the significance of looking at the issue of §5H1.6 (Family Ties and Responsibilities). In his view, the Commission adequately addressed that departure in the application note that accompanies the departure language. But, he expressed his concern about the Bureau of Prisons' compassionate release program and stated it is necessary for the Commission to monitor that situation.

Commissioner Breyer assured his fellow commissioners, particularly Commissioner Barkow, that he will make sure that the Bureau of Prisons is asked the appropriate questions as to their implementation of their compassionate release program.

Commissioner Reeves noted that the Commission has two priorities that deal with the continuation of its work with Congress to implement certain recommendations that were made in two reports, the 2016 Report to the Congress: Career Offender Sentencing Enhancements and the 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System. While Commissioner Reeves intended to vote in favor of all of the priorities, he wished to make clear that while he agreed with some of the recommendations made in those two reports, he did not agree with all the recommendations. Specifically, he did not agree with those that are

listed Priorities (2) and (4) and would not be in favor of adopting those.<sup>4</sup> However, he stated that it was important to give Commission as much flexibility as possible to discuss these issues in the future, including with perhaps some new commissioners that may be joining the Commission. As a result, he will vote in favor of publication, but did not necessarily agree with the recommendations.

Hearing no further discussion, Acting Chair Pryor called on the General Counsel to perform a roll call vote on the motion to adopt and publish the final notice of priorities. The motion was adopted with Acting Chair Pryor, and Commissioners Breyer and Reeves voting in favor of all the priorities, and Commissioner Barkow voting in favor of all the priorities except for Priority 3(A).

Acting Chair Pryor stated that the Commission will continue its ongoing examination of the overall structure of the guidelines post-Booker. This study may possibly include recommendations to Congress on any statutory changes and development of any guideline amendments. The Commission will research the differences and sentencing practices that have emerged across districts, within districts, and in some cases, within courthouses under the advisory guidelines system.

Acting Chair Pryor explained that this effort was important to ensure that the federal sentencing guidelines provide clear and effective guidance for federal courts across the country. This work will take time and presents the Commission with a significant opportunity to collaborate with Congress, the courts, the Department of Justice, and other stakeholders.

Acting Chair Pryor noted that, in 2016, the Commission revised the guideline definition of “crime of violence” and published key findings and statutory recommendations in its 2016 Report to the Congress: Career Offender Sentencing Enhancements. In its recent public comment, the Department of Justice identified a number of application issues that have arisen since the Commission’s 2016 amendment, including the meaning of robbery and extortion. In addition, the Department of Justice identified issues arising from the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance.

Acting Chair Pryor stated that the Commission intended to address these concerns during the

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<sup>4</sup> These Priorities state:

(2) Continuation of its work with Congress and others to implement the recommendations of the Commission’s 2016 Report to the Congress: Career Offender Sentencing Enhancements, including its recommendations to revise the career offender directive at 28 U.S.C. § 994(h) to focus on offenders who have committed at least one “crime of violence” and to adopt a uniform definition of “crime of violence” applicable to the guidelines and other recidivist statutory provisions.

(4) Continuation of its work with Congress and others to implement the recommendations of the Commission’s 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System—including its recommendations regarding the severity and scope of mandatory minimum penalties, consideration of expanding the “safety valve” at 18 U.S.C. § 3553(f), and elimination of the mandatory “stacking” of penalties under 18 U.S.C. § 924(c)—and preparation of a series of publications updating the data in the report.

amendment cycle. In addition, and in response to additional concerns raised by the Department of Justice and the significant litigation brought about by the categorical approach, the Commission will also consider possible amendments to §4B1.2 (Definitions of Terms Used in Section 4B1.1) for the determination of whether an offense is a “crime of violence” or a “controlled substance offense.” The Commission will further study recidivism outcomes for federal offenders, as well as the use of mandatory minimums in the federal system. Over the last two years, the Commission released eight reports on both topics.

Acting Chair Pryor announced that during the upcoming amendment cycle, the Commission will release additional findings related to research on recidivism. Additionally, the Commission will report about the use of mandatory minimums relating to identity theft and sex offenses. He stated that he was pleased that the Commission’s research and data regarding mandatory minimums continues to be useful to ongoing sentencing policy deliberations. The Commission remains prepared to work with Congress in this area. Implementation of federal legislation is always a priority for the Commission and the Commission is aware of several new laws that may require conforming changes to the guidelines including the creation of new federal criminal penalties.

Acting Chair Pryor noted that the public will see that two items that were listed in the notice of tentative priorities but are not listed in the final priorities. However, this did not mean that they were unimportant. The first relates to the compassionate release policy statement, which the Commission recently amended in 2016. He explained that, at this early juncture, the Commission did not have sufficient data and information to consider whether further revisions to the policy statement were appropriate. Therefore, the Commission will continue to work with the Bureau of Prisons to obtain relevant data and monitor whether the amendment has had the intended effect, so this work will proceed without listing it as a priority at this time.

Second, the Acting Chair continued, the Commission chose not to proceed with further study regarding the guidelines for family ties and responsibilities of a defendant. The Commission understands and appreciates the tremendous impact incarceration has on the families and children of defendants. While not ordinarily relevant, the Guidelines Manual does have a downward departure provision based on loss of caretaking and financial support when the defendant’s sentence is within the applicable guideline range and will cause a substantial direct and specific loss of essential caretaking or essential financial support to the defendant’s family. The provision provides further guidance to the court by providing a non-exhaustive list of factors to consider in determining whether a downward departure is warranted. Acting Chair Pryor believed that the current policy statement operates as intended.

Acting Chair Pryor announced that the Commission’s Quick Facts data series has been updated to reflect fiscal year 2017 data. These short, two-page fact sheets analyze a variety of sentencing topics for the public in an accessible format. He also invited interested parties to explore the fiscal year 2017 sentencing data further by visiting the Commission’s Interactive Sourcebook of Federal Sentencing Statistics where users can filter data and customize charts by time period or jurisdiction.

Acting Chair Pryor on behalf of the Commission thanked everyone who attended the National Seminar in San Antonio, TX. Over 700 people attended the seminar, including judges, Federal Defenders, Assistant United States Attorneys, and probation officers. The Commission's next seminar will be in May 2019 in New Orleans, LA.

Commissioner Rybicki on behalf of the Department of Justice thanked the Commission for agreeing to reexamine the categorical approach and making it a top priority for the Commission in the upcoming amendment cycle. He noted that it's the Department of Justice's view that the categorical approach has so strained application of what constitutes a "crime of violence" or a "controlled substance offense", especially for recidivists and violent offenders, that the guidelines provisions that deal with those offenders are not operating as intended.

Commissioner Rybicki further explained that the Department of Justice is seeing criminal sentences that have become more disparate and inconsistent for criminal defendants depending on the circuit in which they were sentenced.

Finally, Commissioner Rybicki thanked Acting Chair Pryor and his fellow commissioners for welcoming him so warmly and graciously to the Commission. He also thanked Commission staff, specifically Staff Director Ken Cohen and General Counsel Kathleen Grilli, for welcoming him. He looked forward to a productive amendment cycle.

Acting Chair Pryor thanked Commissioner Rybicki for his remarks.

Acting Chair Pryor asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Barkow made a motion to adjourn, with Commissioner Reeves seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 11:27 a.m.