

**Remarks of Circuit Judge William H. Pryor Jr.,
Acting Chair of the United States Sentencing Commission
August 23, 2018 Public Meeting**

Thank you for attending this public meeting of the United States Sentencing Commission. The Commission appreciates the attendance of those joining us here as well as those watching our livestream broadcast on the Commission's website. As always, we welcome and encourage the significant public interest in federal sentencing issues and the work of the Commission.

I would like to start by introducing the other members of the Commission. First, I will introduce Rachel Barkow. Commissioner Barkow is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law and serves as the faculty director of the Center on the Administration of Criminal Law at the law school.

Judge Charles Breyer joins us by phone today. Judge Breyer, can you hear us? Judge 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 in that position since 2001.

Finally, David Rybicki is here with us as the new *ex officio* Commissioner from the Department of Justice. Commissioner Rybicki was appointed Deputy Assistant Attorney General for the Department of Justice's Criminal Division in 2017. He previously served as counselor to the Attorney General and as an Assistant United States Attorney in the District of Columbia. Welcome to the Commission.

Commissioner Patricia Cushwa, who will be representing the Parole Commission, is not able to attend the meeting today. She was nominated to the United States Parole Commission and confirmed to that position in 2004. She currently serves as Acting Chair of the Commission. Commissioner Cushwa has a long tenure of public service, including 12 years on the Maryland Parole Commission, seven of those years as Chair. We look forward to working with her in the future.

Finally, a word about some departures. Commissioner Patricia Smoot is no longer with the Parole Commission and Commissioner Zachary Bolitho, who previously served as the DOJ's *ex officio* has returned to teaching. We thank them both for their contributions to the Commission.

Before we begin the hearing, I would like to briefly update the public on some of the Commission's most recent publications and actions.

The Commission has a unique statutory responsibility to act at the intersection of all three branches of government as a clearinghouse of federal sentencing data. Since we last met in April, 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 in the criminal histories of federal offenders sentenced in a fiscal year. One of our key findings from the publication is that 72% 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% 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 ten 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. I'd like to briefly highlight two of our findings.

The Commission found that 851 enhancements were applied inconsistently, with wide geographic variation in filing, withdrawal, and ultimate application of the enhancement among eligible offenders. For instance, in five judicial districts the government filed 851 enhancements against more than 50% of eligible offenders while in 19 districts the government chose not to file any 851 enhancements against eligible offenders. Also, the decision to file an 851 enhancement significantly impacted an offender's average sentence length. When the government chose to file an 851 enhancement, offenders received an average sentence over five years longer than when an 851 enhancement was not filed against an eligible offender.

Turning to the business of the day, the Commission would like to thank the numerous individuals and groups who submitted thoughtful comments and recommendations during our most recent public comment period.

I will now turn to the Commission's General Counsel, Kathleen Grilli, as we start the discussion of the final priorities pending for our consideration and approval today.

I would like to take a moment to briefly discuss some of the priorities that involve multi-year projects examining sentencing practices and their outcomes within the federal system.

First, as a top priority, the Commission will continue its ongoing examination of the overall structure of the guidelines post-*Booker*, possibly including recommendations to Congress on any statutory changes and development of any guideline amendments. The Commission will research the differences in sentencing practices that have emerged across districts, within districts and, in some cases, within courthouses under the advisory guideline system.

This effort is 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 us with a significant opportunity to collaborate with Congress, the courts, the Department of Justice, and other stakeholders.

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 on Career Offender Enhancements*. In its recent public comment, the Department of Justice raised a number of application issues that have arisen since Commission’s 2016 amendment, including the meaning of “robbery” and “extortion.” In addition, the Department raised issues arising from the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance. The Commission intends to resolve these concerns during this amendment cycle.

In addition, in response to additional concerns raised by the Department and the significant litigation brought about by the “categorical approach,” the Commission also will consider possible amendments to section 4B1.2 to allow courts to consider the actual conduct of the defendant, rather than only the elements of the offense, in determining 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. This amendment cycle, the Commission will release additional findings related to research on recidivism. In addition, the Commission will report about the use of mandatory minimums relating to identity theft and sex offenses.

I’m 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. The Commission is aware of several new laws that may require conforming changes to the guidelines, including the creation of new federal criminal penalties.

The public will see that two items that were listed in our notice of tentative priorities but not in our final priorities, but not because they are not important. The first relates to the compassionate release policy statement, which the Commission recently amended in 2016. At this early juncture we do not have sufficient data and information to consider whether further revisions to the policy statement are appropriate. Therefore, we 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 can proceed without listing it as a priority at this time.

Second, the Commission has also chosen not to proceed with further study regarding the guidelines for family ties and responsibilities of the 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 service of a sentence within the applicable guideline range 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. The Commission believes that the current policy statement operates as intended.

As we conclude our business for today, I would like to draw attention to the Commission's Quick Facts data series, which has now been updated to reflect 2017 data. These short two-page fact sheets analyze a variety of sentencing topics for the public in an accessible format. If you haven't done so already, we invite you to explore the 2017 sentencing data further by visiting our Interactive Sourcebook of Federal Sentencing Statistics where you can filter data and customize charts by time period or jurisdiction.

Finally, the Commission would like to thank everyone who attended our National Seminar in San Antonio. Over 700 people attended the seminar, including Judges, Federal Defenders, Assistant U.S. Attorneys, and probation officers. The Commission's next seminar will be held next year in May in New Orleans.