

UNITED STATES SENTENCING COMMISSION

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PUBLIC MEETING

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THURSDAY
AUGUST 23, 2018

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The United States Sentencing Commission met in Suite 2-500, One Columbus Circle, N.E., Washington, D.C., at 11:00 a.m., the Honorable William H. Pryor, Jr., Acting Chair, presiding.

PRESENT

WILLIAM H. PRYOR JR., Acting Chair
RACHEL E. BARKOW, Commissioner
CHARLES R. BREYER, Commissioner*
DANNY C. REEVES, Commissioner
DAVID RYBICKI, Ex Officio Commissioner

ALSO PRESENT

KENNETH P. COHEN, Staff Director
KATHLEEN C. GRILLI, General Counsel

**Present via teleconference*

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C-O-N-T-E-N-T-S

Welcome and Introduction
by Acting Chair Pryor..... 3

Adoption of April 2018 Minutes
by Acting Chair Pryor..... 6

Motion to Adopt and Publish Final Policy
Priorities for 2018/2019
by Kathleen Grilli..... 9

Adjourn 27

1 P-R-O-C-E-E-D-I-N-G-S

2 (11:00 a.m.)

3 ACTING CHAIR PRYOR: Okay, this
4 meeting is called to order. Thank you for
5 attending this public meeting of the United
6 States Sentencing Commission. The Commission
7 appreciates the attendance of those joining us
8 here, as well as those watching our live-stream
9 broadcast on the Commission's website. As
10 always, we welcome and encourage the significant
11 public interest and federal sentencing issues and
12 the work of the Commission.

13 I'd like to start by introducing the
14 other members of the Commission. First, to my
15 immediate left is Commissioner Rachel Barkow, who
16 is the Segal Family Professor of Regulatory Law
17 and Policy at the New York University School of
18 Law and serves as the faculty director of the
19 Center on the Administration of Criminal Law at
20 the law school.

21 Judge Charles Breyer joins us by phone
22 today. Judge Breyer, can you hear us?

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1 COMMISSIONER BREYER: Yes, I can.

2 ACTING CHAIR PRYOR: Thank you. Judge
3 Breyer is the Senior District Judge for the
4 Northern District of California and has served as
5 a United States District Judge since 1998.

6 To my far left at the end of the table
7 is Judge Danny Reeves. Commissioner Reeves is a
8 District Judge for the Eastern District of
9 Kentucky and has served in that position since
10 2001.

11 Finally, David Rybicki is here with us
12 as the new Ex Officio Commissioner from the
13 Department of Justice. Commissioner Rybicki was
14 appointed Deputy Assistant Attorney General for
15 the Department of Justice's Criminal Division in
16 2017. He previously served as counselor to the
17 Attorney General and as an Assistant United
18 States Attorney in the District of Columbia.
19 Welcome to the Commission.

20 Commissioner Patricia Cushwa, who will
21 be representing the Parole Commission, is not
22 able to attend the meeting today. She was

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1 nominated to the United States Parole Commission
2 and confirmed to that position in 2004. She
3 currently serves as Acting Chair of the
4 Commission. Commissioner Cushwa has a long
5 tenure of public service including 12 years on
6 the Maryland Parole Commission, seven of those
7 years as Chair. We look forward to working with
8 her in the future.

9 Finally, a word about some departures.

10 Commissioner Patricia Smoot is no longer with
11 the Parole Commission, and Commissioner Zach
12 Bolitho, who previously served as the DOJ's Ex
13 Officio, has returned to teaching. We thank them
14 both for their contributions to the Commission.
15 We will miss them both and enjoyed working with
16 them both.

17 The first order of business is a vote
18 to adopt the April 12, 2018, public meeting
19 minutes. Is there a motion to do so?

20 COMMISSIONER BARKOW: So moved.

21 COMMISSIONER REEVES: Second.

22 ACTING CHAIR PRYOR: And there's a

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1 second. Is there any discussion of the motion?
2 Vote on the motion by saying aye.

3 (unanimous ayes)

4 ACTING CHAIR PRYOR: Any nays? The
5 motion is adopted by a voice vote. The next item
6 of business is the report of the Chair. Before
7 we begin the hearing, I would like to briefly
8 update the public on some of the Commission's
9 most recent publications and actions.

10 The Commission has the unique
11 statutory responsibility to act at the
12 intersection of all three branches of government
13 as a clearinghouse of federal sentencing data.
14 Since we last met in April, the Commission has
15 published three new publications. In May, the
16 Commission published a report titled "The
17 Criminal History of Federal Offenders." This
18 publication, for the first time, provides
19 complete information on the number of convictions
20 and the types of offenses and the criminal
21 histories of federal offenders sentenced in a
22 fiscal year.

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1 One of our key findings from this publication is
2 that 72 percent of federal offenders sentenced in
3 fiscal year 2016 had been convicted of a prior
4 offense.

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

14 Finally, in July, the Commission
15 published its report entitled, "Application and
16 Impact of 21 U.S.C. § 851: Enhanced Penalties for
17 Federal Drug Trafficking Offenders." This report
18 examines the use and impact of increased
19 penalties for drug offenders who have a prior
20 felony drug conviction. This publication is the
21 fourth in a series of reports on mandatory
22 minimum penalties, which builds on the

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1 Commission's 2011 report to Congress.

2 I'd like to briefly highlight two of
3 our findings. The Commission found that § 851
4 enhancements were applied inconsistently, with
5 wide geographic variation in filing, withdrawal,
6 and ultimate application of the enhancement among
7 eligible offenders. For instance, in five
8 judicial districts, the government filed § 851
9 enhancements against more than 50 percent of
10 eligible offenders. While in 19 districts, the
11 government chose not to file any § 851
12 enhancements against eligible offenders.

13 Also, the decision to file an § 851
14 enhancement significantly impacted an offender's
15 average sentence. When the government chose to
16 file an § 851 enhancement, offenders received an
17 average sentence over five years longer than when
18 an § 851 enhancement was not filed against an
19 eligible offender.

20 Turning to the business of the day,
21 the Commission would like to thank the numerous
22 individuals and groups who submitted thoughtful

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1 comments and recommendations during our most
2 recent public comment period. I will now turn to
3 the Commission's General Counsel, Kathleen
4 Grilli, as we start the discussion of the final
5 priorities pending for our consideration and
6 approval today.

7 MS. GRILLI: Thank you, Judge Pryor.
8 A notice of possible policy priorities for the
9 amendment cycle ending May 21, 2019, was
10 published in the federal register on June 28,
11 2018. The Commission has received and reviewed
12 public comment pursuant to that notice. A motion
13 to adopt and publish in the federal register the
14 final notice of policy priorities for the
15 Commission's 2018/2019 amendment cycle would be
16 in order at this time.

17 ACTING CHAIR PRYOR: Is there a motion
18 to adopt and publish in the federal register, the
19 final notice of policy priorities for the
20 Commission's 2018/2019 amendment cycle as
21 suggested by the General Counsel?

22 COMMISSIONER REEVES: So moved.

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1 ACTING CHAIR PRYOR: Is there a
2 second? Is there a second? Judge Breyer, are
3 you still with us? We may have lost Judge
4 Breyer. Hold on.

5 COMMISSIONER BREYER: Hello?

6 ACTING CHAIR PRYOR: Judge Breyer.

7 COMMISSIONER BREYER: Sorry. Suddenly
8 I was disconnected.

9 ACTING CHAIR PRYOR: Well that is
10 fine. The General Counsel has suggested that we
11 move to adopt and publish in the federal
12 register, the final notice of policy priorities
13 for the 2018/2019 amendment cycle. And I asked
14 if there was a motion. Commissioner Reeves so
15 moved. And then I asked then is there a second.

16 COMMISSIONER BREYER: I will second.

17 ACTING CHAIR PRYOR: Is there any
18 discussion?

19 COMMISSIONER BARKOW: I'd like to
20 raise a few. So, I am voting for most of the
21 priorities this term for us. But I'm voting "no"
22 on Priority 3(A). And I wanted to offer some

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1 comments as to why that is. I do not think we
2 should consider allowing courts to consider the
3 actual conduct of the defendant that's the quote
4 of the priority, instead of the elements the
5 offense of conviction in determining whether
6 something is a crime of violence or controlled
7 substance offense. And there's several reasons
8 for that.

9 First, I think it's inconsistent with
10 the Supreme Court's jurisprudence mandating the
11 categorical approach. And it raises Sixth
12 Amendment issues. Second and relatedly, I think
13 the statutory language in 28 U.S.C. § 994(h) is
14 comparable to the statutory language that was at
15 issue in Taylor, which is the Supreme Court case
16 where the court concluded the categorical rule
17 was appropriate. And there the court said
18 Congress in the statute there, used the phrase
19 "convicted of a felony," not "committed a felony"
20 in a significant way to indicate that it was the
21 language of conviction that mattered, suggesting
22 an elements inquiry.

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1 Third, when the Supreme Court in
2 Taylor announced the categorical approach, it
3 noted the practical difficulties and potential
4 unfairness of a factual approach is daunting in
5 this context. How exactly is a court going to
6 figure out what the "actual conduct" of the
7 defendant is in prior cases when that conduct may
8 have occurred long ago, particularly where the
9 defendant pleaded guilty. There will be no trial
10 record. No jury finding.

11 And as the Supreme Court noted in
12 Descamps, statements of fact in plea colloquies
13 or arrest records might be, in the Court's words,
14 "downright wrong." Because a defendant has
15 little incentive to contest facts that are not
16 elements of the charged offense. And may have
17 good reason not to do that. At trial, extraneous
18 facts and arguments may confuse a jury. During
19 plea hearings, the defendant may not want to wish
20 to irk the prosecutor or court by squabbling
21 about superfluous factual allegations, the Court
22 said.

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1 I do not believe we should allow
2 unreliable documents to be used to support a
3 lengthy career offender enhancement. Now I think
4 the initial Sentencing Commission went astray
5 when it approached relevant conduct, precisely
6 because it allows a free for all inquiry into
7 what "really happened," as opposed to what a
8 defendant was actually charged with. And state
9 commissions have rejected this approach for good
10 reason in my view. But that would be far worse
11 if this priority were to result in any actual
12 changes. Because we wouldn't just be engaged in
13 that kind of inquiry for the present offense and
14 conduct, we would be using it for things that
15 happened long ago and in other jurisdictions.

16 Now reconsidering the categorical
17 approach isn't necessary in my view to raise the
18 significant concerns raised by the Department of
19 Justice. Because we can address those concerns
20 by modifying definitions of enumerated crimes,
21 which is why I support 3(B).

22 Now you might think there's no harm in

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1 just considering this as a priority because it's
2 not a vote to actually do it. But the
3 Commission's time is limited and adding something
4 as a priority means other things cannot be
5 considered. This cycle for example, my
6 colleagues decided it wasn't worth it for us to
7 extend resources considering the use of family
8 ties and responsibilities at sentencing. Or to
9 study BOP's use of compassionate release. We
10 have dropped those issues from the final
11 priorities, even though they were initially
12 listed. And even though we received voluminous
13 supportive comment to do so. And that at least
14 one Commissioner and possibly two, is interested
15 in looking at them further.

16 Now I think deleting those issues from
17 the priorities was a mistake. I think the
18 Commission is well-situated to study family ties
19 and responsibilities and how they relate to
20 sentencing. Both to understand what judges are
21 actually doing with their departures and their
22 variances because we know they're considering it,

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1 and to report to Congress about whether
2 Congress's initial decision to say family ties
3 are not ordinarily relevant was in fact correct
4 or needs to be modified or should be considered
5 to be modified given the consequences of
6 incarceration on children.

7 We also know there remains a
8 tremendous problem with compassionate release
9 decision-making at BOP. Even after we were
10 promised that there would be changes when we made
11 our amendments to the sentencing guidelines. So,
12 we should, in my view, prioritize oversight of
13 what's happening there.

14 So, despite my disagreement with the
15 deletion of these issues and the inclusion of
16 3(A), I will support publishing the remaining
17 priorities. And I wanted for the record to
18 indicate why I come out the way I do on these
19 issues. Thank you.

20 ACTING CHAIR PRYOR: Thank you. Any
21 further discussion?

22 COMMISSIONER BREYER: Yes.

1 ACTING CHAIR PRYOR: Commissioner
2 Breyer, Judge Breyer?

3 COMMISSIONER BREYER: Yes. First, I
4 would like to associate myself with Commissioner
5 Barkow's remarks on the merits concerning the
6 categorical approach. I do not think at the
7 present time that for the reasons that
8 Commissioner Barkow has stated, that it would be
9 wise to change the categorical approach that
10 we've already examined on numerous occasions.
11 Nevertheless, I am voting in favor of including
12 3(A) because this is the process in which we
13 simply determine whether it should be studied.
14 And in the context of 3(B), I think it does make
15 sense to include an examination of that issue.

16 An examination of that issue may
17 confirm that my views are correct, at least in my
18 mind and require no change. On the other hand,
19 an examination of an issue may result in the fact
20 that I think it ought to be changed -- my mind
21 ought to be changed on the subject. And if
22 that's the case, I think it would be my

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1 responsibility to consider whatever the report is
2 and the information from the Sentencing
3 Commission and the public and make some
4 determination. So, I am in favor of listing it
5 as a priority with the reservations that I've
6 indicated.

7 Now as to the argument that we ought
8 to take a look at family ties and compassionate
9 release, I do not think that by prioritizing the
10 matters that we are prioritizing, we are in any
11 way detracting from the significance of looking
12 at the issue of §5H1.6, family ties and
13 responsibilities. It is my view that, that's a
14 very significant departure but that the
15 Commission has adequately addressed that
16 departure in the application note that
17 accompanies the departure language.

18 So, I think it's a matter that is
19 highly individualized. It ought to be highly
20 individualized. And I have found that -- What I
21 have done and what I know my colleagues have
22 done, that the departure language is adequate to

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1 address that subject. Nevertheless, I am
2 concerned that the Bureau of Prisons report
3 publicly or at least to the Commission as to the
4 status of their compassionate release program
5 because I think that, that is required by
6 Congress. And that it is necessary for the
7 Commission to monitor that situation.

8 So, I do want to assure my fellow
9 Commissioners and in particular, Commissioner
10 Barkow that as far as my agenda is concerned, I
11 will make sure that the Bureau of Prisons is
12 asked the appropriate questions as to their
13 implementation of that program.

14 ACTING CHAIR PRYOR: Thank you. Any
15 further discussion?

16 COMMISSIONER REEVES: Just one brief
17 comment. We have two priorities that deal with
18 continuing to work with Congress to implement
19 certain recommendations that are made in two
20 reports that have been previously published; the
21 2016 report on career offender sentencing
22 enhancements and also the 2011 Report on

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1 Mandatory Minimum Penalties in the Federal
2 Criminal Justice System.

3 While I plan to vote in favor of all
4 of the priorities that are listed, I do want to
5 indicate that while I agree with some of the
6 recommendations made in those two reports, I
7 don't agree with all the recommendations. And
8 specifically don't agree with those that are
9 listed in our priorities and would not be in
10 favor of adopting those. But I do believe that
11 it's important to give this Commission as much
12 flexibility as possible to discuss these in the
13 future, including with perhaps some new
14 Commissioners that may be joining us. And so, I
15 will be voting in favor, but again don't
16 necessarily agree with the recommendations.

17 ACTING CHAIR PRYOR: Okay. Hearing no
18 further discussion, will the General Counsel
19 please call the roll?

20 MS. GRILLI: Yes. Commissioner
21 Barkow?

22 COMMISSIONER BARKOW: I vote in favor

1 of all the priorities except 3(A).

2 MS. GRILLI: Judge Breyer?

3 COMMISSIONER BREYER: I vote in favor
4 of all the priorities.

5 MS. GRILLI: Judge Reeves?

6 COMMISSIONER REEVES: I vote in favor
7 of all the priorities.

8 MS. GRILLI: Judge Pryor?

9 ACTING CHAIR PRYOR: I vote in favor
10 of all the priorities.

11 ACTING CHAIR PRYOR: Let the record
12 reflect that at least three Commissioners voted
13 to publish and adopt the final notice of
14 priorities for the 2018/2019 amendment cycle.

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

20 The first is a top priority. The
21 Commission will continue its ongoing examination
22 of the overall structure of the guidelines post-

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1 Booker. Possibly including recommendations to
2 Congress on any statutory changes and development
3 of any guideline amendments. The Commission will
4 research the differences and sentencing practices
5 that have emerged across districts, within
6 districts, and in some cases, within courthouses
7 under the advisory guidelines system.

8 This effort is important to ensure
9 that the Federal Sentencing Guidelines provide
10 clear and effective guidance for federal courts
11 across the country. This work will take time and
12 presents us with a significant opportunity to
13 collaborate with Congress, the courts, the
14 Department of Justice, and other stakeholders.

15 In 2016, the Commission revised the
16 guideline definition of crime of violence and
17 published key findings and statutory
18 recommendations in its 2016 Report to the
19 Congress on Career Offender Enhancements. In its
20 recent public comment, the Department of Justice
21 raised a number of application issues that have
22 arisen since the Commission's 2016 amendment,

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1 including the meaning of robbery and extortion.
2 In addition, the Department raised issues arising
3 from the treatment of inchoate offenses and
4 offenses involving an offer to sell a controlled
5 substance.

6 The Commission intends to address
7 these concerns during the amendment cycle. In
8 addition, and in response to additional concerns
9 raised by the Department and the significant
10 litigation brought about by the categorical
11 approach, the Commission will also consider
12 possible amendments to Section 4B1.2 for the
13 determination of whether an offense is a crime of
14 violence or a controlled substance offense. The
15 Commission will further study recidivism outcomes
16 for federal offenders, as well as the use of
17 mandatory minimums in the federal system. Over
18 the last two years, the Commission released eight
19 reports on both topics.

20 This amendment cycle, the Commission
21 will release additional findings related to
22 research on recidivism. In addition, the

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1 Commission will report about the use of mandatory
2 minimums relating to identity theft and sex
3 offenses.

4 I'm pleased that the Commission's
5 research and data regarding mandatory minimums
6 continues to be useful to ongoing sentencing
7 policy deliberations. The Commission remains
8 prepared to work with Congress in this area.
9 Implementation of federal legislation is always a
10 priority for the Commission. The Commission is
11 aware of several new laws that may require
12 conforming changes to the guidelines including
13 the creation of new federal criminal penalties.

14 The public will see that two items
15 that were listed in our notice of tentative
16 priorities, but not in our final priorities --
17 that were two that are not listed in our final
18 priorities, but not because they are unimportant.

19 The first relates to the compassionate release
20 policy statement, which the Commission recently
21 amended in 2016.

22 At this early juncture, we do not have

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1 sufficient data and information to consider
2 whether further revisions to the policy statement
3 are appropriate. Therefore, we will continue to
4 work with the Bureau of Prisons to obtain
5 relevant data and monitor whether the amendment
6 has had the intended effect, so this work can
7 proceed without listing it as a priority at this
8 time.

9 Second, the Commission has also chosen
10 not to proceed with further study regarding the
11 guidelines for family ties and responsibilities
12 of a defendant. The Commission understands and
13 appreciates the tremendous impact incarceration
14 has on the families and children of defendants.
15 While not ordinarily relevant, the Guidelines
16 Manual does have a downward departure provision
17 based on loss of caretaking and financial support
18 when the defendant's sentence is within the
19 applicable guideline range will cause a
20 substantial direct and specific loss of essential
21 caretaking or essential financial support to the
22 defendant's family. The provision provides

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1 further guidance to the court by providing a non-
2 exhaustive list of factors to consider in
3 determining whether a downward departure is
4 warranted. I believe that current policy
5 statement operates as intended.

6 As we conclude our business for today,
7 I would like to draw attention to the
8 Commission's Quick Facts data series, which has
9 now been updated to reflect 2017 data. These
10 short two-page fact sheets analyze a variety of
11 sentencing topics for the public in an accessible
12 format.

13 If you haven't done so already, we
14 invite you to explore the 2017 sentencing data
15 further by visiting our Interactive Sourcebook of
16 Federal Sentencing Statistics where you can
17 filter data and customize charts by time period
18 or jurisdiction.

19 Finally, the Commission would like to
20 thank everyone who attended our National Seminar
21 in San Antonio. Over 700 people attended the
22 seminar, including judges, Federal Defenders,

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1 Assistant U.S. Attorneys, and probation officers.

2 The Commission's next seminar will be next year
3 in May in New Orleans.

4 Is there any further business before
5 the Commission?

6 COMMISSIONER RYBICKI: Judge Pryor, if
7 I could, I'd like to make a brief comment. On
8 behalf of the Department of Justice, I'd like to
9 thank the Commission for agreeing to reexamine
10 the categorical approach and making that
11 reexamination a top priority for the Commission
12 in the upcoming amendment cycle. The categorical
13 approach and the view of the Department has so
14 strained application of what constitutes a crime
15 of violence or a controlled substance offense,
16 especially for recidivists and violent offenders
17 that the guidelines provisions that deal with
18 those offenders are not operating as intended.

19 Additionally, we're seeing criminal
20 sentences that have become more disparate and
21 inconsistent for criminal defendants depending on
22 the circuit in which they were sentenced. So,

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1 the Department applauds the Commission for making
2 the categorical approach a priority.

3 And on a final note, I would like to
4 thank you, Judge Pryor and my other fellow
5 Commissioners for welcoming me so warmly and
6 graciously to the Commission. I'd also like to
7 thank the Commission staff, specifically Ken
8 Cohen and Kathleen Grilli for welcoming me. And
9 I look forward to a productive amendment cycle.
10 Thank you.

11 ACTING CHAIR PRYOR: Thank you. And
12 as we look forward to one as well.

13 Hearing no further business, is there
14 a motion to adjourn?

15 COMMISSIONER BARKOW: So moved.

16 ACTING CHAIR PRYOR: Is there a
17 second?

18 COMMISSIONER REEVES: Second.

19 ACTING CHAIR PRYOR: Vote on the
20 motion by saying aye.

21 (Unanimous ayes)

22 ACTING CHAIR PRYOR: All in favor. So

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1 is anyone -- no one's opposed. So the motion is
2 adopted by a voice vote. And the meeting is
3 adjourned. Thank you all for being with us today
4 and have a good day.

5 (Whereupon, the meeting in the above-
6 entitled matter was concluded at 11:27 a.m.)

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