

UNITED STATES SENTENCING COMMISSION

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UNITED STATES SENTENCING COMMISSION

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PUBLIC MEETING

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FRIDAY OCTOBER 28, 2022

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The United States Sentencing Commission met in Suite 2-500, One Columbus Circle, N.E., Washington, D.C., at 9:00 a.m. EDT, the Honorable Carlton W. Reeves, Chair, presiding.

PRESENT:

CARLTON W. REEVES, Chair
LUIS FELIPE RESTREPO, Vice Chair
LAURA MATE, Vice Chair
CLAIRE MURRAY, Vice Chair
CLARIA HORN BOOM, Commissioner*
JOHN GLEESON, Commissioner*
CANDICE C. WONG, Commissioner
JONATHAN J. WROBLEWSKI, *Ex-Officio*

* Present via Teleconference

ALSO PRESENT:

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

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

9:00 a.m.

CHAIR REEVES: (presiding)

Good morning. The meeting is now called to order. The first order of business is to vote to adopt the December 13th, 2018, public minutes. Is there a motion to do so?

VICE CHAIR MATE: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MURRAY: I'll second.

CHAIR REEVES: Is there any discussion on the motion?

Well, no discussion so let's have a vote. Vote on the motion by saying aye.

(The motion is adopted by voice vote.)

CHAIR REEVES: The next item of business is the report of the Chair. Good morning, ladies and gentlemen. Whether you're joining us in person or via live stream on our website, I welcome you all to this public meeting of the United States Sentencing Commission.

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I'm honored to chair my first public meeting, which also marks the first time in four years that the Commission has held a public meeting with a full slate of Commissioners.

I was confirmed by the Senate on August 4th along with six other highly qualified and well-respected individuals who I am pleased are here with us today.

Equally notable is that our confirmation is the first time since 1999, more than two decades, that a full slate of voting Commissioners was appointed at once.

Since Commissioners are generally appointed to staggered six-year terms, the fact that all seven of us are new to the Commission is highly unusual and indeed very exciting.

Before introducing my colleagues, I want to take this opportunity to acknowledge the passing on October the 10th of former Commissioner Sterling Johnson. It so happens he was in that class of Commissioners from 1999, having served on the Commission until 2002.

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Commissioner Johnson was a district judge in the Eastern District of New York where he served with distinction with one of my current colleagues who described him as a great American.

We appreciate all he did for the Commission, the State of New York and this great Nation.

Now, I have the pleasure of introducing my colleagues. First, I introduce the Commission's Vice Chairs. Laura Mate, who served as the Sentencing Resource Counsel to the Federal Public and Community Defenders for many years. And Judge Luis Felipe Restrepo, who serves on the United States Court of Appeals for the Third Circuit.

Many of you know may know Judge Restrepo has also served as United States District Judge, a federal defender and as a private practitioner. He accepted cases through his court's CJA panel.

Also with us today, Commissioner Claire Murray, who most recently served as Associate Attorney General. Judge John Gleeson,

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who previously served in the Eastern District of New York, along with Sterling Johnson, and as a former federal prosecutor.

And Candice Wong, who is an Assistant United States Attorney and Chief of the Violence Reduction in Trafficking Offenses Section in the United States Attorney's Office in Washington, D.C.

Commissioner Wong previously served as the Commission's ex officio member, a position once again filled by Jonathan Wroblewski who is here today as well. Joining us by phone today is District Judge Claria Horn Boom, who serves in both the Eastern and Western Districts of Kentucky.

I'm grateful to these colleagues, each of whom will bring a wide breadth and robust experience and a unique and very important perspective to our conversations and deliberations on sentencing policy.

As everyone is fully aware, after four years there's a backlog of policy work awaiting

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us. Upon our appointment, we quickly rolled up our sleeves and began the important mission work that is entrusted to us.

The 2022-2023 amendment cycle is already somewhat abbreviated because, by statute, we must submit amendments to Congress for review no later than May 1st, 2023. Our year-long amendment cycle is down to just over six months.

Nevertheless, we are committed to meeting our deadlines with the focus in this initial amendment cycle on the most urgent policy concerns.

As such, on September 29th, the Commission issued its tentative policy priorities and notice for public comment with our top focus on implementation of the First Step Act of 2018.

These priorities were posted on the Commission's website, www.ussc.gov.

Indeed, the volume of feedback we've received as part of this public comment period is incredible and certainly indicative of the important work the Commission has ahead of us.

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We have received well over 8,000 public comments.

The Commission heard from district courts throughout the Nation. We heard from members of Congress. We heard from federal public defenders as well as criminal defense lawyers.

We heard from both from the Departments of Justice and Homeland Security, as well as other executive branch agencies. We heard from dozens and dozens of advocacy organizations in addition to probation officers.

We heard from universities. We heard from many individuals who are currently incarcerated, and we heard from many of their families. I'm grateful for this input. That input is important. It will be valuable to the Commission as we move forward in the amendment process.

But before I delve further into today's agenda, I do want to take a moment to recognize the good work done under the leadership

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of my predecessor, Judge Charles Breyer, Senior Judge for the Northern District of California.

We all owe him a great deal of gratitude for the two years he served as Acting Chair and lone voting member of the Commission. I commend his great stewardship of the Commission and acknowledge its impressive productivity under his leadership.

This year alone, the Commission has released 14 reports on many timely and important topics in our federal criminal justice system. Recidivism, the impact of Bureau of Prison programming, robbery, illegal reentry, and two areas on which legislation awaits implementation by the Commission: compassionate release and firearm offenses.

The release of these reports is a testament to the dedication of my friend Judge Breyer, and the remarkable public servants who staff this Commission.

Before turning to the business of today, I would be remiss if I did not acknowledge

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the calls, the text messages and the emails I received from many of you upon my nomination and subsequent confirmation as Chair.

You've offered your support and encouragement. Many have also given me a blank look followed by a slight gasp and then the question, "How in the world are you going to do it?"

I don't know how to answer that question just yet, but what I do know is that we will not be able to do anything without the incredible staff or without the Commissioners listening to one another and keeping an open mind.

Our criminal justice system has many interrelated parts. And note, I've emphasized the word justice. Justice will be front and center in all that we do.

We know much is expected of this new Commission beyond the immediate priorities, and we are eager to dig in and do the important work that has been entrusted to us. We will operate

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in a deliberative, empirically-based and inclusive manner.

And we are all committed to a shared common goal, to build upon the good work of past Commissions and leave an even more improved federal sentencing guideline system for the next set of Commissioners.

Now, I will be the first to acknowledge that our work is not easy. It is challenging, sometimes tedious, and always vitally important. As a Commission, we will deliberate, we will discuss, we will debate. And at times, we may even disagree. But we will not be disagreeable.

We will work hard, and we will have some fun. And at the end of the day, we will have the satisfaction of knowing we did what we think is best for our Nation's criminal system.

Turning back to today's business, the Commission's proposed priorities. First on our list is implementation of the First Step Act of 2018.

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The First Step Act amended 18 U.S.C. § 3582 to allow defendants for the first time to move for compassionate release on their own, without having the Director of Bureau of Prisons to make that motion.

In the absence of a Commission policy statement recognizing this new avenue, Courts of Appeals generally have held the Commission's policy statement governing compassionate release does not apply to motions filed by the defendants.

And without guidance from the Commission during the COVID-19 pandemic, the debate about what constitutes "extraordinary and compelling reasons" for compassionate release took front and center stage across the Nation with differing results.

A Commission report on compassionate release found that the likelihood of compassionate release motions succeeding varied significantly depending upon the circuit or district in which they were filed.

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This suggests that courts could benefit from clearer guidance from the Commission, and that will be an important part of our agenda this year.

In addition, the First Step Act expanded eligibility for the safety valve to certain offenders with more than one criminal history point. The Commission needs to amend section 5C1.2 to recognize this change.

But we will also need to consider changes to the two-level reduction in the drug trafficking guideline for meeting the safety valve criteria.

Our consideration may be complicated by different case law among the circuits regarding the scope of the new statutory safety valve criteria.

The Commission also intends to implement the Bipartisan Safer Communities Act, firearms legislation that was passed after the Uvalde, Texas shootings and signed into law in July.

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The Act directs the Commission to increase penalties for certain firearm offenders, particularly straw purchasers. The Commission also will work to implement other legislation that warrants action.

The Commission's proposed priorities also include examining and resolving the most critical circuit conflicts regarding guideline interpretations as suggested in some of the United States Supreme Court's denials of writs of certiorari.

While these are the most critical time-sensitive matters before the Commission, we also outlined several other policy priorities that we will certainly work on this year but may not complete this amendment cycle given their complexity and the abbreviated timeframe we're working under. Remember, we have a little over six months.

These include, though, continuation of the Commission's examination of the categorical approach in determining, for example, whether an

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offense is a crime of violence or a controlled substance offense.

And we may examine amendments to the criminal history guidelines to account for recent recidivism research regarding zero-point offenders and the impact of status points.

Multi-year priorities also include possible amendments to prohibit the use of acquitted conduct in applying the guidelines, simplification of the guidelines and examination of case law concerning the validity, enforceability of guideline commentary and a study of court-sponsored diversion and alternative to incarceration programs.

Again, I wish to thank my colleagues and Commission staff for their hard work that is behind today's public meeting. And thank you all. Thank you to all who submitted comments on these proposed priorities.

The work ahead of us will not be easy, but I believe we are up to the task. Now the next item of business is a possible vote on the

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final policy priorities for the 2022-2023 amendment cycle. The General Counsel, Ms. Grilli, will now advise the Commission on that matter.

GENERAL COUNSEL KATHLEEN GRILLI :

Thank you.

Good morning. A notice of possible priorities was published by the Commission on its website on September 29th and in the Federal Register on October 5th, 2022, with the comment period concluding on October 17th, 2022.

The Commission received and reviewed public comment pursuant to that notice. At this time, a motion to adopt and publish in the Federal Register the final notice of priorities for the Commission's 2022-2023 amendment cycle would be in order.

VICE CHAIR MATE: So moved.

CHAIR REEVES: Oh, is there a motion?

(Laughter.)

VICE CHAIR MATE: Oh, is there a motion? I'm jumping ahead.

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CHAIR REEVES: That's all right.

(Laughter.)

CHAIR REEVES: Is there a motion?

VICE CHAIR MATE: Yes, so moved.

CHAIR REEVES: All right. We're all one team here, you see that?

(Laughter.)

CHAIR REEVES: Is there a motion to adopt and publish in the Federal Register the final notice of policy priorities for the Commission's 2022-2023 amendment cycle as suggested by General Counsel, Ms. Grilli.

VICE CHAIR MATE: Yes, so moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MURRAY: Yes, seconded.

CHAIR REEVES: Is there any discussion on the motion?

Hearing no further discussion, let's have a vote by saying aye. Any ayes?

(Chorus of aye.)

CHAIR REEVES: Any nays? No nays, great. The motion is adopted. And let the

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record reflect that at least four Commissioners voted in favor of the motion. Is there any further business before the Commission?

COMMISSIONER WROBLEWSKI: Mr. Chairman?

CHAIR REEVES: Yes, sir. Mr. Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you so much, Mr. Chairman. I'd like to make just a very few remarks, if I could.

I want to just briefly say publicly what I've said to you and other Commissioners privately that we are absolutely thrilled that the Commission once again has a quorum, that the President nominated and the Senate confirmed each of you, and that the new Commission is off to a really very productive start.

The range of issues covered in the final priorities is substantial and reflects the range of the Commission's statutory responsibilities.

We thank the Commission for

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considering all of the public comment and of course the several letters that we sent to the Commission in September and October identifying the issues that we think are especially important for Commission review.

We noted, and I mention this here so it's not lost, that the Commission and we are all approaching the 40th anniversary of the Sentencing Reform Act. And as we do, we think it's important for the Commission to review the federal sentencing system as a whole and not just its various individual parts.

We hope that the Commission will consider holding regional hearings or otherwise taking on some sort of systemic review sometime in 2023.

I also want to take this opportunity to echo some of the remarks you made, Mr. Chairman, and thank Judge Danny Reeves, the Commission staff, all of the Commission staff, and especially Judge Charles Breyer, for their stewardship of the Commission over the last four

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years.

The Commission does a lot more than just amend the sentencing guidelines. The Commission's research and data functions are invaluable to giving an accurate assessment of what's going on in the federal criminal justice system. And during COVID, this was especially important.

And the Commission's training function continues to ensure that the criminal justice practitioners accurately apply the law as the Act and the Supreme Court require. We appreciate more than we can express the Commission's work and work products over the last several years.

Mr. Chairman, thank you so much for giving me the opportunity to just say a few words. Thank you for your leadership of the Commission.

It's an honor to serve with you and with all the other Commissioners, and we very much look forward to working with you and the other Commissioners over the coming months and

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years. Thank you, sir.

CHAIR REEVES: Thank you, Mr. Wroblewski. I do want to note, and I don't know if I said it, but we do have two Commissioners who are appearing by phone today.

I appreciate Judge Boom and Judge Gleeson for being with us in that manner due to circumstances beyond their control. So now having said all of that, is there any further business before the Commission?

Hearing none, is there a motion to adjourn?

VICE CHAIR MATE: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR RESTREPO: Second.

CHAIR REEVES: All right, let's vote on it, then. Are there any ayes on adjourning this morning?

(Chorus of aye.)

CHAIR REEVES: All right. The motion is adopted by voice vote, and the meeting is now adjourned. Thank you so much.

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(Whereupon, the above-entitled matter
went off the record at 9:21 a.m.)