

**Remarks of Chief Judge Patti B. Saris,  
Chair of the United States Sentencing Commission  
December Public Meeting  
December 9, 2016**

Thank you for attending this public meeting of the United States Sentencing Commission.

This is the Commission's final meeting in 2016. The Commission will end the year with a number of transitions and vacancies as it marks the final meeting of my six-year term as Chair of the Commission which expires when the Congress adjourns. So sadly, this will be my last address to you as Chair of the Commission. Typically, my remarks to you focus on our recent activities and plans for the immediate future. Today I also will look back at this important and exciting period in the Commission's history.

Before I do that, I would like to introduce the other members of the Commission. I'll start with Judge Charles R. Breyer. He is a Senior District Judge for the Northern District of California and has served as a United States District Judge since 1998. He joined the Commission in 2013 and serves as a Vice Chair. Judge Breyer is one of the best known and loved judges in the federal judiciary. His insights from many years as a trial judge have been invaluable. Hopefully, he will have the opportunity to serve a second term, as his first term is also ending at the end of this congressional session.

Next, we have Dabney Friedrich, who has served on the Commission since 2006. Immediately prior to her appointment to the Commission, Commissioner Friedrich served as Associate Counsel at the White House. She previously served as counsel to Chairman Orrin Hatch of the United States Senate Judiciary Committee and as an Assistant U.S. Attorney, first for the Southern District of California and then for the Eastern District of Virginia. This also marks the final meeting for Commissioner Friedrich. For the last decade, Dabney has been an active and hard-working member of the Commission contributing greatly to the Commission's decisions. Our staff, would like to thank her for being very supportive of their efforts. She has also been very impactful in prison reform efforts to better educate prisoners in the Bureau of Prisons, particularly those with learning disabilities. She has been a valued member of the Commission often offering that one idea or insight that makes a compromise possible on important amendments like drugs minus 2 and we wish her well.

Next is Judge William H. Pryor, who also joined the Commission in 2013. Judge Pryor is a United States Circuit Judge for the Eleventh Circuit Court of Appeals, appointed in 2004. Before his appointment to the Federal bench, Judge Pryor served as Attorney General for the State of Alabama and he is also responsible for the creation of the Alabama Sentencing Commission. Judge Pryor is a true scholar who thinks deeply about the big picture of sentencing policy.

Next is Rachel Barkow, who also joined in 2013. Commissioner Barkow is the Segal

Family Professor of Regulatory Law and Policy at the New York University School of Law, where she focuses her teaching and research on criminal and administrative law. Commissioner Barkow brings extensive academic knowledge to the Commission, not just relating to sentencing policy but also in other substantive areas like mens rea law. She also serves as the faculty director of the Center on the Administration of Criminal Law at the law school.

I'd also like to recognize Michelle Morales, who serves as the designated *ex officio* member of the Commission representing the Department of Justice. Commissioner Morales is the Acting Director of the Office of Policy and Legislation in the Criminal Division of the Department. She first joined that office in 2002 and has served as its Deputy Director since 2009. Commissioner Morales previously served as an Assistant United States Attorney in the District of Puerto Rico.

During this period of transitions, I'd like to acknowledge that next year will mark the thirtieth anniversary of the Commission's first publication of the sentencing guidelines. Over the last six years the proposed amendments to the guidelines have been developed and adopted in the same tradition of bipartisanship that has shaped the Commission the last three decades. Over the last six years, the Commission's current membership has continued this remarkable tradition with an evidence-based and collegial approach to decision-making. Our efforts have resulted in significant policy decisions that we believe have contributed to a decrease in the federal prison population, which peaked in 2013 at 219,298 and now has declined to its current level of 190,303. That's a reduction of more than 28,995 offenders, or 13.2% over three years.

It has been a pleasure to serve as Chair of the Commission. I have learned so much from each and every commissioner I have had the honor to serve alongside with. I started with my friend and former chair Ricardo Hinojosa, Ketanji Brown Jackson, Beryl Howell, William Carr and *ex officio* Jonathan Wroblewski. I have become a big fan of our standing advisory groups: the practitioners advisory group, the probation officers advisory group, and the victims advisory group. I would also like to thank the Federal Defenders Guidelines Committee, Commission Liaison Subcommittee for their assistance. I am enthusiastic about the future contribution of our tribal issues advisory group, newly announced with the members identified on our website. These groups regularly meet with the Commission and help us in the formation of sentencing policy.

I would be remiss if I did not acknowledge the significant impact of the public comment in relation to our amendments to the guidelines sent from a broad range of interested Americans and stakeholders during my tenure as Chair. Your formal comment has helped shape over 50 amendments that were promulgated during my tenure.

It has also been a joy to work with the Commission's staff of esteemed attorneys, social scientists, and other professionals with expertise in criminal justice and federal sentencing policy, along with many other hard-working individuals who each contribute with their best effort in their respective roles. I want to give a particular shout out to Staff Director Ken Cohen and our staff director before him, Judith Sheon. My first year here was a tough one as I learned the ropes and I have had the best teachers, friends and mentors. Our staff has provided all the

commissioners with invaluable support and expertise. Together, and with you—the listening public—hopefully, we have been active in trying to make the guidelines and federal sentencing fairer and more proportionate while maintaining an ongoing commitment to public safety.

As I mentioned before, when I first became Chair six years ago, the BOP inmate population was 37 percent overcapacity, and now it is about half that. In 2011, my first year on the Commission, the Commission implemented new lower crack cocaine penalties from the 2010 Fair Sentencing Act and voted to apply these changes retroactively to benefit currently incarcerated crack cocaine offenders. In arriving at these decisions, the Commission found that the crack cocaine penalties were not proportionate to the harms on society, and that the impact of the unduly severe penalties were borne most by minorities. That decision resulted in 7,748 offenders receiving an average reduction in their sentences of 19.9% – from 153 to 123 months.

In 2014, the Commission voted to reduce the Drug Quantity Table for all drug trafficking offenses – not just crack cocaine – by 2 levels – which reduced drug penalties going forward by about 17%. The Commission then voted to make those reductions retroactive and to date 28,544 drug offenders have received an average sentence reduction of 17%, or 25 months from 143 months to 118 months. It’s important for the public to know before sentence reductions were granted as a result of the 2011 and 2014 amendments, each individual case was reviewed by a federal judge to ensure that the offender did not pose a public safety risk. Simply put – none of these reductions are automatic.

The Commission also had several other important amendments that became effective this year. In response to the Supreme Court’s decision in *Johnson v. United States* the Commission eliminated the analogous residual clause from the Sentencing Guidelines definition of crime of violence. The amendment will help relieve some of the strain on the courts and the broader uncertainty that has followed *Johnson*. In addition, this year the Commission published a report to Congress analyzing career offenders in the federal system and the statutory definition of crime of violence. In our report, the Commission recommended that Congress establish one definition of “crime of violence” for all criminal law purposes, and we encourage Congress to adopt the Commission’s definition of “crime of violence” as that single, uniform definition.

The Commission also strengthened and broadened the criteria for compassionate release with several meaningful changes. Congress charged the Commission with issuing policy statements describing what should be considered extraordinary and compelling reasons for a sentencing reduction. Through the Commission’s newly expanded criteria, federal inmates may be eligible for compassionate release based on four categories relating to medical conditions, age, family circumstances, or other extraordinary and compelling reasons. The Commission’s action encourages the BOP to use its current authority if an eligible offender meets any of these circumstances.

This year, the Commission also addressed the guidelines for illegal reentry offenses. The 2016 amendment increased penalties for those immigrants who commit crimes after unlawfully reentering the country or who are convicted of reentering the country multiple times. Immigration offenses comprise a large proportion of the federal docket and these enhancements

may affect a large number of cases. These amendments also simplified the application of immigration guidelines.

Over the past 6 years, I have traveled throughout the nation speaking to different audiences about the challenges confronting the federal criminal justice system today. Whether I'm addressing a room full of federal judges or a group of law students, I have always emphasized that the Commission's decisions are evidence-based and data-driven. During my tenure as Chair, the Commission's Office of Research and Data has analyzed 397,248 individual cases, cataloguing the pertinent sentencing data into a comprehensive computer database maintained by the Commission. Our detailed synthesis of sentencing data has culminated in 60 publications ranging from significant research reports to more tailored Quick Facts. We have also responded to 845 special data requests. The Commission's reports have a continued impact on educating policymakers and the public.

For instance, several of the Commission's recommendations in its 2011 Mandatory Minimum Report are reflected in bipartisan legislation pending before the House and the Senate. Since 2011, the Commission unanimously concluded that mandatory minimum sentences in their current form are often too high, are applied too broadly to lower level defendants, and the most severe penalties are often applied inconsistently.

That's why we've urged Congress to reduce the current statutory mandatory minimum penalties for drug trafficking.

We've also urged Congress to consider expanding the safety valve to allow a greater number of non-violent, low-level drug offenders to be sentenced below mandatory minimum penalties.

In addition, we've urged Congress to follow the Commission's lead and give retroactive effect to the statutory changes made by the Fair Sentencing Act of 2010.

And we've urged Congress to reassess the scope and severity of the recidivism provisions in 21 U.S.C. sections 841 and 960, which generally double the mandatory minimum penalties if a drug offender has a prior conviction for a drug trafficking offense.

The Commission plans to update that pivotal mandatory minimum report with more current data in the near future. It is my hope that the courts, Congress, the Executive Branch, and the public continue to base sentencing laws and policies on the Commission's high-quality data and thoughtful analysis. So much bipartisan progress has been made in criminal justice reform. I am hopeful that the 115<sup>th</sup> Congress will pass meaningful legislation.

The Commission has also focused on making its reports and data more accessible to the public and Congress. We have started publishing a series of 23 Quick Facts, two page documents focusing on a variety of issues within the federal criminal justice system. Since 2012, the Commission has made its prison and sentencing impact analyses available to the public on its website and this year the Commission launched a redesigned website. The Commission has also expanded its national training opportunities for judges and practitioners in recent years. In June, about 100 judges attended our first-ever training for judges in Chicago, and the feedback was so positive that the Commission is holding another training session for judges in 2017.

On September 7-9, the Commission held its Annual National Training Program in Minneapolis and had approximately 850 attendees. I would like to acknowledge the excellent work of the Commission's staff who organized the event and conducted the individual sessions offered during the training programs.

We have received some feedback from the seminar participants that National Training Program's audience has grown too large. To respond to this feedback, but to also accommodate the continued demand for our training programs, we have decided to hold a National Training Program series next year. The first in the series that is open to the public will be on May 31-June 2, 2017, in Baltimore, MD and the second will be on September 6-8, 2017, in Denver, CO. We will also hold a judges-only training program in San Diego, CA on June 22-23, 2017. Registration has not yet opened for these programs but you can check our website for more details in the weeks ahead.

In October the Chair and Vice Chair of the Commission's Practitioners Advisory Group (PAG) completed their terms of office. I would like to take a moment to acknowledge their service and thank them on behalf of the Commission.

Eric Tirschwell served as the Chair of the PAG from October 2015 - October 2016, following previous service as Vice Chair.

Nanci Clarence served as the Vice Chair for one year and was a member of the PAG since 2013. Nanci practices law in San Francisco, California with Clarence Dyer and Cohen.

Existing members of the PAG have taken over the leadership roles and I would like to acknowledge them as well. On the advisory group since 2012, the New Chair of the PAG is Ronald Levine, who practices law in Philadelphia, PA. Ron is a principal at Post and Shell in the firm's Business Law and Litigation Department and Chair of the Firm's Internal Investigation and White Collar Defense Group.

The new Vice Chair, Knut Johnson, who practices criminal defense in San Diego, California, and is the Criminal Justice Act representative for the Southern District of California. Knut has been a member of the PAG since 2015. We are grateful to them and all the members of the Commission's advisory groups for their continued service to the Commission. We value their input.

And we have a new advisory group! As you may recall, in July, 2016, the Commission held a hearing, at which the ad hoc Trial Issues Advisory Group presented their report to the Commission and testified about the recommendations in that report. One recommendation that the ad hoc group made to the Commission was that it should create a standing Tribal Issues Advisory Group. The Commission accepted that recommendation and adopted a charter for the advisory group in August and published a Federal Register Notice seeking applicants for membership on the group. I am pleased to announce the membership of the new Standing Tribal Issues Advisory Group (TIAG):

Chief Judge Ralph Erickson from the District of North Dakota, who will also serve as the TIAG's chair; the other members have been announced on our website and we thank them for their time and service.

We would also like to thank those applicants who were not selected for membership on the TIAG at this time for their interest in working with the Commission. We hope you will seek future opportunities for service to the Commission.

The Commission is considering a proposed amendment to reduce penalties for first-time offenders and to increase the availability of alternatives to incarceration.

Last year, the Commission studied alternatives to incarceration and found that alternative sentences were imposed in only 13% of federal cases. Increasing the use of alternatives may further decrease the overcapacity issues within the federal prison system. We've also been informed by our ongoing recidivism research that shows that true first offenders have a significantly lower recidivism rate than offenders with 1 criminal history point (30.2% for offenders with zero criminal history points, compared to 46.8% for those with 1 point).

So, the Commission would like to consider greater use of alternatives, especially for first time offenders. Today, we are publishing a proposed amendment that could increase the use of alternatives by combining Zones B & C, perhaps adding a downward adjustment for certain first offenders, and adding commentary encouraging the use of alternatives for certain categories of offenders.

Based on the dedicated work of Commission staff, federal judges, and stakeholder groups, the Commission successfully established a Tribal Advisory Issues Group (TIAG) which published its report on the unique federal sentencing issues relating to American Indians in June of this year. As a result of that report and the subsequent hearing, the Commission has established a permanent tribal issues advisory group in August of this year.

In considering and implementing this group's important work, the Commission examined the impact of the federal sentencing guidelines on tribal issues. The Commission is putting forth a proposed amendment that responds to the TIAG's recommendations regarding tribal court convictions and sets forth five factors for a sentencing judge to consider when determining whether, and to what extent, an upward departure may be appropriate based on a defendant's history of tribal court convictions.

The Commission is also considering a proposed amendment that targets youthful offenders under the guidelines. This proposal will exclude juvenile sentences from being considered in the defendant's criminal history score. It also provides a list of certain offenses that should never be counted for purposes of a criminal history score, including "juvenile status offenses and truancy." In light of the growing adolescent brain development research and recent court decisions, we welcome public comment on this issue.

In response to the Bipartisan Budget Act of 2015, the Commission is also considering a proposed amendment that reflects Congress's changes to the Social Security Act by increasing penalties for social security fraud. I would like to acknowledge the important years of work, as well as the continued oversight, led by the House Judiciary Committee, the Senate Committee on Finance and the House Ways and Means Committee to ensure aggressive implementation of these new penalties relating to Social Security fraud.

The Commission is publishing an issue for comment that initiates a two-year study on synthetic drugs, including synthetic cannabinoids, cathinones and MDMA. The study will consider, among other things, whether to add new substances to the Drug Equivalency Tables. In light of the increasing trend of synthetic drug cases in the federal docket the Commission believes that it is appropriate to further examine the issue. The Commission welcomes any public comment on the impact of synthetic drugs as we conduct this study. We want to make sure that the penalties are appropriate and the guidelines are well-informed.

Thank you all for your attendance and dedication to these issues today, and during – and in some cases before! – my tenure with the Commission.

It has been a real honor for me to serve in this role. I am pleased with the contributions that we've accomplished together to strengthen and improve the federal sentencing guidelines. Also, I am grateful to each of you for your support of my work here and the relationships that we've developed.

Looking forward, I remain committed to the ongoing success and contributions of the Sentencing Commission. As we have put forth these serious and important amendments for public comment today, it's clear that the work remains as critical as ever and there is a full agenda for the year ahead.

To that end, I would like to acknowledge that there will be a new Acting Chair announced as my term ends with the conclusion of this session of Congress. I am confident that the future Commission and the Commission's staff will remain dedicated and serious about the important mission here.

As we look back on the thirty years of work to improve the nation's federal sentencing guidelines, I appreciate my opportunity to serve as the Chair during this historic period. While my time is ending, the work goes on and I urge each of you to remain as focused and dedicated as ever to a system of guidelines that is fair, effective and just.

Thank you all.