

UNITED STATES SENTENCING COMMISSION

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June 6, 2022

The Honorable Chuck Schumer
Senate Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Senate Minority Leader
United States Senate
Washington, DC 20510

The Honorable Dick Durbin
Chair
United States Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
United States Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Leader Schumer, Leader McConnell, Chairman Durbin and Ranking Member Grassley:

I have had the privilege of serving as Acting Chair of the United States Sentencing Commission since January 2021, and as a member since 2013. As a sitting federal judge, I was long familiar with the important role of the Commission and the federal sentencing guidelines and gained an even greater appreciation for the Commission's function my time on the Commission. It is with my experience both on the Commission and as a sentencing judge that I write to articulate my firmly held view that the Commission must be reconstituted as soon as possible.

As you are aware, the Commission is an independent bipartisan agency in the judicial branch for which no more than four of the Commission's seven voting members may be from the same political party, and at least three of whom shall be Federal judges (28 U.S.C. § 991). This bipartisan framework, along with the Commission's empirically based policymaking, ensures that the guidelines remain an integral part of the federal criminal justice system as both an anchor for federal sentences and a guidepost for sentencing judges nationwide.

However, for more than three years the Commission has been unable to fulfill its most fundamental statutory mission, establishing uniform national sentencing policy, because it lacks the minimum four affirmative votes required under 28 U.S.C. § 994 to promulgate amendments to the federal sentencing guidelines. The Commission lost its voting quorum at the end of 2018, and since the adjournment of the 116th Congress has operated with only one voting commissioner and six vacancies.

I am aware President Biden sent a full slate of seven nominations to the Senate on May 12, 2022, and I am encouraged that Chairman Durbin and Ranking Member Grassley will hold their confirmation hearing soon. I am not writing to opine upon the merits of any particular nominee or nominees, but rather to articulate some of the harms to the federal criminal justice system caused by the prolonged absence of a voting quorum.

The Commission's inability to act comes while important sentencing legislation awaits implementation. The First Step Act of 2018 contained significant sentencing provisions expanding relief from mandatory minimum penalties under 18 U.S.C § 3582(f) and the availability of compassionate release under 18 U.S.C § 3582(c), and, more than three years later, the Commission still has been unable to promulgate amendments implementing these changes. In the absence of updated policy guidance from the Commission, courts have filled the void themselves, but unlikely in the uniform manner contemplated by either the First Step Act or the Sentencing Reform Act of 1984, the legislation that established the Commission.

The Commission has also been unable to fulfill its important function of resolving growing circuit conflicts relating to the application of the guidelines. Such circuit conflicts inherently result in a lack of uniformity in certain aspects of federal sentencing and has not gone unnoticed by important actors in the federal system.

Supreme Court Justices have recently written in two separate statements about the pressing need to restore a voting quorum. In a recent *writ of certiorari* denial, Justice Sotomayor took the unusual step of issuing a statement, joined by Justice Barrett, in which she wrote, "At this point, the Sentencing Commission has not had a quorum for three full years. As the instant petition [regarding the career offender guideline] illustrates, the resultant unresolved divisions among the Courts of Appeals can have direct and severe consequences for defendants' sentences. I hope in the near future the Commission will be able to resume its important function in our criminal justice system." *Guerrant v. United States*, 142 S. Ct. 640, 641, 211 L. Ed. 2d 522 (2022) (Statement of Sotomayor, J., joined by Barrett, J.). The sentiment expressed in *Guerrant* echoed a statement issued a full year earlier by Justice Sotomayor, joined by Justice Gorsuch, denying another *writ of certiorari* statement. *See Longoria v. United States*, 141 S. Ct. 978, 979, 209 L. Ed. 2d 496 (2021) (Statement of Sotomayor, J., joined by Gorsuch, J.) ("The Sentencing Commission should have the opportunity to address [the proper interpretation of the acceptance of responsibility guideline], once it regains a quorum of voting members.").

In view of the important work awaiting a reconstituted Commission, I thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to be 'C. R. Breyer', with a long horizontal flourish extending to the right.

Charles R. Breyer
Acting Chair, United States Sentencing Commission
Senior United States District Court Judge
Northern District of California