



NEW YORK
CITY BAR

COMMITTEE ON FEDERAL COURTS

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June 9, 2022

Hon. Chuck Schumer
Majority Leader
U.S. Senate
322 Hart Senate Office Building
Washington, D.C. 20510

Hon. Mitch McConnell
Minority Leader
U.S. Senate
317 Russell Senate Office Building
Washington, D.C. 20510

Hon. Dick Durbin
Chair, Judiciary Committee
U.S. Senate
711 Hart Senate Office Building
Washington, D.C. 20510

Hon. Chuck Grassley
Ranking Member, Judiciary Committee
U.S. Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Re: Confirming United States Sentencing Commission Commissioners

Dear Senators Schumer, McConnell, Durbin and Grassley:

On behalf of the Federal Courts Committee of the New York City Bar Association¹ (“City Bar”), we respectfully write to urge the United States Senate to confirm expeditiously new commissioners to the United States Sentencing Commission (“Commission”). The Commission plays a critical role in the federal criminal justice system, most notably in its promulgation of the advisory United States Sentencing Guidelines (“Guidelines”)² and policy statements concerning

¹ The City Bar, founded in 1870, has over 23,000 members practicing throughout the nation and in more than fifty foreign countries. It includes among its membership lawyers in many areas of law practice, including present or former federal prosecutors as well as lawyers who represent defendants in criminal cases. The Federal Courts Committee is charged with studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts.

² The Sentencing Guidelines, which went into effect in 1987, provide for “very precise calibration of sentences, depending upon a number of factors. These factors relate both to the subjective guilt of the defendant and to the harm caused by his acts.” *Payne v. Tennessee*, 501 U.S. 808, 820 (1991). Though the Guidelines are no longer mandatory, *United States v. Booker*, 543 U.S. 220, 259 (2005), they remain authoritative and persuasive to many courts.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

application of the Guidelines and other matters relevant to federal sentencing. Yet, since January 2019, the Commission has been near vacant: it has had just one voting commissioner (with six empty seats) and lacked a quorum. As a result, the Commission has been unable to address several important matters bearing on federal sentencing policy, including resolving divisions within various federal appellate courts and amending or updating the existing (2018) Guidelines. Indeed, earlier this year, in a statement with respect to a denial of certiorari, Justice Sotomayor, joined by Justice Barrett, pointed out the harm caused by the absence of an operational Commission and expressed the hope that “in the near future the Commission will be able to resume its important function in our criminal justice system.”³

On May 11, 2022, President Biden announced the nomination of seven nominees for the Commission, including the nomination of a U.S. District Court Judge to serve as Chair of the Commission. The Senate Judiciary Committee held a hearing on the President’s nominees on June 8, 2022. We encourage the full Senate to take up these nominations and to vote on their confirmation without further delay.⁴

BACKGROUND

The Commission is an independent agency in the Judiciary that was created as part of the Sentencing Reform Act of 1984.⁵ The Commission consists of seven voting members—including a Chair and three Vice Chairs—who are appointed by the President and confirmed by the Senate, to serve six-year terms.⁶ At least three commissioners must be federal judges, and no more than four may be members of the same political party.⁷ In addition, the Attorney General, or the Attorney General’s designee, and the Chair of the United States Parole Commission serve as *ex officio* nonvoting members of the Commission.⁸

The Sentencing Commission is an essential part of the sentencing process in the federal courts of the United States. The late Judge Marvin Frankel, whose 1973 book “Criminal Sentences: Law Without Order” inspired the creation of Sentencing Guidelines, imagined a “Commission on Sentencing” many years before it existed.⁹ Judge Frankel referred to it “as the most important single suggestion” in his book and stated that it would need to study current practice, formulate laws and rules based on its studies, and enact rules that governed federal

³ *Guerrant v. United States*, 142 S. Ct. 640, 641 (Mem.) (2022) (statement of Sotomayor, J., joined by Barrett, J., respecting denial of certiorari).

⁴ In this letter, the City Bar does not express a position on the qualifications of any of the nominees.

⁵ See 28 U.S.C. § 991(a); see also United States Sentencing Commission, Organization, available at <https://www.ussc.gov/about/who-we-are/organization> (accessed Feb. 14, 2021).

⁶ 28 U.S.C. §§ 991(a), 992(a).

⁷ 28 U.S.C. § 991(a). The federal judges must be selected from a list of six judges submitted to the President by the Judicial Conference of the United States. *Id.*

⁸ *Id.*; see *Mistretta v. United States*, 488 U.S. 361, 369 n.4 (1989). On November 30, 2021, Senator Cory Booker introduced a bill that would add another *ex officio* member with a public defender background to the Commission. Sentencing Commission Improvement Act, S. 3286, 117th Cong. § 2(a)(2) (2021), available at <https://www.congress.gov/bill/117th-congress/senate-bill/3286/text>.

⁹ See Marvin Frankel, *Criminal Sentences* (Hill & Wang, 1973), at 119.

sentencing.¹⁰ The commission he envisioned “would require prestige and credibility” and be composed of “people of stature, competence, devotion, and eloquence.”¹¹

For many years, the Sentencing Commission created by Congress has embodied these aspirations. The Commission’s purpose is to “establish sentencing policies and practices for the Federal criminal justice system” that meet the sentencing purposes set forth in 18 U.S.C. § 3553(a)(2); to provide “certainty and fairness” in sentencing and avoid “unwarranted sentencing disparities” among similarly situated individuals while maintaining flexibility to “permit individualized sentences” based on the existence of mitigating and aggravating factors; to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process”; and to develop measurements of the effectiveness of federal sentencing and correctional practices.¹² The Commission’s specific duties include promulgating the Guidelines and policy statements about applying the Guidelines or any other aspect of sentencing that furthers the purposes set forth in 18 U.S.C. § 3553(a)(2).¹³

The affirmative vote of at least four commissioners is required to promulgate amendments to the Guidelines. Four votes are also required to issue general policy statements about applying the Guidelines or any other aspect of sentencing that would further the purposes set forth in 18 U.S.C. § 3553(a)(2), and to issue guidelines or policy statements about the revocation of probation, 18 U.S.C. § 3565, and the modification of the terms or conditions of supervised release as well as the revocation of supervised release, 18 U.S.C. § 3583(e).¹⁴ To conduct its other empowered actions, a vote of “a majority of the members present and voting” is required.¹⁵ A quorum consists of a “simple majority of the membership then serving.”¹⁶

As noted, the Commission has lacked a quorum since January 2019. Judge Charles R. Breyer (N.D. Cal.) is now the sole voting commissioner (and Acting Chair).¹⁷ President Trump nominated four individuals, including three federal judges, to serve on the Commission. The Senate did not act on those nominations.¹⁸

¹⁰ *Id.*

¹¹ *Id.* at 119-20.

¹² 28 U.S.C. § 991(b)(1)-(2).

¹³ *Id.* § 994(a). The statute provides the Commission with a list of factors to consider in setting federal sentencing policy. *Id.* § 994(b)-(y). The Commission also provides substantial research and educational services to Congress, the executive branch, the courts, practitioners, the academic community, and the public. See <https://www.ussc.gov/about-page>.

¹⁴ 28 U.S.C. § 994(a)(1)-(3).

¹⁵ *Id.* § 995(a).

¹⁶ *Id.* § 995(d).

¹⁷ Judge Breyer’s term expired on October 31, 2021. He has continued to serve in a temporary capacity. See 28 U.S.C. § 992(b)(2); Madison Alder, *Near-Vacant Sentencing Panel Gives Biden Chance for Fresh Start*, BLOOMBERG LAW (June 28, 2021), available at <https://news.bloomberglaw.com/us-law-week/near-vacant-sentencing-panel-gives-biden-chance-for-fresh-start>.

¹⁸ See Avalon Zoppo, *Sentencing Commission’s Lone Member Urges Biden to Make Nominations*, LAW.COM (Jan. 12, 2022), available at <https://law.com/nationallawjournal/2022/01/12/sentencing-commissions-lone-member-urges-biden-to-make-nominations/>; Todd Ruger, *Biden to Revive Sentencing Commission*, WINSTON-SALEM J., B5 (Apr.

EFFECTS OF THE NEAR VACANT COMMISSION

Because the Commission has been nearly vacant for more than three years, significant sentencing issues, some of which have divided various U.S. Courts of Appeals in the last several years, remain unresolved. A few examples follow.

1. Setting Policy on the First Step Act and Compassionate Release

Effective December 21, 2018, the First Step Act enacted several changes aimed at reforming federal prisons and sentencing laws to help reduce recidivism, decreasing the federal inmate population, and maintaining public safety. Before December 2018, courts were authorized to consider compassionate release motions only if they were filed by the Director of the Bureau of Prisons. Under the First Step Act, prisoners were for the first time able to petition the court directly for compassionate release.

A court may now reduce a defendant's term of imprisonment upon a motion of the Director of the Bureau of Prisons or "upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier," if the court finds "extraordinary and compelling reasons warrant such a reduction" and the reduction is "consistent with applicable policy statements issued" by the Commission.¹⁹

The effect of this change has been profound. In 2018, just 34 federal inmates received compassionate release sentence reductions.²⁰ The Bureau of Prisons reports that 4,084 compassionate release applications have been granted since the Act became law.²¹ Compassionate release motions have become even more prevalent after the outbreak of the COVID-19 pandemic in March 2020. The Commission reports that, between January 1, 2020 and June 30, 2021, more than 20,000 compassionate release motions have been decided by federal courts.²²

3, 2021). The nominees were: Judge William H. Pryor (11th Cir.), Judge Luis Felipe Restrepo (3rd Cir.), Judge Henry E. Hudson (E.D. Va.), and William Graham Otis, an Adjunct Professor of Law at Georgetown University Law Center. See <https://trumpwhitehouse.archives.gov/presidential-actions/president-donald-j-trump-announces-bipartisan-group-nominees-united-states-sentencing-commission/>. Although President Trump stated his intent to nominate another slate of commissioners on August 12, 2020, it is not clear that the nominations were formally transmitted to the Senate. See <https://www.law360.com/articles/1347291/wide-open-sentencing-commission-gives-biden-reform-path>; <https://trumpwhitehouse.archives.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-individuals-key-administration-posts-081220/>.

¹⁹ 18 U.S.C. § 3582(c)(1)(A).

²⁰ See *United States v. Brooker*, 976 F.3d 228, 233 (2d Cir. 2020).

²¹ See <https://bop.gov/inmates/fsa> (last visited Feb. 17, 2022).

²² *U.S. Sentencing Commission Compassionate Release Data Report, Calendar Years 2020 to 2021*, U.S. SENT'G COMMISSION (Sept. 2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf>.

This influx of compassionate release motions, however, has raised a significant legal question. While the Commission is tasked with describing “what should be considered extraordinary and compelling reasons for sentence reduction,”²³ the current Guidelines specifically address only the situation in which a motion is brought by the Bureau of Prisons.²⁴ The current Guidelines do not describe what constitutes “extraordinary and compelling reasons” when a defendant brings a compassionate release motion.

Federal appellate courts are divided on whether the existing Guidelines apply to motions brought by defendants. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits have held that the current Guidelines do not apply, and that District Courts may consider *any* extraordinary or compelling reason for relief a defendant may raise;²⁵ the Eleventh Circuit, however, has held that the pre-First Step Act Guidelines continue to apply to motions brought by defendants.²⁶

A full Commission could address this issue to ensure there is a uniform policy on what constitutes “extraordinary and compelling” circumstances for granting a compassionate release motion, no matter if the motion is brought by a defendant or the Bureau of Prisons.²⁷

2. Resolving Circuit Splits Over Interpretations of Guideline Provisions

At least twice in the past year, the Supreme Court has denied certiorari petitions presenting circuit splits on the application of Guideline provisions. The first case, *Longoria v. United States*, involved interpretation of § 3E1.1(b), which provides that a defendant whose offense level is 16 or greater may receive a one-level sentence reduction, upon the government’s motion, if the defendant timely notifies the government of the defendant’s intent to plead guilty.²⁸ The split concerned whether going forward with a suppression hearing was a valid basis for denying the reduction.²⁹ In a statement respecting the denial of certiorari, Justice Sotomayor, joined by Justice Gorsuch, noted that the Commission “should have the opportunity to address this issue in the first instance, once it regains a quorum of voting members,” and emphasized the need for clarification

²³ 28 U.S.C. § 994(t).

²⁴ U.S.S.G. § 1B1.13; *id.*, nn. 1(D), 4. The Guideline contains a catch-all provision which allows for unidentified extraordinary and compelling reasons “[a]s determined by the Director of the Bureau of Prisons.” *Id.* § 1b1.13 n. 1(D).

²⁵ *United States v. Ruvalcaba*, — F.4th —, 2022 WL 468925, at *5-6 (1st Cir. Feb. 15, 2022); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. Long*, 997 F.3d 342, 352-59 (D.C. Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 800-02 (9th Cir. 2021); *United States v. Shkambi*, 993 F.3d 388, 392-93 (5th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050-51 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281-84 (4th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020); *Brooker*, 976 F.3d at 234-36;

²⁶ *United States v. Bryant*, 996 F.3d 1243, 1247-48, 1252-62 (11th Cir. 2021). The Eighth Circuit has not taken a side on the issue. See *United States v. Crandall*, — F.4th —, 2022 WL 385920, at *2 (8th Cir. Feb. 9, 2022); *United States v. Marcussen*, 15 F.4th 855, 859 (8th Cir. 2021); *United States v. Rodd*, 966 F.3d 740, 747 (8th Cir. 2020).

²⁷ See 28 U.S.C. § 994(o).

²⁸ *Longoria v. United States*, 141 S. Ct 978, 978-79 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting denial of certiorari).

²⁹ *Id.* at 979.

from the Commission given the substantial effect a one-level reduction can have on a defendant's sentence.³⁰

The second case, *Guerrant v. United States*, involved a circuit split over the definition of “controlled substance offense” to determine whether a defendant with two or more prior felony convictions qualified as a “career offender” under the Guidelines.³¹ Again, in a statement respecting the denial of certiorari, Justice Sotomayor, joined by Justice Barrett, observed that Guidelines § 4B1.2(b) defines a “‘controlled substance offense’ as ‘an offense under federal or state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of’ such substances with intent to engage in such activities.”³² But the Guidelines do not define “controlled substance.”³³ As a result, some Circuits define the term by reference to federal law, while others define it by reference to state law.³⁴ Justice Sotomayor again remarked that it was the Commission’s “responsibility . . . to address this division to ensure fair and uniform application of the Guidelines.”³⁵

3. Reconsidering the Guidelines’ Emphasis on Economic Loss

In recent years, there have been increasing calls for the Commission to reconsider the weight the Guidelines give to loss amounts in determining the applicable offense level for economic offenses. *See* U.S.S.G. § 2B1.1(b)(1) (loss amount chart). Judges and commentators have noted that the Guidelines loss amounts, and the resulting sentencing enhancements, may lead to inequitable sentencing outcomes because the amount of loss does not necessarily correlate with the moral seriousness of the offense or the governing sentencing factors set forth under 18 U.S.C. § 3553(a).³⁶

In white collar fraud cases with substantial loss amounts, it is not uncommon now for sentencing courts to impose sentences below the advisory Guidelines range. Indeed, the Second Circuit has recognized that allowing loss amounts to become “the principal determinant of the adjusted offense level and hence the corresponding sentencing range,” an approach “unknown to other sentencing systems, was one the Commission was entitled to take, but its unusualness is a circumstance that a sentencing court is entitled to consider.”³⁷

³⁰ *Id.*

³¹ *Guerrant*, 142 S. Ct. at 641.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004) (Lynch, J.) (observing that the Guidelines “place undue weight on the amount of loss,” which “[i]n many cases . . . is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.”); *United States v. Johnson*, No. 16 Cr. 457-1 (NGG), 2018 WL 1997975, at *4 (E.D.N.Y. Apr. 27, 2018) (Garaufis, J.) (“Many in the legal community have urged the Sentencing Commission to right this grievous wrong, and today I add my name to that lengthy list of judges, practitioners, scholars, and other commentators. The problems with the loss enhancement have been evident since the inception of the Guidelines.”).

³⁷ *United States v. Algahaim*, 842 F.3d 796, 800 (2d Cir. 2016) (citation omitted).

To be sure, some bar associations such as the American Bar Association, have proposed an alternative sentencing framework, sometimes called the “Shadow Guidelines,” that de-emphasizes the reliance on the loss amount.³⁸ And some judges within the Second Circuit have applied the Shadow Guidelines over the existing Guidelines in white collar cases.³⁹

A full Commission could provide guidance on whether the Guideline’s current reliance on economic loss amounts (as set forth in U.S.S.G. § 2B1.1(b)(1)) continues to promote fair and uniform sentencing in white collar cases, given the evolving practices of sentencing courts since the last amendment of the Sentencing Guidelines Manual in 2018.

CONCLUSION

The City Bar urges the Senate to consider and confirm expeditiously new commissioners because there are many important issues bearing on federal sentencing that the Commission cannot address without at least four voting commissioners. The Sentencing Guidelines cannot operate as intended without a Sentencing Commission that can study their operation and propose and enact new guidelines to take into account those studies and the experience of criminal practitioners. By waiting so long to nominate and confirm Commission members, the political actors have created a crisis for the judicial system and for both the government and defense counsel that wish to see the law develop. For these reasons, we join in the bipartisan chorus of members of Congress, and Justices of the Supreme Court, that have called for these important positions to be filled.

Respectfully,

Harry Sandick, Chair
Federal Courts Committee

Cc: Members of the Senate Judiciary Committee

³⁸ See American Bar Association Criminal Justice Section, *A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes* (Nov. 10, 2014), available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf.

³⁹ *United States v. Faibish*, No. 12 Cr. 265 (ENV) (E.D.N.Y. 2016) (Vitaliano, J.) (imposing a non-Guidelines sentence based on the Shadow Guidelines’ proposed loss amount table: resulting in a sentence of 63 months instead of life in prison); *United States v. Rivernider*, No. 3:10 Cr. 222 (RNC) (D. Conn. Dec. 18, 2013) (Chatigny, J.) (applying the Shadow Guidelines in sentencing a defendant convicted of wire fraud and conspiracy to commit wire fraud; noting that the Shadow Guidelines’ calculation yielding a sentence of 144 months’ imprisonment was “preferable to” the 324–405 month calculation under the current Guidelines that “significantly overstate[d]” the defendant’s culpability).