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May 25, 2016

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Public Comment on Proposed Amendments to Rules of Practice and Procedure

Dear Chief Judge Saris:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the Commission's proposed amendments to the rules of practice and procedure that were published on March 31, 2016.

We welcome the Commission's efforts to be more transparent about its operations, include Federal Defenders within Rule 3.3, provide an opportunity for reply comments, and expand the use of social media to inform the public of Commission actions. We have some concerns, however, about several of the proposed rules that exclude the public from commenting on important policy decisions (e.g., reports to Congress), and elevate certain stakeholders (e.g., Office of Probation and Pretrial Services and judges) over Defenders, who Congress intended to be equally involved in the work of the Commission. We also offer some suggestions on how the rules can be amended to promote greater transparency, including changes to the rules regarding access to Commission datasets.

While deliberating on the proposed amendments, we encourage the Commission to keep in mind the legislative history of the Sentencing Reform Act. When Congress passed the Act, it made clear that "[t]he Commission should consider as broad a cross-section of views and consult as diverse a group of interested parties as possible during all stages of guideline development."[1] And while it mandated that the Commission follow the notice and comment procedures of 5 U.S.C. § 553, it "did not intend that the informal rulemaking procedures of section 553 constitute

[1] S. Rep. No. 98-225, at 3663-3364 (1983).

the first and only means by which the Commission consults interested parties outside the Commission. Rather these procedures represent the final steps in the process."[2]

Because all of the Commission's work, including such things as the statement of reasons form, congressional reports, and recidivism studies, impacts guideline development, we encourage the Commission to consult as many stakeholders as possible in connection with all of its projects relating to sentencing. The Commission's rules should acknowledge its obligation to consult "with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system."[3] They should also recognize the special role that Congress gave an express set of stakeholders – "the United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders" – in "commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work." 28 U.S.C. § 944(o). In the comments following, we offer some suggestions on how the Commission might make additional amendments to carry out Congress's intent when it passed section 994(o).

A. Actions and Meetings

The Commission proposes expanding Rule 2.2 regarding the actions that may be taken at a nonpublic meeting. Some of the proposed actions involve personnel and general administrative issues, and which should presumably occur in nonpublic meetings. Others, however, have an impact on sentencing policy and the information the Commission receives or provides to others regarding sentencing. Chief among these are reports and recommendations to Congress and the statement of reasons form. To ensure transparency and a process that considers the views of all stakeholders, the rule should require that all decisions related to sentencing policy be made in public meetings. If the Commission nonetheless wishes to take action at nonpublic meetings on matters regarding sentencing, it should at least permit the stakeholders identified in § 994(o) to attend those meetings so that they can meaningfully carry out the statutory obligation to comment not only on the guidelines, but to assess the Commission's work.[4]

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[2] *Id*.

[3] 28 U.S.C. § 994(o) (cited in *Mistretta v. United States*, 488 U.S. 361, 369 (1989)).

[4] Of course, Defenders do not interpret the statute as permitting us to assess the Commission's work as part of an effort to detect and deter waste, fraud, abuse, misconduct, or to promote efficiency – the classic responsibilities of an Inspector General. *See*, *e.g.*, 50 U.S.C. § 3517 (d)(1)(F) (setting out Inspector General duties for Central Intelligence Agency). Section 994(o)'s directive for Defenders to "assess[] the Commission's work" contextually refers to the Commission's duties set forth in 28 U.S.C. § 994 – e.g., promulgating guidelines, analyzing use of prison resources, making recommendations to Congress on

Proposed Rule 3.3(5) sets forth the conditions under which the Commission may hold nonpublic meetings "to receive information from and participate in discussion with outside experts, on matters unrelated to the merits of any pending proposed amendment to the guidelines, policy statements or commentary (e.g., to hold a symposium, convene an expert roundtable, or discuss local practices with a locality's judges and practitioners)." The proposed rule leaves it within the Chair's discretion to invite one or more observers, with priority given to those referred to in subdivision (3), including Federal Public and Community Defenders. We appreciate the rule expressly including Defenders, but because such meetings are integrally related to the Commission's statutory duties and have historically been related to the Commission's decisions on whether to study a particular substantive sentencing issue or propose amendments, the inclusion of the stakeholders recognized in § 994(o) should be mandatory, not discretionary.

To carry out the statutory mandate, the § 994(o) stakeholders must know the nature of the Commission's work, including how it carries out its statutory responsibilities of (1) deciding the relevance of certain offense and offender characteristics, 28 U.S.C. § 994(c) and (d); (2) establishing sentencing policies and practices that "reflect to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process," 28 U.S.C. § 991(b)(1)(C); (3) "develop[ing] means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing," 28 U.S.C. § 991(b); and (4) "mak[ing] recommendations concerning any change or expansion in the nature or capacity of [penal, correctional, and other facilities] and services." 28 U.S.C. § 994(g). Because roundtables, symposiums, and visits with local judges or practitioners, are linked to the Commission's statutory responsibilities and part of the "work" that the stakeholders listed in § 994(o) must assess, and because Congress intended the Commission to "consult as diverse a group of interested parties as possible during all stages of guideline development,"[5] it would be contrary to the statute and the intent of Congress to exclude a Defender representative and the other groups mentioned in § 994(o).

If the Commission decides to give the Chair discretion to determine whether a stakeholder will be invited to a nonpublic meeting, the rule should at least state that the stakeholders identified in § 994(o) be informed that the Commission is conducting a nonpublic meeting to obtain information from persons or groups outside the Commission and be given an opportunity to explain why they should be invited. Over the past several years, we have learned of Commission roundtable meetings purely by happenstance, as was the case with the Roundtable on State Sentencing Guidelines.

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changing statutory penalties, determining retroactive application of the guidelines, deciding on the significance of certain characteristics of the person subject to sentencing and characteristics of the offense, and approving the statement of reasons form.

[5] S. Rep. No. 98-225, at 3663-3364 (1983).

Similarly, when the Commission chooses to have a nonpublic meeting to receive or share information under the circumstances set forth in proposed Rule 3.3, the Commission should notify the stakeholders named in 28 U.S.C. § 994(o) of the general purpose of the meeting so that such stakeholders can have a basic understanding of the work of the Commission and ask additional questions or comment as permitted under § 994(o).

We also encourage the Commission to retain and follow the provisions in Rule 6.2 that it has proposed deleting. Those provisions generally require it to make available information about nonpublic meetings, including the attendees, issues discussed, and written materials submitted by outside parties. The Chatham House Rule should only be invoked when a majority of voting members of the Commission believes that it would be most beneficial and it should be modified to provide that "specific remarks cannot be attributed to particular attendees," but "neither the identities of the attendees nor the general subjects discussed are protected by confidentiality."[6]

To promote transparency and to generate meaningful dialogue about the Commission's analysis and the relevance of empirical data, Defenders encourage the Commission to modify Rule 5.3 and its policy on Public Access to Commission Publication and Other Reports. Rule 5.3, which is referenced in Rule 6.2 regarding the availability of materials for public inspection, addresses when data, reports, and other information relevant to the amendment process are made available to the public.

In the past, the Commission made available reports of its working groups and policy teams. The Commission, however, no longer shares such reports. Those reports are helpful in understanding what issues the Commission has considered when deciding whether to amend the guidelines and in tracing the historical evolution of the guidelines.[7] Again, even if the Commission opts not to make those reports public, the reports should be made available to the § 994(o) stakeholders that Congress intended to have a greater role than the general public in working with the Commission.

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[6] *See* Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 Sw. L. Rev. 87, 104 n.97 (2012) (discussing use of modified Chatham House Rule at roundtable meeting).

While the Commission is only required to file notice and comment procedures when amending the guidelines, Chatham House Rules are not a standard practice in agency rule making. Indeed, the Commission's proposed changes to the rules of practice and procedure contain the only reference to Chatham House Rules in the federal register.

[7] *See, e.g., Working Group Report on Drugs and Role in the Offense* (1991); *Violent Crimes, Firearms, and Gangs Working Group Report* (1992); *Loss Issues Working Paper* (1997); *Career Offender Guidelines Working Group Report* (1988).

B. Public Meetings and Hearings

We applaud the Commission for taking steps to ensure that the public is aware of its meetings, has meaningful access to documents, and may observe hearings without being physically present, but the Commission could be more effective in publicizing its activities with regular emails to its listerve subscribers and use of other social media where appropriate.

The Commission should also make written hearing testimony available as soon as practicable before the hearing rather than at its start. The Commission often receives written hearing testimony before the actual hearing and distributes it to the Commissioners. The Department of Justice Ex Officio also receives copies of the hearing testimony in advance and is able to distribute it to witnesses for the Department. This practice benefits the Department's witnesses, but puts other witnesses at a disadvantage because they are often left without any notice of the position taken by other witnesses. To encourage a more robust discussion and for the various stakeholders to be able to hone in on the most significant points, it would be helpful for all witnesses to have access to the written statements of other witnesses at the same time Commission staff distributes the written testimony to the Commissioners.

C. Decisions on Retroactivity

The Commission has not consistently addressed retroactivity with respect to amendments that may have significant impact on some individuals confined in prison. For example, the Commission made major changes this year to the definitions of crimes of violence and illegal reentry guidelines but it did not vote on whether there should be a retroactivity analysis because no Commissioner moved for such an analysis. Defenders urge the Commission to adopt a rule that requires the Commission to vote (without a motion) on whether to conduct a retroactivity analysis whenever the Commission passes an amendment that lowers guideline ranges. Such a procedure would provide the public with more information about the various views of the Commissioners on the circumstances under which a guideline should be considered retroactive and would ensure that the issue of retroactivity receives the attention it deserves.

D. Public Comment and Priorities

Defenders welcome an opportunity to reply to the comments of others before the Commission votes on whether to promulgate an amendment, particularly amendments to guidelines that impact a significant number of individuals. We are concerned, however, about two issues. First, the proposed language in Rule 4.3 might be misinterpreted to preclude the Commission from considering comments that Defenders and other stakeholders mentioned in § 994(o) submit to the Commission outside the designated public comment period. The stakeholders in § 994(o) are statutorily obligated to "submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such

communication would be useful." 28 U.S.C. § 994(o). Failure to consider such comments because they do not comply with the identified comment period would be inconsistent with the statute. The simplest solution would be to add a sentence at the end of the proposed language:

> Public comment received after the close of the comment period, and reply comment received on issues not raised in the original comment phase, may not be considered. *This rule does not apply to comments received by the entities granted authority under 28 U.S.C. § 994(o) to comment whenever they believe such communication would be useful (i.e., United States Probation System, the Bureau of Prisons, the Judicial Conferences of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders).*

Second, we are concerned about the suggested time frames for dividing the comment period into an original comment phase and reply phase. In amendment cycles where the Commission undertakes major revisions to the guidelines or promulgates numerous amendments and seeks comment on a multitude of issues (e.g., the 2016 amendment cycle), the current 60–day period provides the bare minimum of time necessary to allow for meaningful comment. For example, with every proposed amendment, Defenders attempt to survey the field to see whether and how issues affect different areas of the country. Doing this is time-consuming, but provides invaluable information when considering national changes in sentencing policy. Also during this time frame, Defenders conduct extensive research in an attempt to provide the Commission with information on relevant law and social science. With limited staff to do this, shortening the initial comment period below 60-days would likely lower the quality of Defender comments, or result in untimely submissions. As an alternative that would allow for both an initial comment and reply period, Defenders recommend retaining the current 60-day period for initial comment, and then providing an additional 14-day reply period. Such timing would typically provide Commission staff with two weeks to process the replies before the Commission votes. To give more time for replies, the Commission should also modify Rule 5.1 to provide that it will post original comments as soon as practicable after they are received rather than "[a]s soon as practicable after the close of the comment period (or the comment phase, as applicable)."

We agree with the Commission that it may be appropriate at times to "redact sensitive information from public comment," as provided for in proposed Rule 5.1, but the rule should provide that such redaction will not occur without first informing the commenter and providing an opportunity for the commenter to agree with the redaction or explain why the information should not be redacted.

The proposal in Rule 5.2 for the Commission to consider the "impact of the priorities on available penal and correctional resources, and on other facilities and services," as well as "the number of defendants potentially involved and the potential impact" is an important amendment that will help the Commission comply with 28 U.S.C. § 994(g). Defenders encourage the

Commission to add a provision that it will release any data on the impact of a proposed priority at the time it publishes the notice.

Petitions filed by defendants under section 994(s) should be made publicly available on the Commission's website. This would be consistent with the practices recommended by the Administrative Conference of the United States, *Recommendation 2014-6: Petitions for Rulemaking* (2014).

E. Input from Outside Parties: Ex parte Communications

The Commission proposes deleting the following language from Rule 5.4 – Advisory Groups: "In addition, the Commission expects to solicit input, from time to time, from outside groups representing the federal judiciary, prosecutors, defense attorneys, crime victims, and other interested groups." We assume that it considers that provision no longer necessary because of the amendment to Rule 3.3 on Nonpublic Meetings, which provides for a mechanism for the Commission to receive information from various parties, including the Federal Public and Community Defenders. If this is true, and the Commission adopts the amendment to Rule 3.3 as proposed, Defenders have no objection to the proposed deletion. If, however, the Commission does not adopt the new provision in Rule 3.3, it should retain the language in Rule 5.4 and expressly add "Federal Public and Community Defenders" to the list of groups from whom it will solicit input.

We are gravely concerned about the proposed Rule 5.5 – Outside Consultations and Ex parte Communications. The proposal states that "during the pendency of a proposed amendment. . . [o]utside parties should not make unsolicited ex parte communications on the merits of the proposed amendments to an individual Commissioner or to the Commissioners collectively." Assuming that the representative of the Federal Public Defenders responsible for submitting comments to the Commission "whenever they believe such communication would be useful," is considered an "outside party," the proposed rule is contrary to what Congress intended in 28 U.S.C. § 994(o).

In addition, Rule 5.4, combined with proposed Rule 5.5(c), which sets forth exceptions to the rule against ex parte communications, create significant inequities in the ability of certain stakeholders to consult with the Commission. Because of their special status enumerated in Rule 5.4, it appears as if "Advisory Groups" are not an "outside party." Thus, any member of those groups may have an ex parte communication with a Commissioner at any time. Under the proposed Rule 5.5, every group mentioned in § 994(o), with the exception of the designated representative of the Federal Public Defenders, is permitted to have ex parte communications with the Commissioners. For example, the reference to "leadership staff of the Judicial Conference of the United States or its committees" permits leadership staff of the Committee on

Criminal Law, which is responsible for probation practices, to communicate with Commissioners during the amendment cycle.

It also appears to permit the leadership staff of the Committee on Defender Services to communicate with Commissioners,[8] but that is inconsistent with the protocols that have been established for a Federal Defender representative to carry out the mandate of 28 U.S.C. § 994(o). In 2002, with approval of the Committee on Defender Services, the Sentencing Resource Counsel Project was established for the express purpose of staffing the Federal Defender Guideline Committee, which is charged with carrying out the mandate of 28 U.S.C. § 994(o). The Commission should acknowledge that protocol and add to proposed Rule 5.5(c), which excepts certain stakeholders from the rules against ex parte communications: members of the Federal Defender Guideline Committee and its staff.

Without such a change, the Commission will further limit the ability of the Federal Defenders to consult with the Commissioners in a meaningful way. In 2009, the Commission excluded from the Practitioners Advisory Group, either as voting or non-voting members, any attorney from the Federal Defender community. If the Commission adopts the proposed amendment to Rule 5.5, it would further exclude Federal Defenders from interacting with Commissioners at critical times during the amendment cycle whereas a host of other stakeholders will have an opportunity to do so. Of particular concern are the repeated opportunities that the Department of Justice, judges, and the Probation Office have to communicate ex parte with Commissioners. And while the Commission undoubtedly believes that DOJ should be granted special status because it is entitled to an ex officio member,[9] the same cannot be said of U.S. Probation. U.S. Probation has the same statutory mandate as a representative of the Federal Defenders, and is situated within the judicial branch like Defenders, but it has multiple opportunities to communicate ex parte with Commissioners – through the Criminal Law Committee and its leadership staff and through the Probation Officers Advisory Group. The differential treatment given Defenders creates serious inequities, increases the risks of the Commission being disproportionately influenced by judges, probation officers, and the Department of Justice, and further marginalizes the voices of the individuals who will be most directly affected by the policy decisions the Commission makes – the defendants who are sentenced in federal court and their families

[8] The Committee on Defender Services is part of the Judicial Conference. Among other things, it meets with the Department of Justice, has encouraged an ex officio member on the Sentencing Commission, and oversees the Defender program. *See Report of the Proceedings of the Judicial Conference of the United States*, 16-17 (Sept. 2015).

[9] We repeat here our longstanding request that the Commission recommend to Congress that a Federal Defender ex officio be added to the Commission. We fail to see why the Commission continually rejects the recommendations of the Judicial Conference that Defenders be given a seat at the table.

No matter which groups the Commission excepts from the proposed rule on ex parte communications, it should, at a minimum, follow the approach recommended by the Administrative Conference of the United States, which is to make available to the public all communications from intragovernmental agencies, when those communications "contain material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule."[10] The Commission should amend proposed rule 5.5 to discourage judges, the Executive Office of the President, U.S. Probation, and others excepted from the rules on ex parte communications, from involving "themselves secretly" in the Commission's amendment process.[11] All stakeholders should be encouraged to "provide their views during the public comment period so that the public might respond, or at least be aware of the views expressed."[12] To the extent that any of the stakeholders delineated in proposed 5.5(c) do not provide public comment, then a "summary of all oral comments and copies of written comments should be placed in the public file as soon as possible, and in no event later than the date when the rule is promulgated."[13]

F. Use of Social Media Platforms

We are pleased to see that the Commission is changing its rules to encourage "distribution of public meetings notice and other information about the Commission." Proposed Rule 6.3. We oppose, however, the proposal to give the Office of Legislative and Public Affairs discretion as to which platforms to use to distribute information about proposed amendments and public meetings. Defenders have historically received notice of Commission proposals and meeting notices through the Commission's email listerve. Lately, however, notices have been going out on Twitter rather than the listserve. For example, the notice of proposed amendments to the rules of practice and procedure was not distributed by the usual email method that Defenders and others have come to rely upon, and one would only know about it if they happened to catch the tweet or notice it in an unusual location on the Commission's website. While Twitter can be a useful way to disseminate information, and we encourage the Commission to continue sharing information in as many different forums as possible, it should not replace well-established forms of notice that are still heavily relied upon.

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[10] Administrative Conference of the United States, *Recommendation 80-6:Intragovernmental Communications in Informal Rulemaking Proceedings* 2 (1980).

[11] *Id*. at 4 (Separate Statement of Peter A. Bradford, William A. Butler, Laurence Gold, Charles L. Halpern, Rhoda H. Karpatkin, Alan V. Morrison, Katherine E. Sasseville, and Thomas M. Susman).

[12] *Id.*

[13] *Id.*

G. Rules Concerning Access to Commission Data

Changes to the rules concerning access to Commission data are not included in the proposed amendments, but we believe changes are urgently needed and should be considered for several reasons. First, existing rule 6.5 does not reflect current practice and the significant improvements the Commission has made in affording online access to its data. Second, the rules do not reflect important statutory duties and powers of the Commissioners regarding its research and data dissemination functions, as well as commitments made by previous Commissioners and staff to expand access to data, especially databases underlying Commission reports. And third, with criminal justice reform a priority of Congress and other stakeholders, the need for more complete information on federal defendants and sentencing practices has increased dramatically. The Commission has an opportunity to make significant and timely contributions to these important debates.

1. Current Access to Commission Data

Rule 6.5 directs researchers interested in studying federal sentencing practices to obtain data from the Inter-University Consortium for Political and Social Research (ICPSR). For many years this was the only place to download the annual Monitoring, Organizations, and Appeals datasets, as well as many of the specialty datasets created for Commission reports in its earlier years, such as the Four Year Evaluation and the first report to Congress on Mandatory Minimum Penalties.

The Commission has now greatly improved on this cumbersome and indirect system by providing direct download of many datafiles from the Commission's website. At the time of this writing, FY2013 data are the most recent available from ICPSR, but FY2015 Individual and Organizational datafiles have been downloadable from the Commission's website for several weeks. We applaud this improvement and encourage the Commission to update Rule 6.5 to reflect these changed conditions.

2. Research and Data Dissemination Functions

In the Sentencing Reform Act (SRA), Congress gave the Commission extensive data collection and dissemination authority, including the enumerated powers to "(12)(A) serv[e] as a clearinghouse of and information center for the collection, preparation, and dissemination of information on Federal Sentencing practices;" "(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process; (14) publish data concerning the sentencing process; (15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States

Code; [and] (16) collect systematically and disseminate information regarding effectiveness of sentences imposed." 28 U.S.C. § 995(a).

Data on prison impact. When promulgating guidelines the Commission must take account of the nature and capacity of penal, correctional, and other facilities and services, and minimize the likelihood that the Federal prison population will exceed prison capacity. 28 U.S.C. § 994(g). Congress further directed that any legislation submitted by the Judicial or Executive branch that could affect the number of persons incarcerated, "shall be accompanied by a prison impact statement" prepared in consultation with the Sentencing Commission. 18 U.S.C. § 4047. The Commission must also consult with the Attorney General and the Administrative Office of the U.S. Courts when Congress requests impact statements related to pending matters. *Id*.

Rule 4.2 implements § 994(g) by requiring the Commission to consider prison impact prior to promulgating guideline amendments. The proposed technical amendment adds a statutory reference to § 994(g), but otherwise leaves the substance of the rule unchanged. We wholeheartedly agree with the current rule that the Commission should consider prison impact prior to promulgation and should "make such information available to the public." We note, however, that other statements of the Commission and actual practice do not fully comply with the rule. The answer to question nine on the "Most Frequently Asked Questions Prison & Sentencing Impact Assessments," section of the Commission's website states:

> Prison and sentencing impact analyses not included on the website are not available to the public. Analyses may not be made public for a number of reasons, including because the analysis was requested directly by a member of Congress, or because the analysis was performed for the Commission during the deliberation phase of proposed guideline changes and those changes were not promulgated by the Commission's final vote.[14]

Current Rule 4.2 clearly contemplates making prison impact analyses available during deliberations before the Commission votes to promulgate and to make such analyses available to the public. We support the practice anticipated by the rule. Defenders and other stakeholders cannot provide fully informed comment on proposed amendments if they do not have access to crucial information such as this. Information on amendments that are considered, but not promulgated, is of interest to the public and stakeholders and can inform future comment on proposed priorities. If this information is not to be provided in some cases, we believe Rule 4.2 should be revised to reflect actual practice.

[14] http://www.ussc.gov/research-and-publications/most-frequently-asked-questions-prison-sentencing-impact-assessments.

Data underlying reports. We were encouraged in recent years by comments indicating that the Commission intended to more fully embrace its role as collector and disseminator of data on sentencing practices and their effectiveness. At the Commission's 2012 Annual National Seminar in New Orleans, then-Vice-Chair William Carr announced several changes intended to increase access to Commission data. One of these was to "put on the website the data files generated in connection with [the Commission's] published reports."[15] A similar practice seems to have been intended in a 2014 letter to colleagues from Glenn Schmitt, Director of the Office of Research and Data, which stated that "in the next few months [the Commission] will be posting the datasets used in recent Commission publications."[16]

Since these announcements, the Commission has released several important reports, on topics including mandatory minimum penalties, child pornography offenses, illegal reentry, recidivism, and retroactivity determinations. But the only data released in conjunction with Commission reports of which we are aware concerns the most recent report on *Booker*. The datafile on this report is available on the Commission's website, but consists largely of data already available in the annual monitoring datafiles. None of the important data collected as part of other reports – e.g., use of § 851 motions for sentencing enhancement in drug cases, the actual functions performed by persons convicted of drug offenses, types of criminally sexual conduct engaged in by persons convicted of federal pornography charges, or the recidivism of all types of convicted individuals – has ever been released by the Commission.

These topics are too important for the Commission to fail to disclose them to stakeholders and outside researchers. For years, the Commission has withheld some data, such as judge identifiers, some types of confidential information about defendants, and public information that might be used to identify individual defendants. A reason for this is described in the Commission's Federal Register notice on Public Access to Sentencing Commission Documents and Data:

> The U.S. Sentencing Commission seeks to carry out its Congressional mandates in a manner that provides for the most efficient use of government resources and is consistent with its agreement with the Administrative Office of the U.S. Courts regarding the confidentiality of certain documents.[17]

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[15] Email from Vice-Chair William Carr, U.S. Sent'g Comm'n to Paul Hofer, Policy Analyst, Sentencing Resource Counsel Project of the Federal Public and Community Defenders (June 14, 2012) (on file with Paul Hofer).

[16] Letter from Glenn R. Schmitt, Dir. Office of Research and Data, U.S. Sent'g Comm'n to Colleagues, at 2 (Apr. 24, 2014) (on file with Paul Hofer).

[17] USSC, *Public Access to Sentencing Commission Documents and Data* 1 (1989) (published in 54 Fed. Reg. 51279-01 (Dec. 13, 1989).

The Federal Register notice also reproduces the agreement between the Commission and the Administrative Office. Nothing in this agreement or in other published policies of the Commission precludes release of data underlying Commission reports, purged of defendant and judge identifiers.

Consistent with the powers granted in the SRA to "collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process,"[18] the Commission has obtained data from federal agencies regarding the effectiveness of sentencing practices. The recent report on recidivism noted that:

> [T]he Commission entered into a data sharing agreement with the FBI's Criminal Justice Information Services (CJIS) Division and the Administrative Office of the United States Courts to provide the Commission with electronic access to criminal history records (i.e., RAP sheets) through the CJIS's Interstate Identification Index (III).[19]

This statement references an additional agreement between the Commission, the Administrative Office, and the FBI. Unlike the agreement published in the Federal Register, this new agreement has not been made public and requests for it have been denied. Without access to it, interested parties are unable to determine what restrictions it places on the types of information that the Commission is able to disseminate.

We know of no policy reason or regulation that would preclude release of recidivism data with the same restrictions on information that would identify judges and defendants found in the earlier agreement. Indeed, without releasing such data, it is difficult to see how the Commission can fulfil its purpose to "(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code; [and] (16) collect systematically and disseminate information regarding effectiveness of sentences imposed." 28 U.S.C. § 995(a). Few types of data are more necessary for evaluating sentencing practices than recidivism information, which is highly relevant to three of the statutory purposes of sentencing. We urge the Commission to make available the datafile on recidivist events that was used in preparation of its recent report.

The data underlying other reports are also sorely needed, particularly data that are not already available in the annual Individual and Organizational datafiles. When the Commission releases report data, it should include other information on the individuals in the study sample. This could be accomplished either by including, along with newly collected data, variables from the annual Individual Datafile for the individuals in the study population, or including the

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[18] 28 U.S.C. § 995(a)(13).

[19] USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview*, Appx. B (2016).

anonymous USSCID number for each defendant in the sample. This would allow outside researchers to supplement the datafile with information from the annual Individual Datafiles while still protecting the identity of the individuals and the judges. Without this, the types of analyses that can be performed would be reduced largely to those the Commission undertakes.

It is time for the Commission to perform the clearinghouse and dissemination functions Congress has given it, and make good on its promises to researchers and stakeholders. We propose a new rule to implement the policy described by the Commission in 2012 and staff in 2014.

Rule 6.6 - Release of Data Collected and Used in Published Reports

> Concurrent with the release of reports on federal sentencing practices, the Commission shall release datasets used in the report, including any specialty data collection on samples performed as part of the report. Such datasets will not include information identifying sentencing judges, individual defendants, or other persons identified in sentencing information nor information that can reasonably be expected to lead to the identification of an individual defendant or other person identified in the sentencing information. Anonymous identification numbers that can be used to link defendants in the sample with other publicly available data will be provided.

3. Inform Policymaking More Completely and Fairly

The proposed new rule would greatly amplify the public benefit of the resources the Commission spends in collecting data. The published reports provide only a subset of possible analyses that could help inform policy making. In some cases, new questions arise after a report's release that can be answered by data currently available only to the Commission. For example, information on the nature of prior offenses committed by defendants has been highly relevant to recent legislative proposals. Data on the functional roles played by defendants has been useful for evaluating drug penalties, but the analyses prepared for the Commission's own reports examine the data in only limited ways. The proposed rule would enhance transparency, implement the best agency practices, and reflect the norms of social science and public policy analysis.

It is important that researchers outside the Commission be able to test, replicate, and supplement the findings and conclusions presented in Commission reports. Public data and replication are strong values in the research community, and are especially important in the area of sentencing policy, given the crucial public and individual interests that are at stake.

Data is important precisely because of its relevance to policy issues. While Commission reports are often highly descriptive, and cannot address every conceivable policy question, experience has shown that legislators and advocates look to the reports for answers. Some may

misconstrue findings from the report to suggest answers to questions it was not designed to provide. Releasing the dataset can make possible additional analyses and prevent or counteract misunderstandings that can arise from the limited findings in a report.

In recent years, commentators have criticized the Commission for incomplete and partial empirical evaluations and for its use of research reports to engage in policy advocacy.[20] This has eroded the trust of stakeholders and researchers in the Commission as neutral supplier of facts.[21] This makes the need for transparency, accountability, and above all more open access to data all the more urgent.

The rule proposed above would do much to correct these problems, and would greatly increase the return on resources invested in data collection.

Conclusion

We look forward to continuing to work with the Commission on matters related to federal sentencing policy and we remain hopeful that the Commission will amend its rules to allow greater participation of Defenders in the Commission's decision making process.

Very truly yours,
/s/ *Marjorie Meyers*
Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

[20] *See, e.g.*, Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Sentencing Disparity?*, 25 Fed. Sent. R. 1 (June 2013).

[21] *See, e.g.*, Sonja B. Starr and M. Marit Rehavi, *On Estimating Disparity and Inferring Causation: Sur-Reply to the U.S. Sent'g Comm'n Staff*, 123 Yale L. J. Online 273 (2013); Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. Empirical Legal Stud. 729 (2012); Paul J. Hofer, *Review of the U. S. Sent'g Comm'n Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 21 Fed. Sent. R. 193 (2012); Jeffery T. Ulmer et al., *Racial Disparity in the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 Criminology & Pub. Pol'y 1077 (2011); Rodney Engen, *Racial Disparity in the Wake of Booker/Fanfan: Making Sense of "Messy" Results and Other Challenges for Sentencing Research*, 10 Criminology & Pub. Pol'y 1139 (2011); Ryan W. Scott, *Race Disparity Under Advisory Guidelines: Dueling Assessments and Potential Responses*, 10 Criminology & Pub. Pol'y 1129 (2011).

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