United States Sentencing Commission

2026 Public Comment on Proposed Amendment to Rules of Practice and Procedure

91 FR 56724



UNITED STATES SENTENCING COMMISSION



2026 PUBLIC COMMENT ON PROPOSED AMENDMENT TO RULES OF PRACTICE AND PROCEDURE 91 FR 56724

UNITED STATES SENTENCING COMMISSION

Rules of Practice and Procedure

AGENCY: United States Sentencing Commission

ACTION: Notice and request for public comment.

SUMMARY: The United States Sentencing Commission is considering promulgating amendments to its Rules of Practice and Procedure. This notice sets forth the proposed amendment to the Commission's Rules and synopsis of the issues addressed by the proposed amendment. This notice also sets forth several issues for comment together with the proposed amendment.

DATE: Written public comment regarding the proposed amendment and issues for comment set forth in this notice should be received by the Commission not later than **October 26, 2026**. Public comment regarding the proposed amendment received after the close of the comment period may not be considered.

ADDRESSES: There are two methods for submitting public comment.

Electronic Submission of Comments. Comments may be submitted electronically via the Commission's Public Comment Submission Portal at https://comment.ussc.gov. Follow the online instructions for submitting comments.

Submission of Comments by Mail. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

Section 995(a)(1) of title 28, United States Code, authorizes the Commission to establish general policies and promulgate rules and regulations as necessary for the Commission to carry out the purposes of the Sentencing Reform Act of 1984. The

Commission originally adopted the Rules of Practice and Procedure in July 1997 and amended the Rules in 2001, 2007, and 2016. The Commission is considering promulgating amendments to these rules. In accordance with Rule 1.2 of its Rules of Practice and Procedure, the Commission hereby invites the public to provide comment on the proposed amendment set forth in this notice.

Bracketed text within the proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions on whether the proposed provision is appropriate. Additionally, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The text of the proposed amendment and related issues for comment are set forth below. Additional information pertaining to the proposed amendment and issues for comment described in this notice may be accessed through the Commission's website at www.ussc.gov.

AUTHORITY: 28 U.S.C. § 995(a)(1); USSC Rules of Practice and Procedure, Rule 1.2.

Carlton W. Reeves,

Chair.

1. Rules of Practice and Procedure

Synopsis of Proposed Amendment: This proposed amendment revises the Commission's Rules of Practice and Procedure. The Rules were issued in 1997 "for the purpose of more fully informing interested persons of opportunities and procedures for becoming aware of and participating in the public business of the Commission." *See* Rule 1.1 of the Commission's Rules of Practice and Procedure. The Commission is undertaking a comprehensive review of its Rules to determine whether any amendments are appropriate to further the Commission's statutory purposes and enhance public engagement with and understanding of the Commission's work. As part of the review, the Commission is examining current practices and considering possible changes to the Rules regarding: (a) what Commission work is conducted in public; (b) what Commission policymaking materials should be made public; (c) how stakeholder and public involvement is structured, including through rules about ex parte communications; and (d) what analyses supporting agency policymaking are conducted and released publicly.

The Commission is publishing this proposed amendment to inform that review. The proposed amendment contains eight parts (Parts A through H). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A of the proposed amendment would make changes to the introduction ("About the Commission") of the Rules to closely track the statutory purposes of the Commission set forth in 28 U.S.C. § 991(b).

Part B of the proposed amendment would revise Rule 2.2 (Voting Rules for Action by the Commission) to provide that the decision to make an amendment available for retroactive application shall require the affirmative vote of at least five members at a public meeting. It brackets the possibility of adding a provision stating that if there are only four members serving on the Commission, the affirmative vote of four members at a public meeting shall suffice to authorize such action. An issue for comment is also provided.

Part C of the proposed amendment would amend Rules 3.1 (Meetings) and 3.4 (Public Hearings) to allow a representative of the Committee on Criminal Law of the Judicial Conference of the United States and a representative of the Federal Public and Community Defenders to participate in meetings and public hearings of the Commission.

Part D of the proposed amendment sets forth three options for revising the provision of Rule 4.3 (Notice and Comment on Proposed Amendments) that addresses ex parte communications. Issues for comment are also provided.

Part E of the proposed amendment would amend Rule 5.2 (Notice of Priorities) to make the procedure for setting the Commission's policymaking agenda every year more participatory and transparent.

Part F of the proposed amendment would amend Rule 5.3 (Information Relevant to the Amendment Process) to require the public disclosure of (1) meeting materials generated for or given to the commissioners in preparation for a public or nonpublic meeting; (2) written minutes of any public or nonpublic meeting held by the Commission; and (3) any document approved for public release by a majority of members of the Commission. Issues for comment are also provided.

Part G of the proposed amendment would make technical and clerical changes to Rules 3.2 (Public Meetings), 3.3 (Nonpublic Meetings), and 5.4 (Advisory Groups).

Part H of the proposed amendment provides an issue for comment on possible further revisions to the Rules.

(A) Changes to the Introduction to the Rules

Synopsis of Proposed Amendment: The introduction to the Rules was added in 2016 and intended to provide general background concerning the Commission. The current text of this introduction builds upon previous editions of the Commission's *Annual Report*, each of which includes at the beginning a chapter that provides an overview of the

Commission (including its purposes and organization). Part A of the proposed amendment would amend the introduction to the Rules to closely track the statutory purposes of the Commission set forth in 28 U.S.C. § 991(b).

Proposed Amendment:

The undesignated section of the Rules of Practice and Procedure captioned "About the Commission" is amended by striking the following:

"The United States Sentencing Commission is an independent agency in the judicial branch of government. Its principal purposes are:

(1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes;

(2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and

(3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.";

and inserting the following:

"The United States Sentencing Commission is an independent agency in the judicial branch of government. Its purposes, as set forth by Congress in 28 U.S.C. § 991(b), are to:

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.".

(B) Voting Rules for Commission Action

Synopsis of Proposed Amendment: Rule 2.2 (Voting Rules for Action by the Commission) sets forth the voting rules for action by the Commission. Rule 2.2(a) states that "[e]xcept as otherwise provided in these rules or by law, action by the Commission requires the affirmative vote of a majority of the members at a public meeting at which a quorum is present." Consistent with 28 U.S.C. § 995(d), Rule 2.2(a) further provides that "[a] quorum shall consist of a majority of the members then serving."

Rule 2.2(b) sets forth more stringent vote requirements for actions related to the promulgation of amendments to the guidelines, policy statements, and official commentary. Consistent with 28 U.S.C. § 994(a), Rule 2.2(b) provides that "[p]romulgation of guidelines, policy statements, official commentary and amendments thereto shall require the affirmative vote of at least four members at a public meeting." In addition, Rule 2.2(b) provides that "[p]ublication for comment of proposed amendments to guidelines, policy statements, or official commentary shall require the affirmative vote of at least three members at a public meeting."

Rule 2.2(b) also provides that approval of a notice of priorities and the adoption or revision of the minutes of a public meeting "shall require the affirmative vote, at a public meeting, of a majority of the members then serving."

Rule 2.2(c) provides that "[a]ction on other matters may be taken (1) at a nonpublic meeting; or (2) without a meeting by written or oral communication (*e.g.*, by 'notation voting'), and shall be based on the affirmative vote of a majority of the members then serving."

Rule 2.2(d) sets forth the requirements for the reconsideration of any Commission action. It states that "[a] motion to reconsider Commission action may be made only by a commissioner on the prevailing side of the vote for which reconsideration is sought, or who did not vote on the matter." It also requires that "[f]our votes are necessary to reconsider a Commission vote on any question on which a four-vote majority is required."

The Commission is considering whether the voting threshold should be increased for certain Commission actions of heightened significance. Part B of the proposed amendment would amend Rule 2.2(b) to provide that the decision to make an amendment available for retroactive application shall require the affirmative vote of at least five members at a public meeting. It brackets the possibility of adding a provision stating that if there are only four members serving on the Commission, the affirmative vote of four members at a public meeting shall suffice to authorize such action. Part B of the proposed

amendment would also make conforming changes to Rule 2.2(d) relating to the votes necessary for the reconsideration of Commission actions.

An issue for comment is also provided.

Proposed Amendment:

Rule 2.2(b) is amended by inserting after the paragraph that begins "Promulgation of guidelines, policy statements, official commentary, and amendments thereto" the following new paragraph:

"Action to make an amendment available for retroactive application to previously sentenced, imprisoned defendants (*see* 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2)) shall require the affirmative vote of at least five members at a public meeting. **[**Provided, however, that if there are only four members serving on the Commission, the affirmative vote of four members at a public meeting shall suffice to authorize such action.**]**".

Rule 2.2(d) is amended by striking "Four votes are necessary to reconsider a Commission vote on any question on which a four-vote majority is required" and inserting "If the underlying action requires the affirmative vote of more than a majority of the members then serving, a motion to reconsider the Commission vote on that specific action shall require the same minimum voting threshold".

Issue for Comment

1. Part B of the proposed amendment would amend Rule 2.2(b) to provide that the decision to make an amendment available for retroactive application shall require the affirmative vote of at least five members at a public meeting. The Commission seeks comment on whether it should increase the voting threshold for any other Commission action. If so, what Commission actions should require an elevated voting threshold, such as a supermajority requirement? What should the voting threshold be for such Commission actions and why? For example, should the Commission require the affirmative vote of at least five members at a public meeting for amendments to the *Guidelines Manual* (or the affirmative vote of four members if there are only four members serving on the Commission) that may result in increasing a term of imprisonment recommended in the guidelines? Should the Commission instead amend the Rules to provide that promulgation of any guideline, policy statement, official commentary, and amendments thereto shall require the affirmative vote of at least five members at a public meeting (or the affirmative vote of four members if there are only four members serving on the Commission)?

(C) Participation in Meetings and Hearings of Representatives from the Committee on Criminal Law and the Federal Public and Community Defenders

Synopsis of Proposed Amendment: Rule 3.1 (Meetings) provides that the "Chair shall call and preside at Commission meetings." It also provides for participation in meetings of commissioners from remote locations. Rule 3.4 (Public Hearings) sets forth provisions relating to how the Commission may convene a public hearing on any matter involving the promulgation of guidelines or any other matter affecting the Commission's business.

The Commission is evaluating whether to expand the involvement of specific judicial branch stakeholders in its meetings and hearings. Part C of the proposed amendment would amend the Rules to allow a representative of the Committee on Criminal Law of the Judicial Conference of the United States and a representative of the Federal Public and Community Defenders to participate in meetings and public hearings of the Commission. Specifically, it would amend Rule 3.1 (Meetings) to allow the attendance of representatives of such institutions in [public meetings and nonpublic briefing sessions of the Commission][all Commission meetings at which Commission staff is present], except for those parts of meetings in which matters not related to policymaking or data are addressed. These representatives would have access to the same materials relating to policymaking provided to commissioners in preparation for meetings. Additionally, Part C of the proposed amendment would amend Rule 3.4 (Public Hearings) to allow

these representatives to participate in public hearings alongside commissioners and, as necessary, ask questions to witnesses.

Proposed Amendment:

Rule 3.1 is amended by striking the following:

"The Chair shall call and preside at Commission meetings. *See* 28 U.S.C. § 993(a). In the absence of the Chair, the Chair will designate a Vice Chair to preside.

Members may participate in meetings from remote locations by electronic means, including telephone, satellite, and video conference devices.";

and inserting the following:

"(a) The Chair shall call and preside at Commission meetings. *See* 28 U.S.C. § 993(a). In the absence of the Chair, the Chair will designate a Vice Chair to preside.

(b) Members may participate in meetings from remote locations by electronic means, including telephone, satellite, and video conference devices.

(c) One representative designated by the Committee on Criminal Law of the Judicial Conference of the United States, and one representative designated by the Federal

Public and Community Defenders, shall be permitted to attend **[**public meetings and nonpublic briefing sessions of the Commission**][**all Commission meetings at which Commission staff is present**]**. These designated representatives may participate in such meetings by engaging in deliberations with commissioners and other meeting participants, requesting information and documents, and presenting relevant information to the Commission. The representatives designated under this paragraph shall not attend any portion of a meeting dedicated to non-policy, non-data, or internal administrative matters (such as approval of budget requests, administrative and personnel issues, decisions on contracts and cooperative agreements, and decisions on litigation and administrative proceedings involving the Commission) or in which the Commission will receive or share information that is inappropriate for public disclosure. In addition, the representatives designated under this paragraph may not vote or make or second motions at meetings.

To facilitate informed participation, the designated representatives shall receive the same meeting materials distributed to commissioners. However, the meeting materials distributed to the designated representatives shall not include, or shall be redacted to prevent disclosure of, information that is not related to policymaking or data, or is inappropriate for public disclosure, including confidential or sensitive information regarding budgetary allocations or appropriations, personnel and staffing matters, and procurement and contract actions. Each designated representative may be accompanied at Commission meetings by one staff member

from their respective organization to provide necessary technical, administrative, or advisory support.”.

Rule 3.4 is amended by inserting after the paragraph that begins “The Commission may specify the format” the following new paragraph:

“The representatives of the Committee on Criminal Law of the Judicial Conference of the United States and the Federal Public and Community Defenders, as designated under Rule 3.1(c), shall be permitted to actively participate in such a hearing alongside commissioners and are authorized, as necessary and relevant to the proceeding, to pose questions to any witness called to testify during the hearing. To facilitate informed participation, the designated representatives shall be provided with all written testimony submitted as soon as practicable prior to the commencement of the proceeding.”.

(D) Ex Parte Communications

Synopsis of Proposed Amendment: Rule 4.3 (Notice and Comment on Proposed Amendments) contains a provision relating to ex parte communications. It provides that “[t]he Commission does not intend to solicit ex parte communications (*i.e.*, communications outside the public comment process) on the merits of a proposed amendment from outside parties.” The Commission is considering whether to change how the Rules address ex parte communications on the merits of a proposed amendment,

during the pendency of the proposed amendment, from outside parties. Three options are provided.

Option 1 would delete the ex parte communications provision currently contained in Rule 4.3. The absence of a formal policy governing ex parte communications in the Rules implies that such communications—whether actively solicited or passively received—are permissible during the pendency of a proposed amendment and exempt from any mandatory disclosure requirements. The absence of a mandatory disclosure requirement would not impede the Commission from voluntarily disclosing any ex parte communications received during the pendency of a proposed amendment.

Option 2 would amend the ex parte communications provision set forth in Rule 4.3 to permit all forms of ex parte communications, including both solicited and unsolicited communications, while requiring public disclosure only of those communications that satisfy a specified standard. It brackets two alternatives for the standard. Option 2 would require that "[a]ny ex parte communications **[**that provides significant, material information addressing the merits of a pending proposed amendment**][**that is of substantial significance and clearly intended to affect the ultimate decision on a pending proposed amendment**]** be treated as public comment and disclosed accordingly." Option 2 would define the term "ex parte communication" as "any written or oral communication by an outside party to an individual member of the Commission, or to the members collectively, concerning the substance of a proposed amendment to the guidelines, policy statements, or commentary that is not transmitted through the formal public comment

process." Option 2 also brackets the possibility of adding a provision excluding from the definition of ex parte communications "any communication with: (1) members of Congress, congressional staff, and legislative branch agencies; (2) members of the Federal Judiciary (including the Judicial Conference of the United States and its committees); (3) United States Probation Officers; (4) the Federal Bureau of Prisons; (5) the Criminal Division of the United States Department of Justice; and (6) representatives of the Federal Public and Community Defenders."

Option 3 would amend the ex parte communications provision set forth in Rule 4.3 to permit all forms of ex parte communications, including both solicited and unsolicited communications, while requiring public disclosure of all such communications. It would provide the same definition of "ex parte communication" as Option 2. In addition, like Option 2, Option 3 brackets the possibility of adding a provision excluding from the definition of ex parte communications "any communication with: (1) members of Congress, congressional staff, and legislative branch agencies; (2) members of the Federal Judiciary (including the Judicial Conference of the United States and its committees); (3) United States Probation Officers; (4) the Federal Bureau of Prisons; (5) the Criminal Division of the United States Department of Justice; and (6) representatives of the Federal Public and Community Defenders."

Issues for comment are also provided.

Proposed Amendment:

[Option 1 (No Provision Addressing Ex Parte Communications):

Rule 3.4 is amended by striking "The Commission does not intend to solicit ex parte communications (*i.e.*, communications outside the public comment process) on the merits of a proposed amendment from outside parties.".**]**

[Option 2 (Permitting Ex Parte Communications But Subject to Certain Disclosure Requirements Based on a Standard):

Rule 3.4 is amended by striking the following:

"The Commission does not intend to solicit ex parte communications (*i.e.*, communications outside the public comment process) on the merits of a proposed amendment from outside parties.";

and inserting the following:

"Any ex parte communication **[**that provides significant, material information addressing the merits of a pending proposed amendment**][**that is of substantial significance and clearly intended to affect the ultimate decision on a pending proposed amendment**]** shall be treated as public comment and its contents (including a record of the date and the

substance of the communication) shall be disclosed accordingly as soon as practicable after the communication. For purposes of this provision, an 'ex parte communication' means any written or oral communication by an outside party to an individual member of the Commission, or to the members collectively, concerning the substance of a proposed amendment to the guidelines, policy statements, or commentary that is not transmitted through the formal public comment process. **[**This definition does not include any communication with: (1) members of Congress, congressional staff, and legislative branch agencies; (2) members of the Federal Judiciary (including the Judicial Conference of the United States and its committees); (3) United States Probation Officers; (4) the Federal Bureau of Prisons; (5) the Criminal Division of the United States Department of Justice; and (6) representatives of the Federal Public and Community Defenders.**]**".**]**

[Option 3 (Permitting Ex Parte Communications But Subject to Disclosure):

Rule 3.4 is amended by striking the following:

"The Commission does not intend to solicit ex parte communications (*i.e.*, communications outside the public comment process) on the merits of a proposed amendment from outside parties.";

and inserting the following:

"All ex parte communications shall be treated as public comment and their contents (including a record of the date and the substance of any such communication) shall be disclosed accordingly as soon as practicable after the communication. For purposes of this provision, an 'ex parte communication' means any written or oral communication by an outside party to an individual member of the Commission, or to the members collectively, concerning the substance of a proposed amendment to the guidelines, policy statements, or commentary that is not transmitted through the formal public comment process. **[**This definition does not include any communication with: (1) members of Congress, congressional staff, and legislative branch agencies; (2) members of the Federal Judiciary (including the Judicial Conference of the United States and its committees); (3) United States Probation Officers; (4) the Federal Bureau of Prisons; (5) the Criminal Division of the United States Department of Justice; and (6) representatives of the Federal Public and Community Defenders.**]**".**]**

Issues for Comment

1. Part D of the proposed amendment provides options for amending Rule 4.3 (Notice and Comment on Proposed Amendments) to address ex parte communications on the merits of a proposed amendment to the *Guidelines Manual*, during the pendency of the proposed amendment, from outside parties. The Commission seeks comment on whether it should adopt a provision relating to ex parte communications that applies more broadly to other Commission

actions that require a notice-and-comment rulemaking procedure, such as proposed priorities and amendments to the Rules of Practice and Procedure.

2. Option 2 would amend the ex parte communications provision set forth in Rule 4.3 to permit all forms of ex parte communications, including both solicited and unsolicited communications, while requiring public disclosure only of those communications that satisfy a specified standard. It brackets two alternatives for the standard. Option 2 would require that any ex parte communications **[**that provides significant, material information addressing the merits of a pending proposed amendment**][**that is of substantial significance and clearly intended to affect the ultimate decision on a pending proposed amendment**]** be treated as public comment and disclosed accordingly. The Commission seeks comment on which, if any, of the bracketed alternatives for the standard should the Commission provide to require public disclosure of ex parte communication. Should the Commission provide a different standard? If so, what standard should the Commission provide, and why?

3. Both Options 2 and 3 would require public disclosure of some or all ex parte communications. Both options would require that such communications shall be treated as public comment and their contents (including a record of the date and the substance of any such communication) shall be disclosed accordingly as soon as practicable after the communication. The Commission invites comment

regarding the specific elements and substantive content that should be included in the disclosure of ex parte communications.

4. Rulemaking decisions at the Commission are made solely by the voting members of the Commission. Consequently, both Options 2 and 3 would define ex parte communications strictly in relation to individual voting members of the Commission or such members collectively. Communications directed to Commission staff are excluded from this classification. The Commission seeks comment on whether the definition of ex parte communications should also apply to communications directed to Commission staff.

(E) Increasing Transparency and Participation in the Commission's Work Agenda-Setting

Synopsis of Proposed Amendment: The Sentencing Reform Act of 1984 states that guideline amendments may be submitted to Congress during a window that opens once each year. *See* 28 U.S.C. § 994(p). Accordingly, Rule 5.2 (Notice of Priorities) establishes a three-step procedure for setting the Commission's policymaking agenda on an annual basis. First, the Commission publishes for comment a set of "proposed priorities" for future Commission inquiry and possible action, including areas for possible amendments to guidelines, policy statements, and commentary. Second, the Commission receives and considers comment from the public on the proposed priorities. Finally, the Commission selects and publishes a set of "final priorities."

Part E of the proposed amendment would revise these steps to make agenda-setting at the Commission more participatory and transparent. Under revised Rule 5.2, the Commission would open its agenda-setting process by soliciting proposed priorities from the public, stakeholders, Commission staff, and commissioners themselves. After publishing all those proposals on its website, the Commission would open its annual planning session by soliciting further information about the proposals at a public hearing. Next, the Commission would—during the nonpublic portion of the planning session—deliberate over (and, if necessary, refine) the proposed priorities to craft an agenda that best fulfills the Commission's statutory purposes as set forth at 28 U.S.C. § 991(b). Finally, the Commission would—during a public meeting at the end of the annual planning session—vote to adopt a list of final priorities as the Commission's policymaking agenda.

Part E of the proposed amendment aims to achieve its stated goals in several ways. First, by having all groups (both internal and external to the Commission) propose and justify policymaking priorities in an open fashion, the revised Rule 5.2 would allow the public to better understand and shape the scope of the Commission's potential agenda. Second, by enumerating relevant statutory duties and powers, the revised Rule 5.2 would help the public grasp all the ways the Commission can make policy. Third, by requiring the Commission to use its statutory purposes as the criteria for selecting final priorities, the revised Rule 5.2 would allow the public to understand that the Commission determines its policymaking agenda by looking to Congressional intent for priorities for future Commission inquiry and possible action.

Proposed Amendment:

Rule 5.2(a) is amended by striking the following:

"The Commission shall publish annually in the *Federal Register*, and make available to the public, a notice of the proposed priorities for future Commission inquiry and possible action, including areas for possible amendments to guidelines, policy statements, and commentary. Any such notice shall include an invitation to, and deadline for, the submission of written public comment on the proposed priorities.

Subsequent to the deadline for comment on the proposed priorities, the Commission shall publish in the *Federal Register,* and make available to the public for inspection, a notice of priorities for Commission inquiry and possible action.";

and inserting the following:

"No later than **[**March**][**April**][**May**]** each year, the Commission shall publish a notice in the Federal Register requesting the public to submit proposed priorities to inform future Commission inquiries and potential policymaking actions. Submissions received pursuant to this notice may request the Commission to exercise any of its statutory duties or powers, including holding hearings or other events, collecting or publishing information, undertaking or funding research, issuing instructions to probation officers, conducting

training programs for persons connected with the sentencing process, providing recommendations to Congress, and amending guidelines, policy statements, and commentary. *See* 28 U.S.C. §§ 994–995. Proposed priorities may be submitted by individual commissioners, Commission staff, Commission advisory groups, stakeholders in the criminal justice system, and any member of the public. The period for submitting proposed priorities shall be at least **[**30**][**45**][**60**]** days. Within seven days after closing of the submission period, the Commission shall make available to the public all submitted proposed priorities on its website.".

Rules 5.2 is amended—

by redesignating paragraphs (b) through (d) as paragraphs (c) through (e), respectively;

and by inserting after paragraph (a) the following new paragraph (b):

"(b) No later than **[**June**][**July**][**August**]** each year, the Commission shall hold a planning session to, among other things, prepare an annual policymaking agenda. The planning session shall include: (1) a public hearing wherein commissioners, Commission staff, Commission advisory groups, the Department of Justice, the Federal Public and Community Defenders, the Committee on Criminal Law of the Judicial Conference of the United States, and others may present and discuss proposed priorities; (2) a nonpublic meeting wherein commissioners deliberate over and, if necessary, refine proposed priorities; and (3) a public meeting

wherein members of the Commission vote to adopt a list of priorities as the Commission's policymaking agenda. In determining its final priorities, the Commission shall adopt those priorities that, viewed collectively, best further the Congressional purposes listed at 28 U.S.C. § 991(b).".

(F) Information Relevant to the Amendment Process

Synopsis of Proposed Amendment: Rule 5.3 (Information Relevant to the Amendment Process) provides that data, reports, and other information prepared by Commission staff to inform the Commission's fulfillment of priorities and consideration of potential amendments might be made publicly available. The Commission is considering whether it should make publicly available additional information relevant to the amendment process.

For example, before every Commission meeting (public or nonpublic), commissioners receive a compilation of materials prepared by Commission staff addressing the topics on the agenda for that meeting. Meeting materials include data reports, memoranda discussing policy, legal opinions from the Office of the General Counsel, draft proposed amendments to the *Guidelines Manual*, contracts, requests for cooperative agreements, documents relating to litigation and administrative proceedings involving the Commission, budget requests, draft data reports, documents relating to Commission personnel, and documents relating to advisory groups. The Commission is considering

whether some of these materials, as they relate to the Commission's priorities and amendment process, should be publicly disclosed.

In addition, the Commission already publishes on its website the minutes of public meetings after their approval by the Commission at a public meeting. The Commission is considering whether a written record of nonpublic meetings should be also prepared and made publicly available.

Part F of the proposed amendment would amend Rule 5.3 to require the public disclosure of (1) meeting materials generated for or given to the commissioners in preparation for a public or nonpublic meeting; (2) written minutes of any public or nonpublic meeting held by the Commission; and (3) any document approved for public release by a majority of members of the Commission. The revised rule would also provide that any document authorized for public release shall not include, or shall be redacted to prevent disclosure of, information that is inappropriate for public disclosure, including commissioner deliberations, legal opinions, and any other confidential, privileged, or personal information.

Part F of the proposed amendment also includes conforming changes to Rules 2.2 (Voting Rules for Action by the Commission), 3.5 (Live Webcasts and Written Records), and 6.2 (Availability of Materials for Public Inspection; Office of Legislative and Public Affairs).

Issues for comment are also provided.

Proposed Amendment:

Rule 5.3 is amended by striking the following:

"To fulfill Commission priorities and inform consideration of potential amendments, the Staff Director shall direct the preparation of relevant data, reports, and other information for consideration by the Commission. Upon authorization by the Staff Director, the Office of Legislative and Public Affairs shall make the data, reports, and other information available to the public as soon as practicable.";

and inserting the following:

"(a) To fulfill Commission priorities and inform consideration of potential amendments, the Staff Director shall direct the preparation of relevant data, reports, and other information for consideration by the Commission. Upon authorization by the Staff Director, the Office of Legislative and Public Affairs shall make the data, reports, and other information available to the public as soon as practicable.

(b) To ensure transparency, facilitate public observation, and promote meaningful public engagement, the following documents shall be made available to the public and maintained on the Commission's website as provided below.

(1) A public notice of any public or nonpublic meeting, the meeting agenda, and any document, briefing, or information relevant to Commission's priorities or the amendment process generated for or given to the commissioners in preparation for such a meeting shall be made available to the public **[**at least **[**seven days**]** prior to the scheduled date of the meeting**]****[**no later than **[**seven days**]** following the adjournment of the meeting**]**.

(2) The written minutes of any public or nonpublic meeting held by the Commission shall be made publicly available no later than **[**fourteen days**]** following the adjournment of the meeting. The minutes of each meeting shall contain a list of all participants in attendance, a summary of the topics discussed that are relevant to the Commission's priorities or the amendment process, and a record reflecting the final vote of each member on any action taken by the Commission.

(3) Any other document approved for public release by the affirmative vote of a majority of the members then serving shall be made available to the public as soon as practicable.

(c) Documents authorized for public release pursuant to this rule shall not include, or shall be redacted to prevent disclosure of, information that is inappropriate for public disclosure, including commissioner deliberations, legal opinions, and any other confidential, privileged, or personal information.".

Rule 2.2(b) is amended by striking "Adoption or revision of the minutes of a public meeting shall require the affirmative vote, at a public meeting, of a majority of the members then serving.".

Rule 2.2(c) is amended by striking "Such matters include the approval of budget requests, administrative and personnel issues, decisions on contracts and cooperative agreements, decisions on workshops and training programs, decisions on publishing reports and making recommendations to Congress, decisions to hold hearings and call witnesses, decisions on litigation and administrative proceedings involving the Commission, decisions relating to the formation and membership of advisory groups, the approval pursuant to 28 U.S.C. § 994(w) of a statement of reasons form, notices of proposed priorities, extensions of public comment periods, notices of proposed amendments to these rules, approval of technical and clerical amendments to these rules, and decisions to hold a nonpublic meeting" and inserting: "Such matters include the adoption or revision of the minutes of public and nonpublic meetings, the approval of budget requests, administrative and personnel issues, decisions on contracts and cooperative agreements, decisions on workshops and training programs, decisions on publishing reports and

making recommendations to Congress, decisions to hold hearings and call witnesses, decisions on litigation and administrative proceedings involving the Commission, decisions relating to the formation and membership of advisory groups, the approval pursuant to 28 U.S.C. § 994(w) of a statement of reasons form, notices of proposed priorities, extensions of public comment periods, notices of proposed amendments to these rules, approval of technical and clerical amendments to these rules, and decisions to hold a nonpublic meeting".

Rule 3.5 is amended in the heading by striking "Live Webcasts and Written Records" and inserting "Live Webcasts and Written Records of Public Meetings and Public Hearings".

Rule 6.2 is amended by striking "approved minutes of Commission public meetings" and inserting "approved minutes of Commission public and nonpublic meetings".

Issues for Comment

1. Part F of the proposed amendment would add a new provision at Rule 5.3(b)(1) requiring the public release of "[a] public notice of any public or nonpublic meeting, the meeting agenda, and any document, briefing, or information relevant to Commission's priorities or the amendment process generated for or given to the commissioners in preparation for such a meeting." Commission meeting materials sometimes include preliminary, working drafts of proposed amendments for commissioner discussion.

The Commission seeks comment on what meeting materials relevant to the Commission's priorities or the amendment process should be publicly released. Should the Commission publicly release additional or different documents from the ones listed in Rule 5.3(b)(1)? Should the Commission make available to the public preliminary drafts of proposed amendments regardless of whether such working documents ultimately advance to the formal amendment process? What are the advantages and disadvantages of publicly releasing working drafts of potential proposed amendments?

2. The current Rules of Practice and Procedure contain provisions relating to the preparation and public release of written minutes of public meetings. *See* Rules 2.2(b), 3.5, 6.2, and 6.3 of the Commission's Rules of Practice of Procedure. Part F of the proposed amendment would add a new provision at Rule 5.3(b)(2) requiring the preparation and public release of written minutes of nonpublic meetings held by the Commission that includes a summary of the topics discussed that are relevant to the Commission's priorities or the amendment process.

The Commission invites comment on whether to establish a practice of preparing and disclosing to the public written records of its nonpublic meetings. If so, what should be the scope of such written records? Should their scope be strictly limited to disclosing information relevant to the Commission's priorities and the

amendment process, as provided in the proposed amendment? Alternatively, should the scope encompass other topics discussed at nonpublic meetings, provided that confidential, privileged, or personal information is strictly excluded from disclosure? If so, what topics of discussion should be included in such a public written record? Should the Commission rules require a comprehensive written record of all topics discussed in nonpublic meetings, while disclosing to the public only the sections pertinent to the Commission's priorities or amendment process?

The Commission further invites comment concerning the specific format, structure, and level of detail that written records of nonpublic meetings should assume. What should be the content of such records? For example, should they only include a summary of topics discussed and record of final voting on actions taken by the Commission? Should they also include wide-raging items, such as other decisions made, tasks assigned, and follow-up actions agreed upon? To what extent should the written record of a nonpublic meeting differ from the conventional structure of the minutes of public meetings (*i.e.*, documents containing list of participants attending, actions items, topics discussed, voting results, and actions taken)? For example, should the Commission only release to the public a summary of the meeting, a list of topics discussed, or a detailed agenda?

3. The Commission requests comment on whether, rather than establishing a standard practice of preparing and publicly disclosing written records of all nonpublic meetings, it should limit public disclosure to records of specific action matters that may be taken at nonpublic meetings (such as decisions to publish reports or make recommendations to Congress) contingent upon an explicit request by a voting member of the Commission. Should the Commission instead amend the Rules to provide that the decisions on any such matter shall be made at a public meeting upon an explicit request by a voting member of the Commission?

(G) Clerical Changes

Synopsis of Proposed Amendment: Part G of the proposed amendment would make several technical and clerical changes throughout the Rules. First, it would amend the general reference to Rule 3.3 (Nonpublic Meetings) in the first paragraph of Rule 3.2 (Public Meetings) to provide a more specific reference to the applicable provisions of Rule 3.3 relating to meeting with outside parties. Second, it would amend subdivision (1) of Rule 3.3 relating to actions on matters that do not require a public meeting to clarify and reflect the longstanding practice of how Commission interacts with staff at nonpublic meetings. Finally, it would amend Rule 5.4 (Advisory Groups) to add the Sentence Impact Advisory Group to the list of the standing advisory groups and to reflect the change in name of the Victims' Rights Advisory Group.

Proposed Amendment:

Rule 3.2 is amended by striking "Rule 3.3" and inserting "Rule 3.3(3)–(5)".

Rule 3.3 is amended by striking "To receive information from, and participate in discussions with, Commission staff or any person designated by an *ex officio* Commissioner as support staff for that Commissioner" and inserting "To meet with Commission staff or any person designated by an *ex officio* Commissioner as support staff for that Commissioner on any matter".

Rule 5.4 is amended by striking "the Practitioners Advisory Group, the Probation Officers Advisory Group, the Tribal Issues Advisory Group, and the Victims Advisory Group" and inserting "the Practitioners Advisory Group, the Probation Officers Advisory Group, the Sentence Impact Advisory Group, the Tribal Issues Advisory Group, and the Victims' Rights Advisory Group".

(H) Further Revisions to the Commission's Rules of Practice and Procedure

Issue for Comment: The Commission is publishing this proposed amendment to inform its comprehensive review of the Rules of Practices and Procedure. The proposed amendment contains seven parts (Parts A through G) that would make specific changes throughout the Rules and provides issues for comment relating to those proposed changes.

The Commission seeks comment on whether it should further revise its Rules of Practice and Procedure. In particular, the Commission invites the public to propose additional or different amendments to the Rules that are appropriate to advance the Commission's statutory purposes, foster public engagement with the Commission, augment public comprehension of the Commission's work, and improve the Commission's practices and processes. Commenters are encouraged to identify specific rules that should be amended, provide precise text of proposed amendments to the Rules, recommend overarching structural reforms to the Rules, and suggest actionable measures to improve the operational efficiency and transparency of the Commission's internal processes.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

October 26, 2026

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Rules of Practice and Procedure

Dear Chair Reeves:

We write in response to the Sentencing Commission's request for comment on its Proposed Amendment to the Rules of Practice and Procedure.[1] Specifically, we urge the Commission to adopt Part C, which would allow a representative of the Federal Public and Community Defenders, along with a representative of the Committee on Criminal Law of the Judicial Conference of the United States, to participate in the Commission's meetings and public hearings.

We commend the Commission for proposing this change. For several Congresses, I have joined Senator Cory Booker in introducing the *Sentencing Commission Improvements Act*, which would add a Federal public defender or community defender to the Commission as an *ex officio*, nonvoting member.[2] While Congress should pass this legislation, Part C is a meaningful step within the Commission's authority toward the balance that legislation seeks to achieve. For the reasons outlined below, we urge the Commission to adopt Part C in its broadest form.

The Commission's Current Structure Lacks Balance.

Congress intended the Commission to hear from every component of the federal criminal justice system. The *Sentencing Reform Act of 1984* directs the Commission to consult with institutional representatives across that system, and it specifically requires a representative of the Federal Public Defenders—alongside the Department of Justice's Criminal Division—to submit observations on the Commission's work and an annual written report assessing the guidelines.[3]

Yet only one side of the adversarial system currently has a seat at the table. By statute, the Attorney General or the Attorney General's designee serves as an *ex officio*, nonvoting member of the Commission.[4] So does the Chair of the U.S. Parole Commission,[5] even though the same

[1] *Rules of Practice and Procedure*, 91 Fed. Reg. 56,724 (Sept. 3, 2026).
[2] Sentencing Commission Improvements Act, S. 4136, 119th Cong. (2026); Sentencing Commission Improvements Act, S. 851, 118th Cong. (2023); Sentencing Commission Improvements Act, S. 3286, 117th Cong. (2021).
[3] 28 U.S.C. § 994(o).
[4] 28 U.S.C. § 991(a).
[5] Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 235(b)(5) (codified at 18 U.S.C. § 3551 note).

Act that created the Commission abolished federal parole nearly four decades ago.[6] The Department of Justice's representative attends the Commission's nonpublic meetings, receives the staff briefings, memoranda, and data analyses that shape the Commission's policy choices, and sits alongside commissioners at public hearings. Federal Defenders have no comparable role, even though Federal Defenders and appointed counsel under the *Criminal Justice Act* represent nearly 90 percent of people charged with federal crimes, and Federal Defender offices serve 92 of the 94 federal judicial districts.[7]

This imbalance matters. A substantial share of the Commission's policymaking work takes place in nonpublic meetings and briefings where options are narrowed and data are interpreted long before a proposed amendment is published for comment. When prosecutors are present for those discussions and defenders are not, the Commission loses the perspective of the attorneys who represent the vast majority of people affected by its guidelines. The imbalance also risks creating the appearance that federal sentencing policy is disproportionately shaped by only one party to criminal cases—an appearance that could undermine public confidence in the Commission's work.

The Proposed Amendment Would Improve the Quality of the Commission's Deliberations.

Part C would help correct the aforementioned imbalance, and we offer the following recommendations on its specific provisions.

First, we urge the Commission to adopt the bracketed option permitting the designated representatives to attend "all Commission meetings at which Commission staff is present," rather than the narrower option limited to "public meetings and nonpublic briefing sessions." The broader option comes closest to the access the Department of Justice's *ex officio* member already enjoys; the Commission's current Rules expressly contemplate that support staff designated by *ex officio* commissioners will participate in nonpublic meetings.[8] A representative who is excluded from the meetings where substantive policy is debated cannot provide the balance Part C is meant to achieve. The proposed rule already excludes the representatives from administrative, personnel, budgetary, and other confidential matters, which adequately addresses any concern about the scope of their participation.[9]

---

[6]Cong. Rsch. Serv., R48765, *Overview of Continuing Appropriations for FY2026 (Division A of P.L. 119-37)* (2025) (explaining that the Sentencing Reform Act of 1984 ended parole for federal offenders convicted on or after November 1, 1987, and that Congress has periodically extended the Parole Commission's authorities to address remaining populations).

[7]Admin. Office of the U.S. Courts, *Defender Services – Annual Report 2024*, https://www.uscourts.gov/data-news/reports/annual-reports/directors-annual-report/annual-report-2024/defender-services-annual-report-2024 (nearly 90 percent of federal criminal defendants are represented by counsel appointed under the Criminal Justice Act); Admin. Office of the U.S. Courts, *Defender Services*, https://www.uscourts.gov/about-federal-courts/defender-services (federal defender organizations serve 92 of the 94 federal judicial districts).

[8]*See* 91 Fed. Reg. 56,724, 56,731 (proposed amendment to Rule 3.3, which currently permits the Commission in nonpublic meetings "[t]o receive information from, and participate in discussions with, Commission staff or any person designated by an *ex officio* Commissioner as support staff for that Commissioner").

[9]*Id.* at 56,726–27 (proposed Rule 3.1(c)).

Similarly, we support the provision giving the designated representatives the same policymaking materials distributed to commissioners in preparation for meetings. We encourage the Commission to specify that these materials be provided at the same time they are provided to commissioners. Meaningful participation in deliberations depends on having adequate time to review staff analyses and data before a meeting, not after.

Moreover, we support the amendment to Rule 3.4 allowing the designated representatives to participate in public hearings alongside commissioners and to question witnesses.[10] The Department of Justice's *ex officio* member already plays this role. Allowing a Defender representative to do the same will improve the quality of the hearing record and demonstrate to the public that the Commission is hearing from all sides.

Finally, we support including a representative of the Judicial Conference's Committee on Criminal Law. The judges who apply the guidelines every day bring an essential perspective to the Commission's work. Notably, the Judicial Conference has long recognized that the Commission would benefit from a Federal Defender representative.[11]

The Commission has ample authority to make these changes. Congress empowered the Commission to establish general policies and promulgate such rules and regulations as are necessary to carry out its statutory purposes.[12] Adopting Part C would be a sound exercise of that authority.

The Proposed Amendment Is a Necessary Step, but Not a Substitute for Legislation.

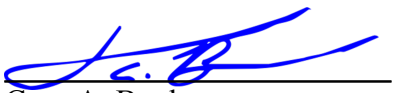
While Part C is a welcome and meaningful step, a rule of practice cannot fully substitute for statutory change. The designated representatives would not be members of the Commission, and a rule adopted by one Commission can be narrowed or rescinded by a future one. Only Congress can establish a Defender *ex officio* member who serves in the same capacity as the Department of Justice's *ex officio* member.

In the meantime, adopting Part C—including the broader option for meeting attendance—would send a clear message that the Commission intends to set sentencing policy in a fair, balanced, and transparent manner. Thank you for considering our views.

Sincerely,



Richard J. Durbin
Ranking Member



Cory A. Booker
United States Senator

---

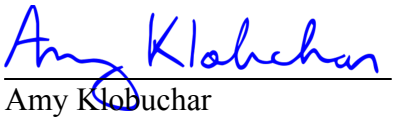
[10] *Id.* at 56,727 (proposed amendment to Rule 3.4).

[11] 164 Cong. Rec. H10,401 (daily ed. Dec. 20, 2018) (letter from the Judicial Conference of the United States stating that the Commission "would benefit by having a federal defender representative as a non-voting member").

[12] 28 U.S.C. § 995(a)(1); *see also* 91 Fed. Reg. 56,724, 56,725 (citing § 995(a)(1) as authority for the proposed amendment).



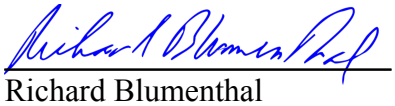
Sheldon Whitehouse
United States Senator



Amy Klobuchar
United States Senator



Christopher A. Coons
United States Senator



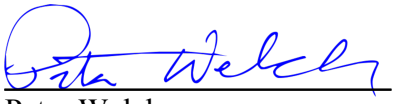
Richard Blumenthal
United States Senator



Mazie K. Hirono
United States Senator



Alex Padilla
United States Senator



Peter Welch
United States Senator



Adam B. Schiff
United States Senator

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
JOSH HAWLEY, MISSOURI
THOM TILLIS, NORTH CAROLINA
JOHN KENNEDY, LOUISIANA
MARSHA BLACKBURN, TENNESSEE
ERIC SCHMITT, MISSOURI
KATIE BOYD BRITT, ALABAMA
ASHLEY MOODY, FLORIDA
DARLINE GRAHAM, SOUTH CAROLINA

RICHARD J. DURBIN, ILLINOIS
SHELDON WHITEHOUSE, RHODE ISLAND
AMY KLOBUCHAR, MINNESOTA
CHRISTOPHER A. COONS, DELAWARE
RICHARD BLUMENTHAL, CONNECTICUT
MAZIE K. HIRONO, HAWAII
CORY A. BOOKER, NEW JERSEY
ALEX PADILLA, CALIFORNIA
PETER WELCH, VERMONT
ADAM B. SCHIFF, CALIFORNIA

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

October 26, 2026

VIA ELECTRONIC TRANSMISSION

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Washington, DC 20002-8002
Attention: Public Affairs

Dear Chair Reeves:

As Chairman of the Senate Judiciary Committee, I write to express my views regarding the U.S. Sentencing Commission's Proposed Amendment to the Rules of Practice and Procedure, which was published on August 27, 2026. Although many of the Commission's proposals merely address administrative concerns and appear reasonable, I strongly encourage the Commission to reject the proposed amendments to Rules 3.1 (Meetings) and 3.4 (Public Hearings), labeled as Part C in the Commission's broader publication.

As you are aware, our constitutional structure relies on strict adherence to the separation of powers across co-equal branches of government. This applies to agencies within those branches, which may only operate within their validly delegated authority. The proposed amendments to Rules 3.1 and 3.4 violate that principle because they serve as an end-around to Congress's clear intent surrounding the composition of the Commission itself.

Congress established and defined that composition in 28 U.S.C. § 991(a), which includes the Chair, Vice Chairs, and members of the Commission. By statute, Congress established one "ex officio, nonvoting member of the Commission," who is to be either "[t]he Attorney General, or the Attorney General's designee."[1] Congress also temporarily added the "Chairman of the United States Parole Commission" as a second "nonvoting member … ex officio."[2]

The proposed amendments to Rules 3.1 and 3.4 usurp Congress's constitutional authority by creating two additional ex officio, nonvoting members—"[o]ne representative designated by the Committee on Criminal Law of the Judicial Conference of the United States, and one representative designated by the Federal Public and Community Defenders."[3] Although the

[1] 28 U.S.C. § 991(a).
[2] *See* Joint Resolution making continuing appropriations for the fiscal year 1985, and for other purposes, Pub, L. No. 98–473 § 235(b)(5), 98 Stat. 1837 (1984). Since its creation, Congress has repeatedly extended this temporary ex officio member—most recently this year. *See* Consolidated Appropriations Act of 2026, Pub. L. No. 119-75 § 5011, 140 Stat. 630 (2026).
[3] *See* Proposed Amendment, Part C.

proposed amendments do not label these new representatives as "ex officio, nonvoting members," they are functionally one and the same.

Indeed, the same privileges and authorities of the Commission's existing ex officio members would be—without the congressional authorization—afforded to the new representatives proffered by the proposed amendments:

- ***Hearings.*** Congressionally authorized ex officio members currently "sit[] alongside the voting Commissioners as they hear witness testimony concerning proposed amendments and may, as would a voting Commissioner, question the witnesses on the public record."[4] Likewise, the new proposed representatives would "actively participate in … hearing[s] alongside commissioners and [would be] authorized … to pose questions to any witness called to testify during [a] hearing."[5]

- ***Meetings.*** Congressionally authorized ex officio members currently "appear[] on the dais with the voting Commissioners and may make a statement addressing actions the Commission has taken (or failed to take)."[6] Likewise, the new proposed representatives "receive the same meeting materials distributed to commissioners," "participate in [] meetings by engaging in deliberations with commissioners and other meeting participants, requesting information and documents, and presenting relevant information to the Commission."[7]

Not only are these roles functionally identical, but so too are their limitations. The Commission's existing ex officio members and the proposed amendments' new representatives "may not vote or make or second motions at meetings."[8]

As a policy matter, reasonable minds may agree or disagree on the expansion of ex officio member participation in Commission proceedings. But that *is* a policy matter reserved for Congress to decide. In recent history, Members of Congress, including some of my Democratic colleagues on the Judiciary Committee, have sought to tackle this very issue.[9] On numerous occasions, Congress has considered bills that would add ex officio members to the Commission, but it has not enacted such legislation.[10]

---

[4] *See generally* Sentencing, 74 DOJ J. Fed. L. & Prac. No. 3, at 217 (2019), https://www.justice.gov/usao/media/1463136/dl?inline.
[5] Proposed Amendment, Part C.
[6] *See generally* Sentencing, 74 DOJ J. Fed. L. & Prac. No. 3, at 217 (2019), https://www.justice.gov/usao/media/1463136/dl?inline.
[7] Proposed Amendment, Part C.
[8] *Compare* Rule 2.1 ("Ex-officio members may not vote or make or second motions.") *with* Proposed Amendment, Part C ("[T]he representatives designated under this paragraph may not vote or make or second motions at meetings.").
[9] *See, e.g.*, Press Release, Booker, Durbin Reintroduce Legislation Aimed at Increasing Membership within the U.S. Sentencing Commission, SENATOR CORY BOOKER (Mar. 18, 2026), https://www.booker.senate.gov/news/press/booker-durbin-reintroduce-legislation-aimed-at-increasing-membership-within-the-us-sentencing-commission.
[10] *See, e.g.*, Sentencing Commission Improvements Act, S. 4136, 119th Cong. (2026); Sentencing Commission Improvements Act, S. 851, 118th Cong. (2023); Sentencing Commission Improvements Act, S. 3286, 117th Cong. (2021); Federal Public Defense Commission Act, H.R. 10379, 118th Cong. § 2(b) (2024); To amend title 28, United

Accordingly, the Commission may not substitute its judgment for that of Congress because "[r]egardless of how serious the problem an administrative agency seeks to address, [] it may not exercise its authority in a manner that is inconsistent with *the administrative structure* that Congress enacted into law."[11] Moreover, it is a fundamental principle underlying the separation of powers that the judicial branch must "apply, not amend, the work of the People's representatives," even when it might think that "Congress should reenter the field and alter the judgments it made in the past."[12] Unless and until Congress decides to add ex officio members to the Commission, the Commission lacks the authority to do so.

I therefore urge the Commission to adhere to the metes and bounds of its delegated authority. To that end, the Commission must reject the proposed amendments to Rules 3.1 (Meetings) and 3.4 (Public Hearings), labeled as Part C in the Commission's broader publication.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate

States Code, to add a Federal defender representative as a nonvoting member of the United States Sentencing Commission, and for other purposes, H.R. 1251, 114th Cong. (2015); To amend title 28, United States Code, to add a Federal defender representative as a nonvoting member of the United States Sentencing Commission, and for other purposes, H.R. 2526, 113th Cong. (2013).

[11] *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (quoting multiple cases) (emphasis added).

[12] *Cf. Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 90 (2017).

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States Courthouse
111 Seventh Avenue, SE, Box 21
Cedar Rapids, IA 52401-2101

Honorable Roy K. Altman
Honorable Nathanael M. Cousins
Honorable Katherine Polk Failla
Honorable Rich Federico
Honorable David J. Hale
Honorable Beryl Howell
Honorable Lindsay C. Jenkins
Honorable Leslie E. Kobayashi
Honorable Sherri A. Lydon
Honorable Karen Spencer Marston
Honorable Diana Saldaña
Honorable Leo Sorokin

Honorable C.J. Williams, Chair

TELEPHONE
319-286-2340

October 26, 2026

Honorable Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chair Reeves and Members of the Sentencing Commission:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, thank you for the opportunity to comment on the proposed amendment to the Commission's Rules of Practice and Procedure. We appreciate the invitation to participate in the Commission's earlier roundtable discussion and the opportunity now to provide stakeholder input to help the Commission make its work "more effective, open, and participatory."[1] To that end, the Committee offers five recommendations.

Context and Summary

Within the Judicial Conference, the Committee on Criminal Law is responsible for both overseeing the federal probation and pretrial services system and for reviewing issues relating to the administration of criminal law. Specifically, the Committee monitors the workload and

[1] *See* U.S. Sentencing Comm'n News Release (Aug. 27, 2026).

operations of probation and pretrial services offices and, when the budget is formulated, proposes funding and resources to support these operations, considering the overall fiscal situation of the Judiciary. The Committee also reviews and recommends revisions to the staffing formula for the probation and pretrial services offices. Based on these responsibilities, the Committee provides the Sentencing Commission with public comment and feedback to support effective probation and pretrial services operations as well as the fair, efficient administration of criminal law.[2]

* * *

In the Proposed Amendment, the Commission states that it is considering changes to its internal rules to "further the agency's statutory purposes and enhance public engagement with and understanding of the Commission's work."[3] The Commission's goal is to "make the agency's work more effective, open, and participatory."[4] Although some of our recommendations touch on the specific amendments proposed, they all respond to Part H of the proposed amendment, which seeks revisions from its commenters to "foster public engagement with the Commission, augment public comprehension of the Commission's work, and improve the Commission's practices and processes."[5] Part H also asks commenters to "suggest actionable measures to improve the operational efficiency and transparency of the Commission's internal processes."

The Committee has five related recommendations, summarized here and discussed below, to help further the Commission goals of a more effective, open, and participatory process that will improve public engagement and understanding of its work.

1. To derive the benefit of better stakeholder input, the Committee recommends that the Commission provide a longer comment period between publication of proposed amendments and adoption (perhaps by publishing proposed amendment language earlier in the amendment cycle).

2. The Committee supports Part C of the proposed amendment to the extent that it would provide for a representative of the Federal Public and Community Defenders to participate in Commission meetings and public hearings. The Committee might

---

[2] The Judicial Conference has authorized the Committee to "act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase the flexibility of the Guidelines." JCUS-SEP 1990, p. 69. The Conference has resolved that "the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible." JCUS-MAR 2005, p. 15.

[3] *See* Proposed Amendment to the Rules of Practice and Procedure at 1.

[4] *See* U.S. Sentencing Comm'n News Release (Aug. 27, 2026).

[5] *See* Proposed Amendment to the Rules of Practice and Procedure at 23.

also support a participatory role for the Committee on Criminal Law, subject to further details about the role, expectations, and resources required.

3. The Committee recommends that the Commission formally include in its rules or processes consideration of the impact on judicial resources (including probation and pretrial services offices) when making amendment and retroactivity decisions.

4. The Committee proposes that the Commission investigate potential ways to pilot or simulate amendments in near-real-world scenarios prior to adoption, with the help of its advisory groups and the Committee.

5. The Committee recommends that the Commission preserve in its Rules of Practice and Procedure the presumption that guideline amendments should generally "be given prospective application only." (Rule 4.1A).

Discussion

The Committee's recommendations respond to some aspects of the Commission's request for comment while taking no position on others.

1. Expand public comment period for proposed amendments

To make the Commission's Rules of Practice and Procedure more "effective, open, and participatory" — and to provide the Commission with better stakeholder input — stakeholders should have more time to review, analyze, and comment on the proposed amendments. To provide the Commission with enhanced public engagement and more informed feedback, we would suggest a 90-day comment period for proposed amendments.

Part E, like other parts of the proposed amendment, seeks to increase "transparency and participation" in the Commission's work, but it proposes changes only at the agenda-setting stage of the amendment cycle. Expanding the comment period at the proposed amendment stage of the cycle is even more critical to the Commission's goals of increasing transparency and participation, and it would offer the added benefit of enhancing "public engagement with and understanding of the Commission's work." Expanding the comment period would also benefit the Commission with more informed feedback, especially regarding lengthy and complex proposals where there may be multiple options and issues for comment. If stakeholders had a longer period to engage with, discuss, and perhaps even collaborate on proposed amendment language, they could provide the Commission with more thoughtful, informed, and comprehensive feedback.

The Department of Justice (DOJ) has also raised the need for a longer comment period, with adjustments to improve stakeholder input on amendments with a realistic prospect of adoption. Specifically, in its July 2026 comment letter, DOJ stated:

Because stakeholders expend considerable resources when providing input, the

> Commission has an obligation to ensure that the input it requests will be directed toward areas that will be most helpful to the Commissioners. To that end, the Commission could consider publishing proposed amendments earlier in the cycle to allow for a longer comment period and then issuing an updated version closer to the hearing that reflects any developments in the Commission's thinking. Rather than expanding the volume of publicly released materials, adjusting the public comment process in this way would promote transparency by directing stakeholder input toward amendments with a realistic prospect of adoption and minimizing the need for multiple open-ended issues for comment.

For proposed amendments, the current Commission rules require that it allow, when practicable, a minimum comment period of "at least 60 calendar days."[6] In practice, the Commission's comment periods have been shorter than 60 days. During each of the last two amendment cycles, for example, the Commission published two sets of complex and lengthy proposed amendments, along with many issues for comment, with overlapping comment periods and two separate hearings during the same timeframe. The comment periods in those cycles ranged from 29 to 54 calendar days.[7]

Within the designated public comment period, Commission stakeholders must review

---

[6] Specifically, Rule 4.4 states:

> In the case of proposed amendments to guidelines or issues for comment that form the basis for possible guidelines amendments, the Commission shall allow, to the extent practicable, a minimum period of public comment of at least 60 calendar days prior to final Commission action on the proposed amendments

In addition, Rule 4.3 states:

> Where appropriate, the Commission may divide a comment period into an original comment phase and a reply comment phase. For example, the Commission may divide a comment period of 60 calendar days into an original comment phase of 40 calendar days and a reply comment phase of 20 calendar days. Comments during a reply phase are limited to issues raised in the original comment phase.

[7] Last cycle, the Commission published (based on the Federal Register date) the first set of proposed amendments on Dec. 19, 2025, held a hearing on those proposals 46 calendar days later, on Feb. 3, 2026, with all public comment due 54 calendar days from publication of the amendments (Feb. 10, 2026). Data briefings were released throughout the comment period on Jan. 8, Jan. 15, and Feb. 5, 2026. During the same public comment period, a second set of proposed amendments was published on Feb. 6, 2026, with a hearing held 32 days later (March 9, 2026) and the public comment phase ending 41 calendar days from publication (March 18, 2026). Data briefings were released during the comment period on Feb. 13 and 25, 2026.

Similarly, for the 2024-2025 cycle, the first set of proposals was published on Jan. 2, 2025, with original comment due 33 calendar days later (February 3, 2025) and reply comment due February 18, 2025. Data briefings were released throughout the comment period on Jan. 10 and Jan. 13, 2025. During that public comment period, a second set of proposals was published on February 3, 2025, with the original public comment phase ending 29 calendar days later (March 3, 2025) and reply comment due on March 18, 2025. Data briefings were released throughout the comment period on Feb. 5 and updated March 6, 2025.

for the first time proposed amendment language regarding multiple, often lengthy and complex, amendments – language and options that the Commission may have been considering for months. In that limited timeframe, the Committee — presumably similar to other stakeholders such as the DOJ, the defender community, and the Commission's various Advisory Groups – must review and digest the proposals and issues for comment for the first time and analyze any relevant data briefings the Commission releases (posted, at times, with only a few days left in the comment period). After that, the Committee must then seek and incorporate feedback from its members and constituents (who often approach sentencing and the guidelines with diverse views), try to get consensus around a collective position, draft language on issues where they reached consensus, prepare for a hearing when testimony is warranted, and obtain internal organizational approval, where necessary.

The short timeframe and sequencing for comment and testimony also limit the ability of stakeholders to collaborate on proposed amendments. Last cycle, for example, during the two overlapping comment periods on the two sets of proposed amendments, the Commission held a public hearing before public comment was due. As a result, stakeholders had to prepare their testimony and answer the Commissioners' hearing questions without the opportunity to review the comments of the other stakeholders who were testifying. This was a problem for the witnesses, who were asked about other stakeholders' views that they had not had the opportunity to consider, and for the Commission, which did not have the benefit of any cross-pollination of ideas.

If the Commission provided proposed amendments earlier in the process, stakeholders would have more time to understand and perhaps even try out the proposals to help identify the strengths and weaknesses of the various options. Extra time would also allow the Commission's institutional stakeholders to discuss the proposals and get more buy-in from their members and/or constituents. Importantly, more time with proposed amendments would allow stakeholders to provide the Commission with more informed and educated feedback and greater buy-in, enhancing public engagement and promoting better understanding of the Commission's work.

The Committee also notes that Part F of the Commission's proposed amendment (Rule 5.3) would allow for public release of Commission material that currently is disclosed only to the Commissioners during the priority-setting and amendment-drafting process. The staff-generated documents, data reports, and other information that would be released could be a large volume of material. Were the Commission to decide to release additional material to the public, there would likely be a lot more for stakeholders to review in the limited time that they have to analyze the proposals and draft their public comments and hearing testimony.

The Commission might also consider whether to set and publicly announce a 2-year amendment cycle for certain particularly complex amendments to allow for greater development and refinement of amendment language. The Committee believes that this approach could result in better input during the amendment process and more buy-in from the Commission's stakeholders. It could also help the Commission develop workable solutions for

issues such as the categorical approach, where multiple rounds of comment and revisions of the amendment may be necessary to achieve amendment language that the Commission finds suitable for adoption.

2. **Adopt Commission proposal to allow a more participatory role for the Defenders and a representative of the Committee on Criminal Law**

The Committee wholeheartedly supports the Commission's proposal in Part C of the amendment to allow a representative of the Federal Public and Community Defenders to participate in Commission meetings and public hearings. It believes that the defender community should have a greater, participatory role in the Commission process based on a long-standing Judicial Conference position (JCUS-MAR 2004, p. 11) and in light of the need for parity with the Attorney General's current status as an ex officio member (which could be perceived as giving the government an advantage in advancing its positions in the amendment process and other Commission work).

The Committee also supports the proposal to include a representative of the Committee on Criminal Law at Commission meetings and hearings. The Committee is interested in exploring this proposal further and will need to determine who would best fulfill this role in consultation with the Administrative Office (AO).

3. **Formalize consideration of the impact on judicial resources**

As we discussed in our previous comment letter, the Committee also recommends that the Commission explicitly state in its internal rules that the Commission should consider the impact of its amendment-related actions on judicial resources. This area of analysis and discussion would largely be based on information that the Commission already gathers, such as the numbers of cases in which a new or amended guideline provision would apply and anticipated impacts on sentence length.

Naturally, the potential impact of a sentencing change on judicial resources should never be the driving determinant behind Commission decisions, but we nonetheless believe that there are instances in which these resources should be considered. In providing comment and testimony to the Commission, the Committee strives to provide general information on the practical impacts that a proposed amendment (or retroactive application of an amendment) could have on judicial and probation office resources, including the probation system's workload, budget, and staffing needs, and on the interplay of those impacts with the Judiciary's mission and community safety. Adopting a formal role for consideration of workload impact would appropriately recognize the importance of the overall efficient administration of federal criminal law.

4. **Develop means of testing proposed amendments and retroactive application in real-life scenarios**

There are some proposed amendments that give rise to challenges in crafting precise text

or in clearly defining terms to guide litigants, lawyers, probation officers, and judges. To help discover substantive or administrability issues associated with these proposals, we recommend that the Commission consider simulating the application of proposed amendments and the consequences of retroactivity in real-life scenarios. For example, the Committee could assemble a rotating set of volunteer judges and probation officers — perhaps drawn from the Commission's Probation Officers Advisory Group or AO-supported working groups — who would take facts from (anonymized) real or simulated cases and apply to them a proposed amendment or retroactive application of an amendment. The Commission could examine the results, and the volunteers also could provide the Commission with feedback on any refinements needed. The Commission also could explore the use of a sentencing institute under 28 U.S.C. § 334 as a means of testing potential amendments. To be sure, this sort of simulation process would not be appropriate for all proposed amendments, but it could be useful for piloting some proposals that have widespread impact (e.g., those related to career offender and low-level trafficking) or complex issues (e.g., categorical approach).

5. Maintain the long-standing Commission rule stating that amendments generally should be given only prospective application

Although the Committee does not take a position on Part B of the proposed amendment, which would increase the number of votes required for retroactive application of an amendment, the general rule against routine retroactive application should be maintained. Rule 4.1A of the Commission's Rules of Practice and Procedure, which has been in effect since the Commission first issued its rules in 1997, states: "Generally, promulgated amendments will be given prospective application only." Maintaining this rule helps to further the goals set out in the Commission's proposed amendment — to enhance the effective application and understanding of the guidelines and "further the agency's statutory purposes." [8]

Indeed, as the Committee stated in its April 2025 comment letter on the retroactivity criteria (Retroactivity Factors Letter), we recommend that the Commission formally incorporate that principle of prospective application into the policy statement at §1B1.10. Although retroactive application may be warranted in some instances, many amendments reflect fine-tuning of the Guidelines based on evolving research, case law, or legislative changes. Amendments addressing issues of fundamental fairness, which may warrant retroactive application, are relatively rare. When amendments have been based on fundamental fairness issues, such as the crack amendments and the "drugs minus two" amendment, the Committee has supported retroactivity even where it would place significant burdens on the Judiciary.

As the Committee expressed in its Retroactivity Factors Letter, the Commission's general rule against retroactive application appropriately reflects the goals of the Sentencing Reform Act of 1984 (Act). The Act abolished parole and created the Sentencing Commission

[8] *See* Proposed Amendment to the Rules of Practice and Procedure at 1.

to create a more predictable system of determinate sentencing. Finality of sentences promotes the general-deterrence goal of sentencing. As we have also noted in other comments, when amendments not addressing a fundamental unfairness or inequity are routinely deemed retroactive, "over time the perception may arise that the Guidelines themselves are fundamentally unfair, thereby undermining public confidence in the system of certain and determinate sentencing established by the Sentencing Reform Act of 1984." Retroactivity Factors Letter, at 4 (quoting an earlier comment letter from the Committee).

Reasonable certainty of release dates also ensures that individuals receive the advantages of effective release preparation and reentry services. Appropriate release planning—which requires time, resources, and coordination, from both the Bureau of Prisons and our probation offices—is critical to an individual's success upon release. It is especially important for those who have served long sentences, those who lack family or other community support, and those with higher risks and needs.

The retroactive application of amendments also impacts the judicial and probation office workload and staffing, resulting in a significant burden on the judges and probation offices that must evaluate many motions that do not result in sentence reduction. For that reason, the Committee has supported retroactive application when amendments address a fundamental unfairness or inequity but not adjustments that are more routine in nature. Time spent evaluating and addressing ineligible retroactivity motions means time taken from judges to rule on legitimate motions for release and time taken from probation officers to supervise and support individuals in the community.

Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on this set of proposed amendments. The Committee members look forward to continuing work with the Commission to improve the overall effectiveness of the sentencing guidelines and the fair administration of justice. We remain available to assist in any way we can.

Respectfully submitted,



C.J. Williams
Chair, Committee on Criminal Law of the
Judicial Conference of the United States

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530*

October 26, 2026

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This letter responds to the Sentencing Commission's request for comment on its proposed amendments to its Rules of Practice and Procedure and issues for comment published in the Federal Register on September 3, 2026.[1]

Consistent with the preliminary views shared during the Rules roundtable, the Department supports the Commission's efforts to ensure greater transparency, public engagement, and efficiency in its amendment process but underscores the importance of preserving candid internal deliberation and avoiding unintended burdens or public confusion.[2] Transparency builds trust. Public engagement can lead to better informed decisions that are more workable for litigants, judges, and probation officers. But effective policymaking also depends on thoughtful deliberation, which requires candid discussion and informed advice. And measures that prioritize transparency above all else can unintentionally chill debate, confuse the public, and undermine the goals of producing reasoned amendments.

Accordingly, although the Department appreciates that many of the proposed changes aim to improve the amendment process, we are concerned that most may not achieve their intended objectives and could increase burdens on stakeholders and the Commission without sufficient benefit. We therefore recommend that the Commission instead focus its efforts on refining the priorities and amendment comment processes to make those processes more iterative and to better leverage existing advisory groups and opportunities for public input.

Our comments comprise two segments. In Part I, we outline an alternative amendment comment process—designed to complement the priorities process set forth in proposed Rule 5.2—that would accomplish the Commission's goals without requiring the prescriptive and complicated

---

[1] *Notice of Request for Public Comment*, 91 Fed. Reg. 56724 (Sept. 3, 2026), https://www.govinfo.gov/content/pkg/FR-2026-09-03/pdf/2026-17994.pdf; U.S. Sent'g Comm'n, *Proposed Amendment to the Rules of Practice and Procedure* (Aug. 27, 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202608_rf-proposed.pdf ("*Proposed Amendments*").

[2] Letter from Scott Meisler, Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, at 3–4 (July 24, 2026) ("DOJ 2026 Annual Letter"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202607/91FR35802_public-comment_R.pdf#page=19.

changes to Rules 3.1 (participation in meetings), 3.4 (participation in public hearings), 4.3 (ex parte communications), and 5.3 (disclosure of meeting materials). We present our affirmative public comment proposal as an alternative to the Commission's proposed changes to Rules 3.1, 3.4, 4.3, and 5.3.

In Part II, the Departments offers more granular comments on each of the proposals as published. Those parts lay out our views that in lieu of changing the voting thresholds in Rule 2.2, the Commission should clarify the criteria for making an amendment retroactive; and that the Commission should refrain from altering the roles of the Judicial Conference's Criminal Law Committee and the Federal and Community Defenders in ways that could be viewed as deviating from the statute that establishes the Commission's composition. We also outline an alternative process to ensure that the other Commissioners and the public are informed about communications that factored significantly into the Commission's decisions. Finally, we have no objection to the clerical changes.

I. The Department's Amendment Comment Proposal

The Commission has proposed revising the process for setting its priorities to make that process "more participatory and transparent."[3] The Department largely supports these efforts and, in response to the Issue for Comment in Part H of the proposed amendment,[4] recommends that the Commission similarly revise its overall public comment process to make the process more iterative. Put simply, we think that the Commission should engage its stakeholders and the public at different points throughout its amendment process to get calibrated feedback as the Commission's thinking on a particular issue evolves. We explain our proposal below.

We propose this revision for two reasons. First, stakeholders spend significant time and resources providing input and want that input to be as helpful as possible for the Commissioners. To avoid unnecessary burden and duplicative efforts, we encourage the Commission to focus its requests for feedback on areas most useful to Commissioners. Because hearings currently occur so close to the comment letter deadlines, stakeholder testimony often serves merely to reiterate positions stated in recently submitted comments, which may not be as helpful to Commissioners.

Second, gathering feedback at multiple stages throughout the process would allow Commissioners to receive more targeted and nuanced feedback as their thinking on a particular issue evolves. Under the current process, substantial changes between the proposals published in December and January and the final amendments promulgated in April may surprise stakeholders, prompting them to petition for revisions to the same set of amendments in subsequent cycles.[5] We

---

[3] *Proposed Amendments* at 13 (synopsis of proposed amendment).

[4] *Proposed Amendments* at 23.

[5] *E.g., Compare* U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines* (Feb. 2, 2023), at 238, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf, (fake pills "reason to believe" *mens rea*), *with* U.S. Sent'g Comm'n, *Adopted Amendments to the Sentencing Guidelines* (April 27, 2023), at 45, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf, (fake pills "willful blindness or conscious avoidance of knowledge" *mens rea*); *Compare* U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines* (Jan. 24, 2025), at 72, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20250130_rf-proposed.pdf, (proposed new trafficking functions adjustment at §2D1.1(b)(17)), *with* U.S. Sent'g Comm'n, *2025 Adopted Amendments to the Sentencing Guidelines* (April 30, 2025), at 13,

propose that the Commission get feedback from its stakeholders and the public at multiple stages and in different ways throughout the comment process. A more iterative process would better engage and leverage the considerable expertise of the Commission staff, advisory groups, and stakeholders, and lead to a more efficient and effective process.

In short, this proposed process will allow the Commission to receive targeted and more helpful feedback, while more effectively focusing the stakeholders' efforts, so they address the issues most needed rather than spreading their input farther and wider.

That approach draws from the Commission's method for the Rules proposals this cycle: the Commission and staff would develop and draft the initial proposed amendments, obtain stakeholder feedback as needed, and then refine the drafts as needed in response. But our process repeats this cycle, making it more iterative and allowing each round of feedback to be increasingly focused as the Commission's thinking develops. Under our proposal, the Commission would have revised the draft Rules proposals after holding the roundtable and then published that updated draft for public comment in October. After reviewing public comment, it would then refine the drafts again and either publish the revised drafts or publish only the specific portions on which the Commissioners would like targeted feedback at the hearing.

The proposal is sketched out below, along with a month-by-month breakdown and chart appended to this letter.

Summary:

- First Stage (July–October):

  In July and August, Commissioners would work with staff to develop draft amendments based on the finalized priorities. In September, the Commission would seek high-level feedback on those drafts as needed—through a roundtable, ad hoc convenings, or through other engagements facilitated by staff—and then refine the amendments in September and October as appropriate. More straightforward amendments may not need preliminary feedback.

- Second Stage (October–January):

  In October, the Commission would publish the entire slate of draft amendments—reflecting any revisions from the feedback—for public comment. Public comment would be due in mid-December or mid-January, depending on scheduling preferences.[6] In January and February, the Commission would work with staff to review the public comment and deliberate on which amendments and options remain viable, which should be eliminated, whether any additional changes are warranted based on the feedback, and whether additional targeted input would help resolve remaining questions or policy choices. The Commission could also decide whether to publish any data presentations in October or in February.

---

https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202505_RF.pdf, (mitigating role provisions at §2D1.1(a)(5)).

[6] The goal would be to have a public comment period that is at least 60 days without including the holidays during the final two weeks of December.

- Third Stage (February–April):

  In February, the Commission would either publish—or provide directly to testifying stakeholders—the entire slate of revised amendments with the changes noted, a subset of the revised amendments, or a focused list of topics or questions requiring additional feedback at the hearing. The Commission would choose the option most beneficial to Commissioners. Stakeholders would focus their hearing preparation on those revisions or discrete issues while remaining ready to address any question that Commissioners may have. The Commission would hold a streamlined hearing in March to maximize its usefulness to Commissioners. Commissioners would continue to refine remaining amendments in March and April, before voting to promulgate in April and submitting the promulgated amendments for congressional review.

Month-by-month Breakdown:

- May/June (Establish Priorities for Amendment Cycle): Publish and finalize priorities for the upcoming cycle.
- July/August (Draft Amendments): Research, review, and draft priorities with staff.
- September/October (Early Feedback, Revise Draft Amendments): Early feedback for those drafts that need it through roundtables, ex parte meetings, or other means facilitated by staff. Refine draft amendments.
- October (Publish Proposed Amendments): Period of notice and public comment with a longer period of public comment.
- January/February (Refine and Publish Remaining Viable Amendments; Narrow Issues for Hearing): Deliberation based on public comment. Refine remaining viable amendments and either publish updated versions to reflect the Commission's latest thinking for informational purposes or publish specific areas that the Commission is seeking additional feedback on at the hearing for those testifying.
- March (Public Hearings; Deliberation): Streamlined hearing organized around certain decision points or areas that the Commissioners could benefit from more information or feedback. Commissioners begin deliberation.
- April (Deliberation and Vote to Promulgate Final Amendments): Deliberations and promulgation of finalized amendments and reasons for amendment.

This approach can be tailored to Commissioner preferences and the needs of each amendment. More significant amendments may require additional feedback throughout the process, while straightforward amendments may not need feedback in September or discussion at a March hearing if written submissions suffice. For more complex amendments that span multiple cycles, the Commission could use staff-led working groups drawn from advisory group members, additional roundtables or Commissioner-facilitated ad hoc convenings, or other mechanisms to get feedback and better leverage advisory-group expertise.

Several aspects of our proposal are worth underscoring. First, the proposal is designed to complement—not replace—the priorities-setting process in proposed Rule 5.2. Second, our proposal does not need to be implemented through a formal rule change. The Commission could instead pilot this process. We strongly recommend against a formal rules change at this time to

ensure that the Commission can experiment and improve its process over time and tailor it to Commissioner preferences or the needs of a particular amendment cycle. Third, we offer this proposal as an alternative to the prescriptive and complex changes proposed to Rules 3.1 (participation in meetings), 3.4 (participation in public hearings), 4.3 (ex parte communications), and 5.3 (disclosure of meeting materials).

The proposed iterative process is designed to act as a funnel—helping Commissioners winnow down options over time and focus attention on the proposals most likely to garner sufficient Commissioner support. Ideally, each publication would have fewer options and issues for comment. However, the proposal is designed to be flexible; it could be adopted as a whole or the Commission could experiment with any particular piece. It also would better leverage the tremendous expertise of Commission staff, advisory groups, and stakeholders without requiring duplicative or substantially increased effort. Any additional work would be more targeted, offset by greater efficiencies, and ultimately more useful to Commissioner deliberations. Finally, this approach should address most of the Commission's goals and concerns without any need to increase the volume of publicly released materials, chill important discussion or jeopardize data exchanges, or create complicated ex parte or participation issues that could be in tension with congressional intent.

Taken together, these features create a more responsive and better-informed amendment process, while accomplishing the Commission's goals of increasing stakeholder input and stakeholder requests for a more collaborative process. Overall, it prevents stakeholders from duplicating efforts in written submissions and hearing testimony, ensures Commissioners receive feedback as their views evolve, and makes hearings more efficient and focused.

II. The Commission's Proposed Amendments

a. Part A: Introduction

Turning to the Commission's proposed amendments, the Commission proposed revising the introduction to its Rules of Practice and Procedure "to closely track the statutory purposes of the Commission."[7] The current introduction was added in 2016 to "to provide general background" on the Commission drawing from the Commission's *Annual Reports.*[8] The Commission's purposes, duties, and powers are set out in depth in its organic statute[9] and elegantly explained on the Commission's website, in its *Annual Reports*, and in other Commission publications. For that reason, we question the necessity of retaining an introduction in the Rules of Practice and Procedure at all.

We do not object to revising the introduction to track the statutory purposes outlined in 28 U.S.C. § 991(b), but we caution that using different descriptions of the Commission's purposes across its publications could result in confusion.[10] The Commission's website and *Annual Report*

[7] *Proposed Amendments* at 3.

[8] *Id.*

[9] 28 U.S.C. §§ 991–999.

[10] *Compare* U.S. Sent'g Comm'n, *About* (2026), https://www.ussc.gov/about, (mirroring the current introduction in the Commission's Rules of Practice and Procedure and notes the Commission's functions of advising congress and the executive branch on effective crime policy and its research and data functions), *with* U.S. Sent'g Comm'n, 2025 Annual Report, at 2, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-

are intended for different audiences and serve different functions and we offer no comments on the particular phrasing of the Commission's purposes in each. Rather, we simply do not see a need to risk confusion by retaining a third iteration in the Commission's Rules of Practice and Procedure. We recommend deleting the introduction entirely, and if needed, simply citing to existing sources that articulate the Commission's purposes and functions more fully.

If the Commission decides to retain an introduction, we recommend expressly recognizing the Commission's research, data collection, and advisory functions—such as advising Congress and executive agencies and conducting research—so that the introduction fully captures the breadth of the Commission's role (including functions reflected elsewhere, *e.g.*, §§ 994 and 995).[11] Doing so helps orient the public to how data, research, and reports inform amendments and policy positions. The current introduction to the Rules of Practice and Procedure lists these important functions, and we recommend either retaining or revising that language.

b. Part B: Rule 2.2 Voting Rules for Action by the Commission

The Commission solicited comment on whether it should amend Rule 2.2 to raise the voting threshold for "certain Commission actions of heighted significance,"[12] most notably retroactivity decisions. For such decisions, the Commission proposes requiring a "supermajority" of five votes instead of four.[13] Additionally, the Commission asked in an issue for comment whether it should raise the voting thresholds for certain amendments, such as amendments that would increase sentences, or for all amendments.[14] From the Department's perspective, the answer to each of these questions is no.

The Department understands the Commission's proposal to reflect the disruptive consequences that retroactivity has on the criminal justice system. The Department shares those concerns, as articulated in previous letters to the Commission.[15] Retroactivity decisions are distinct because they disrupt the criminal justice system—redirecting resources from pending cases to closed ones, undermining finality, resubjecting victims and families to trauma, and imposing significant burdens on courts and litigants. That is why, historically, the Commission has rarely

---

sourcebooks/2025/2025-Annual-Report.pdf, (discussing the Commission's statutory, research and data, and training functions).

[11] *See, e.g.,* 28 U.S.C. §§ 994(q) (advising Congress on the Bureau of Prisons), 994(r) (advising Congress on modifying penalties), 994(o) (amendments to the guidelines informed by data), 994(w) (data and submissions to Congress); 28 U.S.C. §§ 995(12)–(16) (establishing the Commission's research and development program).

[12] *Proposed Amendments* at 4.

[13] *Id.*

[14] *Proposed Amendments* at 6.

[15] *See, e.g.*, Letter from Scott Meisler, Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Apr. 18, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf#page=13; Letter from Scott Meisler, Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (June 2, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202506/90FR19798_comment.pdf#page=14; Letter from Scott Meisler, Crim. Div., U.S. Dep't of Just., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (June 21, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202406/89FR36853_public-comment_R.pdf#page=111.

given amendments retroactive application.[16] And it is why many stakeholders, in addition to the Department, have expressed concerns over the retroactive application of guideline amendments.[17]

But if concerns over retroactivity are driving the Commission's proposal, we believe the more sensible course would be for the Commission to instead revise its criteria for retroactive application. In April 2024, the Commission announced that it had "decided to heed th[e] calls" of commenters who were urging "the Commission to identify clear principles" for determining whether to make guideline amendments retroactive.[18] In April 2025, the Commission solicited and received voluminous public comment from judges, advisory groups, and stakeholders on the retroactivity criteria.[19] And while commentators differed on the specific criteria that the Commission should use, many commentors agreed that refinement and clarification were needed.[20] Stakeholders echoed those calls at a recent roundtable held by the Commission. The

---

[16] Of the more than 800 technical and substantive amendments it has promulgated since 1987, the Commission has given retroactive effect to approximately 30. U.S.S.G. §1B1.10(d).

[17] *See, e.g.,* Hon. Edmond E. Chang, Chair, Comm. on Crim. Law of the Jud. Conf. of the U. S., Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (April 18, 2025), at 4, ("[f]requent or routine retroactive application of guideline amendments undermines determinate, predictable sentencing, and erodes the statutory sentencing goals, especially deterrence") https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf#page=5; Hon. Catherine C. Eagles, Chief District Judge, Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, (May 30, 2024), at 1, ("constant revisions to sentences undermine public trust and confidence in the system"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202406/89FR36853_public-comment_R.pdf#page=96; Mary Graw Leary, Chair, Victims Advisory Group, U.S. Sent'g Comm'n, Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, *Public Comment on Criminal History Amendment 8, Parts A and B*, at 2–3, ("[E]ven if not all petitions will be successful, each petition filed represents a crime victim whose life will be upended by the filing; a victim who will experience the repeated yet unexpected trauma of destabilizing their expectations of finality and due process regarding their offender's sentence."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202306/88FR28254_public-comment.pdf#page=83; Probation Officers Advisory Group, Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, (April 18, 2025), at 3 (noting that consideration of how recent retroactivity "may have impacted current resources" should be considered), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf#page=48.

[18] Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, Chair's Remarks at the Sent'g Comm'n Public Meeting on Aug. 8, 2024, at 5, at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240808/remarks.pdf.

[19] *See Proposed Amendments* at 7; *Notice of Request for Public Comment*, 89 Fed. Reg. 106761 (Dec. 27, 2024), https://www.federalregister.gov/documents/2024/12/30/2024-31278/sentencing-guidelines-for-united-states-courts; U.S. Sent'g Comm'n, *Issue for Comment: Criteria for Selecting Guideline Amendments Covered by §1B1.10* (Dec 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202412_IFC.pdf; *Compilation of Public Comment on Issue for Comment: Criteria for Selecting Guideline Amendments Covered by §1B1.10*, U.S. Sent'g Comm'n (Apr. 18, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf.

[20] *See, e.g.,* Hon. Edmond E. Chang, Chair, Comm. on Crim. Law of the Jud. Conf. of the U. S., Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (April 18, 2025), at 3 ("The Committee believes that Rule 4.1 should be incorporated, more formally, into the policy statement at §1B1.10" and that the Commission should "specifically add to its criteria a required consideration of the workload and staffing impacts" of retroactivity.), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf; Hon. Micaela Alvarez, District Judge, Public Comment to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, (April 3, 2025), at 1, ("The Commission should retain the Rule's language" of a presumption against retroactivity and "develop Guideline criteria that comport with this Rule."),

Commission has not yet acted; and we urge it to do so. Clarifying retroactivity criteria would require an amendment, but it is a significant, and worthy undertaking—and exactly the type of systemic and broad reflection warranted by the milestone 40th Anniversary of the Guidelines.[21]

By contrast, increasing the vote threshold for retroactivity decisions raises substantial questions under the Commission's organic statute. Through that statute, Congress established voting thresholds and set the structure and procedures for its membership. Congress set three different voting thresholds. First, Congress required an "affirmative vote of at least four" Commissioners—consistent with the Commission's Rules of Practice and Procedure and other federal statutes—to promulgate amendments.[22] Congress separately required only "a majority of the members present and voting" for the Commission to promulgate its Rules of Practice and Procedure.[23] Finally, Congress required that "a simple majority of the membership then serving" constitutes a quorum but permits the Commission to conduct its business—other than promulgating guidelines and policy statements—by "a simple majority of the members present."[24] Taken together, these four provisions reflect a deliberate voting scheme for a bipartisan body designed to endure across Administrations and Commissions.

We recognize that a higher voting threshold for retroactivity decisions could help ensure that those decisions are bipartisan and consistent across Commissions. We also acknowledge a potential legal argument that the voting thresholds in the Commission's organic statute set a floor, not a ceiling, leaving the Commission free to self-impose higher thresholds. But that proposition is, to our knowledge, untested. And absent further legal analysis, the Department believes that the Commission should adhere to those thresholds as set by Congress and address retroactivity-specific concerns by amending the retroactivity criteria.[25] That path would offer clearer guidance and respond to stakeholder concerns without creating tension with the voting thresholds Congress established.

Finally, the Commission's issue for comment asked whether the Commission should raise the voting thresholds based on the intended effects of Guideline amendments. As our answer above reflects, we believe that it should not. A system that requires different voting thresholds based on the intended effect of a prospective amendment—raising or lowering sentences—is not only unworkable, but unwise. The effect of an amendment on sentences is already a core consideration

---

https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf; Joshua Luria, Chair, Probation Officers Advisory Group, Letter to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (April 18, 2025), at 1, ("POAG unanimously agrees that the Commission should provide further guidance on how the existing criteria for determining whether an amendment should be retroactively applied."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf.

[21] *Final Priorities*, 91 Fed. Reg. 56732 (Sept. 3, 2026), https://www.govinfo.gov/content/pkg/FR-2026-09-03/pdf/2026-17998.pdf.

[22] 28 U.S.C. § 994(a).

[23] 28 U.S.C. § 995(a).

[24] 28 U.S.C. § 995(d).

[25] We note that when Congress considered raising voting thresholds, it considered doing so through legislation that would have raised the voting threshold across the board, not for a particular kind of amendment. Consensus in Sentencing Act, S.4135, 118th Congress (2024), https://www.congress.gov/bill/118th-congress/senate-bill/4135/text?s=2&r=1&hl=consensus+in+sentencing+act.

in a Commissioner's vote and the Commission should not employ a procedural change to embed a bias against particular results into the entire amendment process. Such a change would lead to confusion and litigation on many issues, including when the amendment produced an unpredictable result or combined with other amendments in unanticipated ways. Congress carefully designed the Commission's organic statute, establishing a specific framework for operation of the Commission. Congress contemplated the voting thresholds for various Commission actions yet did not distinguish between types of amendments to the Guidelines. The Commission should abide by the statutory framework established by Congress or, if a change is warranted, petition Congress for it.

c. Part C: Rule 3.1 Meetings and 3.4 Public Hearings

The Commission also solicited comment on significant changes to its rules for public and non-public meetings (Rule 3.1) and public hearings (Rule 3.4) to expand involvement of "specific judicial branch stakeholders" in its meetings and hearings.[26] Specifically, the Commission asked whether it should add a representative from the Federal Public and Community Defenders and a representative from the Committee on Criminal Law of the Judicial Conference of the United States to all meetings and hearings.[27] Such representatives would either be able to attend "public meetings and nonpublic briefing sessions" or "all Commission meetings at which Commission staff is present," depending on which of the bracketed options that the Commission chooses.[28] Such participation may include engaging in deliberations, requesting information and documents, and presenting relevant information to the Commission.[29]

The Department understands the Commission's desire to increase engagement with the public, particularly with those stakeholders listed in 28 U.S.C. § 994(o) and its five advisory groups. We support that goal. The Commission created these advisory groups to assist it in carrying out its statutory responsibilities under § 994(o) and inform its work under § 995.[30] Each group regularly testifies at Commission hearings, participates in roundtables, and provides valuable insight. Particularly in recent years, the Commission has endeavored to increase engagement with the Federal Public and Community Defenders, who represent an important perspective and whose collaboration the Department greatly appreciates.

The Department does not, however, support the proposed amendments to Rules 3.1 and 3.4. These proposals would, in effect, create a Federal Defender *ex officio* and Criminal Law Committee *ex officio* without the necessary legislative changes to the Commission's organic

---

[26] *Proposed Amendments* at 7.

[27] *Proposed Amendments* at 7–8.

[28] *Proposed Amendments* at 7.

[29] *Id.*

[30] *See, e.g.*, *See, e.g.*, U.S. Sent'g Comm'n, *Probation Officers Advisory Group Charter*, § 1, https://www.ussc.gov/sites/default/files/pdf/advisory-groups/probation-officers-advisory-group/2025_POAG_Charter.pdf; U.S. Sent'g Comm'n, *Practicioners Advisory Group*, § 1(b)(1); U.S. Sent'g Comm'n, *Sentence Impact Advisory Group Charter*, § 1, https://www.ussc.gov/sites/default/files/pdf/advisory-groups/sentence-impact-advisory-group/2025_siag_charter.pdf; U.S. Sent'g Comm'n, *Tribal Issues Advisory Group Charter*, § 1, https://www.ussc.gov/sites/default/files/pdf/advisory-groups/tribal-issues-advisory-group/2025_TIAG_Charter.pdf; U.S. Sent'g Comm'n, *Victims' Rights Advisory Group*, § 1, https://www.ussc.gov/sites/default/files/pdf/advisory-groups/victims-rights-advisory-group/2025_VRAG_Charter.pdf.

statute. Congress carefully set the composition and requirements to serve on the Commission in the Sentencing Reform Act.[31] Altering the Commission's meeting and hearing procedures to include participants who serve as *ex officio* commissioners in all but name would be in tension with the Commission's organic statute and serve as an end-run around Congress.

We have several concerns with the Commission's proposal as drafted. Some background on the issue helps to frame those concerns. The Federal Public and Community Defenders have repeatedly advocated that the Commission support legislation to add a Defender *ex officio* to the Commission.[32] Although Congress has considered expanding the Commission's membership, that legislation has failed to advance each time it has been introduced.[33] Against that backdrop, the Federal Defenders have also advocated for the Commission to create a Defender *ex officio* absent congressional action.[34] The Commission's current proposal, however, does not seek public comment on that possibility, including on whether it would be within the Commission's legal authority to take that step. Instead, the Commission asked whether it should, through a Rules change, provide for a role that is the functional equivalent of a Defender *ex officio* but without using that nomenclature. It should not. We do not think that the Commission should get ahead of Congress and it may create the appearance of circumventing Congress and thereby diminish public trust and transparency. We think it is especially unwise to do so now.

Second, we have not heard similar calls from or about the Criminal Law Committee. As with the Federal Defender *ex officio*, we do not opine here on the merits of a statutory change to the Commission's composition. Rather, we question the necessity of such a change when the Chair of the Criminal Law Committee has a standing panel at Commission hearings, regularly submits detailed and informative comments to the Commission, and regularly engages with the Commission. Here, again, we urge the Commission to adhere to its organic statute and the membership Congress prescribed, including the distinction that Congress drew between Commission membership (28 U.S.C. § 991(a)) and comment or consultation authority (§ 994(o)). We cannot support what must be understood to function—however well intended—as backdoor *ex officios*. If the Commission seeks a change in its composition, petitioning Congress is the appropriate path.

Third, these changes risk prioritization and line drawing problems among stakeholders. It could give the misimpression of a hierarchy of stakeholder views, which we do not understand to be the Commission's intention. For example, some might question why the voices from the U.S.

---

[31] 28 U.S.C. § 991(a).

[32] *See, e.g.*, Letter from Heather Williams, Chair, Fed. Pub. And Cmty. Def., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (July 27, 2026), at 3 (citing to previous FPD letters), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202607/91FR35802_public-comment_R.pdf#page=38.

[33] The Sentencing Commission Improvement Act, S. 4136, 119th Cong. (2026), https://www.congress.gov/bill/119th-congress/senate-bill/4136/text; The Sentencing Commission Improvements Act, S. 851, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/senate-bill/851?hl=%22sentencing+commission+improvements+act%22&s=7&r=2; The Sentencing Commission Improvements Act, S. 3286, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/3286?hl=%22sentencing+commission+improvements+act%22&s=10&r=1.

[34] *See, e.g.*, Letter from Heather Williams, Chair, Fed. Pub. And Cmty. Def., to Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (July 27, 2026), at 2–4, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202607/91FR35802_public-comment_R.pdf#page=38.

Probation System—the only other § 994(o) stakeholder not included—are left out, particularly given the Probation Officer Advisory Group's active participation at public meetings and hearings, thoughtful submissions, and regular engagement with the Commission. A similar question could be raised with respect to representatives of the Victims' Rights Advisory Group or Tribal Issues Advisory Group. We also note that recently representatives from the Department of Justice and the Federal Public and Community Defenders have been seated together on hearing panels, already facilitating the type of back-and-forth dialogue that this rule fosters.

The Department is also concerned that the proposals as drafted could have deleterious effects on the conduct of Commission meetings and hearings. Transparency and meaningful input are vital. Any changes to these Rules and the Commission's composition should be in service of maximizing useful information received by the Commission without overburdening stakeholders, creating unpredictable meetings and hearings, or chilling important deliberations. As drafted, the proposed rule could create confusion, unrealistic expectations, and distract from meeting and hearing agendas. Additionally, the two bracketed options could use clarification of what types of meetings or convenings qualify. The result could be less useful information coming to the voting Commissioners. These changes and the proposed changes to Rule 5.3 could unintentionally chill the Department's ability to provide and facilitate data exchanges with the Commission and could be in tension with the terms of the current data exchanges by disclosing that data to those outside the Commission.

Adding *de facto* Criminal Law Committee and Defender *ex officios* would also potentially lengthen meetings and meeting preparation. The proposed rule would prohibit the Federal Defender and Criminal Law Committee representatives from attending certain portions of the meetings (non-policy, non-data, internal administrative matters, or for which the Commission will share or receive information inappropriate for public disclosure).[35] It would also require them to receive redacted copies of meeting materials in advance of the meeting. The Commission would need to decide in advance which portions of the meetings the representatives would be excluded from and which materials—distributed in advance of the meeting[36]—would need redactions. We think that any rule change here should be modest to allow the Commission (or the Chair) discretion to seek input from stakeholders or subject matter experts at non-public meetings or other ad hoc convenings in ways that would be most helpful to the Commissioners.

Finally, we note that our proposed revisions to the Commission's comment process outlined in Section I above would achieve the Commission's goals of increasing stakeholder input and public engagement without creating misperceptions of prioritizing certain perspectives or running afoul of statutory constraints. It would allow for informed comments as the Commission's thinking on a particular issue evolves and avoid duplicative efforts, resulting in more helpful comments for Commissioners. And it would facilitate the provision of that feedback in a collegial process.

---

[35] *Proposed Amendments* at 7.

[36] *Proposed Amendments* at 16 (synopsis of proposed amendment) ("For example, before every Commission meeting (public or nonpublic), commissioners receive a compilation of materials prepared by Commission staff addressing the topics on the agenda for that meeting.")

d. Part D: Rule 4.3 Ex Parte Communications

The Commission solicited comment on whether it should amend the rules to allow ex parte communications. Currently, Rule 4.3, which governs notice and comment on proposed amendments, provides that "[t]he Commission does not intend to solicit ex parte communications (*i.e.*, communications outside the public comment process) on the merits of a proposed amendment from outside parties."[37] The implication is that the ex parte rules apply only during the comment process. The comment process, however, could be interpreted in two different ways—as running from the time of publication of proposed amendments through the deadline for submitting comments (usually December or January) *or* from the time of publication through when the Commission votes to promulgate amendments in April.

The Commission offered three options for revision.[38] Option One would delete the existing provision, leaving no rule in place and potentially allowing all forms of ex parte communications. Option Two would delete the existing provision, allowing all forms of ex parte communications, but require public disclosure of only those communications that meet a specific standard. It brackets two sub-options for articulating that standard and a sub-option for exempting § 994(o) stakeholders from the definition of ex parte communications, thereby allowing engagement with those stakeholders without requiring disclosure. Option Three would similarly amend the rule to allow all forms of ex parte communications and require public disclosure of all such communications. It brackets the same sub-option of excluding § 994(o) stakeholders from the definition of ex parte communications. We recommend against adopting any of these proposals and outline an alternative approach below.

None of these proposals appear to address what we understand to be the Commission's core concern of allowing engagement while also being transparent about ex parte conversations that ultimately affected the Commission's decisions—to provide enough information without chilling important discussion. That balance is essential and unlikely to be achieved through overly prescriptive proposals.

Option One risks unequal participation and confusion. In allowing all ex parte communications it addresses concerns over incidental conversations, but it also privileges those with more access to Commissioners and does not seem to address transparency concerns.

Options Two and Three strike us as overly prescriptive, threatening to chill both substantive discussions and incidental exchanges. The exceptions in those Options are important but so broad that they could potentially swallow the rule, raising questions about what the rule would meaningfully accomplish. We appreciate that the exception lists § 994(o) stakeholders, but we do not see the benefit of listing only the Criminal Division, rather than the Department of Justice as a whole. Although the Department's *ex officio* and staff representative have historically come from the Criminal Division, the Department's views reflect input from subject-matter experts and leadership across the entire Department. Listing only the Criminal Division understates that breadth and could limit the Commission's ability to consult with Department experts as needed. Further, disclosing all ex parte communications as public comment would not only be chilling—especially for those who may not realize that their conversations may qualify as ex parte—it would

[37] *Proposed Amendments* at 10.

[38] *Proposed Amendments* at 10–11.

also be distracting to stakeholders and the public, potentially creating inaccurate impressions about the Commission's current thinking on a particular amendment or issue.

A better approach would be to ensure that the other Commissioners and the public are informed about communications that factored significantly into the Commission's decisions. We outline four recommendations.

First, at a minimum, the Commission should clarify what constitutes an ex parte communication; when the "public comment process" ends (submission of written comments or promulgation of amendments); who is an outside party (non-Commissioners, non-staff, advisory group members, or outside the Commission structure entirely); what "does not intend to solicit" means; and, if disclosure is required, whether that is to other Commissioners, the public, or both. We largely defer to the Commission, but it seems like public comment process should extend through promulgation of amendments, which would include hearings and any other ad hoc convenings. The term "outside party" likely includes those who are not Commissioners or employed by the Commission; and at a minimum, Commissioners should disclose those communications to each other as appropriate (to the extent they do not already). Not every incidental ex parte communication, however, merits disclosure, and a prescriptive rule seems unnecessary and risks chilling candid discussion or even incidental encounters. We recommend a separate mechanism for disclosure to the public below.

Second, the Commission should consider adopting a flexible rule that allows the Chair and Commissioners' discretion to engage in ex parte communications or ad hoc convenings. Here, we favor a set of standards, not rules, that would allow for different sorts of regulated feedback or input from § 994(o) stakeholders depending on the issue. Such a standard could look like:

> Commissioners may engage in ex parte communications or ad hoc convenings as appropriate, subject to the Commissioner's discretion. To the extent reasonable and appropriate, Commissioners should disclose the content of such communications or convenings to other Commissioners.

The goal is to ensure that the Commission has flexibility to allow ad hoc procedures that can lead to better and more informed decision making. This Commission in particular has made significant strides in ensuring participation from the defense bar as a whole and making sure important voices are heard, like victims and sentenced offenders.

Third, to address transparency concerns, the Commission should provide a broad summary in its reasons for amendment (or separately) of significant factors, including ex parte communications or ad hoc convenings that affected its decision making, and briefly explaining why certain published amendments or options changed or were not pursued. We recognize the need to preserve candid deliberations and that a detailed breakdown of internal Commission discussions would be counterproductive and unnecessary. Instead, the Commission could provide a high-level summary outlining the main contours of an issue, noting if Commissioners could not reach consensus and broadly identifying areas of disagreement, as it did when it declined to solicit public comment or hold a hearing on retroactivity for the 2026 Amendments.[39] Doing so would

[39] *Notice of Request for Public Comment*, 91 Fed. Reg. 35802 (June 12, 2026), https://www.govinfo.gov/content/pkg/FR-2026-06-12/pdf/2026-11906.pdf; U.S. Sent'g Comm'n, *Proposed Priorities for 2026–2027 Amendment Cycle* (June 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202606_fr_proposed-priorities.pdf.

help the public understand the origins of an amendment, including any ideas refined through roundtables or informal convenings.[40] For multi-year projects, the summary could indicate which issues have been resolved and which remain outstanding. This approach would maintain the confidentiality necessary for frank internal debate while keeping the public informed. It would also help stakeholders offer more targeted and useful priorities proposals in the next cycle by signaling when an issue is unlikely to be resolved under current conditions.

In that regard, we note once again that adopting our proposed revisions to the public comment process would engage stakeholders more actively throughout the Commission's cycle and keep the public better informed as the Commission's thinking evolves. Providing a more detailed summary when amendments are promulgated would allow the Commission to explain how its views developed over the course of the comment process. Taken together, these steps would better advance the Commission's goals and help address the nuanced questions raised, without adding in procedural checks that would slow and overburden the Commission's work.

Finally, the Commission solicited comments on several other specific issues relating to ex parte communications.[41] First, the Commission asked whether it should extend the ex parte rules to the priorities setting process or amendments to the Rules of Practice and Procedure. We do not see the benefit of doing so. Extending the ex parte rules to the priorities setting process may hamstring the Commission's ability to receive broad input and make informed decisions. Second, the Commission asked about the standard for public disclosure of ex parte communication if the Commission elects to adopt one. Any standard should be workable and focus on whether the communication significantly affected a Commissioner's or the Commission's decisions. Third, the Commission asked about the specific elements and substantive content of any disclosures. We think that these disclosures could be distracting and confusing for stakeholders, but that any disclosure should provide enough summary detail to sufficiently inform the public. Fourth, the Commission asked whether ex parte communications should also apply to Commission staff. We do not see the benefit, but if the Commission decides to extend the Rule to staff, we recommend a flexible Rule that allows staff to consult with subject matter experts in the field to help inform their advice to the Commission.

Separately, we reiterate our previous recommendation from our annual letter[42] that the Commission should position itself through internal deliberations and stakeholder input to promptly implement any change that might be warranted in response to, or independent of, *Beaird v. United States*.[43] In addition to considering whether to support legislation or making systematic changes

---

[40] In recent cycles the Commission has already begun to implement this practice for certain amendments. We request the Commission more consistently employ its recent practice. For the 2026 multiple counts amendment, the Commission helpfully noted in its reason for amendment that the amendment responded to commentor concerns and Commission observation that the rules were confusing and misapplied. *Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2026*, 91 Fed. Reg. 24088 (May 4, 2026), https://www.govinfo.gov/content/pkg/FR-2026-05-04/pdf/2026-08647.pdf; U.S. Sent'g Comm'n, *2026 Amendments to the Sentencing Guidelines* (June 2026), at 49, https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202606_fr_proposed-priorities.pdf. Additionally, in its reason for amendment for the 2025 Drug Amendments, the Commission noted that it considered feedback from a roundtable discussion along with public hearing testimony and public comment. U.S.S.G. App. C., amend. 833 (effective Nov. 1, 2025).

[41] *Proposed Amendments* at 11–12.

[42] *DOJ 2026 Annual Letter* at 3.

[43] No. 25-5343, 2026 WL 1052007 (U.S. Apr. 20, 2026).

to the commentary, we strongly recommend that the Commission amend Rule 4.3 to memorialize the Commission's general practice of publishing commentary and policy statement revisions for notice and comment, and eventually submitting them for congressional review, alongside Guidelines amendments.

e. Part E: Rule 5.2 Notice of Priorities

The Commission proposes a new shortened priorities development process to increase transparency and public engagement. This new process has three steps.[44] First, the Commission would invite comment on proposed priorities for the upcoming cycle. The Commission brackets doing so in March, April, or May. Commissioners, staff, stakeholders, and the public would submit proposals that would be published on the Commission's website. Proposals are not limited to guideline amendments but could cover anything under the broader exercise of the Commission's statutory authority under §§ 994 or 995. Second, the Commission would hold a planning session at which it would consider the proposals. Part of this process would include a mandatory public hearing at which Commissioners, Commission staff, and stakeholders would present ideas and respond to questions. Finally, the Commissioners would deliberate and vote to publish final priorities at the end of the planning session.

We understand the goals of this new process to be increasing transparency and public engagement and shortening the priorities-development process. We support these goals but offer some recommendations to refine the process without overburdening stakeholders, chilling important deliberation, or resulting in unhelpful submissions.

First, we support shortening the priorities development process to May and June, with the Commission publishing its final priorities by the end of June. We pinpoint May as the appropriate starting point, rather than March or April, because stakeholders need time to absorb the amendments promulgated in April before they can begin to consider new proposals and generate ideas. The Commissioners and Commission staff would likely also need some time to assess the previous cycle and regroup. Starting earlier than May would risk overburdening stakeholders and potentially interfering with the end of the previous cycle.

Second, when practicable, the Commission should provide guidance on the types of submissions or themes it is interested in receiving. Clear direction would help focus input on the areas most relevant to Commissioners. This cycle, for example, the Commission's priorities reflect a broader review of the Guidelines in recognition of two milestone anniversaries; individual guideline amendments may therefore be less responsive to the Commission's thinking.[45] Providing thematic guidance for each cycle, to the extent possible, would help channel input toward the issues on which the Commission most wants feedback and limit extraneous proposals.

Third, because the comment period would be shorter, the Commission may want to consider a more concise submission format. Instead of traditional letters, it could provide a template for submissions or consider an alternative format, set limits on the number or length of submissions, or outline criteria for submissions. Doing so would reduce burdens on stakeholders while also focusing their efforts on more useful products for the Commission. For example, in drafting our proposals, the Department runs a multi-tiered process that starts with asking line

[44] *Proposed Amendments* at 14.

[45] *Notice of Request for Public Comment*, 91 Fed. Reg. 56732 (Sept. 3, 2026), https://www.govinfo.gov/content/pkg/FR-2026-09-03/pdf/2026-17998.pdf.

prosecutors and subject matter experts to submit proposals using a short template that asks for an explanation of the application issue, data or case law supporting it, and the specific textual changes requested. The Commission may similarly wish to guide stakeholder submissions.

Fourth, while we favor a shorter and more streamlined priorities submission process, we question the necessity of mandating a public hearing for every cycle. We are concerned that preparing for a public hearing on top of drafting submissions would overburden stakeholders with little additional benefit for the Commission. Because a public hearing may be beneficial for multi-cycle or more complex proposals, we recommend that the Chair or Commission retain the discretion to conduct one on an as-needed basis. At a minimum, we recommend that the Commission consider a more informal hearing format organized around panels based on themes to facilitate more stakeholder engagement or a roundtable.

Fifth, we read the proposal to require not only § 994(o) stakeholders and the public to submit written proposed priorities, but also for Commissioners and Commission staff to do so and for those to be treated as public comment and posted on the Commission's website.[46] Additionally, it is unclear to us whether Commissioners or Commission staff would need to formally present their submissions at the required public hearing.[47] Requiring them to do so could prolong the process and be confusing for stakeholders and the public if Commissioners or staff had to switch roles. While transparency about the origins of ideas is important, there is a balance to strike with avoiding undue chilling of viable proposals or candid advice. That balance may be better achieved by noting in the final priorities, the published proposals, or the end-of-cycle summary where certain ideas originated—for example, that a priority was pursued in response to a suggestion from Commission staff, a Commissioner, or a particular stakeholder—without identifying specific individuals.

In sum, we support a shortened, calibrated priorities development process and think it would complement our affirmative proposed comment process. We just caution the Commission to be mindful of stakeholder resources and provide sufficient guidance and time for stakeholders to draft and focus their submissions to only those matters most useful for Commissioners.

f. Part F: Rule 5.3 Information Relevant to the Amendment Cycle

The Commission proposes disclosing meeting materials, detailed meeting minutes, and other documents relevant to the amendment cycle.[48] The Commission brackets options for mandating disclosure of these materials within a certain timeframe, sometimes before the meeting occurs. The Commission also asks whether it should release working drafts and other deliberative material, detailed information about non-public meetings, and whether it should establish a general standard of disclosure or disclosure subject to a voting Commissioner's request. The answer to all of these is no. A flexible standard that allows the Commission to exercise discretion over what

[46] *Proposed Priorities* at 14 ("Proposed priorities may be submitted by individual Commissioners, Commission staff, Commission advisory groups, stakeholders in the criminal justice system, and any member of the public. . . .Within seven days after closing of the submission period, the Commission shall make available to the public all submitted proposed priorities on its website.")

[47] *Proposed Priorities* at 14 ("The planning sessions shall include: (1) a public hearing wherein Commissioners, Commission staff, . . . and others may present and discuss proposed priorities.")

[48] *Proposed Priorities* at 17.

materials are appropriate for release would better serve its needs. Our proposed affirmative comment process would also be a more effective alternative.

Once again, the transparency principles underlying the Commission's proposals are ones that we share and that have proven valuable to the Commission's recent work. To take one example, the Commission's recent practice of releasing data briefings on proposed amendments has helped stakeholders provide more informed and targeted analysis in their public comments.

At the same time, we remain concerned that disclosure of deliberative or staff-generated materials could inadvertently chill internal discussions. At least within the Executive Branch, agencies can counter the risk of chill by invoking privileges such as work-product, attorney-client, and deliberative-process protections—tools the Commission does not necessarily have. And even within the judicial branch, judges do not generally disclose bench memos, drafts of opinions, or details of conversations with clerks or other judges. We also note that the Commission may not be able to exercise its authority to prevent disclosure of certain materials under subsection (c) of the proposed amendment if those materials are disclosed before the meeting or immediately following a meeting, as the Commission would have to devote meeting time to approving redactions. These changes and the proposed changes to Rules 3.1 and 3.4 could unintentionally chill the Department's ability to provide and facilitate data exchanges with the Commission.

We are likewise concerned that the disclosures contemplated by the proposal would not be helpful to stakeholders or the public. Over-disclosure could suppress candid Commissioner dialogue, create misleading impressions about the Commission's thinking, and distort the substance of public comments. The challenge is balancing transparency with preserving robust internal deliberation. To achieve this balance, the goal should keep stakeholders well informed so their input is as focused and effective as possible. We recommend instead issuing the summaries (subsection D above) and making the comment process more iterative (Section I above) to improve both transparency and deliberative space.

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions, and we look forward to working with the Commission on these and other issues throughout the amendment year.

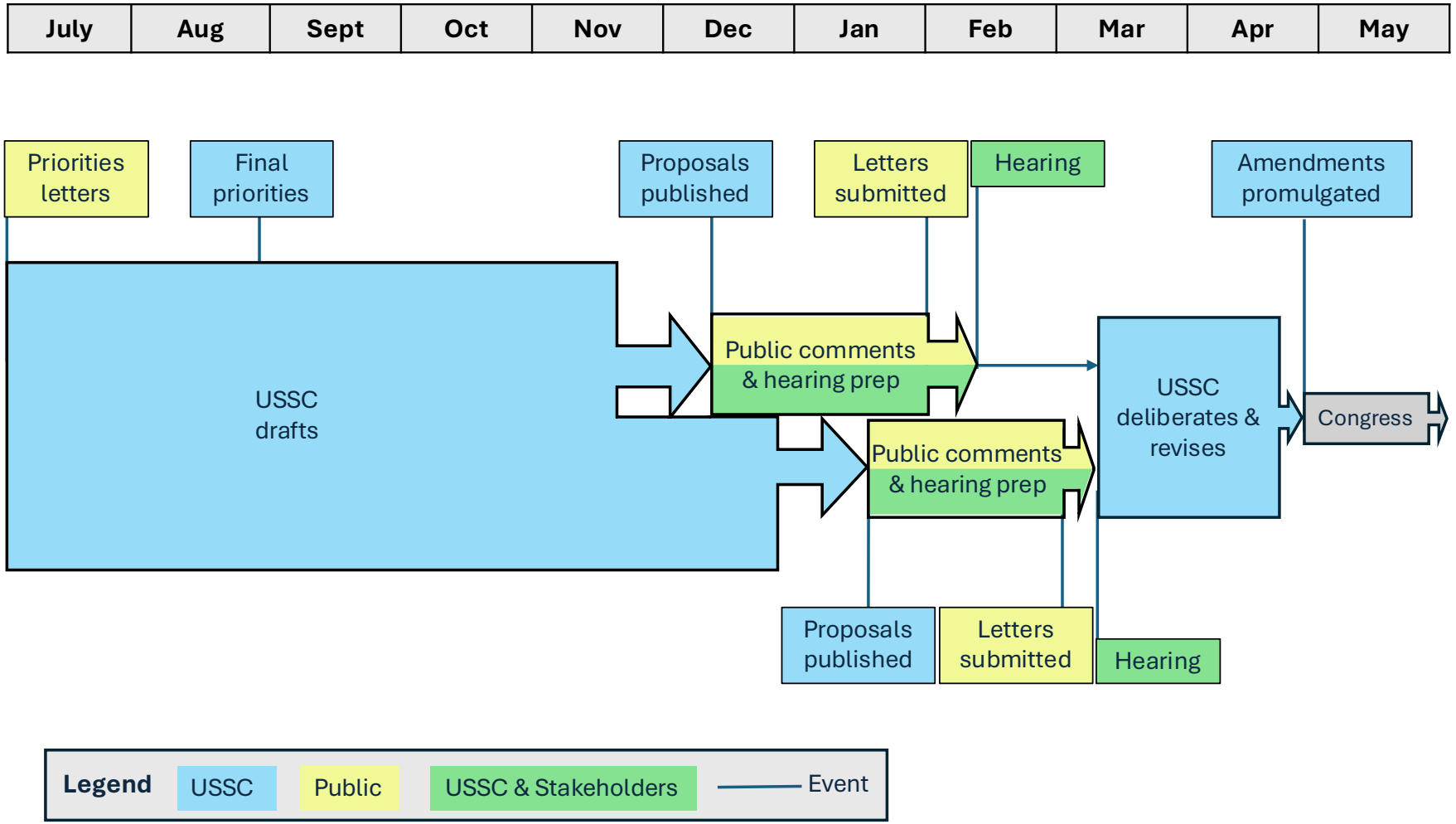
Sincerely,

Kelly S. Milliron

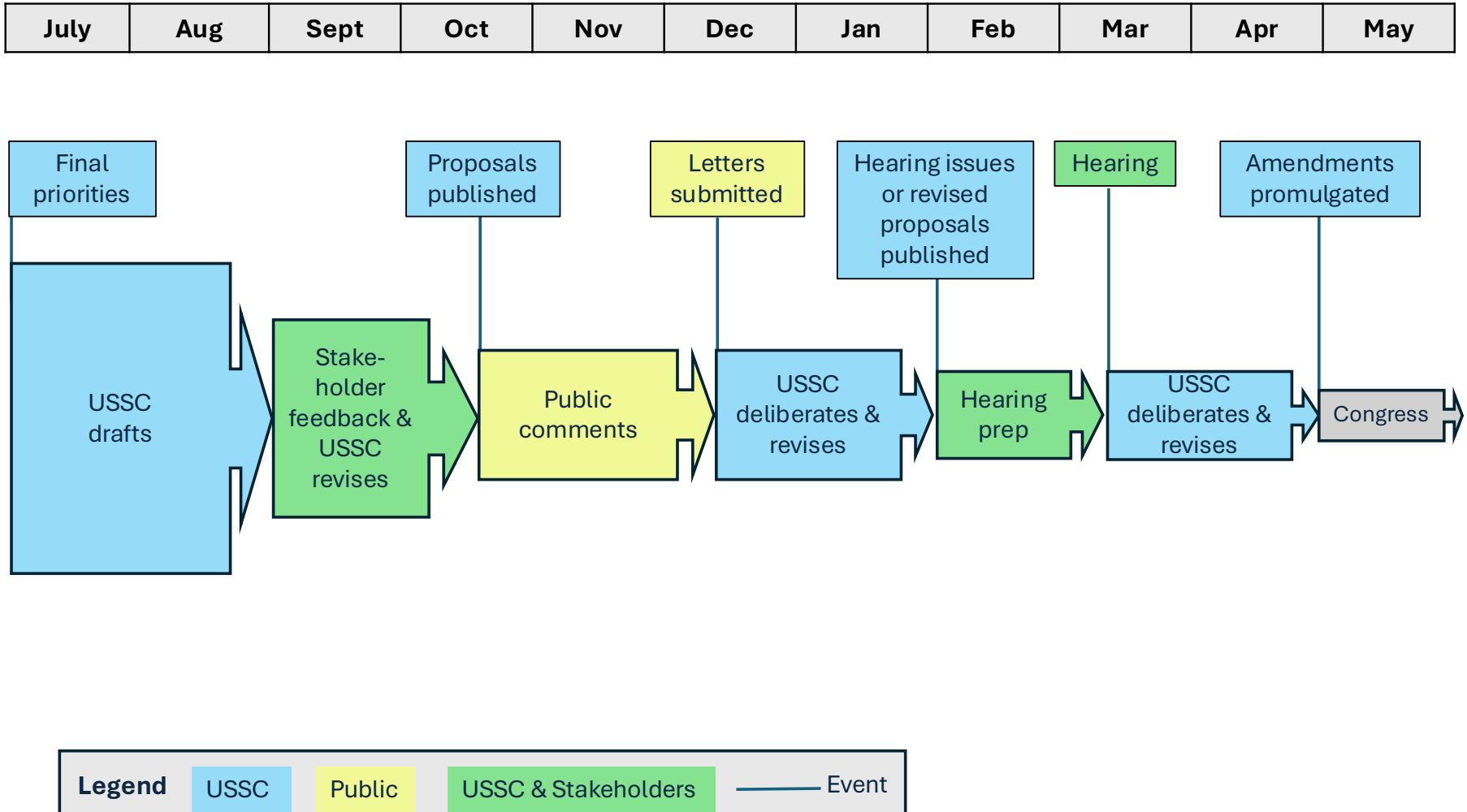
Kelly S. Milliron
Chief of Staff (A) and Counselor to the
Assistant Attorney General, Criminal Division
U.S. Department of Justice
Ex Officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director

Current Amendment Process



DOJ Proposed Amendment Process



FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

801 I Street, 3rd Floor
Sacramento, California 95814

Chair: Heather Williams Phone: 916.498.5700

October 26, 2026

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

Re: Public Comment on 2026 Proposed Amendments to the Rules of Practice and Procedure

Dear Judge Reeves:

Defenders support changes to the Commission's Rules of Practice and Procedure (the Rules) that would advance the Commission's statutory purposes, increase transparency and public engagement, promote a better balance of viewpoints, and boost the perceived legitimacy of the Commission's policymaking process. With the exception of Part B, these amendments further these laudable goals and would strengthen the Commission's ability to carry out its important work.

The Commission makes serious decisions that influence how long individuals will be separated from their loved ones, restricted in their movements and daily activities, and subjected to deplorable custodial living conditions.[1] Likewise, federal judges—who often describe sentencing as "their most difficult duty"[2]—look to the Commission for its data and research capabilities and institutional expertise in developing guidelines that satisfy

---

[1] *See* DOJ, Off. of the Inspector Gen., *Top Management and Performance Challenges Facing the Department of Justice* at 2 (Jan. 26, 2026) ("The [BOP] continues to face persistent challenges, most critically those presented by staffing shortages, deteriorating infrastructure, and the introduction of contraband."); Cong. Rsch. Serv., *Correctional Officer Staffing in Federal Prisons: Background and Issues* at 1 (Jan. 26, 2026) (discussing ongoing understaffing problem and resulting safety issues within BOP).

[2] Chief Justice John G. Roberts Jr., 2016 Year-End Report on the Federal Judiciary at 5 (2016).

the purposes of sentencing, provide certainty and fairness, avoid unwarranted disparities, and reflect "advancement in knowledge of human behavior as it relates to the criminal justice process."[3]

But the Commission does not operate in a vacuum. It is only by regularly communicating with and learning from the public—especially its key stakeholders—that the Commission can understand, for instance, what the public views to be a serious offense, what types of sentences will promote respect for the law, and the options available to best deter crime.[4] Yet, the public cannot effectively inform the Commission of its perceptions without a transparent and participatory guideline development process.[5] Providing more robust information to the public earlier in that process, calling on all of us to help the Commission first set its proposed priorities and later refine its proposed amendments, and rounding out the Commission's membership by adding representatives from the Federal Defenders and the Criminal Law Committee would be significant steps in the right direction.[6] Not only would

---

[3] 28 U.S.C. § 991(b)(1); *see also Kimbrough v. United States*, 552 U.S. 85, 108–09 (2007) ("Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." (citation and quotation marks omitted)).

[4] *Cf.* Anya Bernstein & Julia Simon-Kerr, *Keeping Evidence Real*, 111 Iowa L. Rev. 589, 593, 599, 635–36 (2026) (criticizing the Federal Rules of Evidence advisory committee for making normative judgments of what the public will presume or how people act that are unmoored from what the public actually thinks and does).

[5] The Sentencing Reform Act's drafters intended to have an effective public-input system beyond just the minimal requirements of notice and comment rulemaking. *See* S. Rep. 98-225 at 181 (1983) (noting that the Senate Judiciary Committee "does not intend that the informal rulemaking procedures of section 553 constitute 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."). And they expected the Commission to "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." *Id.* at 181.

[6] Recognizing that the DOJ, by virtue of its *ex officio* spot on the Commission, is the only institutional stakeholder with significant access to the Commission at every stage in the life (or death) of a guideline amendment, Defenders have long encouraged the Commission to be more transparent about its operations and to more fully integrate all of its diverse stakeholders into its guideline development work.

these changes enhance the Commission's legitimacy and accountability to the public, but they would lead to more informed input from stakeholders and, in turn, better-reasoned policy decisions by the Commission.

For these reasons, Defenders urge the Commission to:

- **Promulgate Part A**, making changes to the Rules' introduction to more closely track statutory mandates (p. 4);
- **Reject Part B**, an ill-advised policy change limiting retroactivity which is at odds with the Commission's enabling statute (pp. 4-7);
- **Promulgate Part C**, furthering the consultation and advice requirements of § 994(o) (pp. 8-17);
- **Promulgate Part D, Option 1**, permitting *ex parte* communications without rigid disclosure requirements which could lead to unintended consequences (pp. 17-19);
- **Promulgate Part E**, ensuring the Commission's agenda is consistent with § 991(b) (p. 20);
- **Promulgate Part F**, sharing meeting minutes and materials broadly, *but also including legal opinions possibly impacting policy decisions* (pp. 21-26);
- **Promulgate Part G**, recognizing the Sentence Impact Advisory Group as one of the Commission's standing advisory groups (p. 26); and
- **Consider, for Part H,** rules making more data publicly available (pp. 26-27).

See, e.g., Defenders' Comment on the USSC's 2016 Proposed Amends. to Rules of Practice and Procedure (May 25, 2016).

A. Amending the Rules' introduction to mirror the Commission's statutory purposes makes sense.

Defenders support the Commission's proposal to amend the Rules' introduction to closely track its statutory purposes as set forth in 28 U.S.C. § 991(b). The current introductory language neither tracks nor references § 991(b), yet these congressional mandates are meant to guide the Commission's work. Their inclusion in the introduction would better align the Rules with congressional intent, serving as an important reminder of the Commission's ultimate mission when formulating sentencing policies and practices for the Federal criminal justice system.

B. Requiring a supermajority vote to make amendments retroactive would frustrate several of the Commission's purposes and is not otherwise supported by statute.

Defenders oppose Part B of the proposed amendment, which would amend Rule 2.2(b) to increase the voting threshold from four to five votes before an ameliorative amendment could apply retroactively.[7] Part B would also amend Rule 2.2(d), which sets the voting threshold needed to reconsider Commission actions, effectively requiring five affirmative votes before the Commission could reconsider any prior action on amendment retroactivity.[8] The Commission should not adopt this amendment because it is in tension

[7] The current Rule 2.2(b) states that "guidelines, policy statements, official commentary, and amendments" require the affirmative vote of at least four members at a public meeting. USSC, Rules of Practice and Procedure, Rule 2.2(b) (Voting Rules for Action by the Commission) (Aug. 2016). The proposed amendment also brackets the possibility of requiring only four votes if the Commission has only four members at the time of the vote. *See* USSC, Proposed Amendment to the Rules of Practice and Procedure at 5 (Aug. 27, 2026).

[8] Rule 2.2(d) currently states that, among other things, a motion to reconsider a Commission action requires four votes "on any question on which a four-vote majority is required." Rules of Practice and Procedure, Rule 2.2(d). The amendment would change this language to: "If the underlying action requires the affirmative vote of more than a majority of the members then serving, a motion to reconsider the Commission vote on that specific action shall require the same minimum voting threshold." Proposed Amendment at 5. The effect of this change would be to require five votes for any motion to reconsider a Commission action to make an amendment available for retroactive application, if the language to Rule 2.2.(b) is also amended.

with several Congressional directives to the Commission and otherwise lacks statutory support.

First, by making ameliorative guideline changes less accessible to people already sentenced, Part B would undermine several Congressional directives to the Commission, including those found at §§ 994(g), 991(b)(1)(B), and 991(b)(1)(C).

Section 994(g) requires the Commission to monitor the Bureau of Prisons' (BOP) capacity and "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons[.]"[9] The BOP currently faces significant, longstanding, and well-documented overcapacity, understaffing, and related issues that compromise the safety and emotional well-being of incarcerated individuals and BOP workers alike.[10] Retroactivity provides the Commission one tool to abate these staffing, crowding, and safety concerns.[11] Indeed, the Commission has, on multiple occasions, based its retroactivity decisions on the need to alleviate federal prison overcrowding.[12]

---

[9] 28 U.S.C. § 994(g).

[10] Along with the problems plaguing BOP we have documented in past amendment cycles (*see, e.g.*, Defenders' Comment on the USSC's 2025 Proposed Amendments: Drug Offenses at 8–14 (Mar. 3, 2025)), BOP recently closed several facilities due to "extreme staffing challenges" and crumbling infrastructure, demonstrating that its ongoing problems continue to implicate § 994(g). *See, e.g.*, Drew Friedman, *Bureau of Prisons to close six institutions, citing 'extreme staffing challenges*, Federal News Network (July 6, 2026); NPR, *How prison staffing shortages are driving away mental health staff*, Consider This (Feb. 25, 2026) ("Chronic understaffing and rising inmate numbers have created an increasingly unsafe environment for everyone on the inside.").

[11] Defenders' Comment on the USSC's Criteria for Selecting Guideline Amends. Covered by §1B1.10 at 11 (Apr. 18, 2025).

[12] *See, e.g.*, Amend. 788, Reason for Amend. (citing to § 994(g)); USSC, Tr. of Pub. Meeting on Retroactivity of 2014 Drug Amend. at 6–7 (June 10, 2014) (Chair Saris) ("An overarching theme for our amendment cycle has been a focus on the statute, the Sentencing Reform Act at Section 994(g) . . . . So we made it a priority to work to reverse the trends of increasing prison populations and costs."); USSC, Tr. of Pub. Meeting on Retroactivity of Amend. 750 at 23–24 (June 30, 2011) (Comm'r Howell) ("Congress have [given]us both lofty goals and practical goals . . . Practical goals included directions to the Commission to examine the capacity of prison

Section 991(b)(1)(B) requires the Commission to set policies that "provide certainty and fairness in meeting the purposes of sentencing" and "avoid[ ] unwarranted sentencing disparities[.]"[13] As past Commissions have noted, making retroactive amendments that redress fundamental unfairness in the sentencing system or alleviate an unwarranted racial disparity furthers these salient goals.[14]

And section 991(b)(1)(C) requires the Commission to establish policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[15] Accordingly, the Commission has based the retroactive application of some amendments on data and empirical studies demonstrating that our knowledge regarding the need for longer sentences had fundamentally changed.[16]

Second, neither of the two statutes governing retroactivity, 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2), supports a heightened voting threshold for retroactivity decisions. Instead, these statutes empower the Commission to determine *whether* and *to what extent* an amendment should be made retroactive and are devoid of any implicit or explicit discouragement or limitation.[17] If Congress had wanted to create a heightened voting threshold

---

facilities when we promulgate guideline amendments, and in fact Congress directed us to formulate the guidelines to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.").

[13] 28 U.S.C. §§ 991(b)(1)(B), 994(f).

[14] *See* 2025 Defender §1B1.10 Criteria Comment at 7–10 (discussing how concerns with fairness have driven the retroactive application of prior amendments but also cautioning that, while "fundamental fairness" should be a sufficient basis for retroactivity, it "should not be elevated to a necessary factor . . ."); 9–10 (addressing the reduction of racial disparities).

[15] 28 U.S.C. § 991(b)(1)(C).

[16] *See* 2025 Defender §1B1.10 Criteria Comment at 6–7 (discussing how Amendments 750 and 821 were specifically driven by updated data reflecting the "advancement in knowledge of human behavior as it relates to the criminal justice process.").

[17] *See* 28 U.S.C. § 994(u) ("If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.").

for retroactive amendments, it could have easily done so and would have. Instead, Congress chose to create a bipartisan Commission of seven voting members,[18] and require a voting threshold of at least four votes for any guideline, policy statement, and amendment (forward-looking or retroactive).[19]

Because critical congressional mandates to the Commission are often implicated in the decision to make ameliorative guideline amendments retroactive, and nothing in the statutory scheme contemplates a need to cabin retroactivity decisions, the Commission should not promulgate Part B of its proposed amendment.[20]

Additionally, the Commission's own guideline regarding retroactivity, §1B1.10, does not set forth any reasons to make it more difficult to make an amendment retroactive than any other Commission action.

[18] 28 U.S.C. § 991(a).

[19] *Id.* §§ 994(a) and (p). In doing so, Congress allowed for a vote on retroactivity—just like other voting decisions—to be unanimous or split. And, as expected, over the Commission's history, some votes on retroactivity have been unanimous while others have not. *See*, *e.g.*, USSC Meeting Minutes at 1–2 (Aug. 26, 1992) (retroactive application of Amendments 433 and 461 passed by a vote of 4-1 vote; no vote taken on Amendment 448 because of insufficient votes in favor of passage); USSC Public Meeting Minutes (July 17, 1993) (vote on retroactive application of Amendment 487, defining "cocaine base" to mean "crack," failed in 3-2 vote); USSC Meeting Minutes (July 26, 1994) (vote on retroactive application of Amendment 505 failed by a vote of 1-4; and vote on retroactive application of Amendments 506 and 371 passed by a vote of 4-1 each); USSC Public Meeting Minutes (Nov. 5, 2003) (vote on retroactive application of Amendment 657, passed by 5-2 vote). The fact that there is occasionally disagreement among commissioners over the decision to make an amendment retroactive is not reason to change the longstanding voting threshold requirement.

[20] If the Commission nonetheless chooses to require a supermajority voting threshold for retroactive application of ameliorative amendments, then, at minimum, it should also require a supermajority voting threshold for amendments that may increase guideline-recommended imprisonment to counteract the negative effect on prison crowding and comply with § 994(g). *See* Issue for Comment 1, Proposed Amendment at 6. To the extent the Commission believes this proposal is compelled by the "heightened significance" of retroactivity decisions, surely Commission actions resulting in people serving additional time in unsafe and unsanitary prison conditions are equally of "heightened significance." *See id.* at 4.

C. Adding a Defender representative to the Commission would allow for more informed input from the Defense community, promote balance and legitimacy in the policy-making process, and better enable the Commission to satisfy its statutory duty to consult with Defenders.

Part C of the proposed amendment would modify Rules 3.1 (Meetings) and 3.4 (Public Hearings) to permit representatives designated by the Federal Defenders and the Criminal Law Committee (plus one staff member each) to participate in certain Commission nonpublic meetings and all public hearings. The proposed change to Rule 3.1 brackets two different options: the first would permit these representatives to attend and participate in "public meetings and nonpublic briefing sessions of the Commission," and the second would permit them to attend and participate in "all Commission meetings at which Commission staff is present."[21]

Defenders enthusiastically support this proposal. As an initial matter, we urge the Commission to adopt the second option, permitting these representatives to attend and participate in "all Commission meetings at which Commission staff is present." It is not clear what distinguishes a nonpublic briefing session from other nonpublic meetings at which Commission staff is present, but the second option appears to allow for broader, more fulsome participation, which would best enable the representatives to offer meaningful input and advice. We also urge the Commission to revise proposed Rule 3.1(c), describing meetings, as follows: "To facilitate informed participation, the designated representatives shall receive the same meeting materials distributed to commissioners at the same time commissioners receive these materials." And to revise proposed Rule 3.4, describing public hearings, as follows: "To facilitate informed participation, the designated representatives shall be provided with all written testimony submitted ~~as soon as practicable prior to the commencement of the proceeding~~ at the same time commissioners receive the written testimony. These revisions would ensure that the representatives receive the relevant meeting and hearing materials at the same time as commissioners and have enough time to review them before meetings and hearings.

[21] Proposed Amendment at 7.

There are three primary reasons to add a Defender representative to the Commission, give that representative full access to the Commission's non-public meetings where Commission staff are present and related meeting materials, and permit that representative to participate in public hearings.[22]

First, a Defender representative would provide Defenders with a better understanding of the questions, concerns, and motivating principles underlying the Commission's proposals, as well as the many considerations going into various word choices, exceptions, and exclusions. In turn, this deeper involvement and understanding would facilitate our ability to provide more useful advice and information to the Commission, as we are statutorily obligated to do under 28 U.S.C § 994(o).

Second, with an *ex officio* member from the DOJ and without a comparable role for Defenders, the Commission lacks balance of viewpoints, which harms the Commission's legitimacy in the eyes of the public, including those directly affected by its policies—the people Defenders represent day in and out in federal criminal cases.

Third, adding a Defender representative would better enable the Commission to receive input from "as diverse a group of interested parties as possible," and consult with Defenders as key institutional stakeholders, as contemplated by the Commission's enabling legislation.[23]

More informed input. As one of just a handful of key institutional stakeholders in the federal criminal legal system tasked by Congress with

---

[22] Defenders' comment focuses on the Commission inviting a Defender representative to participate in hearings and nonpublic meetings. However, Defenders do not oppose it inviting a representative from the Criminal Law Committee to do the same. Like Defenders, Congress mandated that the Judicial Conference play a greater role in the Commission's work than the public or other agencies, tasking them to "submit any observations, comments, and questions pertinent to the work of the Commission" and to submit annually a written report on the Commission's work. 28 U.S.C. § 994(o). Thus, it makes sense to include a CLC representative along with a Defender representative.

[23] S. Rep. 98-225 at 181; *see also* § 994(o) (detailing the Commission's obligation "to consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system[,]" and listing Federal Public Defenders as one of those authorities).

providing "observations, comments, or questions pertinent to the work of the Commission *whenever [we] believe such communication would be useful*,"[24] it is critical that Defenders have the contextual information that helps shape Commission decisions, some of which is available only through nonpublic discussions. By being privy to all the many considerations underlying these decisions, we would be better equipped to provide meaningful and helpful "observations, comments, or questions" (some of which would undoubtedly be useful during internal working sessions); that is, to carry out our responsibilities under § 994(o).

Former DOJ *ex officio* Scott Meisler recently acknowledged that the DOJ "ex officio's presence at the [internal] meetings helps facilitate the type of information exchange contemplated in the [Sentencing Reform Act of 1984]."[25] He noted that "the Commissioners' consideration of public comments sometimes raises thorny or technical questions within the peculiar expertise of individuals at the Department or elsewhere in the executive branch" and that "[b]y participating in the meetings, the ex officio can promptly identify an expert and facilitate any needed discussions[.]"[26] These observations would apply to the Defender community as well. We also have a statutory obligation, under § 994(o), to exchange information and ideas with the Commission. Among us are defense attorneys with decades of on-the-ground experience in both state and federal court who are equally equipped to tackle "thorny or technical questions" or to identify the right experts, either within or outside of the Defender community, to do the same.[27]

Most importantly, more informed input from Defenders would lead to better policy decisions. Through our connections with our clients and the national Defender and CJA panel networks, the Defender representative would bring unparalleled practical experience to the Commission's sentencing

---

[24] 28 U.S.C. § 994(o) (emphasis added).

[25] Scott A.C. Meisler, *The Role and Responsibilities of the Department of Justice's Ex Officio Sentencing Commissioner*, 74 DOJ J. Fed. L. & Prac. 121, 128 (2026).

[26] *Id.*

[27] *Id.*

policy work. The Federal Defender system includes 83 offices nationwide, serving 92 of the 94 judicial districts, employing approximately 4,200 attorneys with a deep bench of expertise.[28] Together, Defenders and CJA panel attorneys represent over 90% of people charged in federal criminal cases, with Defenders handling approximately 60% of those cases and CJA panel attorneys handling the other 40% of those cases.[29]

Defenders explain the sentencing guidelines to our clients and use them in court every day. We regularly litigate the applicability and meaning of the guidelines, policy statements, and commentary, enabling us to help the Commission avoid the pitfalls we sometimes see with amendments that prove confusing or difficult to implement. We interact daily with all players in the criminal legal system—judges, probation officers, prosecutors, law enforcement officials, correctional officers, community treatment providers, and other stakeholders. We understand how Commission policy decisions operate on the ground, including how they impact charging decisions, plea bargaining, and the liberty interests of thousands of impacted individuals across the country.[30] And while the DOJ regularly focuses its advocacy to the Commission on the nature of the offense, deterrence, and public safety, it is less equipped to speak about other critical factors, such as the history and characteristics of the people being sentenced, as well as their educational, vocational, medical, and other correctional treatment needs. Defenders are experts on these and other issues that center around the people we represent. The Defender representative would bring this expertise to bear in their work with the Commission.

---

[28] U.S. Courts, About Federal Courts, Defender Services (last accessed Oct. 23, 2026).

[29] U.S. Courts, *Funding Crisis Leaves Defense Lawyers Without Pay* (July 15, 2025).

[30] *Cf.* Bernstein & Simon-Kerr, *Keeping Evidence Real* at 624 (discussing the benefit of a Federal Defender representative on the Federal Rules Committee on Evidence, who would be "exceptionally practiced at seeing things from the perspectives of particular litigants" such as "defendants in criminal cases," and whose "litigation experiences . . . would likely sensitize them to particular issues, and raise concerns about the rights of the disadvantaged, the poor, and the unrepresented, for example.").

Of course, Defenders endeavor to provide the best legal analyses, practical experience, empirical data, and specific proposals we can through our Commission Liaison Subcommittee meetings and formal comments and testimony, but our input is necessarily limited by what we don't know. Including us earlier in the policymaking process, when potential priorities and amendments are being internally debated and discussed, would allow us to offer more constructive ideas and feedback at every step along the amendment cycle, [31] instead of just back-end critiques to fully formulated proposals (which sometimes change significantly from proposed to final form). [32]

Better balance of viewpoints. Inviting a Defender representative to participate in hearings and nonpublic meetings would correct a longstanding imbalance of perspectives and viewpoints, which would enhance the public's perception of the legitimacy and fairness of the Commission's work. By virtue of the DOJ's *ex officio* role on the Commission, the DOJ directly influences policy decisions behind closed doors in a way Defenders cannot. [33] More, its participation in internal meetings and access to meeting materials means the DOJ is better able to anticipate and prepare its witnesses to address the questions, concerns, and motivating principles of the voting commissioners

---

[31] *See, e.g.,* Defenders' 2023 Letter to the USSC on Proposal for Increased Defender Involvement in Commission Work at 2–5 (Aug. 11, 2023) (discussing how a Defender representative could contribute to Commission's work re: priorities, amendments, and research and data.).

[32] *Compare* USSC, Proposed Amendments to the Sentencing Guidelines, Drug Offenses at 56–78 (Jan. 24, 2025) (proposing to recalibrate the use of drug weight in §2D1.1 to set the highest base offense levels in the Drug Quantity Table at a lower base offense level and adding a reduction for low-level trafficking functions) *with* USSC, Amendments to the Sentencing Guidelines, Drug Offenses at 9–16 (April 30, 2025) (amending the mitigating role caps at §2D1.1(a)(5) and adding a new special instruction to §2D1.1 about the application of mitigating role to drug cases).

[33] *Cf.* Meisler at 127 ("Between . . . public sessions, the ex officio attends the Commission's internal meetings—both those where the Commission and its staff discuss possible amendments for publication and those where the Commissioners ultimately debate whether to promulgate amendments.").

than we are.[34] And the DOJ *ex officio* can question witnesses—including Defender witnesses—at public hearings with these topics in mind.[35]

Commentators have warned that the DOJ's heightened access to the Commission's work without comparable access for Defenders suggests the Commission has "more of a prosecutorial orientation than a defense orientation" and "the Commission has always been far more responsive to the concerns of the Department of Justice than to the concerns of the defense bar."[36] Others have likewise lamented that "[b]ecause of its imbalanced composition, the Commission is not politically accountable to the people who

---

[34] *Cf. id.* (discussing how the DOJ *ex officio* works with others at the Department to prepare DOJ witnesses to "respond to Commissioner inquiries with precision and candor").

[35] *Cf. id.* (discussing how the DOJ *ex officio* "sits alongside the voting Commissioners as they hear witness testimony concerning proposed amendments and may, as would a voting Commissioner, question the witnesses on the public record"). Indeed, former DOJ *ex officio* Meisler recently observed that his most "public-facing function" is appearing on the dais with the voting Commissioners and questioning witnesses, while having the ability at public meetings where Commissioners vote on possible amendments to "make a statement addressing actions the Commission has taken (or failed to take)." *Id.* Because the Commission is without a similarly functioning Defender representative, the public sees this imbalance of viewpoints at every public meeting and hearing. Allowing the Defender representative to participate in these public-facing events in a similar manner to the DOJ *ex officio* is a particularly intuitive and direct way to help correct this perceived and real imbalance.

[36] Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol'y Rev. 93, 109 (1999); *see also* Fred W. Bennett, *A Direct Participant's Perspective on the Guideline Amendment Process*, 3 Fed. Sent. R. 148, 150 (1990) ("An ex officio member from the defense bar would also help dispel the widespread belief that the Commission is too heavily influenced by the views of the Department of Justice"); Defenders' 2022 Annual Letter to the USSC at 28 (Sept. 14, 2022) ("Numerous scholars and judges have recognized that the lack of a Defender ex officio deprives the Commission of an essential balance. Defenders and the Department of Justice should have an equal voice in setting sentencing policy and should be equal partners in improving the guideline system."); Defenders' Comment on the USSC's 2026–2027 Proposed Priorities at 2 n.4 (July 27, 2026) (citing scholarship criticizing the lack of a Defender voice on the Commission).

are more directly affected by its decisions" because those people "lack a way to effectively shape and influence the Commission's deliberations."[37]

The current imbalance is also contrary to our adversarial criminal legal system. Sentencing proceedings often involve significant debate between the government and defense over § 3553(a) factors, as well as guideline interpretations and whether to abide by their recommendations. It is important for sentencing judges to consider both sides. Just as a sentencing judge would not exclude a defense attorney from participating in a sentencing hearing where their client's fate is being decided, the Commission should not exclude Defenders from consequential internal discussions, where policy options are weighed and selected. In other policymaking settings, the judiciary has recognized the need for balanced perspectives to ensure fairness, legitimacy, and accountability to the public: the Judicial Conference's three criminal rules-related committees each include a Defender voice.[38] This proposal rightly brings the Commission more in line with these other bodies.

Statutory support and authority. Nothing in the Sentencing Reform Act (SRA) restricts the Commission's ability to grant Defenders access to non-public meetings and materials. On the contrary, this proposal would better enable the Commission to fulfill its obligations under the Act.[39]

The SRA empowers the Commission to create its own rules of practice and procedure.[40] Using this authority, the Commission has determined who

---

[37] Seth Mayer & F. Italia Patti, *Confronting Political Disagreement About Sentencing: A Deliberative Democratic Framework*, 20 New Crim. L. Rev. 616, 655 (2017).

[38] *See* 2026 Defender Priority Letter at 2. And as we've previously observed, essentially every state sentencing commission has a legislatively mandated defense presence. *Id.* at 2–3 n.6 (discussing the composition of state sentencing commissions).

[39] *See, e.g.*, Defenders Comment on the USSC's 2015-16 Proposed Priorities at 16–18 (June 15, 2015) (describing numerous ways that giving a Defender representative access to internal working sessions would better enable Defenders and the Commission to carry out their statutory duties under § 994(o)).

[40] *See* 28 U.S.C. § 995(a)(1); USSC, Rules of Practice and Procedure, Rule 1.1 (Application and Purpose) (Aug. 2016) (discussing that the rules were established

it can meet with,[41] what materials it can consider,[42] and which internal materials can be made available to others.[43] It gives the Commission authority to "delegate to any . . . designated person such powers as may be appropriate" to help it carry out its duties, other than certain powers not implicated by this proposal.[44] It also empowers the Commission to "perform such other functions as are required to permit Federal courts to meet their responsibilities under [§ 3553(a)] and to permit others involved in the Federal criminal justice system to meet their related responsibilities."[45]

Further, § 994(o) requires the Commission to consult with key institutional stakeholders in fulfilling its duties and exercising its powers, while the SRA's legislative history reveals Congress's intent for the Commission to consider as "diverse" and "broad a cross-section of views . . . as possible *during all stages of guideline development*."[46] The SRA also mandates that certain key stakeholders (naming the Federal Defenders as one of them) submit observations, comments, or questions relevant to the Commission's work *whenever they believe it to be useful*, and at least

---

pursuant to § 995(a)(1) and other provisions of the Commission's organic statute to govern its usual operating practices and in an effort "to involve interested members of the public in its work to the maximum extent practicable").

[41] USSC, Rules of Practice and Procedure, Rule 3.3(2)-(3), (5) (Nonpublic Meetings) (establishing who Commissioners can "participate in discussions with").

[42] Rule 3.3(2)-(4) (establishing from whom the Commissioners can "receive information"); (5) ("Upon a decision by a majority of the members then serving, to receive information from, and participate in discussions with, outside experts, on matters unrelated to the merits of any pending proposed amendment to the guidelines, policy statements, or commentary.").

[43] Rule 3.3(4) ("Upon a decision by a majority of the members then serving, to receive or share information, from or with any other person, that is inappropriate for public disclosure").

[44] 28 U.S.C. § 995(b).

[45] *Id.* § 995(a)(22). "Related responsibilities" logically refers to the directive to Defenders set forth in 28 U.S.C. § 994(o).

[46] S. Rep. 98-225 at 181 (emphasis added).

annually.[47] Thus, expanding Defenders' access to the Commission's work through a representative is not only consistent with the expectations Congress set for the Commission, but will allow the Commission to better meet those expectations.[48]

To be sure, the Commission's proposal is a meaningful step towards greater balance, transparency, legitimacy, and public accountability in its policymaking work, but it would provide only an interim solution to the lack of parity between Defenders and the DOJ. There would remain a significant gap between the Defender representative's access to the Commission and that enjoyed by the DOJ *ex officio* member.[49] Unlike the *ex officio* members, the Defender representative would be excluded from attending certain meetings,[50] and prevented from receiving or reviewing any materials deemed

---

[47] *See* 28 U.S.C. § 994(o) (emphasis added). In addition to the Defenders, the SRA also names Probation, the Bureau of Prisons, the Judicial Conference, and the DOJ. *See id.*

[48] Past practice demonstrates that the Commission has long understood its ability to include a Defender representative in the Commission's work. *See* Proposal for Increased Defender Involvement at 2 (discussing how, in the late 1980s and early 1990s, the Commission enabled Defender involvement comparable to the Defender representative role described here); *see also* Defenders' 2011 Priority Letter to the USSC at 35 (August 26, 2011) (noting that the Criminal Justice Act, the Code of Conduct for Federal Public Defender Employees, and the ABA's Model Rules of Professional Conduct allow a defender representative to work with the Commission).

[49] The Parole Commission also currently has a non-voting *ex officio* member. Pub. L. No. 98-473, § 235(b)(5) (Oct. 12, 1984), 98 Stat. 1837, 2033; Pub. L. No. 119-75, § 5011 (Feb. 3, 2026), 140 Stat. 173, 630 (2026) (extending the Parole Commission's *ex officio* position on the Commission through January 31, 2031). As we have pointed out before, parole was abolished four decades ago, so it makes no sense for the Parole Commission to have representation on the Commission but not Defenders. *See* Defenders' 2025 Annual Letter to the USSC at 13 n.55 (May 16, 2025).

[50] Under the proposed amendment, the Defender representative "shall not attend any portion of a meeting dedicated to non-policy, nondata, or internal administrative matters (such as approval of budget requests, administrative and personnel issues, decisions on contracts and cooperative agreements, and decisions on litigation and administrative proceedings involving the Commission) or in which the Commission will receive or share information that is inappropriate for public disclosure." Proposed Amendment at 7. As a de facto Commissioner, the DOJ *ex officio* member is presumably allowed to attend such meetings.

unrelated to policymaking or data.[51] Defenders will obtain true parity with DOJ only through Congressional action, which we continue to ask the Commission to support.[52] Until then, adding a Defender representative is the appropriate first step.

D. The rules should permit *ex parte* communication without nebulous or rigid disclosure requirements that may have unintended consequences.

Defenders support altering the Commission's approach to *ex parte* communications: a brief rule noting only that the Commission does not intend to solicit *ex parte* communications on the merits of a proposed amendment.[53] Of the three options proposed to replace the current rule, Defenders believe option 1—deleting the *ex parte* provision entirely—makes the most sense. Via its silence, option 1 allows all *ex parte* communications and does so without requiring or forbidding disclosure, providing the Commission with maximum flexibility to carry out its work. Despite option 1's silence on public disclosure, we would nonetheless expect that the Commission would use its good judgement to timely disclose and seek comments on communications likely to have a bearing on important policy decisions so the public may vet those communications.

The Administrative Conference of the United States has acknowledged that *ex parte* communications "can benefit members of the public and agencies, including by facilitating more candid communications and ensuring

---

[51] The proposal also excludes the Defender representative from receiving materials "not related to policymaking or data, or [] inappropriate for public disclosure, including confidential or sensitive information regarding budgetary allocations or appropriations, personnel and staffing matters, and procurement and contract actions." Proposed Amendment at 8. As with meeting participation, the Rules do not appear to restrict the DOJ *ex officio* member's access to these materials.

[52] *See* S. 4136, 119th Cong. (Introduced Mar. 18, 2026). Historically, the Judicial Conference of the United States has endorsed adding a Defender *ex officio* as have other advocacy groups. *See* Defenders' Comment on the USSC's 2012–2013 Proposed Prioirities at 36 (July 23, 2012).

[53] USSC, Rules of Practice and Procedure, Rule 4.3 (Notice and Comment on Proposed Amendments) (Aug. 2016).

more opportunities for public input."[54] Simultaneously, however, information obtained on an *ex parte* basis is no less important to verify and critique.[55] And for transparency purposes, agencies should both encourage the public to participate in rulemaking through the formal written comment process and publicly disclose their reasons for adopting or failing to adopt a rule, including any communications affecting those decisions.[56]

Options 2 (requiring disclosure of *ex parte* communications that satisfy a specified standard) and 3 (requiring disclosure of all *ex parte* communications) have some surface-level appeal, but by placing nebulous or rigid disclosure requirements on the Commission, we are concerned that both options could prove unworkable and have a chilling effect, undermining the Commission's laudable efforts at better transparency and public engagement. While publicly disclosing and seeking feedback on communications having a bearing on policy decisions (and encouraging public comment in any event) is a best practice,[57] the Commission must also guard against "communication policies—or the interpretation of those policies—[that] unnecessarily interfere with [its] outreach and engagement efforts [because they are] outdated or unnecessarily restrictive."[58]

---

[54] Richard L. Revesz, Office of Management and Budget, Memo. For the Heads of Exec. Depts. and Agencies at 12–13 (July 19, 2023) (citing Admin. Conf. of the U.S. Recommend. 2014-4: "Ex Parte" Communications in Informal Rulemaking (June 6, 2014)).

[55] *See, e.g.*, Admin. Conf. of the U.S. Recommend. 2014-4: "Ex Parte" Communications in Informal Rulemaking at 3 (June 6, 2014) (describing potential harms of ex parte communications).

[56] *See* Revesz at 13.

[57] "Ex Parte" Communications in Informal Rulemaking at 3–5 (noting one concern with *ex parte* communications is that agency decisionmakers will base decisions on information not part of the public docket, depriving interested groups of the ability "to vet the information and reply to it effectively" and recommending that agencies ensure that all substantive oral and written communications, whether planned or unplanned, "are included in the appropriate rulemaking docket").

[58] Revesz at 13; *see also* "Ex Parte" Communications in Informal Rulemaking at 2 n.6 (discussing *ex parte* meetings involving "sensitive information" where "interested persons may be willing to share essential information with the agency only through face-to-face, private conversations . . . .").

First, both options 2 and 3 could prove unworkable. As to option 2, the proposed disclosure standards would each generate their own additional questions and application issues. For instance, how would the Commission determine whether a communication is "significant" and "material" or "substantially significant and clearly intended to affect the ultimate decision"? And what happens if there's disagreement about whether that standard has been met? A vague standard could effectively undermine transparency by permitting arbitrary, inconsistent, or unexplained enforcement. Although option 3 avoids these concerns, its total disclosure requirement could quickly prove burdensome, potentially requiring logging and sharing perhaps every informal amendment-related encounter between the public and Commissioners during a comment period.

Second, both options could have a chilling effect incompatible with the goal of open information and idea-sharing. Unlike statements to be presented via public comments or testimony, *ex parte* statements provide an opportunity for brainstorming. It is easy to envision potentially valuable insight being withheld in a mandatory-disclosure world for fear of rendering final and permanent ideas that are still marinating.

While both options potentially mitigate these workability and chilling concerns as they relate to certain influential and vocal stakeholders—including Defenders—by bracketing their possible exclusion from the definition of "ex parte," we nonetheless fear these many exclusions largely swallow the disclosure rule, all but guaranteeing nondisclosure of contacts with the excluded groups. This would undermine, rather than promote, transparency. Instead, Defenders prefer option 1, which puts no thumb on the scale in either direction for anyone. This option allows the Commission flexibility to determine when disclosure is in the public's and the Commission's best interests to both ensure ideas and information are properly vetted before they influence decisions and inform the public of the reasons for its decisions.

E. To promote better transparency and public engagement, the Commission should solicit proposed priority ideas from the public and should adopt final priorities that best fulfill its statutory obligations.

Defenders welcome Part E, which would both increase public participation and transparency in the Commission's agenda-setting process and better ensure the Commission's annual workload stems directly from its obligations under 28 U.S.C. § 991(b).[59]

Soliciting input in advance of proposing priorities—both through written comment and public hearing—would address concerns that the die is already cast by the time priorities are proposed.[60] And, by publishing those proposals on the Commission's website and opening its planning session with a public hearing, the public would have opportunities to not only explain their proposals and answer questions about them, but to comment on others' suggestions.

Presently, only one stakeholder, the DOJ, enjoys this level of involvement in and influence over the Commission's annual planning via its *ex officio* role and participation at the nonpublic planning sessions. Yet, § 994(o) identifies several other important stakeholders with whom the Commission *must* consult to fulfill its duties, one of which is to set priorities for the amendment cycle. Part E would level the playing field, while also grounding the public's commentary and the Commission's annual planning in the Commission's statutory obligations. Defenders have no doubt that this more inclusive agenda-setting process would both "allow the public to better understand and shape the scope of the Commission's potential agenda" and "help the public grasp all the ways the Commission can make policy."[61]

---

[59] We defer to the Commission on the timing of its priority planning, in terms of determining which month is best for its workflow.

[60] For example, this year, the Commission's proposed priorities were nearly identical to its final priorities. *Compare* USSC, 2026-2027 Proposed Policy Priorities (June 12, 2026) *with* USSC, 2026–2027 Final Priorities (Aug. 27, 2026).

[61] Proposed Amendment at 13.

F. The Commission should publish its meeting minutes and materials, including any legal opinions relevant to the amendment process.

On the heels of the Sentencing Commission's fortieth anniversary, Defenders applaud Part F, the proposal to publish for public review the Commission's meeting materials, nonpublic meeting minutes, and any written document approved for public release by a commissioner majority. Sharing these materials would not only facilitate more informed public participation in the Commission's policy-setting work but would also address decades of scholarly criticism about the Commission's lack of transparency and failure to explain some of its decisions.[62] This transparency problem is compounded by the Commission's imbalanced composition—that is, by the fact that the DOJ, through its *ex officio* member, already has access to these materials, which Defenders and the rest of the public do not get to review and evaluate.

Of course, increased transparency and information-sharing leads to increased accountability, engagement, and public trust, which is why transparency is a key feature across branches of our democratic government.[63] Scholar and longtime Pennsylvania Sentencing Commissioner

---

[62] Mark Osler & Judge Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DePaul J. for Soc. Just. 117, 139–40 (2014) ("While the early Sentencing Commission could have adopted open meetings and procedures based on transparency, it opted instead for private meetings, but included the DOJ's ex officio commissioner . . . and often provided no or very little explanation or rationale for its amendments"); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(Land): The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 725, 728–29 (1999) (arguing for the Commission to "create sentencing policy through a real administrative process—one that embraces the ideal of transparency and accountability, one that routinely lays out its reasoning and gathers or creates evidence to support its choices."); David J. Gottlieb, *The Sentencing Commission's Administrative Reforms: Two Cheers, and Some Suggestions*, 9 Fed. Sent. R. 71, 76 (1996) (arguing that the Commission's work should be more open to the public, especially considering the DOJ's "unusual position").

[63] The U.S. Code contains multiple, transparency-promoting measures. *See, e.g.*, 5 U.S.C. § 552 (making various records publicly accessible via the Freedom of Information Act); 5 U.S.C. § 552b (requiring open meetings for federal agencies); 5 U.S.C. § 553 (requiring notice and comment rulemaking for administrative agencies); 5 U.S.C. § 706 (enabling judicial review of agency rulemaking); 5 U.S.C.

Stephen Chanenson has emphasized that "[t]ransparency in the sentencing world should be broadly construed and include both process and projects."[64] Any operational costs of transparency are "outweighed by the likelihood of greater trust in the process—trust by other criminal justice actors and by the public at large."[65] The fact that the Commission is placed in the judiciary and includes judges as members does not justify limiting openness. After all, even the judge-Commissioners wield not judicial power, but "administrative power derived from the enabling legislation."[66]

With these principles in mind, we urge the Commission to adopt this proposal in a manner maximizing transparency by (1) broadening the categories of meeting materials publicly released; (2) broadening the categories of items contained in the publicly released meeting minutes; and (3) including legal opinions in the documents publicly released.

Meeting materials. Defenders support releasing those materials described in the proposed Rule 5.3(b)(1), although we urge the Commission to broaden the category of publicly released materials to include documents generated not just "for or given to the commissioners in preparation for" a meeting, but also documents *provided during or after the meeting* relating to

---

§ 1002(b)(5) (finding that "Congress and the public should be kept informed with respect to the . . . activities . . . of advisory committees"); *see also* Sen. Chuck Grassley, *Grassley Calls on President to Sign Bill to Improve Government Transparency* (June 13, 2026) ("The people ought to have a right to know what their government is up to. A more transparent government leads to a more accountable government.").

[64] Hon. Carlton Reeves, *Alternatives to Incarceration and the Sentencing Commission: A Call For Progress Through Partnership*, 36 Fed. Sent. R. 130, 133 n.97 (2024).

[65] Steven L. Chanenson, *Commissions at the Core*, 30 Fed. Sent. R. 84, 84–89 (2017); *see also* Model Penal Code: Sentencing Section 1.02(2), Purposes of Sentencing and the Sentencing System (2024) (naming as one purpose "to increase the transparency of the sentencing and corrections system, its accountability to the public, and the legitimacy of its operations as perceived by all affected communities").

[66] *Mistretta v. United States*, 488 U.S. 361, 404 (1989); *see also* Gottlieb at 72 (arguing that "'traditional' administrative agency procedures are an appropriate model" for the Commission despite it being housed in the judiciary).

questions or issues raised there. We anticipate questions or concerns are sometimes raised in nonpublic meetings leading to additional research memoranda or data runs provided to commissioners either during the meeting or shortly thereafter. If this happens, our suggested modification will ensure that such materials—which are still "relevant to [the] Commission's priorities or the amendment process"—are not left out of the public record.

We also encourage the Commission to include preliminary drafts of proposed amendments in this public release; they are certainly "relevant to [the] Commission's . . . amendment process" and "generated for or given to the commissioners," as contemplated in (b)(1).[67] Granted, one potential "downside" of publicly releasing a preliminary draft amendment is that the Commission may have to contend with increased stakeholder input. But the upsides outweigh the downsides: input at this stage would allow advisory groups and other important stakeholders to lend their expertise before a proposed amendment is finalized and published, potentially positively influencing the language ultimately selected for formal hearing and comment. And the additional time to consider the proposals would benefit the public as well, given the intense time constraints and pressures that accompany the formal comment period.

As to the timing of releasing the materials described in (b)(1), preparatory materials *that are ready and available* at least seven days prior to the scheduled meeting date should be published to the website at that time. This would allow stakeholders to provide meaningful input ahead of the meeting, rather than just after-the-fact observations proving less useful to the Commission. That said, to the extent that there are meeting materials not ready seven days before the meeting (such as the additional materials we anticipate and request above), any strict timing requirement should not absolve the Commission of its responsibility to make them publicly available. Thus, we recommend materials be made available to the public "at least seven days prior to the scheduled date of the meeting or, for materials not yet prepared by that time, as soon as practicable after they are prepared and made available to commissioners."

[67] Proposed Amendment at 17; *see also* Issue for Comment 1, Proposed Amendment at 19.

Meeting minutes. Defenders support the release of detailed meeting minutes disclosing information pertinent to the Commission's priorities or amendment process (provided sensitive information is redacted) including:

- meeting agendas;
- a list of participants in attendance;
- a summary of topics discussed, decisions made, tasks assigned, and follow-up actions agreed upon (that are relevant to the priorities or amendment process); and
- a record of the final vote of each member on any action taken.[68]

The release of these minutes should be standard practice, as opposed to "upon request," to avoid disparities across different Commissions.[69] For helpful examples, the Commission can look to state sentencing commissions in Minnesota, Pennsylvania, and Virginia—all three of which release detailed minutes of all meetings.[70]

As to the timing of releasing the materials described in proposed Rule 5.3(b)(2), we agree that "no later than fourteen days following the adjournment of the meeting" is reasonable.

Legal opinions. Lastly, we urge the Commission to remove the proposed exclusion of "legal opinions" from the materials published to its

---

[68] Issue for Comment 2, Proposed Amendment at 19.

[69] Issue for Comment 3, Proposed Amendment at 19.

[70] *See, e.g.*, Minn. Sent'g Guidelines Comm'n, Previous Meetings; Pa. Comm'n on Sent'g, Previous Commission Policy Meetings; Va. Criminal Sent'g Comm'n, Commission Meetings. These Commissions are subject to applicable state open meeting laws; however they provide an example of best practices surrounding transparency. *See also* Testimony of N.C. Sentencing Commissioner Lyle Yurko at 7 (1994–2007) ("[D]uring my tenure on the 28-member North Carolina Commission we only had one private meeting. . . . There are certainly times when, for reasons of national security or otherwise, private meetings are in the public interest. But I believe transparency is a necessary element of public policy.").

website.[71] The Commission regularly makes decisions that may be shaped by its internal legal opinions and interpretations; it is imperative that the public has an opportunity to scrutinize and respond to any legal opinions shaping policy outcomes.

For example, forty years later, it appears highly possible that an internal legal opinion, which was not publicly shared, played a key role in the Commission's oft-criticized decision to link punishments in §2D1.1 to the weight and type of substance being trafficked.[72] Without explanation, the Commission opted to link guideline ranges for drug offenses to the mandatory minimum punishment levels in the Anti-Drug Abuse Act of 1986, and extended the quantity-based approach across different levels.[73] The Commission itself has described the information vacuum as "unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population."[74] Beyond historians, it has also proved highly unfortunate for impacted persons, the public, and stakeholders who had no opportunity to bring to the Commission's attention the flaws in the relevant internal legal opinion before it was too late.

The Commission would not be alone among agencies if it shared its significant legal opinions. The DOJ, for example, shares many of its own legal opinions on the internet with additional opinions available via a reading

---

[71] *See* Proposed Amendment at 17 ("Documents authorized for public release pursuant to this rule shall not include . . . legal opinions . . . .").

[72] *See, e.g.,* Defenders' 2025 Comment on Proposed Amendments: Drug Offenses at 3, 3 nn.5–8) (gathering examples of decades of criticisms of §2D1.1 from Defenders, judges, stakeholders, and academics).

[73] *See* USSC, *Fifteen Years of Guidelines Sentencing* at 49 (Nov. 2004) (noting that documents published contemporaneously with the inaugural Guidelines "do not discuss why the Commission extended the ADAA's quantity-based approach" across §2D1.1).

[74] *Id.*; *see also United States v. Diaz*, No. 11-CR-00821-2, 2013 WL 322243, *6 (E.D.N.Y. Jan. 28, 2013) ("The original Commission was far from forthright about the role of its own data in formulating Guideline ranges for drug trafficking offenses.").

room,[75] as do administrative agencies when describing the bases for promulgating policies.[76]

In sum, Defenders encourage the Commission to adopt Part F, modified as laid out above.

G. The proposed technical and clerical changes make important updates to the rules.

Defenders support the Commission's technical and clerical changes regarding its nonpublic and public meetings, as well as its standing list of advisory groups. In particular, the clerical update would formally acknowledge as a standing advisory group the Sentence Impact Advisory Group (SIAG), which offers a valuable perspective from individuals most directly impacted by the Commission's policies. We encourage the Commission to continue its effort to include a broader and more diverse array of stakeholders in the guideline development process.

H. The Commission should adopt an express default policy of widely sharing its data with the public.

Part H invites the public to suggest further revisions to the rules, and we appreciate this opportunity.

Here, we urge the Commission to propose and adopt an express default policy in Rule 6.5 (Access to Commission Data) of widely sharing data gathered in creating its research reports, special coding projects, and other tools and publications, with withholding as the exception. The Commission's "[s]entencing data involve public records created with public funds reflecting the exercise of a public trust. We should not fear what this information might reveal."[77] Defenders support any change to the Commission rules that

---

[75] *See* Opinions, Office of Legal Counsel, Department of Justice.

[76] *See, e.g.,* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41306–07 (Aug. 14, 2019) (attempting to justify eventually enjoined and rescinded immigration rule in part by explaining agency's legal interpretation of relevant statutory provision).

[77] Steven L. Chanenson, *Guidance from Above and Beyond*, 58 Stan. L. Rev. 175, 184 (2005) (quotations and internal citations omitted).

promotes greater transparency in its data collection and publication processes. Making available to the public its deanonymized Individual Datafiles dataset, the "dynamic" dataset underlying the JSIN tool, and all special coding project datasets and datasets underlying its research reports would enhance transparency.

For that reason, we also urge the Commission to consider updating Rule 5.3(a) to set a default policy of releasing to the public, unless otherwise prohibited by law or Memorandum of Understanding, all "data, reports, and other information" relied upon by the Commission in setting priorities and considering potential amendments.[78]

* * *

As always, we appreciate the Commission considering our views and experience. We look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,



Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

Sentencing Resource Counsel
Federal Public and Community Defenders

---

[78] *See* Rule 5.3(a). We suggest changing the language as follows:

To fulfill Commission priorities and inform consideration of potential amendments, the Staff Director shall direct the preparation of relevant data, reports, and other information for consideration by the Commission. ~~Upon authorization by the Staff Director~~ Unless otherwise prohibited by statute or applicable Memorandum of Understanding, the Office of Legislative and Public Affairs shall make the data, reports, and other information available to the public as soon as practicable.

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Kelly S. Milliron, Commissioner *Ex Officio*
Kenneth P. Cohen, Staff Director
Ross Thomas, General Counsel

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

David Patton, Chair
Patrick F. Nash, Vice Chair

Circuit Representatives
Matthew Morgan, First Circuit
Susan Walsh, Second Circuit
Abraham Rein, Third Circuit
Marshall H. Ellis, Fourth Circuit
Marlo Cadeddu, Fifth Circuit
Michael Stengel, Sixth Circuit
Michelle L. Jacobs, Seventh Circuit
John R. Murphy, Eighth Circuit
Vacant, Ninth Circuit
Jeremy Delicino, Tenth Circuit
Lauren Krasnoff, Eleventh Circuit
Vacant, D.C. Circuit
Leigh M. Skipper, At-Large
Deborah Roden, At-Large
Alysson Mills, At-Large

October 26, 2026

Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Practitioners Advisory Group Comment on Proposed 2026 Amendment to Rules of Practice and Procedure

Dear Judge Reeves:

The Practitioners Advisory Group ("PAG") submits these comments in response to the United States Sentencing Commission's proposed 2026 amendment to its Rules of Practice and Procedure. The PAG commends the Commission for its comprehensive review of the Rules and its stated goal of enhancing public engagement with, and understanding of, its work. The PAG supports Part A's revision of the introduction to track 28 U.S.C. § 991(b). We strongly oppose Part B, which would require five votes to make an ameliorative amendment retroactive. We support Parts C through F, with targeted revisions described below, and offer one clarification regarding Part G. We do not offer comment on Part H.

I. Part B: The PAG Opposes Requiring Five Votes to Make an Amendment Retroactive

Part B would amend Rule 2.2(b) to require the affirmative vote of at least five commissioners to make a guideline amendment available for retroactive application. The PAG opposes Part B.

The PAG's view of retroactivity has not changed since we last wrote to the Commission on the subject in April 2025.[1] The purpose of a guideline amendment is to achieve a more just guideline. The timing of sentencing should not arbitrarily dictate the length of a sentence. For that reason, we asked the Commission to make amendments presumptively retroactive. Part B moves in the opposite direction. It would make retroactivity the *only* decision in the Commission's Rules that requires more than four votes, and it would allow three commissioners to keep in place sentences that the Commission already judged

[1] *See generally* Letter from PAG to U.S. Sent'g Comm'n (Apr. 18, 2025), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf.

longer than the purposes of sentencing require. We urge the Commission not to adopt the proposed change to Rule 2.2(b).

With respect to the issue for comment, which asks whether the Commission should increase the voting threshold for other Commission actions, the PAG opposes raising the voting threshold for any Commission action.

A. The Proposed Change Imposes a Supermajority on One Decision and Nothing Else

Rule 2.2 sets the number of votes required for every action that the Commission takes. No action under the current Rules requires a supermajority of more than four votes—the number Congress set for the Commission to promulgate guidelines and amendments in 28 U.S.C. § 994(a). Part B would make retroactivity the only decision that requires five votes.

Under Rule 2.2(b), four votes suffice for the promulgation of guidelines, policy statements, official commentary, and amendments to the guidelines, the Commission's most significant actions. Three votes are required to publish for comment proposed amendments, policy statements, or official commentary. A majority of the members then serving can approve a notice of priorities or adopt the minutes of a public meeting. Most other actions require only a majority of the members present at a public meeting with a quorum, or, for many administrative matters, a majority of the members then serving.[2] Not a single action requires five votes.

Under Part B, the Commission could adopt an amendment lowering a guideline range with four votes but would then need five votes to let a court consider the lower range for someone already serving a sentence under the old one. The underlying amendment is at least as significant as its retroactive effect. It sets the range for every defendant sentenced after it takes effect, and four votes is enough to adopt it.

The proposal cuts in only one direction. Retroactivity under 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2) reaches only amendments that lower a guideline range. So Part B places a supermajority requirement on one category of decision: decisions that allow a court to shorten a term of imprisonment. A rule that makes it harder for the Commission to reduce imprisonment rather than increase it is difficult to square with the Commission's statutory charge.

B. Retroactivity Decisions Already Receive Rigorous Scrutiny

A supermajority requirement is usually defended as a check on a hasty or poorly considered action. Retroactivity needs no such check. As the PAG explained in its prior comment, the Commission adopts an amendment only after considering its effect on penal and correctional resources, after public notice and comment, after public hearings, after collecting data and reports, and after soliciting input from its advisory groups.[3]

---

[2] *See* U.S. Sent'g Comm'n, Rules of Practice & Procedure, Rule 2.2 (Aug. 18, 2016), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf.

[3] Letter from PAG to U.S. Sent'g Comm'n at 1-2 (Apr. 18, 2025), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf; U.S. Sent'g Comm'n, Rules of Practice & Procedure, Rules 4.1A,

Retroactivity then goes through a separate review of its own. Rule 4.1A provides that "[g]enerally, promulgated amendments will be given prospective application only." Before an amendment can apply retroactively, the Commission votes separately on whether to consider retroactivity. Once the Commission decides to consider retroactivity, the staff prepares a retroactivity impact analysis; the Commission takes public comment and holds a hearing; and then the Commission votes again at a separate public meeting. The current process of determining retroactivity is a rigorous one that does not require the check of a supermajority.

The 2025 cycle shows the process at work. The Commission published an issue for comment on the retroactivity of four 2025 amendments and released retroactivity impact analyses. It then received public comments from the Committee on Criminal Law of the Judicial Conference of the United States ("Criminal Law Committee"), the Department of Justice ("DOJ"), the Federal Public and Community Defenders ("Federal Defenders"), two of its advisory groups, advocacy groups, incarcerated people, and others. Only then did it vote. Few Commission decisions are considered more carefully. Part B would stack a supermajority requirement on top of the multi-step review that the Rules already require. It is an unnecessary hurdle. Even now, with only four votes needed, the Commission rarely applies amendments retroactively. In the last twenty years, the Commission has voted to make an amendment retroactive just six times.[4] Part B would raise the bar higher still and make retroactivity vanishingly rare.

C. The Change in Part B Would Let a Minority of the Commission Decide

When the Commission makes an amendment retroactive, it is making a policy determination that a reduced guideline range is sufficient to achieve the purposes of sentencing.[5] With a full Commission of seven voting members, Part B would allow three commissioners to defeat the determination over the votes of four. A minority would decide whether people in prison are left without relief for a sentence that the Commission has already determined is too severe.

And the problem becomes more acute when the Commission is short members. With six voting members, five of the six would have to agree. With five, the vote would have to be unanimous; even a single commissioner could block retroactivity. With four, retroactivity would be impossible unless the Commission adopts the bracketed proviso allowing four votes to make an amendment retroactive when the Commission has only four members. But even then, it would require unanimity. The PAG opposes Part B in every form. If the Commission nonetheless adopts it, the bracketed proviso is the minimum necessary to keep retroactivity available at all.

The existing four-vote rule is already a high bar for a Commission with fewer than seven voting members. At the August 6, 2025, public meeting, five voting commissioners were present. A motion to make the

4.2, 4.3, 4.4, 4.5, 5.3 & 5.4 (Aug. 18, 2016), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf.

[4] U.S. Sent'g Comm'n, *Guidelines Manual* § 1B1.10(d) (2025); *see* Kathleen Cooper Grilli, *How the U.S. Sentencing Commission Considers Retroactivity*, 165 U. Pa. L. Rev. Online 113, 115 (2017) (explaining that the "Commission exercises [its] authority [to make amendments retroactive] sparingly, having done so only twenty-nine times"—now thirty—"since the guidelines were first promulgated in 1987").

[5] U.S. Sent'g Comm'n, *Guidelines Manual* § 1B1.10 cmt. background (2025).

mitigating role cap retroactive drew three votes in favor and two against.[6] Retroactivity failed, even though a majority of commissioners present supported it. Part B would raise this bar even further.

D. Retroactivity Serves the Commission's Purpose

Part A of this same proposal would rewrite the introduction to the Rules to track 28 U.S.C. § 991(b), including the Commission's purpose to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." An ameliorative amendment that is denied retroactive effect creates that kind of disparity. Two people with the same record and the same conduct serve different sentences because one was sentenced the day before the amendment took effect and one was sentenced the day after.

Congress addressed that directly. Section 994(u) directs that when the Commission reduces the term of imprisonment recommended for an offense, "it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The statute treats relief for people already in prison as part of the Commission's work. Nothing in the statute suggests that relief should require more agreement than the amendment itself.

The arguments against retroactivity are familiar. The DOJ has pointed to finality and the burden on the courts and probation officers.[7] The PAG answered those concerns in its prior comment.[8] Courts already receive, and must resolve, motions based on amendments that were never made retroactive. Retroactivity does not order release; a court decides under U.S.S.G. § 1B1.10(b) and 18 U.S.C. § 3553(a) whether a reduction is warranted in each case. And the system has absorbed large retroactive amendments before.

Whatever weight those concerns carry in a particular case, they belong in the vote on that amendment. The Background Commentary to § 1B1.10 identifies the factors the Commission considers in deciding retroactivity: the purpose of the amendment, the magnitude of the change, and the difficulty of applying it retroactively. A commissioner who concludes that an amendment falls short on those criteria can vote against retroactivity. No rule should give a minority the final word.

The PAG urges the Commission not to adopt Part B and to leave the vote required for retroactivity at four, the same number required to promulgate the amendment itself.

---

[6] U.S. Sent'g Comm'n, Public Meeting Minutes (Aug. 6, 2025), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20250806/minutes.pdf.

[7] Letter from U.S. Dep't of Just., Crim. Div., to U.S. Sent'g Comm'n at 2-3 (June 2, 2025), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202506/90FR19798_comment.pdf.

[8] *See generally* Letter from PAG to U.S. Sent'g Comm'n (Apr. 18, 2025), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202504/89FR106761_comment.pdf.

II. Part C: The PAG Supports Allowing a Federal Defenders Representative to Participate in Commission Meetings and Public Hearings

Part C would amend Rules 3.1 and 3.4 to allow one representative from the Criminal Law Committee and one representative from the Federal Defenders to take part in the Commission's meetings and public hearings.

The proposal provides two bracketed options for Rule 3.1(c): the first would allow the representatives to attend "public meetings and nonpublic briefing sessions of the Commission," while the second would allow the representatives to attend "all Commission meetings at which Commission staff is present." Under either framework, the representatives could join deliberations with commissioners, request information and documents, and present relevant information. They would receive the same meeting materials as commissioners, with information unrelated to policymaking or data removed. The representatives would not attend any meetings or portions of meetings devoted to non-policy, non-data, or internal administrative matters, or where the Commission receives or shares information inappropriate for public disclosure. The representatives could not vote or make or second motions.

Similarly, the proposal for Rule 3.4 would allow the representatives to participate in public hearings alongside the commissioners, ask questions of the witnesses, and receive written testimony as soon as practicable before the hearing.

The PAG strongly supports Part C to the extent it would add a representative from the Federal Defenders and urges the Commission to adopt the second of the bracketed options for Rule 3.1 (with minor changes, as discussed below). The PAG takes no position as to the addition of a representative from the Criminal Law Committee.

Congress directed the Commission to consult with authorities on the federal criminal justice system,[9] yet the current Rules treat the Federal Defenders—who represent approximately 60% of all federal criminal defendants[10]—as outside parties. Part C would bring in the views of the defenders who apply and litigate the guidelines daily while the proposals are still taking shape, and when drafting problems, application difficulties, and unintended consequences are easiest to fix, consistent with the consultation requirement of 28 U.S.C. § 994(o). While the first option would be an improvement, it does not go far enough; representatives from the Federal Defenders may already attend public meetings, and the proposal does not define a "nonpublic briefing session." Policy takes shape in the staff meetings where data is presented, ideas are discussed, and drafts are refined. Only the second option ensures that a Federal Defenders representative may attend the meetings where the defense bar's input is most likely to matter.

Part C would also begin to correct a long-standing imbalance. Through its ex officio seat, the DOJ already attends Commission meetings, receives the materials prepared for the commissioners, and takes part in deliberations.[11] Currently, there is no comparable representation for the defense counsel who work with and argue the guidelines (or for their clients who are subjected to them). Part C is a first step toward placing a Federal Defenders representative on more equal footing with the ex officio members by allowing

[9] 28 U.S.C. § 994(o).

[10] U.S. Courts, Defender Services, *available at* https://www.uscourts.gov/about-federal-courts/defender-services.

[11] *See* 28 U.S.C. § 991(a); U.S. Sent'g Comm'n, Rules of Practice & Procedure, Rule 3.3(2) (Aug. 18, 2016), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf.

a Federal Defenders representative to add information and perspective to Commission deliberations. The representative's participation would also strengthen public confidence that the Commission hears from and considers all sides before it acts.

The PAG recommends two revisions to Part C. First, under the current proposal, there is no timeline for the representative to receive meeting materials, and written testimony must be provided "as soon as practicable." The PAG recommends clarifying that the representative will receive meeting materials and written testimony at the same time as the commissioners. Second, the proposal states that information "inappropriate for public disclosure" will be omitted from materials provided to the representative and that the representatives will not participate in meetings or portions of meetings in which the Commission will receive or share information that is "inappropriate for public disclosure." The PAG recommends revising these carve-outs to clarify that they are limited to the categories already listed in Rule 3.3(4).

The PAG applauds the Commission for proposing an amendment that would allow the defense bar to more meaningfully participate in the Commission's policymaking work.

III. Part D: The PAG Supports Option 2 for Revising the Ex Parte Communications Provisions

Part D offers three options for revising Rule 4.3's ex parte communications provision. Option 1 would delete Rule 4.3's existing ex parte communications provision altogether with no replacement.[12] Options 2 and 3 would modify the existing provision to allow ex parte communications, but Option 2 would require disclosure of communications that meet a materiality threshold—communications that provide either "significant, material information addressing the merits of a pending proposed amendment," or those that are "of substantial significance and clearly intended to affect the ultimate decision on a pending proposed amendment"—while Option 3 would require disclosure of all ex parte communications regardless of materiality. Options 2 and 3 both bracket a provision that would exclude from the definition of ex parte communications any communication with: "(1) members of Congress, congressional staff, and legislative branch agencies; (2) members of the Federal Judiciary (including the Judicial Conference of the United States and its committees); (3) United States Probation Officers; (4) the Federal Bureau of Prisons; (5) the Criminal Division of the United States Department of Justice; and (6) representatives of the Federal Public and Community Defenders."

The PAG supports Option 2, which would require disclosure of some but not all ex parte communications. On one hand, informal relationships and conversations between practitioners and the Commission offer opportunities for candid dialogue, facilitate information sharing, and help advance the Commission's work. Option 3, which would require disclosure of every ex parte communication regardless of materiality, would chill these exchanges. On the other hand, good governance principles and the public's right to meaningfully participate in the rulemaking process warrant some degree of disclosure,[13] and accordingly, we support Option 2.

---

[12] The proposed amendment refers to Rule 3.4, but the ex parte provision appears in Rule 4.3, as recognized by the synopsis and issues for comment. The PAG assumes the Commission intends to amend Rule 4.3.

[13] *See Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988) ("Such notice must not only give adequate time for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."); *Conn. Light & Power Co. v. Nuclear Regul. Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the

With respect to the options that would exempt communications with various individuals and entities, the PAG opposes all of the bracketed exemptions. A disclosure rule that exempts the most frequent and influential participants in the Commission's policymaking process would do little to advance transparency. If the Commission adopts any exemption, it should not exempt the Criminal Division of the DOJ. The DOJ already enjoys a permanent advantage through its ex officio representative, who has access to all information available to the Commission, may attend every Commission meeting, and has greater insight into the Commission's decision-making processes than any other stakeholder. Exempting the DOJ's advocacy from disclosure would only compound this imbalance.

In addition to the proposed amendment, the Commission requests input on four issues for comment regarding Part D. The first notes that the proposal pertains to proposed guideline amendments only and asks whether the Commission should adopt a broader ex parte communications provision that would apply to other actions that require notice-and-comment rulemaking procedures, such as proposed priorities and amendments to the Commission's Rules of Practice and Procedure. The PAG supports adopting a broader provision as contemplated by the first issue for comment. Advocacy on proposed priorities and on amendments to the Rules of Practice and Procedure can shape the Commission's agenda as much as advocacy on a proposed amendment.

The second issue for comment asks which of Option 2's bracketed alternatives—if either—the Commission should adopt: either requiring disclosure of ex parte communications that "provide[] significant, material information addressing the merits of a pending proposed amendment," or "that [are] of substantial significance and clearly intended to affect the ultimate decision on a pending proposed amendment." The PAG supports adoption of the second bracketed alternative, which would require disclosure of ex parte communications of "substantial significance" that are "clearly intended to affect" the Commission's decision on a proposed amendment. Given that practitioners and stakeholders currently engage in ex parte communications with the Commission on a regular basis, ranging from informal conversations in passing to formal presentations and data reports, the PAG supports requiring disclosure of presentation materials, data, and formal advocacy, but not casual social interactions between the Commission and those interested in its work. To make this standard administrable, the PAG recommends that the Rule state that written submissions, data, presentations, and scheduled meetings addressing a pending proposed amendment are presumed to be of substantial significance and clearly intended to affect the Commission's ultimate decision.

The third issue for comment seeks input on the "specific elements and substantive content" that should be included in the Commission's disclosures of ex parte communications. We recommend that each disclosure include: the date of the communication; the identity and organizational affiliation of the outside party and of the commissioners who took part; the mode of communication; the pending matter addressed; a written summary of the substance; and copies of any written materials, data, or presentations provided.

---

agency's proposals. . . . In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules."); *see also Home Box Off., Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("[T]he notice required by the APA, or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based."); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1089 (9th Cir. 2011) (similar); 28 U.S.C. § 994(x) (making 5 U.S.C. § 553's provisions on publication in the Federal Register and public hearing procedures applicable to the promulgation of guidelines); Esa L. Sferra-Bonistalli, Ex Parte Communications in Informal Rulemaking at 19-23, 86, Admin. Conf. of the United States (2014), *available at* https://www.acus.gov/sites/default/files/documents/2014-4%20Report.pdf.

To the extent that personal, case-specific, or confidential information is provided, the PAG recommends including a redaction and omission provision like that proposed in Part F, and requiring the nature and category of any such redaction or omission to be identified and included in the disclosure. Additionally, the current proposal requires disclosure "as soon as practicable after the communication." The PAG recommends revising this language to require disclosure as soon as practicable, but in any event, within seven days of the communication and before the Commission votes on the pending amendment.

The fourth issue for comment notes that Options 2 and 3 define ex parte communications in relation to individual members of the Commission or to the Commission as a collective group and asks whether the definition should be expanded to encompass ex parte communications with Commission staff too. The PAG supports extending the definition to include some, but not all, ex parte communications with Commission staff. Communications to staff that are intended for or later transmitted to one or more commissioners should be treated as communications to the Commission. Other routine communications relating to the Commission's data and staff analyses need not be disclosed. Requiring disclosure of all staff communications would discourage these productive exchanges and make it more difficult for staff to provide stakeholders with the clarifications they need to comment accurately.

Similarly, while the PAG is not providing substantive comment on Part G, we note that Part G would broaden Rule 3.3(2) to allow nonpublic meetings with an ex officio commissioner's support staff "on any matter." Rule 5.1 already excludes communications with such staff from public comment, and the proposed ex parte communications definition reaches only communications from "outside part[ies]." Together, these provisions could be read to exempt advocacy by the DOJ's support staff from disclosure. The PAG recommends that the Rules expressly provide that substantive information conveyed by an ex officio commissioner's support staff on a proposed amendment be treated as an ex parte communication and disclosed if it meets the applicable materiality threshold.

IV. Part E: The PAG Supports Increased Transparency and Participation in Setting the Commission's Priorities

Part E would revise Rule 5.2 to increase participation and transparency in the Commission's annual agenda-setting process. Currently, the Commission publishes proposed priorities for comment, considers the comments, and then publishes final priorities. Under the revised Rule, the Commission would solicit proposed priorities from the public, stakeholders, advisory groups, Commission staff, and the commissioners themselves, and the submitted priorities would be published on the Commission's website. The Commission would then hold an annual planning session that would include a public hearing on proposed priorities, a nonpublic deliberation session, and a public meeting at which the Commission would vote to adopt its final priorities. The proposed amendment also offers several options regarding the timing of solicitation (no later than March, April, or May), the minimum length of the comment period (at least 30, 45, or 60 days), and the timing of the annual planning session (no later than June, July, or August).

The PAG supports the adoption of Part E. Soliciting input on priorities from a broad range of sources will give the Commission more perspectives and information at the outset of each amendment cycle. The PAG recommends selecting the earliest feasible dates—March for solicitation of priorities and June for the annual planning session—and a comment period of 60 days to allow time to develop and review proposals and to avoid late-summer scheduling conflicts.

V. Part F: The PAG Supports Requiring Public Disclosure of Information Relevant to the Amendment Process

Part F would revise Rule 5.3 to require public disclosure of meeting materials created for or given to commissioners in preparation for any public or nonpublic meeting, written minutes of any public or nonpublic meeting, and any document a majority of the Commission approves for release. Documents containing information inappropriate for public disclosure, such as "commissioner deliberations, legal opinions, and any other confidential, privileged, or personal information," would be redacted prior to release. Part F also contains conforming changes to Rules 2.2, 3.5, and 6.2.

The PAG supports the adoption of Part F, with slight changes as discussed below. We believe that meeting agendas, data, reports, memoranda, and other policymaking materials created for or given to the Commission must be disclosed, as well as written minutes of any Commission meetings. The advisory groups and the public cannot meaningfully participate in the amendment process without having access to the information the Commission is using to evaluate proposals and make decisions. The DOJ, through its ex officio representative, already has access to these materials. Making these same materials publicly available would mitigate the information imbalance and allow the advisory groups and the public to provide informed and helpful feedback. Moreover, although it remains committed to "involv[ing] interested members of the public in its work to the maximum extent practicable," the Commission is not subject to the Freedom of Information Act or the Government in the Sunshine Act.[14] With no external disclosure statute to fill the gap, the Commission's own Rules are the only framework that can ensure public access to the information on which it relies.

With respect to the bracketed deadline options in (b)(1), timing is critical for this proposal to be beneficial. Releasing policymaking materials seven days before a meeting would allow stakeholders to raise potential issues and shape the conversation before the outcome has been decided. Were the Commission to release materials seven days *after* a meeting, any resulting public input would either be obsolete due to decisions made in the meeting or would introduce inefficiency by reopening previously resolved issues. Accordingly, the PAG recommends incorporating the first option, requiring disclosure at least seven days before a meeting. The PAG also supports (b)(2)'s fourteen-day timeframe for release of meeting minutes.

Additionally, (b)(1)'s current proposed text requires disclosure of materials "relevant to [the] Commission's priorities or the amendment process." The PAG recommends clarifying that materials "relevant to [the] Commission's priorities or the amendment process" include retroactivity impact analyses, data briefings, prison and sentencing impact assessments, and similar analyses.

Section (c) contains the redaction provision requiring redaction or withholding of "information that is inappropriate for public disclosure, including commissioner deliberations, legal opinions, and any other confidential, privileged, or personal information." To prevent the exception from swallowing the rule, the PAG recommends adding a sentence requiring the Commission to identify the nature and category of any redacted or withheld information.

In addition to the proposed amendment, the Commission requests input on three issues for comment regarding Part F. The first issue for comment asks which meeting materials should be publicly released and whether any additional or different documents should be added to the proposed list; whether working

[14] U.S. Sent'g Comm'n, Rules of Practice & Procedure, Rule 1.1 (Aug. 18, 2016), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf.

drafts of proposed amendments should be released, even if they do not advance to formal amendment; and what advantages and disadvantages are posed by releasing working drafts of potential proposed amendments. The PAG believes that all the documents listed in the proposed Rule 5.3(b)(1) should be disclosed, as well as preliminary working drafts of proposed amendments and any other policymaking materials created for or given to the Commission. Prior to release, preliminary drafts of proposed amendments should be clearly labeled to indicate that they are preliminary and do not reflect the Commission's position. Releasing preliminary drafts would allow the public to understand the full range of options the Commission considered, not just the option it chose to publish for comment. Practitioners could then alert the Commission to drafting issues, application difficulties, and unintended consequences early, before the formal notice-and-comment process begins. It would also reduce the risk that proposals are dropped or advanced without public scrutiny. The PAG recognizes the potential disadvantages of releasing preliminary drafts, including that there may be resistance to revisiting a proposal that was previously considered and rejected, and that broader disclosure and public involvement may increase the workload of the Commission and stakeholders alike. But given the importance of the Commission's work and the benefits of input from practitioners and stakeholders who work with the guidelines every day and have a wide range of experiences and perspectives, the PAG believes the advantages of releasing preliminary drafts far outweigh the disadvantages.

The second issue for comment seeks input on how much detail should be recorded—and separately, how much should be publicly disclosed—about the discussions that take place in nonpublic Commission meetings. The PAG opposes recording or transcribing the conversations that take place in nonpublic meetings. The Commission should be free to have candid, unfiltered debate behind closed doors without worrying about a transcript becoming public. That said, the PAG supports public disclosure of nonpublic meeting agendas and minutes containing a list of participants in attendance, a summary of topics discussed (limited to topics relevant to the Commission's priorities or the amendment process) and follow-up actions agreed upon, and a record reflecting each member's final votes, with any confidential, privileged, or personal information omitted or redacted.

The final issue for comment asks whether the Commission should limit disclosure to records of specific actions taken at nonpublic meetings contingent upon an explicit request by a voting Commission member, or alternatively, require such decisions to be made at a public meeting upon an explicit request by a voting Commission member. The PAG believes that public disclosure of standardized summary minutes for all nonpublic meetings is preferable to a request-based system, which would apply inconsistently and could create the appearance of selective transparency.

PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

Joshua Luria, Chair, 11th Circuit
Melinda Nusbaum, Vice Chair, 9th Circuit

Circuit Representatives
Laura M. Roffo, 1st Circuit
Tandis Farrence, 2nd Circuit
Shavaughn Chapman, 3rd Circuit
Sami Geurts, 4th Circuit
Andrew Fountain, 5th Circuit
Vacant, 6th Circuit
Rebecca Fowlie, 7th Circuit
Tracy Cowin, 8th Circuit
Daniel Maese, 10th Circuit
Katie Ann Freeman, DC Circuit
Erica Simpson, FPPOA Ex-Officio
Dollie Mason, PPSO Ex-Officio

October 26, 2026

The Honorable Carlton W. Reeves
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following written recommendations to the United States Sentencing Commission (the Commission) regarding the proposed amendments to the Rules of Practice and Procedure.

Voting Rules for Commission Action

POAG supports the adoption of the proposed rule that a retroactive application of an amended guideline should require the affirmative vote of at least five members at a public meeting. We also support the bracketed language concerning the unanimous affirmative vote of four Commission members if there are only four Commission members at a public meeting. In considering this rule, POAG likes the idea that a kind of super-majority should be needed to make a retroactive change. When considering making an amendment to the Guidelines retroactive, the Commission should be focused on balancing fundamental fairness, the purpose of the amendment, the magnitude of the change, the difficulty of applying the amendment retroactively, and the substance and quantity of the workload the amendment would produce for the Court. The balancing of these different principles can be difficult, with some of those factors weighing towards and some against a retroactive application. POAG believes that retroactivity should be reserved for the circumstances when many of these factors so overwhelmingly support the application that it is easy to obtain five affirmative votes or unanimous consent. When action is deeply associated with fundamental fairness such that a change in course is clear and reasonably achievable, it should be able to garner five of seven votes.

Participation in Meetings and Hearings

POAG supports the expansion of the participating representatives at meetings and hearings to include a representative of the Federal Public and Community Defenders. We observed that this addition would create clear parity with the presence of the *Ex Officio* member from the Department of Justice. POAG, in our discussion of this rule amendment, observed that the inclusion of this new representative has the potential of bringing the adversarial process, which occurs in courtrooms around the country, into the Commission's guideline amendment process. Furthermore, we recommend that the Commission work to create opportunities for collaboration amongst the various stakeholders and advisory groups. Often, the first time that we hear the opinions of other stakeholders or advisory groups is well-after we have met with our own groups. There have been times when other groups or stakeholders make suggestions or point out circumstances that would have been beneficial to know and consider earlier in our own process. We believe that there is an opportunity to be had to have varied perspectives around the country and from different positions come together more often and earlier in the process. While we believe a Probation Officer would be of value within the various meetings and hearings associated with the amendment process, we also recognize that this would likely be most effectively done as year-long temporary duty assignment (known as a TDY). We also believe that former POAG members would be some of the most capable of providing meaningful feedback to the Commission, because they often leave their time with POAG having a clear understanding of the different circumstances which impact the various circuits. In the alternative, we would also welcome opportunities to meet with the Commission to help advise or collaborate on solutions earlier in the process if so needed. We believe other members of advisory groups would also welcome an opportunity to engage in collaborative problem solving with the Commission.

Ex Parte Communications

POAG did not generate majority support for any specific option within the *ex parte* communication amendment. In our discussion, we support the Commission's efforts to increase collaboration between the Commission, the stakeholders, and advisory group members. We also recommend that if Option Two or Three is selected that the Commission include an *ex parte* exclusion for all of the members of the advisory groups.

One of the concerns that POAG has in relation to increased transparency and disclosure of *ex parte* communications is that sometimes increased transparency creates its own obscurities. An abundance of documentation does not necessarily provide clear understanding. If the public and stakeholders receive hundreds or thousands of pages of disclosure, it could reduce the transparency because they now have to dig through a sizeable amount of paperwork for the items of relevance to a specific issue. POAG supports the Commission engaging in greater transparency, but we would encourage the Commission to share some of the reports they find most relevant, especially when they are associated with reasons why they have pushed forward certain priorities or made

certain amendment choices. The reasoning behind decisions is the clearest form of transparency and has a real opportunity to support the collaborative efforts discussed earlier.

Increasing Transparency and Participation in the Commission's Agenda-Setting

POAG generally supports the Commission's effort to modify the amendment cycle. POAG discussed different methodologies for how to improve the amendment cycle. Members of the group supported the prospect of having a larger priority cycle over two or three years or, in the alternative, adopting a system that allows for the continuous opportunity to submit feedback on priorities. Additionally, POAG observed that adjustments to the timeframes for the amendment cycle should also be considered.

Priorities Cycle

POAG believes that the double-solicitation priorities cycle is unnecessary every year. If the Commission is inclined towards the adoption of the double-solicitation, "super-cycle," then POAG recommends structuring the rule to engage in a priorities super-cycle about once every three years. We believe this is an appropriate approach because often times, a broad request for priority feedback that would occur in a super-cycle would likely be similar to previous submissions. However, if these super-cycles were further spaced, the Commission could have time to organize, prioritize, and address the concerns that were submitted over the course of that three-year period and then solicit a new, broad round of feedback. In between the super-cycles would still be the normal cycle as exists today.

POAG also observed that the Commission may have success with a different approach by creating a methodology to allow for continuous submission of proposed priorities with an appropriate notice about when that open notice ends and the next cycle begins. POAG observed that often, probation officers may come across an issue in the Guidelines, and they would need to make note of it and remember to submit it to their District Representative, which will eventually lead to their Circuit Representative. However, a more efficient way would be to create digital mechanisms for submitting these issues as soon as they are spotted. This could likely be easily facilitated through the comment submission portal the Commission already utilizes during comment periods. With this ability to get rolling feedback, the Commission could get priorities data, big or small, as soon as an officer perceives an issue and shares it.

Proposed Amendment Cycle

POAG also suggests the Commission make changes to the current amendment cycle. One of the most frequent concerns that we receive from those whom we solicit feedback is that there is not a lot of time to consider, contemplate, or absorb the totality of how a proposed amendment will function. Often, the more time we have to try applying a guideline to old circumstances, the more specific our feedback can be. There have been times when a latent problem with the language or

application does not get revealed until very late in the process. POAG recommends the Commission look at the rules to find a way to increase the amount of time stakeholders and practitioners have to evaluate the proposed amendments. This also comes at an especially busy time of year, as courts work to clear their dockets, staff use their remaining annual leave, and we navigate the additional demands of the holiday season.

POAG further recommends that the Commission consider creating a kind of super-cycle for some of the more complex guideline amendments. The Career Offender guideline has been a reoccurring amendment for the past decade or more. There have been proposed amendments to the Career Offender guideline wherein we believe the Commission was close to a solution. However, the next cycle, the proposed amendment looked substantially different. Perhaps, instead of a single-year cycle to try to resolve this complicated amendment, the Commission could establish a three-year or multi-year proposal process that allowed for feedback, roundtable discussions, mock applications, and collaborative discussions on how to fix the amendment, with perhaps a rolling, open notice of how that amendment has been adjusted over that timeframe. POAG believes this type of super-cycle could also be used for other complex areas, such as the recent effort to revise the treatment of methamphetamine at USSG §2D1.1. POAG believes the Commission would benefit from having multiple approaches available to work through the various amendments. Not all amendments are the same, and it would be beneficial to have different methodologies which consider those differences.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to submit recommendations on these proposed changes.

Respectfully,

Probation Officers Advisory Group
October 2026

SENTENCE IMPACT ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

Dr. Carl Reddix, Chair

JC Jones Anderson
Adam Bentley Clausen
Ronald Evans
Beth A. McRavion
Dr. Shaneva D. McReynolds
David H. Safavian
Bahiya Shakur
Dr. Aaron M. Wright

October 16, 2026

Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed 2026 Amendment to the Rules of Practice and Procedure

Dear Chairman Reeves and Members of the Commission:

The Sentence Impact Advisory Group ("SIAG") respectfully submits the following commentary regarding the Commission's proposed amendment to its Rules of Practice and Procedure, published on August 27, 2026, for the 2026–2027 amendment cycle.[1]

I. INTRODUCTION

SIAG respectfully urges the Commission to use this review to strengthen not only transparency, but the fairness and practical legitimacy of federal sentencing policymaking. Rules governing access, voting, public participation, retroactivity, and impact analysis are not merely administrative. They can affect whether an acknowledged sentencing problem is corrected promptly, whether people already serving sentences may benefit from that correction, and

[1] U.S. Sent'g Comm'n, Proposed 2026 Amendment to the Rules of Practice and Procedure (Aug. 27, 2026) (the "Proposed Amendment"), Parts A–H and Issues for Comment, https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2026-amendment-rules-practice-and-procedure.

whether the Commission hears from those who see the consequences of federal sentencing at ground level.

SIAG therefore supports a framework built on transparency, meaningful participation, understandable information, empirical analysis, and accountability. We further urge that administrative convenience, institutional workload, or the economic value of incarcerated labor not become an unintended reason to preserve incarceration that is no longer necessary to accomplish the purposes of sentencing.

II. SUMMARY OF SIAG'S POSITIONS

The table below summarizes SIAG's position on each part of the proposed amendment. The following section addresses each part and explains SIAG's position in greater detail.

Proposed Amendment	**SIAG's Position**	**Key Rationale**
Part A — Introduction to the Rules	Support	Align the Rules with the Commission's statutory purposes; expressly promote public understanding of policymaking and participation; publish a plain-language companion guide.
Part B — Voting Rules for Commission Action	Oppose Five-Vote Requirement for Retroactivity	No objection to the Rule 2.2(d) reconsideration change; retain ordinary majority decision-making for retroactivity to the extent permitted by law; honor the statutory four-vote floor; do not add a supermajority solely because Commission action may reduce imprisonment; manage workload through implementation planning, not a higher voting threshold.
Part C — Participation of Representatives in Meetings and Hearings	Support with Recommended Expansion	Defender participation is essential institutional knowledge; extend designated-representative participation to each standing advisory group; additional participation by the Criminal Law Committee is unnecessary given the judges already serving on the Commission.

Proposed Amendment	SIAG's Position	Key Rationale
Part D — *Ex Parte* Communications	Support Option 3	Require disclosure of all covered *ex parte* communications; limit any source exemption to the Legislative Branch; apply the rule to proposed priorities, Rules amendments, and senior Commission staff; require disclosure no less than seven days before any public hearing.
Part E — Agenda-Setting and Rule 5.2 Impact Analysis	Support with Recommended Guardrails	Publish the priorities solicitation by March, allow at least 60 days for input, and hold planning sessions no later than August; exclude the economic value or replacement cost of incarcerated labor from Rule 5.2 impact analysis.
Part F — Information Relevant to the Amendment Process	Support with Recommended Guardrails	Post meeting materials seven days before (or within seven days after) a meeting; release minutes within fourteen days and other approved documents within seven days; require detailed minutes of nonpublic meetings; do not require categorical disclosure of pre-decisional drafts.
Part G — Clerical Changes	Support	Adopt the technical revisions; publish a plain-language guide so participation does not depend on legal training or institutional resources.
Part H — Further Revisions to the Rules	Recommend Implementation-Capacity Provisions	Resource reform rather than block it: forecasting, phased effective dates, standardized tools, early interagency coordination, release planning, and public tracking of implementation, building on the Amendment 821 model.

III. COMMENTARY ON THE PROPOSED AMENDMENT

A. Part A — Introduction to the Rules: Support

SIAG supports aligning the Rules with the Commission's statutory purposes.[2] The Rules should expressly promote public understanding of how policy is developed and how affected people may participate. A plain-language companion guide should explain meetings, hearings, public comment, advisory groups, supporting data, *ex parte* communications, and final Commission action.

[2] See 28 U.S.C. § 991(b) (setting forth the purposes of the Commission); Proposed Amendment, Part A.

B. Part B — Voting Rules: Do Not Create a Higher Barrier to Corrective Relief

SIAG strongly opposes the proposed requirement of five affirmative votes to make an amendment retroactive.[3] If the Commission concludes that a guideline should be changed because the existing rule is too severe, insufficiently individualized, or otherwise unsound, the Rules should not make relief harder merely because the people affected were sentenced before the correction. SIAG therefore recommends that the Commission:

- Retain ordinary majority decision-making for retroactivity to the extent permitted by law;
- Honor the statutory four-vote floor in 28 U.S.C. § 994(a) where it applies; SIAG does not suggest that a Commission rule can override Congress;[4]
- Decline to add a five-vote supermajority solely because Commission action may reduce imprisonment; and
- For actions not governed by a statutory voting floor, permit a simple majority when the action reduces unnecessary incarceration while preserving individualized judicial review and public-safety safeguards.

Retroactivity should remain a careful policy judgment.[5] Public safety, implementation capacity, individualized circumstances, and the purposes of sentencing should be considered. But workload should be managed through implementation planning, not converted into an additional substantive obstacle to relief.

The Safer Supervision Act of 2025 reinforces SIAG's concern that heightened procedural barriers can work against carefully targeted reductions in correctional control.[6] S. 3077 would require individualized decisions about supervised release, create a presumption favoring early termination for qualifying people who have demonstrated compliance and whose early termination would not jeopardize public safety, and expressly recognize that excessive

[3] Proposed Amendment, Part B (proposed amendment to Rule 2.2 requiring "the affirmative vote of at least five members at a public meeting" to make an amendment available for retroactive application).

[4] See 28 U.S.C. § 994(a) (requiring the affirmative vote of at least four members of the Commission to promulgate guidelines and policy statements).

[5] See 28 U.S.C. § 994(u) (directing the Commission, when it reduces a guideline range, to specify in what circumstances and by what amount sentences of previously sentenced defendants may be reduced).

[6] Safer Supervision Act of 2025, S. 3077, 119th Cong. (introduced Oct. 30, 2025).

supervision of low-risk individuals can consume scarce resources that should be concentrated on people who need closer supervision.

The Act is particularly instructive here because its congressional findings identify the same institutional problem SIAG asks the Commission to consider in the retroactivity context: federal probation officers may carry caseloads exceeding 100 cases, while appropriate early termination can reduce burdens, conserve judicial resources, reward compliance, and permit officers to focus attention on higher-risk cases. The bill also would authorize appointment of Federal Public or Community Defenders in early-termination proceedings and directs study of probation staffing, caseloads, overtime, reentry services, and funding incentives.[7]

SIAG does not suggest that the pending Safer Supervision Act itself determines the Commission's voting rule. Rather, it provides a useful policy model: when public safety permits, the federal system should remove unnecessary correctional restrictions and redirect limited supervision resources toward the people who need them most. That same principle counsels against creating a new five-vote barrier to retroactive relief. Sound sentence-reducing policy can improve resource allocation as well as fairness.

In addition, the Commission has provided clarifying language to amend Rule 2.2(d) with respect to the necessary vote for a motion to reconsider a vote on a specific action.[8] SIAG has no objection to this amendment.

Finally, in the August 27, 2026 notice, the Commission requested comment on additional questions regarding supermajority voting requirements.[9] It is SIAG's position that all voting requirements should be set as a simple majority of those present, provided that a quorum is present. If, however, the Commission sets the precedent of a supermajority vote requirement for retroactive application of guideline changes, our view is that any prospective change that may result in increasing a term of imprisonment recommended by the Guidelines should also be set at the same level.

---

[7] See S. 3077, 119th Cong. (2025) (congressional findings and provisions concerning individualized supervised-release determinations, early termination, appointment of counsel, and study of probation staffing, caseloads, and funding).

[8] Proposed Amendment, Part B (conforming amendment to Rule 2.2(d)).

[9] Proposed Amendment, Part B, Issues for Comment (supermajority voting requirements).

C. Part C — Participation: Federal Public and Community Defenders Are Essential

SIAG strongly supports the proposal to allow a representative of the Federal Public and Community Defenders to participate in Commission meetings and public hearings.[10] Their participation is essential because defenders bring information that cannot reliably be supplied by statistics alone.

Federal Public and Community Defenders are especially important to defendants because they:

- Protect the constitutional right to counsel for people who often lack the resources to retain private counsel and therefore help make meaningful adversarial testing possible in federal criminal cases;
- Represent defendants from the earliest stages of a case through sentencing and, where appropriate, appeals, post-conviction proceedings, sentence-reduction matters, and reentry-related litigation. Their experience therefore spans the full life cycle of federal sentencing;
- See how guideline provisions operate in individual cases, including interactions among offense levels, criminal history, mandatory minimums, plea decisions, departures, variances, supervised release, and collateral consequences;
- Can identify recurring guideline effects that aggregate data may not reveal—for example, when a technically neutral rule repeatedly produces disproportionate or unusually severe results in real cases;
- Bring the perspective of defendants who otherwise may have little practical access to national policymaking. For many indigent defendants, the Defender is the institution best positioned to explain how a proposed rule will affect people who must actually live under it; and
- Can help the Commission distinguish between changes that appear workable on paper and changes that create unintended litigation, implementation, fairness, or reentry problems in practice.

For these reasons, Defender participation should be treated as a substantive source of institutional knowledge, not merely as representation of an interested constituency. SIAG also

[10] Proposed Amendment, Part C (proposed amendments to Rules 3.1 and 3.4).

encourages structured participation by U.S. Probation, victims, formerly incarcerated people, families, reentry providers, researchers, treatment professionals, and community organizations so the Commission receives a balanced record.[11]

Participation by Standing Advisory Groups

SIAG supports the Commission's proposal to expand participation in Commission meetings and public hearings. However, we recommend that the Commission extend meaningful participation beyond the Federal Public and Community Defenders. Each of the Commission's recognized standing advisory groups merits a seat at the table.

Specifically, each standing advisory group should be permitted to designate one or two representatives to participate in Commission meetings and public hearings concerning policymaking or data, consistent with the participation contemplated for Federal Public and Community Defenders. Designated advisory group representatives should receive relevant nonconfidential policymaking materials sufficiently in advance to allow for informed participation and, where appropriate, should be permitted to engage in discussion, provide information, and pose questions during public hearings.

SIAG believes the use of designated representatives in this manner is important not only to ensure broader representation, but also to promote consistency, continuity, and relationship-building between the Commission and its advisory groups. Having the same designated representatives participate over time would allow those individuals to develop a deeper understanding of the Commission's processes and ongoing work, while enabling Commissioners and staff to develop sustained working relationships with representatives of each advisory group.

This approach would also ensure that the Commission benefits from the distinct perspectives its standing advisory groups were created to provide. Those perspectives should be incorporated meaningfully and consistently into the Commission's policymaking process, rather than depending on episodic invitations or the resources and institutional access available to particular

[11] See 28 U.S.C. § 994(o) (directing the Commission to consult with authorities on, and individual and institutional representatives of, various aspects of the federal criminal justice system).

stakeholders. This recommendation is also consistent with Rule 5.4's recognition of standing advisory groups as a mechanism for facilitating formal and informal input to the Commission.[12]

Participation by the Criminal Law Committee

With respect to the Commission's proposal to permit a designated representative of the Criminal Law Committee of the Judicial Conference to participate in Commission meetings and hearings, we believe such an addition is unnecessary. Our view is that judges appointed to the Commission already bring to the discussions their own "lived experience" in sentencing, thereby making additional participation of the Criminal Law Committee somewhat duplicative.

D. Part D — Ex Parte Communications: Adopt Option 3 with Equal Transparency Safeguards

The Commission's proposed amendment to Rule 4.3 would address *ex parte* communications.[13] The current rule merely states that the Commission does not intend to solicit *ex parte* comments as part of the rulemaking process.

The amendment dealing with *ex parte* communications has three optional approaches. Option 1 merely strikes the current language, leaving the question of *ex parte* communications unanswered (and unacknowledged). Option 2 would permit such communications (whether solicited or unsolicited) and require public disclosure, but only if they meet a certain standard. Under Option 2, *ex parte* communications would have to be disclosed only if they "provide significant, material information addressing the merits of a pending proposed amendment." The alternative disclosure standard of Option 2 would apply to any *ex parte* communications that are "of substantial significance and clearly intended to affect the ultimate decision on a pending proposed amendment." In either case, the *ex parte* communication would have to be disclosed in a manner akin to public comment. Option 3 would require public disclosure of all *ex parte* communications regardless of their significance.

Both Options 2 and 3 contain an exclusion from disclosure of *ex parte* communications from any of six sources: "(1) members of Congress, congressional staff, and legislative branch agencies;

[12] U.S. Sent'g Comm'n, Rules of Practice and Procedure, Rule 5.4 (standing advisory groups).

[13] Proposed Amendment, Part D (proposed amendment to Rule 4.3, Options 1 through 3).

(2) members of the Federal Judiciary (including the Judicial Conference of the United States and its committees); (3) United States Probation Officers; (4) the Federal Bureau of Prisons; (5) the Criminal Division of the United States Department of Justice; and (6) representatives of the Federal Public and Community Defenders."[14]

SIAG has concerns about the impact of *ex parte* communications, not only on the outcomes of the Commission's deliberative process, but with respect to the public perception of the integrity of that process. In a perfect world, there would be no *ex parte* communications on any matter before the Commission. However, we recognize that *ex parte* communications can occur, whether solicited or not.

Our view is that because *ex parte* communications occur, merely striking out the current language of Rule 4.3 (Option 1) is untenable. There should be a mechanism for the Commission to deal with *ex parte* communications. For transparency, SIAG supports public disclosure of *ex parte* communications as envisioned in both Options 2 and 3.

SIAG recommends Option 3. A disclosure rule covering all communications within the rule's definition is clearer, more evenhanded, and more consistent with public confidence than either no mandatory disclosure rule or a subjective significance threshold. Option 3 also:

- Creates a predictable rule rather than requiring the public to guess which private contacts were important enough to disclose;
- Promotes equal access by allowing the public to know what substantive information outside parties placed before Commissioners;
- Protects the Commission by reducing the appearance that undisclosed access may have influenced policy; and
- Preserves consultation: useful communications may occur, but covered substantive communications become part of an accessible record.

Should the Commission decide on Option 2, we would prefer the standard requiring disclosure to be set as follows: any *ex parte* communication intended "to provide significant, material information addressing the merits of a pending proposed amendment." Such an approach would

[14] Id. (bracketed exclusion in Options 2 and 3).

obviate the need to analyze what was intended by the person making the *ex parte* communication, a requirement that exists in the alternative language.

Exemptions from Disclosure

It should be noted that both Options 2 and 3 would exempt certain parties from the *ex parte* disclosure rules. We understand that the Legislative Branch (defined to include its staff and various sub-agencies) has a special relationship with the Commission that merits an exemption from public disclosure of *ex parte* communications.

With regard to the other five groups listed, however, we believe all *ex parte* communications should be made part of the record as soon as practicable. Unless such groups are permitted to participate in deliberations pursuant to the proposed amendments to Rules 3.1 and 3.4, there is no justification for excluding their *ex parte* communications. Of course, the Commission should protect privileged, personal, security-sensitive, law-enforcement-sensitive, or otherwise confidential material through redaction or an appropriate summary. Routine scheduling, administrative, and technical contacts also should remain outside the rule. The bottom line is that allowing substantive off-the-record input from interested parties would negatively impact the public's perception of the Commission and compromise its role as a neutral fact-finding and policymaking body.

Scope, Timing, and Application to Commission Staff

The Commission also seeks comment as to the scope of any modification to the *ex parte* disclosure rules.[15] Specifically, the Commission has asked whether it should adopt a provision that goes beyond the notice-and-comment rulemaking procedures to cover proposed priorities and amendments to the Rules of Practice and Procedure.

SIAG supports application of *ex parte* disclosure rules to both proposed priorities and amendments to the Rules of Practice and Procedure. The Commission's determination as to what priorities should be addressed is nearly as important as how such priorities should be addressed. We also believe questions of parliamentary procedure have a direct impact on whether and how

[15] Proposed Amendment, Part D, Issues for Comment (scope of any *ex parte* provision and application to Commission staff).

the Guidelines are amended. In short, both of these aspects of the Commission's work directly impact stakeholders and, thus, merit disclosure of *ex parte* communications.

Assuming the Commission adopts an *ex parte* rule, SIAG's view is that public disclosures should be required with no less than seven days' notice before any public hearing takes place. This would allow stakeholders to address any arguments, claims, or data contained in the *ex parte* communication.

Lastly, the Commission has asked for views on whether *ex parte* rules should apply to communications with Commission staff. It is SIAG's view that such rules should also apply to senior-level Commission staff, defined as those at the Deputy Director level or higher, as well as the General Counsel.

E. Part E — Agenda-Setting and Rule 5.2 Impact Analysis: Support with Recommended Guardrails

SIAG supports a more participatory priority-setting process.[16] The public should be invited to identify problems before the Commission's agenda is substantially formed, and the Commission should explain in plain language why major priorities were selected.

Providing stakeholders with as much time as possible to participate in the priority-setting process should be an important goal of the proposed amendment to Rule 5.2(a)–(b). Accordingly, SIAG urges the Commission to set a March deadline for publication of a Federal Register notice requesting public input concerning Commission inquiries and policymaking actions. For the same reasons, SIAG requests that the period for submitting proposed priorities be at least 60 days and that any planning sessions be held no later than August of each year. These three elements would expand the window for public input into the Commission's activities.

Incarcerated Labor Should Not Weigh Against Sentence-Reducing Policy

SIAG also respectfully recommends an important limitation on impact analysis under Rule 5.2. When the Commission considers the number of defendants potentially affected and the impact on penal, correctional, and other resources,[17] the Commission should not treat the loss of

[16] Proposed Amendment, Part E (proposed amendments to Rule 5.2(a)–(b)).

incarcerated workers from Bureau of Prisons job assignments as a cost weighing against a sentence-reducing priority.

This limitation is important for several reasons:

- Liberty decisions should turn on the purposes of sentencing, public safety, proportionality, law, and reliable evidence—not on an institution's operational preference to retain a workforce;
- Incarcerated people may perform skilled, necessary, and economically valuable work at compensation far below ordinary market wages. Counting the loss of that labor as a negative impact could create a structural incentive to maintain incarceration because the institution benefits from the person's continued confinement; and
- Such a metric could obscure the distinction between legitimate correctional-resource planning and an economic dependency on incarcerated labor.

If a sentence-reducing policy creates an operational staffing need inside the Bureau of Prisons, that need should be identified transparently as a staffing or appropriations issue and addressed through civilian hiring, competitive compensation, contracting where lawful and appropriate, training, automation, or other workforce planning—not by treating continued incarceration as the labor solution.

Nothing in this recommendation prevents the Commission from analyzing genuine correctional effects such as bed space, security, programming, medical care, release preparation, or supervision demand. SIAG asks only that the economic value of a defendant's prison job assignment not count against a policy that would otherwise support release or reduced incarceration.

SIAG recommends that Rule 5.2 impact analyses expressly distinguish legitimate public-resource consequences from the replacement cost or economic value of incarcerated labor.

[17] See 28 U.S.C. § 994(g) (directing the Commission to take into account the nature and capacity of the penal, correctional, and other facilities and services available, and to make recommendations concerning any change or expansion in those facilities and services); Rules of Practice and Procedure, Rule 5.2.

F. Part F — Policymaking Information: Support with Recommended Guardrails

SIAG supports Part F's objective of making information relevant to the amendment process available early enough to promote meaningful public understanding and participation.[18] At the same time, we recognize that the Commission must have room for candid internal analysis, testing of alternatives, and revision of tentative ideas.

For Rule 5.3(b)(1), SIAG supports a scope of disclosure that includes "a public notice of any public or nonpublic meeting, the meeting agenda, and any document, briefing or information relevant to the Commissions priorities or the amendment process generated for or given to commissioners in preparation for such a meeting." We further support public release of written minutes of nonpublic meetings, including a *detailed* summary of discussions relevant to the Commission's priorities and amendment processes. (Confidential, privileged, or personal information need not be disclosed.) Such a summary should go beyond mere topics. It should provide the public with insight and context concerning the need for any changes, the basis for any decisions to be made, and the data considered that supports or refutes the modifications to the Guidelines and priorities under consideration. For consistency, we believe that such disclosures should be made in the ordinary course of Commission operations, rather than require an explicit request by a voting member of the Commission. We are agnostic as to the specific format or structure of written records of nonpublic meetings.

We are cognizant of the fact that disclosure of information irrelevant to priorities or amendments could actually undermine the goal of transparency, in that extraneous information may make it more difficult for the general public to understand the policy changes being considered. Moreover, it is unclear what the benefit of requiring a written and comprehensive record of all topics discussed in nonpublic meetings would be if such a record is not publicly disclosed. With the dual goals of fostering transparency and public understanding of the Commission's deliberations as guideposts, we believe the Commission and its staff can make decisions as to the granularity of such disclosures via the written record.

SIAG recommends that final or substantially complete meeting materials intended to frame a Commission meeting ordinarily be posted at least seven calendar days before the meeting when

[18] Proposed Amendment, Part F (proposed Rule 5.3(b)(1)–(3)) and Issues for Comment concerning preliminary working drafts and records of nonpublic meetings.

practicable. Where advance release is not reasonably feasible, the materials should ordinarily be posted within seven calendar days after adjournment, subject to Rule 5.3(c). Seven days gives the public a meaningful opportunity to review substantive materials without imposing an unnecessarily long pre-meeting delay.

For Rule 5.3(b)(2), SIAG supports the proposed fourteen-day period for public release of written minutes of public and nonpublic meetings. Fourteen days promotes timely transparency while allowing sufficient time to prepare an accurate record, identify protected material, and make appropriate redactions.

For Rule 5.3(b)(3), documents affirmatively approved for public release should be posted promptly. SIAG recommends a presumptive period of seven calendar days after approval, while retaining "as soon as practicable" flexibility for unusually voluminous material, required redactions, technical preparation, or other exceptional circumstances.

Preliminary and Pre-Decisional Working Drafts

SIAG is cognizant that preliminary and pre-decisional working drafts present a different concern. Requiring publication of every tentative draft, abandoned alternative, internal markup, or early analytical memorandum could chill robust internal discussion, discourage candid exploration of competing approaches, and create public confusion about positions the Commission has not adopted. Transparency is strongest when it illuminates the basis of policymaking without converting every stage of internal deliberation into a public proceeding.

Accordingly, SIAG does not support a categorical rule requiring disclosure of all pre-decisional drafts. We respectfully defer to the Commission's judgment in defining which preliminary materials should remain protected so Commissioners and staff can deliberate candidly. We recommend, however, that once a draft, analysis, or alternative becomes sufficiently developed that it materially frames a Commission meeting or forms a substantial basis for public policymaking, public disclosure should take place unless confidentiality, privilege, deliberative integrity, personal privacy, law-enforcement interests, or another legitimate concern counsels otherwise.

This approach gives Rule 5.3(b)(1)–(3) a workable timetable while respecting genuine deliberative space: seven days before a meeting where practicable (or within seven days afterward when advance release is not feasible); fourteen days for meeting minutes; and presumptively seven days after approval for other documents authorized for public release.

G. Part G — Technical and Clerical Changes: Support

SIAG supports the technical revisions that improve clarity and consistency.[19] The Commission should also publish a plain-language guide so that participation does not depend on legal training or institutional resources.

H. Part H — Invitation to Propose Further Revisions: Resource Implementation Rather Than Blocking Reform

Sentence-reducing reform can transfer work from prisons to courts, probation, counsel, treatment systems, and community providers.[20] That workload is real and should be respected. The appropriate response, however, is advance planning and adequate resources—not preservation of incarceration that is no longer justified as the primary mechanism to address criminal conduct. Specific revisions to the Rules of Practice and Procedure should encourage the following:

- Preparation of district-level forecasts of motions, resentencing hearings, releases, and supervision demands before implementation;
- Utilization of delayed or phased effective dates when needed for orderly review and reentry preparation;
- Provision of standardized eligibility worksheets, model reports, centralized data extracts, and automated case-identification tools;
- Allowance for temporary staffing, term appointments, detailees, or targeted appropriations for districts experiencing concentrated workload;
- Early coordination among U.S. Probation, the Bureau of Prisons, courts, Federal Defenders and CJA counsel, prosecutors, and community providers;

[19] Proposed Amendment, Part G (clerical changes to Rules 3.2, 3.3, and 5.4).

[20] Proposed Amendment, Part H (Issue for Comment inviting further revisions to the Rules).

- Improved guidance concerning release planning before release, including identification documents, medication continuity, housing, transportation, treatment, employment, and benefits;
- Increased utilization of risk-and-needs information to match supervision intensity to the individual rather than automatically imposing the most resource-intensive supervision;
- Expansion of contracts and partnerships with qualified community treatment, housing, workforce, and reentry providers so Probation officers can supervise effectively without being required to personally supply every service;
- Public tracking of implementation and use of the results to improve later retroactivity decisions; and
- Recognition that retroactivity can be paired with an implementation period designed to permit individualized judicial review and orderly reentry preparation, as demonstrated by the Commission's Amendment 821 experience.[21] That model should be refined, not abandoned.

IV. CONCLUSION

SIAG respectfully urges the Commission to adopt Rules that do more than make policymaking visible. The Rules should make the process meaningfully accessible, protect balanced participation, and ensure that procedural structures do not unnecessarily impede correction of sentencing policies that the evidence no longer supports.

Accordingly, SIAG recommends: Option 3 for *ex parte* communications with equal-transparency safeguards; meaningful participation by Federal Public and Community Defenders and other directly affected stakeholders; no new five-vote barrier to retroactivity; a simple-majority approach wherever legally permissible for sentence-reducing action; robust implementation support for Probation and other agencies; and an express rule that the economic value or replacement cost of incarcerated labor in Bureau of Prisons job assignments should not weigh against a sentence-reducing priority or amendment.

[21] See U.S. Sent'g Comm'n, Guidelines Manual, App. C, amends. 821 and 825 (eff. Nov. 1, 2023) (making Parts A and B of Amendment 821 retroactive while providing that reductions under those parts take effect no earlier than February 1, 2024, to permit orderly review and release preparation).

A federal sentencing system should never have a procedural or economic incentive to incarcerate a person longer because the institution benefits from that person's labor. Correctional operations can and should be planned around lawful sentencing policy—not the other way around.

In closing, SIAG remains committed to continued engagement with the Commission and looks forward to supporting thoughtful, data-driven refinement of the Rules of Practice and Procedure.

Respectfully submitted,

SENTENCE IMPACT ADVISORY GROUP (SIAG)

J.C. Jones Anderson	Carl M. Reddix (Chair)
Adam B. Clausen	David H. Safavian, Esq.
Beth A. McRavion	Bahiya H. Shakur
Shaneva D. McReynolds	Aaron M. Wright

United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Brian Morris, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

Voting Members
Charles Addington
Gina Allery
Honorable Natasha K. Anderson
Manny Atwal
Neil Fulton
Jami Johnson
Honorable Gregory Smith
Carla R. Stinnett

October 26, 2026

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE Suite 2-500
South Lobby Washington, DC 20

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the Proposed Amendment on the Rules of Practice and Procedure announced by the U.S. Sentencing Commission.

Part C.

TIAG supports the proposed Part C. In particular, we support the option that would provide for the inclusion of a representative from the Federal Public Defenders and the Committee on Criminal Law in meetings in which Commission staff is present. TIAG is unique among all the Commission's advisory groups in that we are united by our experience in working in Indian Country, instead of by a shared position relative to the criminal legal system. TIAG consists of judges, prosecutors, defense attorneys, and members who work outside of the federal system. We work cooperatively, under the leadership of the Chair and with support from Commission staff, and our diversity of professional viewpoints is beneficial in identifying issues and developing our positions.

TIAG has long supported the addition of a representative from the Federal Public Defender as a means of strengthening the Commission's work. Likewise, having a representative from the Committee on Criminal Law can help strengthen dialogue between the Commission and judges.

Part F.

TIAG supports transparency and the release of documents and comments relied upon by the Commission in its deliberative process. In particular, TIAG again urges the Commission to include and make public data pertaining to the impact of its proposals on Native American defendants.

Sincerely,

Brian Morris, Chair

VICTIMS' RIGHTS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

Christopher Quasebarth, Chair
Colleen Clase
Shawn M. Cox
Rachael Denhollander
Liz Evan
Michelle Means
Colleen Phelan
Theresa Rassas
Richard Welsh

October 26, 2026

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Request for Comment on Proposed Amendments to Rules of Practice and Procedure

Dear Chair Reeves, Vice-Chairs, Members of the Commission:

Thank you for providing your Victims' Rights Advisory Group ("VRAG") this opportunity to provide public comment to the Sentencing Commission ("Commission") on its Proposed Amendments to the Commission's Rules of Practice and Procedure ("Rules" or "Rule"). We each take seriously our advisory group responsibility to assist you in fulfilling your statutory responsibilities under 28 U.S.C. § 994(o). Your Rules provide important guidance directing your action on reviewing and amending the federal Sentencing Guidelines, which action directly affects federal crime victims.

Part A of the proposed amendment would make changes to the introduction ("About the Commission") of the Rules to closely track the statutory purposes of the Commission set forth in 28 U.S.C. § 991(b).

The VRAG advises the Commission to adopt the Part A proposed amendment to amend the Rules Introduction to track closely the statutory language of 28 U.S.C. § 991(b). The proposed amendment directly guides the Commission to follow these statutory purposes, removes any ambiguity of purpose from the current introduction, and provides good assurance to the public that the Commission will follow its statutory purpose.

Part B of the proposed amendment would revise Rule 2.2 (Voting Rules for Action by the Commission) to provide that the decision to make an amendment available for retroactive application shall require the affirmative vote of at least five members at a public meeting.

The VRAG strongly advises the Commission to adopt the amendments proposed in Part B, as drafted, to amend Rule 2.2(b) to increase the number of votes to five necessary to make a Guidelines amendment adopted by the Commission retroactive to inmates currently serving a sentence.[1] The retroactive application of an adopted Guidelines amendment deeply affects crime victims: it reopens the wounds from the offenses committed upon them; undermines their sense of finality in the court process; and provides them no benefit since a retroactive application may only lessen a sentence already imposed. Each Commissioner must always remember these effects on victims if considering overriding its general presumption against retroactive application.

Consistent with our prior public comments, the VRAG supports the Commission's general presumption against the retroactive application of Guideline amendments.[2] Concerns about retroactivity have been conveyed to this Commission by the VRAG and other groups during past amendment cycles. The need for retroactive application of an adopted Guidelines amendment should be so high in the Commission's consideration that a super-majority, as proposed, should be necessary to override the general requirement of prospective application alone.

The Commission's factors for retroactive application set stringent standards:

> Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

---

[1] As part of this endorsement, the VRAG also supports the bracketed proposed amendment in Rule 2.2(b), requiring the affirmative vote of four members if there are only four members serving on the Commission, and the correlating proposed amendment to Rule 2.2(d) of the number of votes needed regarding reconsideration of Commission action.

[2] "Generally, promulgated amendments will be given prospective application only." *U.S.S.C. Rules of Practice and Procedure*, 4.1A.

USSG § 1B1.10, Background.

Common sense dictates that a super-majority of the Commission should agree that this standard of "magnitude" and "difficulty of application" is met before an amendment is made retroactive. The impact on victims needs to be fully considered in that decision.

Retroactive application of Guidelines amendments undermines predictability, certainty and finality for all actors in the criminal justice system. Judicial officers, court staff, United States Attorneys' Offices, federal defenders, Bureau of Prison staff, and probation officers each will face a tremendous administrative burden that is funded by taxpayers. Judges and court staff will receive numerous motions from inmates regardless of whether the amendment is applicable to their case and the government will be required to respond. Judges, already carrying extremely heavy caseloads, will spend hours reviewing motions and drafting rulings.

Retroactive application also risks the erosion of public confidence in the criminal justice system. When an offender commits a crime, the public presumes that the offender will be subject to the laws in effect at the time of the offense and be held accountable. When an offender is perceived to not be held accountable, or to be held less accountable by a future sentence reduction, the public may lose respect for both our laws and our legal process.

The most significant impact of retroactivity falls on crime victims. Retroactivity undermines the intent of the Crime Victims Rights Act ("CVRA"), 18 U.S.C. § 3771,[3] "to

[3] 18 U.S. Code § 3771(a) reads:

> (a)Rights of Crime Victims.—A crime victim has the following rights:
> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> (5) The reasonable right to confer with the attorney for the Government in the case.

transform the federal criminal justice system's treatment of crime victims…" Honorable Jon Kyl, et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, And Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L.R. 581, 593 (2005). Victims' rights are "intended to reestablish the important and central role of victims, to humanize and individualize the victims of crime, and to recognize that victims also have rights to fair treatment and due process in criminal proceedings." Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 Ariz. St. L.J. 421, 424 (2015).

The CVRA provides crime victims [4] the right to be treated with fairness and respect. 18 U.S.C. § 3771(a)(8).[5] A lack of certainty and finality in criminal sentencing is unfair to victims. Fairness requires an acknowledgement by the criminal justice system of the trauma victims of violent crime endure at the hands of violent offenders as well as the secondary trauma from a victim's interaction with the justice system.

Victims have a compelling interest in certainty and finality as it is essential to their emotional healing and recovery. Violent crime, such as the murder of a loved one or robbery at gunpoint, causes significant psychological implications conceptualized within a post-traumatic stress disorder ("PTSD") framework, the most consistently documented consequence of violent crime. Heidi M. Zinzow, et al., *Examining Posttraumatic Stress Symptoms in a National Sample of*

> (6) The right to full and timely restitution as provided in law.
> (7) The right to proceedings free from unreasonable delay.
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
> (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
> (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

[4] "The term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e)(2)(A).

[5] A Guidelines Policy Statement requires that the courts ensure that the statutory crime victim rights are afforded: "In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of federal law pertaining to the treatment of crime victims." *USSG § 6A1.5, p.s.*

Homicide Survivors: Prevalence and Comparison to Other Violence Victims, 24 J. Traum. Stress 743 (December 2011); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traum. Stress 182 (2010); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Traum. Stress 119 (2003); Patricia A. Resick, *The Psychological Impact of Rape*, 8 J. Interpersonal Violence 223, 225 (1993). Victims of all types of violent crime can experience PTSD or various symptom clusters, but homicide survivors are twice as likely to meet the criteria for PTSD and report more symptoms of PTSD than victims of other types of trauma. Zinzow at 744. The high prevalence of PTSD in homicide survivors may be partially due to the fact that survivors are forced to cope not only with the loss of a loved one, but also the sudden and violent nature of their death. Zinzow at 744, citing Angelynne Amick-McMullan, et al., *Family Survivors of Homicide Victims: Theoretical Perspectives and an Exploratory Study*, 2 J. Traum. Stress 21, 35 (1989). Studies also suggest a connection between initial victimization and later depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and even suicide. Parsons & Bergin at 182.

Delayed judicial proceedings negatively affect crime victims. Retroactive application of Guidelines amendments is a delay in the criminal justice system. A prolonged experience in the criminal justice system adds to the intense and painful consequences of initial victimization. *Id*. at 182-183; see also Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. Traum. Stress 159, 159 (2003). Secondary victimization often causes more harm than the initial criminal act. Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Soc. Just. Res. 313, 321 (2002). A victim's experience with the justice system often "means the difference between a healing experience and one that exacerbates the initial trauma." Parsons & Bergin at 182.

The lead sponsor of the CVRA, Sen. Jon Kyl, made clear the right to fairness includes the right to due process. 150 Cong. Rec. S4269 (Apr. 22, 2004) (Senator Kyl) (explaining that the right to be treated with "fairness" under the federal Crime Victims' Rights Act, 18 U.S.C. § 3771, "includes the notion of due process"). The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v.*

Eldridge, 424 U.S. 319, 333, (1976); *accord Hamdi v. Rumsfeld*, 542 US 507, 533 (2004) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' These essential constitutional promises may not be eroded."). Congress intended for victims to have a right to due process. The Commission's consideration of how victim rights under the CVRA are affected by the retroactive application of Guideline amendments is critical. The proposed rule amendment requiring five votes to approve a retroactive application of an approved Guidelines amendment is proper.

Since there is no other Commission action that has the dramatic impact that retroactive application has, the VRAG sees no need for the Commission to require a super-majority vote for any of the Commission's Guidelines amendments. Amendments which may raise sentence levels will always be prospective so will not run the risk to inmates of raising an already imposed sentence and will never exceed the statutory maximum sentence that may be imposed such that the current simple majority vote requirement is more than appropriate.

For the foregoing reasons, the VRAG strongly advises the Commission to adopt the proposed amendment language of Part B.

Part C of the proposed amendment would amend Rules 3.1 (Meetings) and 3.4 (Public Hearings) to allow a representative of the Committee on Criminal Law of the Judicial Conference of the United States and a representative of the Federal Public and Community Defenders to participate in meetings and public hearings of the Commission.

The VRAG strongly advises the Commission to reject the amendments proposed in Part C to amend Rules 3.1 and 3.4 to allow a representative of the Committee on Criminal Law of the Judicial Conference of the United States and a representative of the Federal Public and Community Defenders to participate in meetings and public hearings of the Commission.

These proposed amendments do not include any identification of a problem that the Commission believes needs to be remedied or why the proposed Part C amendments are the proper remedy. Without which, Part C is unnecessary, unneeded and may send a bad public

signal of the selective participatory inclusion of some people in the Commission's statutory duties while excluding others.

The Committee on Criminal Law of the Judicial Conference of the United States and the Federal Public and Community Defenders each currently possess a very important role in the Commission's Sentencing Guidelines work. Each provides important and reasoned public comments and opinions to the Commission, based on their wealth of experience, participation and observation in the federal criminal court's sentencing process. Each makes the federal criminal court process work and each understands its strengths and weaknesses. Consequently, the Commission gives great weight to and respect for their public comments and opinions.

The Commission's encompassing inclusion of Committee on Criminal Law of the Judicial Conference of the United States and the Federal Public and Community Defenders in its Sentencing Guidelines work is the very reason that they need not be included in Commission meetings or Commission public hearings, with attendant participatory duties, as are proposed in the Part C amendments. There is no evidence that their voices in Commission public comment are currently unheard or dismissed by the Commission. Even were they, the Commission offers no explanation as to why the remedy is amending the Commission's rules to make them specialized participatory non-voting members in Commission meetings and public hearings.

Participatory inclusion in the Commission is a statutory responsibility for Congress. Congress legislatively determines the composition of the Commission and the process of appointment and confirmation, 28 U.S.C. § 991(a). That statutory process already requires pre-appointment consultation by the President with a variety of identified interested groups in the criminal justice process: "*judges*, prosecuting attorneys, *defense attorneys*, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process" (emphasis added). *That statutory process also requires that the Commission include three Federal judges from a recommended list of six from the Judicial Conference.* That statutory process requires the Attorney General (USDOJ) to be a non-voting *ex officio* member. That statutory process, already providing for important input in the Commission selection process by judges, defense

lawyers, and the Judicial Conference, does not authorize the Commission by Rule to add other members of the Judicial Conference or Federal Public Defenders or, frankly, anyone else.

In addition to whether the proposed rule amendment is unauthorized by statute, the inclusion of the Committee on Criminal Law of the Judicial Conference of the United States and the Federal Public and Community Defenders in the Commission's meetings and public hearings, including *participation* in the Commission's work at those meetings and hearings, plainly sends a public message of selective inclusion. The proposed inclusion directly excludes every other stakeholder and member of the public having an interest in the criminal court sentencing process from similar attendance and participation. Why are the victims, the former inmates, the penologists, the psychologists and others not included?

The Commission offers no background data to support this proposed Part C rules amendment to explain:

- Why the Commission believes that they are not adequately listening to either the Committee on Criminal Law of the Judicial Conference of the United States and the Federal Public and Community Defenders.

- What factors the Commission used to select these extra participants yet exclude others interested in the criminal justice process from the same participation.

- How this proposed rules amendment affects the public comment and public hearing processes.

- How allowing these participants to ask questions at public hearings benefits the Commission (or does not) when the Judicial Conference and the Federal Public Defenders are already submitting public comment and testifying at those public hearings.

- How this proposed inclusion/exclusion process makes the Commission's work more open or effective.

- Whether the Commission's work could be more open and/or more effective by including more participants than just these two.

Without important information from the Commission as to why the Commission believes that there is a problem to be remedied, or that this is the proper remedy, the VRAG

strongly advises the Commission to reject the amendments proposed in Part C to amend Rules 3.1 and 3.4.

Part D of the proposed amendment sets forth three options for revising the provision of Rule 4.3 (Notice and Comment on Proposed Amendments) that addresses ex parte communications.

In furtherance of a more open governmental process, so the public has a clearer concept of all communications the Commission receives which may affect Commissioner's official actions, the VRAG advises the Commission to adopt Part D's proposed amendment 3 to Rule 4.3, with modification to clarify how the proposed rule will operate. These modifications should include:

- Adding the Commission's appointed Advisory Groups to the proposed bracketed language excluding certain communications from the definition of *ex parte* communications.

- The Commission needs to specify in the rule how they and their staff will identify, record and make public *ex parte* communications.

- The rule must clarify that any *ex parte* communication received after the conclusion of any public comment period will not be considered.

- Specifying that *ex parte* communications received include those communications that are made to Commission staff as well as to Commissioners.

- Identifying the reasons for redactions, if used (e.g., confidential personal information).

Part E of the proposed amendment would amend Rule 5.2 (Notice of Priorities) to make the procedure for setting the Commission's policymaking agenda every year more participatory and transparent.

The VRAG respects and encourages the Commission to adopt a more open and inclusive Sentencing Guidelines amendment process. Doing so will successfully improve the Commission's fulfillment of its important statutory responsibilities. Doing so will give

stakeholders and the public greater confidence in the Commission's governmental work significantly affecting those that commit federal crimes, those upon whom federal crimes are committed, their families and communities.

The VRAG advises the Commission to adopt, with slight modification, the part of the amendment adding the new Rule 5.2(b), providing for a planning session on priorities which includes the identified stakeholder participants.

The VRAG advises the Commission to reject the proposed amendment to Rule 5.2(a), as unnecessary.

The VRAG supports the new Rule 5.2(b) because the more open discussion it will provide about the Commission's proposed priorities will give the Commission, the stakeholders and the public a better sense of the reasons underlying Commission priorities. This, in turn, will present a keener forward projection as to how the Commission may turn those priorities into needed Sentencing Guideline amendments.

As a modification to the proposed Rule 5.2(b) amendment, the VRAG advises the Commission, instead of making Step 1 of the planning session proposed in new Rule 5.2(b) a "public hearing," which indicates a more formalized structure, to make Step 1 a "non-public meeting," pursuant to current Rule 3.3, much like the Commission's September 2026 Rules Roundtable.[6] A less formal meeting will encourage more open interaction and discussion than the stilted format of a public hearing. As one commentor at that 2026 Roundtable suggested, the Commission using an independent moderator to lead the meeting may make the process more consensus based rather than adversarial.

Regarding the proposed amendment to Rule 5.2(a), creating a process for publicly soliciting priority proposals, the VRAG does not advise the Commission to adopt this rule amendment. The public solicitation of priority proposals does not appear to be an efficient use of time for the Commission, its staff or the public and does not seem to be an effective mechanism for bringing urgent matters to the Commission's attention.

[6] The VRAG defers to the Commission and its staff as to whether they believe a public hearing legally is required at this priority consideration stage, but it does not appear to VRAG that the language of either 28 U.S.C. § 994(x), 28 U.S.C. § 995(a)(21) or Rule 3.4 mandate a public hearing.

The reasons for more urgent Commission Sentencing Guidelines priorities, such as new or amended legislation, Supreme Court opinion or Circuit Court conflicts, will be obvious to stakeholders and the public when the Commission makes those concerns a priority.

Less urgent priorities take time to develop, starting with identification of a Sentencing Guideline concern to the Commission, followed by the Commission and its staff's decisions to research and review the concern raised. These concerns may come to the Commission's attention throughout the course of a calendar year from judges, the DOJ, Public Defenders, defense lawyers, probation officers, victims, inmates and others. These concerns may take some extended period of time for the Commission to determine whether the concern has a broad effect and, if so, what Guideline amendment(s) may remedy the concern.

The public solicitation of proposed priorities in a compressed timeframe, as proposed in new Rule 5.2(a), does not seem likely to identify priorities that the Commission can readily immediately address in the same annual amendment cycle. It does seem, however, that it may generate a greater number of requests for priorities that the Commission and its staff do not find significant but will nonetheless have to be reviewed and considered in a compressed time frame.

Without the proposed Rule 5.2(a), less urgent concerns will still be brought to the Commission's attention, but the Commission and its staff will have a more reasonable time to consider them. If these concerns then are determined by the Commission to make them priorities, the Commission will be in a better position to identify the underlying information and reasons for the priorities, making stakeholders and the public more fully informed.

For these reasons, the VRAG advises the Commission to adopt proposed Rule 5.2(b), with the suggested modification, and reject proposed Rule 5.2(a).

Part F of the proposed amendment would amend Rule 5.3 (Information Relevant to the Amendment Process) to require the public disclosure of (1) meeting materials generated for or given to the commissioners in preparation for a public or nonpublic meeting; (2) written minutes of any public or nonpublic meeting held by the Commission; and (3) any document approved for public release by a majority of members of the Commission.

The VRAG respects and encourages the Commission to adopt a more open and inclusive Sentencing Guidelines amendment process. The VRAG defers to the Commission on this proposed rule amendment.

Part G of the proposed amendment would make technical and clerical changes to Rules 3.2 (Public Meetings), 3.3 (Nonpublic Meetings), and 5.4 (Advisory Groups).

The VRAG advises the Commission to adopt these Part G amendments.

Part H of the proposed amendment provides an issue for comment on possible further revisions to the Rules.

The VRAG has no additional comment on Part H.

Thank you for this opportunity for VRAG to address the Commission's proposed Rules amendments.

Respectfully yours,

Christopher Quasebarth

The Victims' Rights Advisory Group
Christopher Quasebarth, Chair

pc: Victims' Rights Advisory Group Members

October 26, 2026

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Re: Comments on Proposed Amendments to the Commission's Rules of Practice and Procedure — Parts B and C

Dear Chair Reeves and Members of the United States Sentencing Commission:

Impact for Equity, a law and policy center advocating for housing and criminal legal systems change at the city and state level in Chicago and Illinois, along with our partners signed below, **are writing to urge the Commission to reject Part B and adopt Part C of its proposed amendments to the Rules of Practice and Procedure**.

These proposals matter because the Commission's decisions affect real people, families, and communities. The Commission should make it possible to extend updated, fairer sentencing policies to people already serving sentences, while ensuring that all advocates most familiar with how sentencing guidelines impact real people have access to the same information as the Department of Justice.

Part B: Reject the proposed five-vote requirement for retroactivity.

We strongly oppose Part B, which would require a supermajority for the Commission to make a sentencing-guideline amendment retroactive, rather than the existing four-vote threshold. This proposal would create an unnecessary and significant barrier to retroactivity, making it harder for people already serving federal sentences to benefit from corrective sentencing reforms.

Overly severe criminal penalties remain a pervasive problem in the criminal legal system. They reflect unfair prejudices and misunderstandings of deterrence and recidivism from the "tough-on-crime" era of the 1980s and 1990s. Punitive laws—such as truth-in-sentencing, mandatory minimums, and three-strikes laws—catalyzed mass incarceration and excessive sentences, especially for Black people who are incarcerated at rate much higher than white people when comparing each size of their population.

Now, because the average sentence length has increased dramatically while opportunities for people to earn release have dwindled, thousands of people continue to serve overly long sentences in increasingly unmanageable facilities. Despite overwhelming evidence that these policies are costly and inefficient methods of improving public safety, harsh sentencing laws remain on the books.

Many laws have been passed to effectively reduce sentence lengths, and thus, the number of people incarcerated. But, because these laws tend to only apply prospectively, the thousands of people who were impacted by punitive sentencing structures are being left behind. State legislatures—including the Illinois legislature— with precedent guidance of the United States Sentencing Commission and Supreme Court have alleviated these harsh penalties with retroactive criminal sentencing reforms. The

Federal Government sets the example. Retroactive federal reforms, such as the First Step Act of 2018 and the U.S. Sentencing Reform Act of 1984, inspired state level retroactive reforms that have led to significant impacts on decarceration and safely returning people home to their communities.

Illinois follows the United States retroactivity analysis exhibited in Landgraf v. USI Film Products. Landgraf wrote that a Legislature's clear intent of a statutes temporal reach assures the Courts that the legislature has determined the benefits of retroactive legislation outweigh the potential for unfairness. Retroactive effects are rightly limited by the ex post facto clause, meaning that people currently serving federal sentences are constitutionally protected from increases in punishment. Legislators should be encouraged to draft retroactive amendments because it is an essential tool for fairness. These reforms allow us to identify and fix laws that fail to acknowledge that people inside of prisons have the capacity to change. Retroactive reforms are necessary for new laws to impact everyone impacted by these injustices, regardless of their sentencing date.

As such, increasing the threshold to pass ameliorative retroactive amendments sends a message to each state government and every U.S. Resident, incarcerated or free, that we are unwilling to fully correct our mistakes.

Retroactivity helps bring federal sentencing practices into alignment with our evolving understanding of justice, fairness, and proportional punishment. Research now shows that long sentences do not decrease recidivism rates. Retroactive application of reforms also helps us reduce the aging prison population, who research shows age-out of crime.

When the Commission determines that a sentencing guideline should change, and that change is beneficial to people already sentenced, our default approach should be to apply the law to everyone—not to make it even harder for those inside to benefit from that change.

The existing four-vote threshold provides an appropriate safeguard for consequential Commission decisions. Requiring an additional vote for retroactivity would risk allowing a minority of commissioners to block relief, even when a majority of the Commission’s members otherwise support making a reform retroactive. It would create an additional obstacle to correcting sentences that no longer reflect and the Commission’s, and our country’s, current sentencing policies.

The Commission should not make it harder to extend appropriate sentencing reforms to people who are already incarcerated, especially when we now know those punitive measures were enacted out of racial prejudice and constructed fear.

Retroactivity can offer a meaningful opportunity to correct excessive sentences, reunite families, and ensure that changes in sentencing policy reflect our current views of fairness and more effective ways to increase public safety. We urge the Commission to reject Part B and retain the existing four-vote threshold.

Part C: Support meaningful participation by the federal defender community.

We strongly support Part C, which would allow representatives of the Federal Public and Community Defenders to participate in Commission meetings and public hearings.

It is long past time for the federal defender community to have a meaningful seat at the table with the

Commission. The Department of Justice has a nonvoting representative on the Commission, yet the federal defenders who represent people accused of federal crimes have not had comparable representation. That imbalance is fundamentally unfair.

Federal defenders bring an essential perspective to sentencing policy. They work directly with people facing federal charges, understand how sentencing rules operate in courtrooms across the country, and see the consequences of sentencing decisions for individuals, families, and communities. Their experience can help the Commission understand the practical effects of its policies and identify opportunities to make the federal sentencing system more just and effective.

The Commission should hear from the full range of stakeholders affected by federal sentencing, including those who represent people facing the power of the federal government. Providing federal defenders with a seat at the table would improve the Commission's policymaking and help correct a longstanding imbalance in whose perspectives are represented.

We urge the Commission to adopt Part C and ensure that federal defenders can meaningfully participate in its meetings and public hearings, with access to relevant policymaking materials.

Conclusion

The Commission's rules should promote fairness, informed decision-making, and meaningful participation. Part B would make it more difficult to extend appropriate sentencing reforms to people already sentenced. Part C would help ensure that the Commission hears from an essential and historically underrepresented perspective.

We urge the Commission to reject Part B and adopt Part C. These choices would help protect the possibility of fairer sentences for people already incarcerated while making the Commission's work more inclusive and responsive to the realities of the federal criminal legal system.

Thank you for considering our comments and for your work on federal sentencing policy.

Sincerely,

Impact for Equity

ACLU of Illinois

Illinois Alliance for Reentry and Justice

Illinois Prison Project

Parole Illinois

Unitarian Universalist Prison Ministry of Illinois

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

October 26, 2026

Honorable Carlton W. Reeves, Chair

United States Sentencing Commission

One Columbus Circle, N.E.

Suite 2-500, South Lobby

Washington, D.C. 20002-8002

Submitted via https://comment.ussc.gov

Re: Public Comment on the Proposed 2026 Amendment to the Commission's Rules of Practice and Procedure

Dear Judge Reeves and Honorable Commissioners of the United States Sentencing Commission,

The American Civil Liberties Union (ACLU) welcomes the opportunity to comment on the United States Sentencing Commission's (Commission's) Proposed Amendments to the Commission's Rules of Practice and Procedure. For over 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve individuals' rights and liberties. With more than seven million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all fifty states, Puerto Rico, and Washington D.C., for the right of every individual to access opportunity free from discrimination and government abuse. ACLU respectfully submits the following comment urging the Commission to reject Part B, which would increase the number of affirmative votes required to make a guideline amendment available for retroactive application. We also urge the Commission to adopt Part C, which would provide representatives of the Federal Public and Community Defenders with meaningful participation in Commission meetings and public hearings.

The Commission's rules should promote the purposes that Congress entrusted to it: fairness, proportionality, the avoidance of racial sentencing disparities, and sentencing policy guided by evidence and data about the criminal legal system.[1] Those principles counsel strongly against making retroactive sentencing relief more difficult to achieve. These same principles weigh in favor of greater participation by the Federal Public and Community Defenders in the Commission's policymaking process because they are uniquely situated within the criminal legal

[1] 28 U.S.C. § 991(b)(1)

system to provide input and guidance on the needs of individuals impacted significantly by the Commission's decisions.

I. The Commission Should Reject Part B and Retain the Existing Four-Vote Requirement for Retroactivity

Part B would amend Rule 2.2(b) to require at least five affirmative votes before a guideline amendment could be made available for retroactive application, compared with the current four-vote requirement. The proposal would allow four votes when only four commissioners are serving.[2]

The ACLU urges the Commission not to adopt this change and reject Part B.

A. Retroactivity is essential to fairness and to correcting disparities created by outdated sentencing policy

Sentencing policy should not treat similarly situated people differently simply because they happened to be sentenced at different points in time. When the Commission determines that a guideline produces an unjustifiably severe sentence and changes that guideline, fundamental principles of fairness counsel in favor of giving courts an opportunity to consider whether people already serving sentences under the former rule should receive the same relief.

The consequences of non-retroactivity can be profound. Congress and the Commission have repeatedly recognized that sentencing reforms can leave people behind when they are applied only prospectively. Reforms reducing excessive federal sentences have frequently failed to reach people already incarcerated, leaving individuals serving decades-long sentences even though the same conduct would receive a substantially shorter sentence today.[3]

The problem is not theoretical. The history of federal crack sentencing provides perhaps the clearest example. The Fair Sentencing Act of 2010 reduced the disparity between crack and powder cocaine penalties but did not initially make that change retroactive. As a result, people remained incarcerated under a sentencing regime that Congress had already determined was excessively punitive. In *Dorsey v. United States*, the ACLU argued that Congress's decision to reduce the crack-powder disparity reflected its recognition that the prior 100-to-1 regime was unsupported by science and had a severe and disproportionate racial impact.[4] The Supreme Court

---

[2] Proposed 2026 Amendment to Rules of Practice and Procedure, United States Sentencing Commission (2026), https://www.ussc.gov/guidelines/amendments/proposed-2026-amendment-rules-practice-and-procedure (last visited Oct 26, 2026).

[3] Ames Grawert & Ram Subramanian, What's next after Supreme Court limits compassionate release for excessive sentences Brennan Center for Justice (2026), https://www.brennancenter.org/our-work/research-reports/whats-next-after-supreme-court-limits-compassionate-release-excessive (last visited Oct 26, 2026).

[4] Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Petitioners at 10–15, Dorsey v. United States, 567 U.S. 260 (2012), https://www.aclu.org/cases/dorsey-v-

ultimately held that the Fair Sentencing Act applied to defendants sentenced after the Act took effect, even when their offenses predated the law.[5] The history of the Fair Sentencing Act demonstrates why the timing of sentencing should not determine whether an individual benefits from a reform that repudiates an unnecessarily harsh sentencing regime.

When a sentencing regime is no longer justified, fairness requires serious consideration of retroactive application for the people still serving sentences imposed under that outdated policy. The Commission should not impose a supermajority vote threshold for retroactive application.

B. Retroactivity is an important tool for addressing persistent racial disparities in federal sentencing.

The Commission itself has repeatedly documented racial disparities in federal sentencing. Its most recent comprehensive analysis found that, after controlling for available personal and offense characteristics, Black men received sentences that were 13.4 percent longer than those received by White men during fiscal years 2017–2021 when all sentences were considered.[6] Black men were also 23.4 percent less likely to receive probation than similarly situated White men.[7]

The Commission has appropriately identified eliminating unwarranted disparities as part of its statutory mission.[8] The Commission's own rules recognize that federal sentencing policy should provide "certainty and fairness" while avoiding unwarranted disparities among people convicted of similar conduct.[9] Retroactivity is one of the mechanisms available to address the accumulated effects of sentencing policies that have produced excessive punishment and racial disparities over time. A prospective reduction alone cannot remedy the inequity for people who remain imprisoned under the old regime.

This is particularly important because racial disparities can compound over time. Black Americans are disproportionately represented among people serving lengthy sentences due to systemic racism in policing and the criminal legal system process. Retroactive sentencing

---

united-states-and-hill-v-united-states?document=dorsey-v-us-and-hill-v-us-aclu-amicus-brief (last visited October 26, 2026).

[5] Dorsey v. United States, 567 U.S. at 264.

[6] United States Sentencing Commission, 2023 Demographic Differences in Federal Sentencing (2024), https://www.ussc.gov/research/research-reports/2023-demographic-differences-federal-sentencing (last visited Oct 26, 2026).

[7] Id.

[8] 28 U.S.C. § 991(b)(1)(B)

[9] U.S. Sentencing Commission, 2025 Guidelines Manual § 1B1.1 Background Commentary, United States Sentencing Commission (2026), https://www.ussc.gov/guidelines/2025-guidelines-manual (last visited Oct 26, 2026).

reform is an important means of addressing the racial disparities produced by harsh federal sentencing policies.[10] Racial disparities in federal sentencing are not confined to any single sentencing provision. They arise at multiple stages of the criminal legal system and can be compounded by facially race-neutral sentencing policies. [11]

Federal drug sentencing policies, including the former crack-powder disparity and mandatory minimums, have produced significant racial disparities in punishment.[12] For example, The First Step Act eventually made the sentencing reforms of the Fair Sentencing Act retroactive, allowing thousands of people to seek sentence reductions. A 2022 Commission report noted that 92% of the nearly 4,000 people released due to retroactivity under the First Step Act were Black,[13] which is evidence of the racially disproportionate sentencing rates and targeting of Black people under the previous federal drug sentencing rules. Retroactivity is an essential component of addressing the racial inequities created by the federal crack sentencing regime[14] and broad retroactive application of federal guideline reductions can help reduce racial disparities across the federal system, particularly where the underlying sentencing policy disproportionately affected Black defendants.[15]

Increasing the vote required to make reforms retroactive would make it harder to address these historical inequities. For that reason, the Commission should evaluate retroactivity not merely as a procedural question about the timing of a guideline amendment, but as a substantive tool for addressing the accumulated racial inequities produced by prior sentencing policy.

C. The Commission's own evidence demonstrates that retroactive sentence reductions can advance fairness without compromising public safety.

---

[10] Nazgol Ghandnoosh et al., One in Five: Racial Disparity in Imprisonment—Causes and Remedies The Sentencing Project (2023), https://www.sentencingproject.org/reports/one-in-five-racial-disparity-in-imprisonment-causes-and-remedies/ (last visited Oct 26, 2026).
[11] American Civil Liberties Union, Statement of American Civil Liberties Union Submitted to the 57th Session of the Commission on Narcotic Drugs ACLU (2014), https://www.aclu.org/wp-content/uploads/document/final_aclu_cnd_statement_2014.pdf (last visited Oct 26, 2026).
[12] Id. at 3–5
[13] U.S. Sentencing Commission, U.S. Sentencing Commission First Step Act of 2018 Resentencing Provisions Retroactivity Data Report (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20220818-First-Step-Act-Retro.pdf (last visited Oct 26, 2026).
[14] Liz Komar, The First Step Act: Ending Mass Incarceration in Federal Prisons, The Sentencing Project (2023), https://www.sentencingproject.org/policy-brief/the-first-step-act-ending-mass-incarceration-in-federal-prisons/ (last visited Oct 26, 2026).
[15] Eaglin Jessica, Comments to U.S. Sentencing Commission on Drugs-Minus-Two Sentencing Guideline Amendment Brennan Center for Justice (2014), https://www.brennancenter.org/our-work/research-reports/comments-us-sentencing-commission-drugs-minus-two-sentencing-guideline (last visited Oct 26, 2026).

The Commission should not make retroactivity harder to achieve based on generalized concerns about public safety when its own research demonstrates that carefully administered retroactive sentence reductions can occur without measurable increases in recidivism. In 2014, the Commission reduced the guideline offense levels for most federal drug trafficking offenses and subsequently voted unanimously to make the reduction retroactive. The Commission estimated that more than 40,000 people imprisoned at that time could be eligible for sentence reductions averaging approximately 25 months.[16] The Commission later studied whether those retroactive reductions resulted in increased recidivism. It compared 7,121 people who received sentence reductions and were released early with 7,132 comparable people who would have been eligible but had already completed their sentences before the retroactive amendment took effect. The Commission found no statistically significant difference in recidivism between the two groups.[17] The Commission's own actions and subsequent analysis show that applying sentencing guideline reforms retroactively balances fairness and the need for public safety. More broadly, sentencing policy should follow the evidence rather than the assumption that more punishment necessarily produces greater safety. The Commission's own research has found that, among federal offenders sentenced to at least one year, there was no clear association between sentence length and rearrest rates across sentence-length categories.[18]

The ACLU has emphasized that unnecessarily harsh sentencing policies contribute to racial disparities, undermine individualized sentencing, and produce substantial human and institutional costs without demonstrated public-safety benefits. The governing principle should be proportionality. A sentence should be no greater than necessary to accomplish the purposes of sentencing.[19] When evidence and experience demonstrate that a sentencing policy was unnecessarily severe, the Commission should facilitate, and not impede, careful judicial review of sentences imposed under that policy.

The same principle applies to retroactivity. When the Commission has empirical evidence that reducing sentences does not produce increased recidivism, there is no evidentiary basis for treating people who received those sentences in the past as categorically different from people sentenced after the reform. A sentencing system committed to proportionality should be willing

[16] Materials on 2014 Drug Guidelines Amendment, United States Sentencing Commission (2016), https://www.ussc.gov/policymaking/amendments/materials-2014-drug-guidelines-amendment (last visited Oct 26, 2026).

[17] Retroactivity & Recidivism: The Drugs Minus Two Amendment, United States Sentencing Commission (2020), https://www.ussc.gov/research/research-reports/retroactivity-recidivism-drugs-minus-two-amendment (last visited Oct 26, 2026).

[18] The Effects of Aging on Recidivism Among Federal Offenders, United States Sentencing Commission (2017), https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among-federal-offenders (last visited Oct 26, 2026).

[19] 18 U.S.C. § 3553(a)

to correct excessive punishment when evidence and experience demonstrate that the punishment was unnecessary.

D. Raising the threshold for retroactivity risks creating unnecessary procedural barriers to correcting excessive sentences.

The Commission's proposal is particularly concerning because retroactivity is already subject to a deliberative process that includes public notice, impact analysis when practicable, a public hearing, and a separate Commission vote.[20] There is no need to add another procedural barrier.

A four-vote requirement already demands a substantial consensus among the Commissioners. Raising the threshold to five risks allowing a single additional vote to prevent people from benefiting from a sentencing reform that the Commission has otherwise determined should apply to future cases. That is particularly troubling when the Commission has vacancies. The better approach is to preserve the existing threshold while continuing to require the Commission to consider the evidence, receive public input, and evaluate public safety.

Fairness requires more than prospective reform. When the Commission concludes that a sentencing policy is unnecessarily severe, fairness requires consideration of the people still living with the consequences of that policy. The ACLU's experience advocating for retroactive application of the Fair Sentencing Act, the First Step Act, and other sentencing reforms has shown that the difference between prospective and retroactive relief is not an abstract procedural distinction. It can determine whether a person remains incarcerated for years or has a meaningful opportunity to return home.

Sentencing policy should be guided by fairness, proportionality, and evidence. When the evidence demonstrates that longer sentences do not produce greater public safety, and when prior sentencing policies have produced profound and persistent racial disparities, the appropriate response is not to make reform harder to reach. The appropriate response is to make the correction of excessive punishment possible.

For these reasons, the ACLU urges the Commission to reject Part B.

II. The ACLU Supports Part C and Meaningful Participation by the Federal Public and Community Defenders

[20] U.S. Sentencing Commission, Rules of Practice & Procedure 4.1A.

The ACLU supports Part C of the proposed amendment, which would allow representatives of the Federal Public and Community Defenders (Federal Defenders) to participate in Commission meetings and public hearings.

Part C would provide designated representatives with access to policymaking materials provided to Commissioners and permit the representatives to engage in deliberations, request information and documents, and present relevant information. It would also allow representatives to participate in public hearings and ask questions of witnesses.[21]

This is a valuable and appropriate expansion of stakeholder participation. Federal Defenders bring a perspective that is indispensable to the Commission's understanding of how sentencing policies operate in practice. They represent people at the point where guideline policy becomes an actual sentence imposed on an individual. They see firsthand how sentencing rules affect people and their families, how guideline changes operate across districts, and how seemingly neutral rules can produce disparate consequences.

Their participation would also strengthen the Commission's ability to fulfill Congress's directive that sentencing policy reflect "advancement in knowledge of human behavior as it relates to the criminal justice process."[22] Part C provides an opportunity for the Commission to hear directly from practitioners who routinely litigate and apply the policies under consideration. That is a sensible improvement to the policymaking process.

The Commission has described this rulemaking as an effort to improve public engagement and stakeholder participation in its work.[23] Meaningful participation by representatives of the Federal Defenders advances that objective and should be retained in the final rule.

Conclusion

The ACLU urges the Commission to reject Part B and adopt Part C.

The Commission has a responsibility to develop sentencing policy that is fair, proportionate, evidence-based, and attentive to unwarranted racial disparities. Making retroactivity harder to achieve runs counter to the mandate and work of the Commission. Part B risks preserving disparities between people who committed similar conduct but were sentenced

[21] Proposed 2026 Amendment to Rules of Practice and Procedure, United States Sentencing Commission (2026), https://www.ussc.gov/guidelines/amendments/proposed-2026-amendment-rules-practice-and-procedure (last visited Oct 26, 2026).
[22] 28 U.S.C. § 991(b)(1)(C).
[23] Proposed 2026 Amendment to Rules of Practice and Procedure, United States Sentencing Commission (2026), https://www.ussc.gov/guidelines/amendments/proposed-2026-amendment-rules-practice-and-procedure (last visited Oct 26, 2026).

prior to sentencing reforms, including people who remain incarcerated under sentencing policies that the Commission has subsequently determined should be less severe.

The experience of federal drug sentencing demonstrates both the importance and the safety of retroactive reform. The Commission has already shown that sentence reductions can be implemented in a careful manner, with judicial review and public-safety considerations, without increasing recidivism. Retroactivity should remain a meaningful tool for correcting excessive sentences and addressing the accumulated inequities of past sentencing policy.

The Commission should reject Part B and preserve the existing four-vote standard for retroactivity and reject a rule that would make meaningful relief harder to achieve. At the same time, the Commission should adopt Part C and strengthen its policymaking process by ensuring that Federal Defenders, whose daily work gives them direct knowledge of how federal sentencing policy affects people, have a meaningful opportunity to participate.

Thank you for the opportunity to provide comments. If you have any questions, please contact Nina Patel, Senior Policy Counsel, ACLU Justice Division, at [redacted].

Respectfully submitted,

American Civil Liberties Union

DRUG POLICY ALLIANCE.

United States Sentencing Commission
Attention: Public Affairs - *Public Comment*
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

October 26th, 2026

SUBMITTED ELECTRONICALLY VIA WWW.COMMENT.USSC.GOV

RE: Proposed Amendment to the Rules of Practice and Procedure

To Whom It May Concern,

On behalf of the Drug Policy Alliance (DPA), we are pleased to provide comments on the United States Sentencing Commission's (USSC or the Commission) proposed amendment to the Rules of Practice and Procedure, in particular Part C, which would amend Rules 3.1 (Meetings) and 3.4 (Public Hearings) to allow a representative of the Federal Public and Community Defenders to participate in meetings and public hearings of the Commission. DPA is the leading organization in the U.S. working to address the harms of drug use and drug criminalization. We advocate for approaches to drugs that prioritize health, equity, social supports, and community wellbeing. We believe drug policies should be grounded in evidence, health, equity, and human rights.

Forty years ago in October 1986, President Ronald Reagan signed the Anti-Drug Abuse Act, introducing permanent drug penalties and ushering in a new era of mass incarceration.[1] By 2011, the federal prison population had more than tripled in size and the USSC named mandatory minimums as one cause.[2] In 2025, of the 66,662 cases reported to the Commission, 16,234 involved drugs (approximately 24%).[3] A report from the U.S. Courts found that over ninety percent of defendants in federal criminal cases receive court-appointed counsel due to not being able to afford their own lawyer.[4] Based on the prevalence of federal drug offenses

[1] National Association of Criminal Defense Lawyers, Race and the War on Drugs, November 29, 2022, retrieved from: https://www.nacdl.org/Content/Race-and-the-War-on-Drugs
[2] U.S. Sentencing Commission, Sentencing Commission Issues Comprehensive Report on Statutory Mandatory Minimum Penalties, October 31, 2011, retrieved from: https://www.ussc.gov/about/news/press-releases/october-31-2011
[3] U.S. Sentencing Commission, Quick Facts: Drug Trafficking Offenses FY25, retrieved from: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Drug_Trafficking_FY25.pdf
[4] U.S. Courts, Funding Crisis Leaves Defense Lawyers Working Without Pay, July 15, 2025, retrieved from: https://www.uscourts.gov/data-news/judiciary-news/2025/07/15/funding-crisis-leaves-defense-lawyers-working-without-pay

and the extensive use of court-appointed counsel, federal defenders have unique expertise and experience in federal criminal law, giving them a deep understanding of the federal sentencing guidelines and other sentencing policy issues, such as drug offense mandatory minimums. **DPA urges the USSC to add a federal defender representative to the Commission, in order to leverage their professional experience and expertise on federal sentencing guidelines and sentencing policy issues, such as those pertaining to mandatory minimums for drug offenses.**

Allowing a federal Defender representative has been long supported by groups such as the Judicial Conference, the Council on Criminal Justice, and the Smart on Crime Coalition.[5,6,7] Adding a Defender representative would increase Defender access to important materials, information, and discussions, allowing Defenders to provide meaningful insights and better fulfill their statutory mandate under 28 U.S.C. § 994 (o).[8] Additionally, having a Defender presence on the Commission would offer an important counterbalance to the role of the Department of Justice (DOJ), who have had an *ex officio* position on the Commission since its inception in 1984.[9] **DPA implores the USSC to balance the composition of the Commission by permitting Defenders to attend and participate in all non-public commission meetings and deliberations when substantive policy-setting work is discussed.** This will not only add essential defense perspectives to Commission deliberations but also improve the quality of the Commission's work. The Honorable Carlton W. Reeves, Chair of the USSC, remarked that the Commission will operate in "a deliberative, empirically based, and inclusive manner."[10] In order to fulfill this goal, the Commission must allow Defenders to have the same level of participation as the DOJ.

DPA supports legislative efforts, such as the *Sentencing Commission Improvements Act*, which would bring the Commission in better alignment with active state sentencing commissions.[11]

---

[5] Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States, March 16, 2004, retrieved from: https://www.uscourts.gov/file/2131/download

[6] The Council on Criminal Justice, Reinvigorate the U.S. Sentencing Commission, n.d., retrieved from: https://priorities.councilоncj.org/federal-priorities/rec1

[7] The Constitution Project, The Smart on Crime Coalition, Recommendations for the Administration and Congress, 2011, retrieved from: https://static.prisonpolicy.org/scans/SmartOnCrime.pdf

[8] 28 U.S.C. § 994 (o) https://www.govinfo.gov/content/pkg/USCODE-2024-title28/pdf/USCODE-2024-title28-partIII-chap58-sec994.pdf

[9] U.S. Sentencing Commission, Organization, retrieved from: https://www.ussc.gov/about/who-we-are/organization

[10] Remarks of Judge Carlton W. Reeves, Chair of the U.S. Sentencing Commission, October 28, 2022, retrieved from: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20221028/20221028_chairs-remarks.pdf

[11] S. 4136 - 119th Congress (2025-2026): Sentencing Commission Improvements Act, S. 4136, 119th Congress (2026), retrieved from: https://www.congress.gov/bill/119th-congress/senate-bill/4136

DRUG POLICY ALLIANCE.

Congress can rectify the lack of a Defender *ex officio* position in statute through legislation. However, the Commission does not need to wait for Congress to invite Defender representation and participation on the Commission. **DPA urges the Commission to invite Defender representation, aligning with the best practices of other legal policymaking bodies.** In the words of Senator Cory Booker, "adding a public defender to the Commission will help [...] ensure sentencing practices move towards a fairer, more balanced, and truly just system."[12] Forty years after the introduction of the 100-to-1 sentencing disparity between powder and crack cocaine, harsh mandatory minimums for drug offenses continue to cause significant harm, particularly to marginalized communities.[13] Federal defenders could offer invaluable insights and analysis to the Commission on the impact of harsh mandatory minimums for federal drug offenses, along with other sentencing policy issues. **DPA supports the inclusion of an *ex officio* Defender position on the Commission in order to make meaningful recommendations to Commission policy-setting work.**

We appreciate the opportunity to submit comments. Should you have any questions or concerns, please do not hesitate to contact me at [redacted].

Sincerely,

Daniel Fishbein, MSW
Federal Policy Manager
Drug Policy Alliance
[redacted]

[12] Senator Cory Booker, Booker, Durbin Reintroduce Legislation Aimed at Increasing Membership within the U.S. Sentencing Commission, March 18, 2026, retrieved from: https://www.booker.senate.gov/news/press/booker-durbin-reintroduce-legislation-aimed-at-increasing-membership-within-the-us-sentencing-commission

[13] Legislative Analysis and Public Policy Association, Crack Cocaine and the Fair Sentencing Act, November 2023, retrieved from: https://legislativeanalysis.org/wp-content/uploads/2023/11/Fair-Sentencing-Act-Fact-Sheet-FINAL.pdf

October 26, 2026

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Amendments for the 2026-2027 Amendment Cycle

Dear Judge Reeves,

Since 1991, FAMM has pursued a broad mission of creating a more fair and effective justice system. By mobilizing communities affected by unjust sentences, including incarcerated people and their families, FAMM illuminates the human face of sentencing as we advocate for state and federal sentencing and corrections reform. For thirty-five years, FAMM has been an active advocate before the U.S. Sentencing Commission by submitting public comments, participating in hearings, and meeting with staff and commissioners.

The Guidelines touch countless individuals and families, including many of our members. Our members often express their appreciation for the Commission's encouragement of their involvement in amendment process. At the same time, we regularly receive questions and comments wishing for more transparency in how certain decisions are made. With that said, FAMM appreciates the Commission's dedication to increasing transparency and access to information for the public.

We write to express our support for Part A and Part C through Part H. At the same time, we urge the Commission to reject the proposal in Part B.

1. **Support Part A**

FAMM supports the proposal included in Part A. Congress carefully crafted a statutory purpose for the Commission in 28 U.S.C. § 991(b), directing the Commission to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records . . . permit individualized sentences when warranted by mitigating or aggravating factors . . . and reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process." This congressional directive is an important grounding principle for the Commission's work and yet it is nowhere to be found in the Rules' introductory language. Including the language is an important way to align the Commission's Rules with its statutory purpose.

2. Oppose Part B

FAMM vehemently opposes Part B of the proposed amendment. Part B would essentially require a supermajority of the Commission to support retroactivity of an ameliorative amendment. The Commission *should not* make it *more* difficult to apply ameliorative amendments to individuals already sentenced.

Every year, FAMM holds informational sessions with family members whose loved ones have been sentenced in the federal system. We hold these meetings to help articulate the changes to the Guidelines and the impact that these changes have on individuals moving forward, as well as the potential to benefit individuals who have already been sentenced. When a guideline amendment is adopted and that change could benefit people already sentenced, it is incredibly disheartening to tell individuals with loved ones in prison that the changes will not be applied retroactively to benefit their loved ones. It is *already* difficult to secure retroactivity for amendments—ameliorative amendments are not *de facto* made retroactive. It defies logic and justice to consider making it even harder for ameliorative amendments to be applied retroactively.

Three years ago, Jeffrey McReynolds, the husband of FAMM's President, testified before the Commission in favor of retroactivity for the criminal history amendment in 2023. Mr. McReynolds's life was changed thanks to retroactivity for amendments related to drug offenses and crack cocaine. In his testimony, Mr. McReynolds said, "Because of retroactivity, I was given a second chance to LIVE! It allowed me to spend a year with my mom before she passed away."[1] That same day, another formerly incarcerated individual shared how retroactivity allowed him to be home for his growing family when they needed him the most. As he so beautifully put it, "[w]e know that the system is broken, the question now is how do we rectify it? Like I learned in prison, if you keep doing the same thing, you will keep getting the same result. A fire does not start on its own, it needs a spark. Let's fan this spark and start trying to do the right thing. . . . give more people a second chance."[2]

Retroactivity is a critical tool to advance fairness in sentencing. When the Commission enacts an amendment that would benefit people in prison, that amendment inherently undermines the legitimacy of the sentences that have already been imposed. The Commission should not make it *harder* for people to benefit from that change.

The existing voting threshold, as well as existing procedures around retroactivity, provide appropriate safeguards for consequential amendment changes to balance the impact of the amendment against the administrability of implementing that change retroactively. Requiring

---

[1] Testimony of Jeffrey McReynolds, (July 19, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230719/McReynolds.pdf.

[2] Testimony of Bernard Gibson, (July 19, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230719/Gibson.pdf.

five votes would risk allowing a minority of commissioners to block retroactivity, even if a *majority* support making the ameliorative amendment retroactivity.

Finally, the Commission is simultaneously considering amending its rules to better align with its statutory mission.[3] That statutory mission is clear that the Commission's purpose includes avoiding unwarranted sentencing disparities.[4] Making it harder to approve retroactivity for ameliorative amendments would actually lead to more unwarranted sentencing disparities and call into question whether the Commission is meeting its statutory purpose.

Retroactivity can offer a meaningful opportunity to correct excessive sentences, reunite families, and ensure that changes in sentencing policy reflect our current views of fairness. FAMM urges the Commission to reject Part B and retain the existing four-vote threshold for retroactivity.

3. Support Part C

For too long, an inequity has lingered inside the Commission that reflects an inequity in our justice system: federal prosecutors are given more access to power and decision-making than federal defenders. Part C aims to finally level the playing field by permitting representatives from the federal defender community, as well as designated representatives from the Criminal Law Committee, to attend Commission meetings that are not open to the public. There are two options: one that would allow participation in public meetings and "certain nonpublic briefings," and a second that would allow representation at "all Commission meetings."[5]

As an initial matter, the proposed rules do not make clear what constitutes "certain nonpublic briefings" in which the representatives would be allowed to participate under Option 1. But that lack of clarity is insignificant. FAMM wholeheartedly supports, and urges, the Commission to adopt Option 2—allowing participation at all Commission meetings.

The absence of a federal defender from the Commission's meetings is a longstanding and unjustifiable gap. The Commission is charged with developing sentencing policies that promote fairness, reduce unwarranted disparities, and reflect the realities of federal sentencing.[6] It cannot fully accomplish that mission without hearing from the attorneys who represent people facing federal prosecution and sentencing. Including the federal defender community is not simply a matter of expanding stakeholder participation—it is *essential* to ensuring that the Commission's decisions are informed by the experiences of the people most directly affected by its policies.

Federal defenders bring a perspective that is both unique and indispensable. They see firsthand how sentencing laws and guidelines operate in courtrooms across the country and often must grapple with some of the nuances in the guidelines that may be lost on federal prosecutors. They also uniquely understand how guideline ranges impact plea bargaining from a defendant's perspective. Their experience can help the Commission evaluate the real-world consequences of

---

[3] *See above* Section A.
[4] 28 U.S.C. § 991(b).
[5] Proposed Amendment at 7.
[6] 28 U.S.C. § 991(b).

its proposals, identify unintended effects, and better understand the barriers to fair and proportionate sentencing. This perspective is particularly important for assessing whether sentencing policies operate as intended and whether they contribute to unwarranted disparities or unnecessarily severe punishment. A Commission that seeks to align itself even more closely with its enabling legislation should welcome federal defenders' insight.

The current imbalance in representation is difficult to justify. The Department of Justice has a nonvoting representative on the Commission, yet the federal defender community has always lacked comparable representation. At FAMM, when we explain this to our members, they are struck by the injustice of having prosecutors in the room but not the people who represent their loved ones. A fair and effective sentencing process requires meaningful consideration of the perspectives of both the government and those tasked with defending people against the government. Providing federal defenders with an opportunity to participate would help correct this imbalance and strengthen the legitimacy and quality of the Commission's work.

This reform also has longstanding support in Congress. In 2021, Senators Booker and Durbin introduced legislation to add a federal defender as a nonvoting member of the Commission.[7] They reintroduced the Sentencing Commission Improvements Act in 2023 and again in March 2026.[8] FAMM endorsed the 2026 legislation, which reflects the same core principle underlying Part C: federal sentencing policy should be informed by the experience of those who represent people accused of crimes. Although Congress must act to create an official *ex officio* role for the Defenders, the Commission now has an opportunity to take a meaningful step toward addressing this longstanding omission. FAMM urges the Commission to adopt Part C and ensure that federal defenders can meaningfully participate in all Commission meetings at which Commission staff is present.

4. Support Part D, Option 3

FAMM believes transparency is essential to the integrity of the United States Sentencing Commission. The Commission's decisions shape federal sentencing policy and have profound consequences for individuals, families, and communities. The people most impacted by sentencing policy should be able to understand with whom the Commission is leaning on or conversing with behind closed doors. When outside parties communicate privately with commissioners about pending policy proposals, meaningful disclosure helps ensure confidence in the fairness of the policymaking process.

For these reasons, FAMM supports Option 3 of Part D, which would require disclosure of all covered *ex parte* communications concerning pending sentencing-guideline amendments. A rule that requires disclosure only when a communication meets a particular significance threshold, as

[7] Senate Bill 3286 117th Congress, *Sentencing Commission Improvements Act* (Nov. 30, 2021), https://www.congress.gov/bill/117th-congress/senate-bill/3286

[8] Senate Bill 851 118th Congress (2023); Senator Booker Announcing reintroduction of the act (March 18, 2026), https://www.booker.senate.gov/news/press/booker-durbin-reintroduce-legislation-aimed-at-increasing-membership-within-the-us-sentencing-commission?utm_source=chatgpt.com

proposed in Option 2, risks leaving important communications undisclosed and creates uncertainty about which communications must be made public. Transparency should not depend on how a decisionmaker characterizes its significance. Option 2 is an unworkable standard. Option 3 provides a clearer, more consistent standard. A clearer rule would help prevent the appearance that private access or influence can shape sentencing policy without public scrutiny. Requiring disclosure of all covered communications would strengthen public trust, promote accountability, and help ensure that the Commission's policymaking remains open and responsive to the people affected by its work. Transparency should be a rule, not a matter of discretion by those in positions of power.

5. Support Part E

FAMM has long written to the Commission in early summer with suggestions for the Commission's priorities for the annual amendment cycle. We have put a considerable amount of effort into this process over the years because we know how important it is to help bring forward ideas before the Commission begins the amendment cycle. We have never known, however, whether those suggestions are considered by the Commission. Part E would allow all stakeholders the chance to participate in shaping the Commission's amendment cycle for the year. Providing early input is critical—it allows stakeholders to help shape the direction of the Commission rather than merely responding. FAMM strongly supports this proposal.

6. Support Part F

Efforts at increasing access to transparency are critical for individuals who face sentencing. To this end, publishing materials regarding otherwise nonpublic meetings, along with other Commission materials, is a meaningful way to increase transparency and fairness. Particularly given that the Department of Justice has always had this kind of access through its *ex officio* member, there is no justifiable reason that the individuals being prosecuted should have less information on Commission deliberations than the department prosecuting them.

7. Support Part G

The Commission's formal acknowledgement of impacted individuals in its processes through the Sentence Impact Advisory Group ("SIAG") has been one of its most impactful in recent years. SIAG helps ensure that impacted people have a formal voice and seat in the Commission's amendment cycle. As the newest advisory group, the Commission should be sure to provide all the support that SIAG needs to help it achieve its full potential.

8. Support Part H

FAMM supports Part H and urges the Commission to adopt reforms to strengthen transparency, public participation, and accountability. Specifically, the Commission should ensure that all materials provided to commissioners in connection with policymaking—including research, data analyses, policy memoranda, and written submissions from outside stakeholders—are made publicly available in a timely manner. In addition, the Commission should make public the basis

for its policy decisions, including relevant analyses and explanations of how it considered public comments and stakeholder input.

Individuals who face federal sentencing or whose family members face federal sentencing should be able to understand and evaluate the Commission's work. Strong transparency requirements will promote public trust in the Commission, strengthen the Commission's accountability, and help ensure that federal sentencing policy is developed through an informed and fair process.

9. Conclusion

The Commission and the Guidelines it produces have a tremendous impact on individuals in the criminal justice system. Ensuring transparency, fairness, and participation across stakeholders are critical ways to maintain confidence in the Commission. We are grateful to the Commission for exploring ways to better achieve these goals within its Rules of Practice and Procedure.

Sincerely,

Shanna Rifkin

Shanna Rifkin
General Counsel, FAMM

UNITED STATES SENTENCING COMMISSION
Comment on Proposed Amendments to the Rules of Practice and Procedure
Rule 5.4 — Advisory Groups / Part H — Further Revisions

Submitted by More Than Our Crimes

More Than Our Crimes (MTOC) respectfully submits this comment in response to the United States Sentencing Commission's proposed amendments to its Rules of Practice and Procedure, particularly the proposed amendment to Rule 5.4 formally recognizing the Sentence Impact Advisory Group (SIAG) as a standing advisory group and the Commission's invitation in Part H for recommendations for additional reforms.

MTOC strongly supports the Commission's creation of the Sentence Impact Advisory Group. Establishing SIAG was an important recognition that people directly affected by federal sentencing possess knowledge and perspectives that cannot be fully supplied by judges, attorneys, probation officers, researchers, victims, or other participants in the federal criminal justice system.

We write to recommend an additional step: **the Commission should provide for direct representation on SIAG by people who are currently serving federal sentences of imprisonment.**

Specifically, MTOC recommends that at least two SIAG positions be reserved for currently incarcerated people; that at least one of those individuals be housed in a United States Penitentiary (USP) at the time of appointment; and that the Commission take affirmative steps to ensure that currently incarcerated women are regularly represented.

The perspective SIAG was created to provide remains incomplete

In announcing the creation of SIAG in August 2025, Commission Chair Carlton W. Reeves explained the need for the new advisory body in unusually direct terms:

"But none of us have experienced a single day in prison."

Chair Reeves identified an important limitation in traditional policymaking about incarceration: expertise *about* imprisonment is not a complete substitute for experience *of* imprisonment. The creation of SIAG was a significant response to that gap.

The current SIAG includes individuals with substantial firsthand experience of federal incarceration. At least five of its nine members are formerly incarcerated, including people who served lengthy federal sentences. Their expertise is indispensable, and MTOC's proposal should not be understood to diminish it.

But **former incarceration and current incarceration provide different and complementary forms of expertise.**

A person who has returned to the community can speak with perspective about sentencing, incarceration, reentry, and the long-term consequences of a federal sentence. A person currently incarcerated can tell the Commission how federal sentencing policy is being experienced **right now**.

That distinction matters because the federal prison system and the implementation of federal sentences continually change. People serving sentences today confront policies and practices involving First Step Act earned-time credits, programming availability, prerelease custody, institutional staffing and lockdowns, electronic communications, medical and mental-health care, disciplinary practices, family contact, and other circumstances affecting how a sentence imposed by a federal court is actually experienced.

Among current SIAG members whose incarceration dates can be publicly established, some left federal custody many years ago. Even those with relatively recent experience cannot provide firsthand knowledge of every significant change that has occurred since their release.

The point is not that their experience has become less valuable. It is that **current lived experience is a distinct form of expertise that is presently absent from SIAG.**

The SIAG Charter already contemplates representation of sentenced individuals

Direct participation by a currently incarcerated person would not require the Commission to redefine SIAG's mission.

The existing SIAG Charter provides that a member must be either:

"(1) an individual sentenced for a federal offense, or (2) a family member of an individual sentenced for a federal offense."

The Charter does not state that an individual must have completed that sentence or have been released from custody.

It further provides that the Commission intends to solicit applications from "sentenced individuals and their families" and that membership should "reflect the many perspectives within the federally sentenced population."

A person presently serving a federal prison sentence is therefore not outside the population contemplated by the Charter. That person is at its very center.

Indeed, there is a notable difference between the Charter's broad language and the way SIAG has subsequently been described. The Commission's FY2025 Annual Report characterized SIAG as consisting of "formerly incarcerated individuals and their families." That composition provides important lived experience, but it leaves absent the perspective of anyone currently experiencing federal imprisonment.

The Commission's proposed expansion of direct stakeholder participation makes current-incarcerated representation especially appropriate

The Commission's own proposed amendments recognize that meaningful stakeholder participation can require more than the opportunity to submit written comments or appear at an occasional public hearing.

Part C would substantially expand the direct role of representatives of the Committee on Criminal Law of the Judicial Conference and the Federal Public and Community Defenders in Commission policymaking. Under the proposals, these representatives could receive policymaking materials, attend specified Commission meetings, engage in deliberations with commissioners, request information and documents, present information, and participate alongside commissioners in questioning witnesses at public hearings, subject to limitations concerning voting, motions, confidential matters, and other Commission business.

MTOC supports the Commission's effort to obtain informed and sustained input from stakeholders with distinctive knowledge of the federal sentencing system. But the principle underlying Part C also reinforces the need for direct participation by people currently serving federal prison sentences.

Judges and defenders possess expertise that cannot be fully replicated by other participants in the system. **The same is true of people currently incarcerated.**

If the Commission concludes that its policymaking benefits when particular constituencies have continuing opportunities for direct participation rather than being limited to traditional public-comment mechanisms, that principle should extend to the people experiencing federal imprisonment firsthand.

Indeed, the case is particularly strong in the context of SIAG because the Commission created that advisory group specifically to bring the perspectives of sentenced people into its work. Without currently incarcerated representation, the Commission would be expanding direct policymaking participation for institutional actors within the federal criminal justice system while still lacking direct participation by anyone currently experiencing the imprisonment that its Guidelines help determine.

MTOC does not suggest that incarcerated representatives must receive precisely the same access contemplated for the representatives addressed in Part C. Security, confidentiality, technology, and institutional considerations may require different arrangements.

The underlying principle, however, should be the same: **when a stakeholder possesses distinct and relevant knowledge that cannot adequately be supplied by others, the policymaking process benefits from providing that stakeholder a meaningful and continuing avenue for direct participation.**

SIAG provides an existing and appropriate structure through which the Commission can apply that principle to people currently serving federal sentences.

Federal imprisonment is not a uniform experience

Simply appointing one or two currently incarcerated people, however, would not necessarily solve the representation problem.

Conditions under which a federal sentence is served vary dramatically according to security level. Movement, housing, programming, recreation, lockdowns, communications, visitation, institutional safety, staffing, access to outside opportunities, and preparation for release can look very different in a minimum-security camp than in a high-security United States Penitentiary.

Moreover, opportunities for incarcerated people to participate in advisory bodies, public-policy initiatives, educational programs, and other forms of outside engagement can disproportionately reach people confined in lower-security institutions, where communication and movement may be less restricted.

If the Commission relies only upon the people for whom participation is easiest to arrange, it risks systematically excluding the perspectives of individuals serving sentences under the most restrictive conditions.

That perspective is especially important to the work of a body called the **Sentence Impact Advisory Group**. People confined in USPs experience federal sentences in the Bureau of Prisons' highest-security environments and frequently include people serving very long sentences. Their experience of programming, institutional movement, lockdowns, communications, family contact, safety, and the cumulative effects of lengthy incarceration may differ markedly from the experience of individuals confined at lower security levels.

MTOC therefore recommends that **at least one of the two positions reserved for currently incarcerated members be filled by an individual housed in a United States Penitentiary at the time of appointment.**

This is not a judgment that the experiences of people at other security levels are less important. It is a safeguard against inadvertently hearing only from incarcerated people whose circumstances make participation easiest.

Women's experiences should not disappear because they constitute a smaller share of the federal prison population

The Commission should also pay particular attention to gender in selecting incarcerated representatives.

Women constitute a relatively small proportion of the federal prison population, but their experience of federal incarceration is not simply a smaller-scale version of men's incarceration. Family separation and caregiving responsibilities, healthcare, histories of trauma and abuse, institutional programming, facility placement, distance from family, and reentry can affect incarcerated women in distinctive ways.

Their smaller numbers make intentional inclusion more important, not less. A selection system based solely on proportional representation could result in incarcerated women rarely, if ever, having a direct voice on SIAG.

At the same time, MTOC does not recommend permanently designating one of only two incarcerated positions as a women's seat. Doing so, combined with the proposed USP requirement, would effectively predetermine both positions and leave the Commission too little flexibility to consider other important dimensions of federal incarceration.

Instead, MTOC recommends that the Commission **regularly include a currently incarcerated woman among SIAG's incarcerated representatives and expressly consider gender diversity when making appointments and reappointments.**

More broadly, selection should seek diversity over time in security level, gender, age, sentence length, time already served, disability and health status, offense type, geographic location, and other characteristics relevant to the experience of federal sentencing.

No two incarcerated individuals can represent the entire federal prison population. The objective should instead be to ensure that, over time, the Commission hears directly from people experiencing materially different forms of federal incarceration.

Participation by incarcerated members is administratively feasible

MTOC recognizes that appointing currently incarcerated people will present logistical considerations not encountered with other SIAG members. Those considerations should be addressed rather than treated as grounds for exclusion.



The SIAG Charter already provides that members may participate in meetings remotely through electronic means, including telephone and video conference.

The Commission could work with the Bureau of Prisons to establish procedures allowing incarcerated members to receive relevant materials, participate in scheduled meetings by telephone or video, submit written recommendations, review proposals, and communicate with Commission staff and fellow SIAG members.

Special procedures may be necessary for a representative housed in a USP. The fact that participation is more difficult to arrange in a high-security institution, however, is precisely why the Commission should ensure that administrative convenience does not determine whose experience it hears.

BOP will necessarily play a role in facilitating communications. It should **not**, however, control the selection of the incarcerated representatives.

Members should be selected by the Commission through an independent process that permits applications or nominations from incarcerated people themselves and, where appropriate, from attorneys, family members, advocacy organizations, reentry organizations, and other entities familiar with their experience.

Selection should not depend upon BOP determining which incarcerated individuals it regards as suitable representatives. Nor should candid criticism of BOP policies or institutional conditions disqualify an individual from consideration.

The Commission should also establish protections designed to ensure that incarcerated members can participate candidly without retaliation or loss of privileges because of views expressed in carrying out their SIAG responsibilities.

Meaningful participation must be more than symbolic.

Recommended changes

MTOC recommends that **at least two positions on SIAG be reserved for individuals currently serving federal sentences of imprisonment**, with at least one representative housed in a United States Penitentiary at the time of appointment.

We propose that Section 2(a) of the SIAG Charter be amended substantially as follows:

Section 2(a) — Membership

The SIAG shall consist of not more than 9 members. A member of the SIAG must be (1) an individual sentenced for a federal offense, or (2) a family member of an individual sentenced for a federal offense.

At least two positions shall be designated for individuals who, at the time of appointment, are currently serving sentences of imprisonment for federal offenses. At least one such individual shall be housed in a United States Penitentiary at the time of appointment. In making appointments and reappointments to these positions, the Commission shall seek to ensure that currently incarcerated women are regularly represented and shall consider diversity in the circumstances under which federal sentences are being served.

The Commission shall establish reasonable procedures to facilitate the meaningful and independent participation of incarcerated members in the work of the SIAG.

All members of the SIAG shall be appointed by the Commission.

The Commission could also incorporate the principle of direct representation into Rule 5.4 itself. MTOC suggests consideration of language such as:

In constituting advisory groups, the Commission shall seek direct representation from persons whose perspectives an advisory group is established to provide. The Sentence Impact Advisory Group shall include meaningful representation from individuals currently serving federal sentences of imprisonment.

This approach would establish the principle in the Commission's Rules while leaving detailed requirements concerning number, selection, diversity, and participation to the SIAG Charter.

The Commission should provide for continuity of current-incarceration representation

Because incarcerated members may complete their sentences or obtain release during their terms, the Commission should also establish a procedure ensuring that current-incarceration representation does not disappear when that occurs.

Release should not be treated as a negative event or suggest that the individual's experience suddenly ceases to be valuable. The Commission could permit an incarcerated representative who is released during a term to continue serving for an appropriate transition period while appointing another currently incarcerated representative to the designated position.

The governing principle should be simple: **SIAG should include the voices of people experiencing federal imprisonment now, not merely people who were incarcerated at the time they were originally appointed.**

The Commission can determine the administrative mechanism that best accomplishes that objective without unnecessarily disrupting the work or service of a member who obtains release.

Alternatives if full membership proves impracticable

If the commission concludes that full membership by currently incarcerated individuals presents obstacles that cannot immediately be resolved, those obstacles should not become a reason to exclude their voices altogether.

As alternatives, the commission could establish incarcerated representatives as additional nonvoting SIAG members or create a permanent **Incarcerated Persons Council or Subcommittee** affiliated with SIAG.

Any such body should have a formal right to receive relevant commission and SIAG materials, submit recommendations directly to SIAG and the commission, and participate periodically and meaningfully in SIAG discussions.

It should also be structured to include people serving sentences under significantly different conditions, including at least one person confined in a USP, and should regularly include the direct perspective of an incarcerated woman.

MTOC nevertheless believes that **full SIAG membership should be the commission's starting point**, not its fallback. The existing charter appears to permit such membership already. Administrative inconvenience alone should not determine whose lived experience warrants a seat at the table.

The current rules review presents an unusual opportunity

The commission describes the addition of SIAG to Rule 5.4 as a technical and clerical amendment. But Part H expressly invites the public to recommend "additional or different amendments," "overarching structural reforms," and "actionable measures" to foster public engagement and improve commission processes.

This is an appropriate moment to complete what the Commission began when it created SIAG.



The Commission's advisory structure recognizes that meaningful policymaking requires direct input from people occupying distinct positions within the federal sentencing system. Probation officers provide the perspective of probation officers. Defense practitioners provide the perspective of practicing defense attorneys. Victims provide perspectives arising from their direct experiences. And under the amendments now proposed in Part C, representatives of the Judicial Conference and federal defenders would receive even greater opportunities for continuing, direct participation in Commission policymaking.

People currently living under the prison sentences shaped by the Commission's Guidelines should also have an opportunity to speak for themselves.

More Than Our Crimes communicates regularly with more than 1,000 people incarcerated in federal Bureau of Prisons facilities across the country. Through that work, we repeatedly see the difference between understanding prison policy from outside an institution and understanding how that policy operates in the daily lives of the people subject to it.

MTOC would welcome the opportunity to assist the Commission in developing practical procedures for soliciting applications and nominations from currently incarcerated people, obtaining perspectives from people in institutions of different security levels, and facilitating meaningful participation without allowing the logistical challenges of incarceration to determine who is heard.

The commission created the Sentence Impact Advisory Group because it recognized that lived experience can make federal sentencing policy better informed.

We urge the Commission to carry that principle one necessary step further: **include current lived experience.**

People presently serving the sentences that the Commission helps shape should have a direct and meaningful voice in the Sentence Impact Advisory Group.

Respectfully submitted,

Pam Bailey
Managing Director
More Than Our Crimes

LDF Legal Defense Fund

Advancing racial justice since 1940

October 26, 2026

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

Submitted electronically

RE: Proposed 2026 Amendment to the U.S. Sentencing Commission: Comment on Rules of Practice and Procedure

Dear Judge Reeves:

The NAACP Legal Defense and Educational Fund, Inc. ("LDF"), submits this comment in response to the U.S. Sentencing Commission ("Commission") on the Proposed Amendment to the Rules of Practice and Procedure ("Rules").[1] Founded in 1940 by Thurgood Marshall, LDF is the first and premier racial justice law organization in the United States. LDF has a legacy of challenging racial injustice in the criminal system through litigation and policy advocacy.[2] This work has included targeted efforts against excessively harsh and discriminatory sentencing guidelines that disproportionately affect the Black community.[3] Addressing racial disparities in sentencing is crucial to LDF's mission of defending humanity and advancing the rights of Black people in the United States.[4] LDF appreciates the Commission's consideration of amendments that would expand access and participation among practitioners along with transparency and consistency into the Commission's agenda setting.

The Federal Public and Community Defenders ("Defenders"), along with Criminal Justice Act Attorneys, represent 90 percent of the people charged with federal offenses.[5] Historically, people facing federal criminal consequences have overwhelmingly been people of color thus the Defenders largely represent Black and Hispanic defendants. According to the Fiscal year 2023 Sentencing Sourcebook of the people sentenced to federal offences 22 percent were white, 24.7 percent were Black, 49 percent were Hispanic and 4.3 percent of people were identified as other races. The Commission additionally reported in 2023 that Black males were 23.4 percent less

---

[1] 90 Fed. Reg. 56724 (proposed Sept. 3, 2026).

[2] See *Furman v. Georgia*, 408 U.S. 238 (holding that the arbitrary and inconsistent use of the death penalty violated the Eighth and Fourteenth Amendments and constituted cruel and unusual punishment); *McCleskey v. Kemp*, 481 U.S. 279 (in which LDF introduced the landmark Baldus case study, demonstrating a racial bias against Black defendants in capital cases)

[3] See *Carter v. United States*, 145 S. Ct. 2775 (2025); see also *Rutherford v. United States*, 145 S. Ct. 2776 (2025)

[4] See NAACP Legal Def. & Educ. Fund, *About Us*, https://www.naacpldf.org/about-us/.

[5] See Admin. Off. Of the U.S. Cts., *2024 Annual Report, Defender Services*, available at https://www.uscourts.gov/data-news/reports/annual-reports/directors-annual-report/annual-report-2024/defender-services-annual-report-2024.

likely to receive a probationary sentence than white males and received sentences 13.4 percent longer than white males. This data underscores the sentencing disparity that disproportionately affects people of color, specifically Black and Hispanic individuals.[6] LDF believes amendments to Part C and Part E of the proposed Rule may help close this disparity.[7]

Granting Defenders Access to Non-Public Meetings would Better Include the Voices of those Facing Criminal Consequences in the Commission's Process and Procedures, Many of Whom are Disproportionally Black and Brown.

LDF strongly supports Part C and Part E of the Proposed Amendment to the Rules. These proposed changes to the Rules would increase participation and facilitate dialogue between the Commission and Defenders, while creating more standardization that would facilitate the commission's receipt of comments from the public, including people who are currently or formerly incarcerated.

The amendment to Part C would allow representatives of the Committee on Criminal Law of the Judicial Conference of the United States ("Criminal Law Committee") and the Defenders to participate in the Commission's meetings and public hearings. The proposed amendment to Part C includes two options, the first of which would only extend participation by the Criminal Law Committee and Defenders to public meetings and nonpublic briefing sessions of the Commission. LDF urges the Commission instead to adopt the second option in the proposed amendment to this part which would allow representatives from Defenders and Criminal Law Committee to attend all Commission meetings at which Commission staff are present, including non-public meetings.

Additionally, LDF supports Part E of the Proposed Amendment to the Rules, which would amend Rule 5.2 (Notice of Priorities) by making the procedures and timelines for setting the Commission's policymaking agenda more transparent and consistent. LDF supports the options that will allow for the maximum time for proposed priorities to be published in the Federal Register before public submissions are due. Feedback and policy guidance from a diversity of expert bodies are essential as the Commission seeks to adopt guidelines that reflect fairness and transparency in sentencing.

Implementing Parts C and E of the Proposed Amendment to the Rules would Increase Balanced Participation by the Government and Defense in Commission Meetings

While the proposal serves as a meaningful first step in promoting transparency, Congressional action is needed to provide Defenders with the same *ex officio* status as the U.S. Department of Justice (DOJ), who even if this proposed rule is finalized would still maintain a greater level of

---

[6] U.S. SENTENCING COMM'N, *DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING* (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf.

[7] U.S. SENTENCING COMM'N, FY 2023 SOURCEBOOK ON FEDERAL SENTENCING STATISTICS, at Table 5 (FY 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Characteristics-Section.pdf.

access and input in the Commission's work. The Sentencing Reform Act (SRA) of 1984 created the United States Sentencing Commission with broad bipartisan support to reduce unwarranted sentencing disparities and promote certainty and fairness in sentencing.[8] The SRA included *ex officio* seats for DOJ, that permit the U.S. Attorney General's designee to serve as nonvoting members of the Commission. As *ex officio*, DOJ members attend non-public Commission meetings and receive staff briefings, memos, and internal data. These meetings and materials are an important part of the Commission's policy making process, and it is crucial that Defenders are given the same access as the chief law enforcement officer of the Federal Government. Similarly, access to the Defenders' expertise and data are valuable resources for the Commission as its policy priorities should be shaped by current sentencing practices and realities of those in BOP custody. Increased transparency would facilitate dialogue between Defenders and the Commission while helping to ensure that sentencing guidelines remain reflective of current criminal legal practice. If the Defenders participate in non-public meetings, they will be able to share patterns grounded in data from their clients' experience, for example, when judges regularly issue sentences below non-mandatory guidelines for certain offenses. The Commission could benefit from that data allowing front-end reevaluation of the guidelines before policy amendment priorities are determined.[9]

Given the stark racial disparities in the criminal legal system, the present inclusion of *ex officio* DOJ members in Commission meetings is not sufficient to provide the decision-making body with a comprehensive and balanced understanding of pressing policy issues. The Commission would benefit from the unique experience that Defenders have to offer regarding federal sentencing guidelines, and Defenders would be better equipped to serve their clients with insight into the Commission's internal documents and policy creation process. In the furtherance of these principles, LDF urges the Commission to support a legislative amendment adding a Defender *ex officio* to the Commission's membership.

****

LDF commends the Commission for taking this opportunity to increase Defenders' access to internal policymaking procedures through participation in meetings and public hearings. The ability to engage in meetings and receive some internal documents is undoubtedly positive and demonstrates a shift towards inclusivity and cooperation. Should you have any questions about this comment do not hesitate to email Senior Policy Associate Kristina Roth at [redacted].

Sincerely,

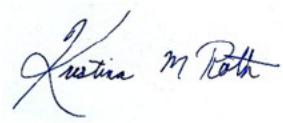
---

[8] U.S. SENTENCING COMM'N, *FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM* ch. 1, at 33 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap1.pdf

[9] See *United States v. Booker*, 543 U.S. 200 (2005) (eliminating a provision that required federal district judges to impose sentences within the ranges prescribed by the United States Federal Sentencing Guidelines).

LDF Legal Defense Fund

Advancing racial justice since 1940



Kristina M. Roth, Senior Policy Associate
Demetria L. McCain, Director of Policy

NAACP Legal Defense and Educational Fund, Inc. (LDF)
700 14th Street NW, Suite 600
Washington, D.C. 20005

C. MELISSA OWEN
President

October 23, 2026

Honorable Judge Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Comments to the U.S. Sentencing Commission on Proposed Amendments to the Commission's Rules of Practice and Procedure

Dear Judge Reeves and Members of the Commission:

The National Association of Criminal Defense Lawyers (NACDL)[1] appreciates this opportunity to express its views on the U.S. Sentencing Commission's proposed amendments to its Rules of Practice and Procedure.

To begin, it would be helpful for stakeholders, commenters, and the public if the Commission would consider publicizing the impetus and rationale for proposed amendments. As the Commission knows, its Rules of Practice and Procedure are facially neutral but can have a significant impact on how the Commission acts and how stakeholders and the public may interact with the Commission. These Rules are changed relatively rarely. Here, some of the proposed amendments are potentially quite significant, yet the Commission provides little or no rationale or explanation for why they are being considered or why specific options are being proposed. Stakeholders and the public would surely be helped if they could suit their comments to the Commission's stated objectives and rationales for such important changes. Additionally, the Commission would no doubt welcome commentary that was more relevant and that directly addressed the Commission's specifically stated goals and concerns. We ask the Commission to consider providing these explanations with future proposals.

[1] NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

Part A: Changes to the Introduction

NACDL does not have a strong opinion about this proposed change but is generally supportive of the Commission's effort to make the Rules introduction more closely track the statutory language.

Part B: Voting Rules for Commission Action

NACDL has no concerns about the proposed amendment to Rule 2.2(a).

1. **The Commission should not change the number of votes required for retroactive application of a guideline amendment.**

NACDL is strongly opposed to the proposed amendment to Rule 2.2(b) which would require five votes to make an amendment available for retroactive application to defendants previously sentenced. As previously said, it is frustrating that stakeholders, commenters, and the public are left with no explanation as to why this is being proposed.

In any event, there are many reasons not to alter the voting threshold for retroactive application of an amended guideline. Retroactive application of guideline amendments is rare, carefully considered and substantiated, beneficial to affected persons and society at large, and readily administrable.

First, retroactive application is rare. A review of the Commission's retroactivity analyses shows that retroactive application has been used very sparingly in the past two decades despite a significant volume of overall guidelines changes during that time.[2] Given how rarely the Commission elects to make a guideline change apply retroactively even with the current four-vote threshold, it is clear that heightening this voting threshold is unwarranted.

Second, the Commission already only acts to make an amendment retroactive when the need is apparent and considerable. The bar for when to apply a guideline retroactively is high. The Commission considers "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively."[3] In practice, the Commission has generally only taken this action when a change is significant and either the need is great or the burden is low or both.

Third, when the Commission has taken the unusual action of making a guideline amendment retroactive, the change has benefited impacted persons, the criminal legal system, and society at large. This has most often occurred in drug sentencing, where the Commission has frequently revised the guidelines. In these instances, recognition of the harm to already-sentenced individuals has compelled the Commission to make the changes retroactive, and the impact on those individuals has been substantial.

[2] *See, e.g.*, U.S. Sent'g Comm'n, Retroactivity Analyses & Data Reports, https://www.ussc.gov/research/data-reports/retroactivity-analyses-and-data-reports.
[3] USSG §1B1.10, cmt. (background).

As just one example, over 31,000 of the roughly 51,000 petitions for resentencing were granted after the Commission made its 2014 Drug Guidelines Amendment ("Drugs Minus Two") retroactive.[4] A Commission analysis estimated that sentenced individuals would have their sentences reduced by an average of 25 months.[5] Back-of-the-envelope math indicates that this would save affected persons a combined more than 60,000 years of imprisonment, a staggering amount. Although it may pale in comparison to the human value of those years of avoided imprisonment, these resentencings also doubtless brought commensurate cost savings to taxpayers. In short, retroactivity has produced and can produce tremendous benefits and cost savings, even though it is infrequently used. There is no need for the Commission to restrict its own judicious use of this powerful tool in support of just sentencing outcomes.

Finally, on the occasions when the Commission has made guideline changes retroactive, adjudicating petitions for resentencing has not been overly burdensome. Although some changes have led to significant numbers of petitions, these applications are naturally distributed appropriately to the original sentencing courts with greater resources. Judges and staff are used to handling and adjudicating these petitions, and retroactive application of guidelines is readily administrable. Even where resentencing petitions produce some burden, this is acceptable as the resentencings lead to fairer ultimate outcomes and conservation of resources on the back end.

2. The Commission should also not alter its voting threshold for other matters.

The Issue for Comment within Part B asks whether the Commission should increase the voting threshold for any other Commission action. NACDL strongly opposes this as well. The Commission and public are well aware of the statutory requirements regarding the partisan makeup of the Commission. In spite of this—or perhaps because of it—the Commission has frequently acted in an admirably bipartisan manner in conducting its work. At other times, the Commission has split on certain issues along partisan lines, a phenomenon that is frequently seen across our government, including in other branches and agencies. There are other agencies, in fact, where the partisan-balance requirements have rendered those bodies largely inert, particularly with respect to controversial issues or in times of greater partisan rancor or polarization. We urge the Commission not to adopt rules that could invite the same result. The Commission has remained productive and collegial with its current voting rules. A sweeping change is not necessary and could have significant consequences.

Part C: Participation of Committee on Criminal Law and Defender Representatives

NACDL supports Part C's core proposal to give the Federal Public and Community Defenders a seated presence in Commission meetings and hearings. Because Federal Public and Community Defenders represent a large share of criminal defendants in federal courts, they have direct, daily

[4] U.S. Sent'g Comm'n, 2014 Drug Guidelines Amendment Retroactivity Data Report, tbl. 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20210511-Drug-Retro-Analysis.pdf.

[5] U.S. Sent'g Comm'n Office of Research & Data, Memo. to Chair Saris, Commr's & Kenneth Cohen re Summary of Key Data Regarding Retroactive Application of the 2014 Drug Guidelines Amendment, at 2 (July 25, 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140725-Drug-Retro-Analysis.pdf.

experience with how the Guidelines operate in practice. Their exclusion from the Commission's deliberative process has long been a gap in the Commission's stakeholder engagement.

The clearest way to fix that gap is to ensure the Defender representative is placed on the same footing the Commission already extends to the Department of Justice's ("DOJ") *ex officio* member: the same meetings, the same participation at public hearings, and the same materials. The recommendations below apply that parity principle to Rule 3.1(c) and Rule 3.4.

1. **The Defender representative should attend whatever meetings the DOJ *ex officio* member attends.**

Rule 3.1(c) brackets two versions of which meetings the designated representatives may attend: "public meetings and nonpublic briefing sessions" or "all Commission meetings at which Commission staff is present." Rather than choosing between these options, NACDL suggests that a more workable rule would tie the Defender representative's access directly to whatever access the DOJ *ex officio* member already has under Commission practice. If the *ex officio* member sits in on staff briefings and nonpublic sessions, the Defender representative should as well. Anything short of that leaves one side of the adversarial process working from a fuller picture than the other when the Commission votes.

2. **The Defender representative's role at public hearings should mirror the DOJ *ex officio* member's role.**

Rule 3.4 as proposed provides that the designated representatives "shall be permitted to actively participate in such a hearing alongside commissioners" and may, "as necessary and relevant to the proceeding," pose questions to "any witness called to testify during the hearing." That language is a good start, but it does not state that the Defender representative's role matches that of the DOJ *ex officio* member. The rule should state expressly that the Defender representative may participate in a public hearing on the same terms as the DOJ *ex officio* member, including presenting the Defenders' own analysis of a proposed amendment and responding to points raised by other participants, in addition to questioning witnesses.

3. **The Defender representative should receive the same materials as the Department of Justice *ex officio* member.**

Rather than defining the excluded category of "non-policy, non-data, or internal administrative matters" in the abstract, Rule 3.1(c) should provide that the Defender representative receives the same set of meeting materials made available to the DOJ *ex officio* member. This gives both sides of the adversarial process parity of information going into a Commission decision, and it avoids litigating a new redaction standard by tying disclosure to a practice the Commission already administers.

Part D: Ex Parte Communications

For this proposal, NACDL reiterates that it would be helpful if the Commission explained its impetus and rationale for proposing and considering these changes. With regard to the substantive proposed changes, NACDL is largely neutral. However, NACDL is strongly opposed

to the bracketed proposals barring the public at large from communicating ex parte with the Commission but exempting select institutional actors from those rules.

1. **Major changes to the Commission's policies on ex parte communications are not needed.**

In general, NACDL is satisfied with current Commission policy regarding ex parte communications and does not feel that major changes are needed. NACDL is supportive of the general policy of not soliciting communications outside the public comment process regarding the merits of a proposed amendment from outside parties. However, as the Commission knows, individuals' and groups' communications with commissioners frequently occur outside of that process and on other various topics. Those who serve as commissioners frequently have other professional positions and it is natural and common for lawyers, academics, impacted persons, and other members of the public to discuss Commission related matters such as past cases, implementation or evaluation of the guidelines, or other sentencing or legal matters with commissioners. These communications are valuable to the Commission and to the public and should not be restricted, even if they may sometimes touch on pending proposed amendments.

The proposed Option 1 would delete the current policy on ex parte communications in Rule 4.3. NACDL does not feel that this change is necessary. As the Commission is aware and as the current rule implies, there are good reasons for communications on proposed amendments or other stages in the rulemaking process to be made solely via the official comment process. This policy is sound from an administrative-law perspective and generally tracks the procedural rules of other agencies.

The main proposals in Options 2 and 3 to provide criteria and more firmly state that ex parte communications regarding the amendments process may be made public. We feel that these proposals would probably not be harmful but it is also not clear that they are necessary.

2. **The bracketed proposals permitting certain institutional actors to communicate with the Commission ex parte while barring all others from doing so would be unfair and undemocratic.**

We wish to address the bracketed proposals within Options 2 and 3. NACDL strongly opposes the proposed bracketed possibility within these options, which would exclude "communication with: (1) members of Congress, congressional staff, and legislative branch agencies; (2) members of the Federal Judiciary (including the Judicial Conference of the United States and its committees); (3) United States Probation Officers; (4) the Federal Bureau of Prisons; (5) the Criminal Division of the United States Department of Justice; and (6) representatives of the Federal Public and Community Defenders" from the rules on ex parte communications that would apply to all others. This would make a process that is open and transparent into one that is closed and opaque. Even if it does not, it would have the unmistakable appearance of doing so.

These enumerated groups understandably carry considerable institutional weight with the Commission. Given that weight, it is wholly unnecessary to exempt them from the Commission's ex parte rules. This proposal also seems to ignore the fact that these are not the only actors that have a stake in the Commission's actions and in communicating with the Commission. Impacted

persons and their families, lawyers who are not prosecutors or federal defenders, and numerous members of other groups would have their voices diminished. While it is appropriate that some who communicate with the Commission are given greater weight by virtue of their important institutional role, this proposal would needlessly relegate the voices of all others to an inferior tier.

The Commission, and this sitting Commission in particular, has rightly prided itself on hearing from a variety of voices and on being open and transparent in its decisionmaking and in its communications with those parties. This bracketed proposal to permit only certain parties to engage in ex parte communications would create the appearance that the Commission is cloistered and insular, listening only to a select few. We strongly oppose the bracketed proposal.

Part E: The Priorities-Setting Process

NACDL supports the restructuring of Rule 5.2 into a three-stage process of public submission, a hearing and deliberative session, and a final public vote tied to the statutory purposes in 28 U.S.C. § 991(b). NACDL offers the following comments on the bracketed options and the structure of the planning session.

1. **The Commission should select the later month and longer comment period options.**

Rule 5.2(a) brackets March, April, or May for the annual solicitation, and a submission period of 30, 45, or 60 days. NACDL recommends May and 60 days. A May notice with a 60-day submission period closes in July, and Rule 5.2(a) requires the Commission to post all submitted proposals within seven days after the period closes. NACDL therefore recommends that the planning session under Rule 5.2(b) be held in July or August, after the proposals are posted, and not in June. A longer window and a later start would give the defense bar time to identify recurring problems from the prior amendment cycle and to consult with practitioners before submitting proposed priorities.

2. **The line between the nonpublic deliberative session and the public vote needs a documentation requirement.**

Rule 5.2(b)(2) allows commissioners to refine proposed priorities in a nonpublic setting before adopting a final list at a public meeting. Given that Part F separately proposes disclosure of nonpublic meeting minutes, NACDL recommends that Rule 5.2 cross-reference that disclosure requirement directly, so that the public can see how priorities were narrowed or reformulated between the hearing and the final vote, not only the initial proposals and the final list.

3. **The Commission should state its rationale for priority selection.**

The proposed rule directs the Commission to adopt priorities that, viewed collectively, best further the purposes in Section 991(b). NACDL recommends adding a requirement that the notice of final priorities briefly explain, for each adopted priority, which statutory purpose or purposes it serves and why it was selected over other submitted proposals. A bare list of final priorities, without that explanation, does not let submitters understand why their proposal was or was not adopted.

Part F: Disclosure of Meeting Materials and Minutes

NACDL supports the disclosure requirements added by Part F to Rule 5.3, subject to the following comments on the bracketed timing, the scope of the redaction standard, and an additional end-of-cycle disclosure.

1. **Meeting materials should be released before the meeting, not after.**

Rule 5.3(b)(1) brackets release of the notice, agenda, and related materials either "at least seven days prior to the scheduled date of the meeting" or "no later than seven days following the adjournment of the meeting." NACDL recommends the pre-meeting option. Advance access is what allows practitioners to identify issues before a vote is taken rather than after the fact. Post-meeting disclosure serves a historical record function but does not support the kind of public engagement the Commission states is its goal.

2. **Draft amendment language should be disclosed as meeting material, not withheld as deliberative.**

Issue for Comment 1 on Part F notes that Commission meeting materials sometimes include preliminary working drafts of proposed amendments and asks whether those should be released. NACDL recommends that draft guideline text be treated as a disclosable meeting material once it is circulated to commissioners for a scheduled meeting, distinct from staff memoranda analyzing the draft or recording individual commissioner positions, which may properly be withheld as deliberative. Early visibility into draft text, even in preliminary form, is what allows the defense bar to prepare informed comments once a matter reaches the formal amendment process.

3. **Nonpublic meeting minutes should record the substance of the discussion, not only the topics and the vote.**

As drafted, Rule 5.3(b)(2) requires that minutes for both public and nonpublic meetings include a list of attendees, a summary of topics discussed relevant to priorities or the amendment process, and the final vote. For nonpublic meetings, a summary limited to naming the topic discussed, without describing the substance of the discussion, will not give the public a meaningful window into how a guideline amendment took shape. NACDL recommends that the rule require a substantive summary of the positions and reasoning presented at a nonpublic meeting, redacted only for the categories already listed in Rule 5.3(c): commissioner deliberations, legal opinions, and confidential or privileged information.

4. **The redaction categories in Rule 5.3(c) need definition.**

Rule 5.3(c) provides that released documents "shall not include, or shall be redacted to prevent disclosure of," information inappropriate for public disclosure, including "commissioner deliberations," without defining that term. Because the exclusion is mandatory, an undefined "commissioner deliberations" could swallow the disclosure requirement, since most of what occurs at a nonpublic meeting could be characterized as deliberation. NACDL recommends that the rule define the term as the individual positions and votes of specific commissioners, leaving the substantive content of the guideline issue discussed disclosable.

5. The Commission should publish a written explanation when it considers but does not promulgate a proposed amendment.

Rule 5.3 as proposed governs what the Commission discloses before and during the amendment process, but not what it discloses at the end of a cycle about published proposals that were not adopted. In recent cycles, the Commission has published proposed amendments, received comment, and held hearings, and then taken no action on certain proposals without stating a reason. Participants cannot tell whether the Commission rejected a proposal on the merits, found the record insufficient, deferred it for further study, or lacked time to reach it.

NACDL recommends that Rule 5.3 require the Commission, at the close of each cycle, to publish a written statement for each proposed amendment and issue for comment that was not promulgated. The statement should identify the proposal, state whether the Commission declined, deferred, or referred it for further study, and state the reasons, including any unresolved concerns raised in comments or testimony. Practitioners could then address those concerns in later cycles with data, research, or revised proposals. The statement may accompany the final amendment package or be published separately and need not include material within the redaction categories in Rule 5.3(c).

Respectfully Submitted,

C. Melissa Owen
President, NACDL

Lisa Monet Wayne
Executive Director, NACDL

JaneAnne Murray
Chair, NACDL Sentencing Committee

Nathan Pysno
Director of Procedural Justice & Senior Counsel, NACDL

Ebise Bayisa
Member, NACDL Sentencing Committee

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

re: comments on proposed amendments

Paralegal Project
Paula Anthony, Paralegal
[redacted]

Honorable Judges and Committee Members:

I am deeply disappointed by any proposal that would make it more difficult, rather than less difficult, for the Commission to correct sentences after it has determined that a guideline no longer produces fair or proportionate results.

Retroactivity is not an academic exercise. Behind every retroactivity vote are real people, real families, and real years of human life.

The Commission has heard extensive evidence about sentencing disparities involving low-level drug offenders. It has recognized that drug quantity, purity, and a defendant's nominal place in a conspiracy do not always accurately measure culpability. Yet people sentenced under those earlier policies remain incarcerated —sometimes for decades—while similarly situated individuals sentenced after an amendment receive substantially lower sentences.

That result is particularly troubling for low-level participants. An addicted runner or courier may know almost nothing about the organization. The dealer or organizer knows the suppliers, customers, routes, finances, and other participants and therefore possesses valuable information to exchange for cooperation credit. The addicted courier frequently has nothing comparable to offer—not because the courier is more culpable, but precisely because he or she occupied such a low position in the organization.

The result can be perverse: the person with the greatest knowledge because of greater involvement receives the greater benefit, while the person with the least knowledge because of lesser involvement receives the greater punishment.

The absence of useful information is not evidence of greater culpability.

There is also a financial consequence that cannot be ignored. Chair Reeves

has already called attention to the substantial annual taxpayer cost of federal incarceration and, more importantly, to "The price of spending one day more than necessary in prison." If one unnecessary day matters, then the Commission must confront the cost—both human and financial—of five, ten, or fifteen unnecessary years.

Taxpayers should not be required to finance incarceration that the Commission's own subsequent policy judgments indicate is longer than necessary to accomplish the purposes of sentencing. Nor should families continue losing parents, children, spouses, and grandparents merely because the correction of an outdated guideline came after their loved one's sentencing date.

Finality has value. But finality should not become a justification for perpetuating a punishment the federal sentencing system itself has subsequently concluded is disproportionate.

When the Commission determines that a guideline requires correction, retroactivity should remain a meaningful mechanism for extending that correction to people already serving sentences under the former rule. The procedural rules governing retroactivity should facilitate careful consideration of justice, public safety, proportionality, and fiscal responsibility—not create unnecessary additional barriers to relief.

I urge the Commission to remember that retroactivity does not automatically release anyone. It permits courts to review individual cases. Judges remain able to examine the defendant's conduct, institutional history, rehabilitation, public-safety considerations, and the factors under 18 U.S.C. § 3553(a).

Allow the courts to do that work.

Do not make it increasingly difficult for deserving individuals even to reach the courthouse door.

The Commission has the ability not only to improve sentencing for tomorrow's defendant, but also to address the consequences of yesterday's sentencing policies. A correction that benefits only the person sentenced tomorrow while leaving an identically situated person serving decades under yesterday's rule may be prospective reform, but it is not complete justice.

I am angry at the actions of this Commission. I have seen more and more unfair sentencing since I started Paralegal Project nearly ten years ago. Between the BOP making life more difficult than necessary, lack of medical, dental and healthcare in general, holding/destroying/not mailing mail (I have proof), disintegration of food and commissary availability, this debacle over application of

Congressional LAW (FSA ETC), unnecessary (preventable) death of AICs, and a whole host of other things while you recognize that past sentencing guidelines are monstrously out of proportion and have made current guidelines more reasonable now refuse to allow inmates (AICs) to petition to have their sentences adjusted to current levels. You'd rather see AICs rot in prison than go home. Getting into trouble should not be a lose your life sentence. Prison does not include losing your life but many have due to prison conditions. It will take an act of God to get Congress to do anything to bring fairness back to the justice system – that is YOUR (the Commission's) job and at this point I'm going to be blunt and say you have NOT brought fairness back to the justice system, especially for those sentenced before the current amendments.

Congress is sitting on the Safer Detention Act which would go a long way towards accomplishing what the Commission started. The Commission getting behind the Act would go a long way toward fixing some of the sentencing disparity from older guidelines. Nudging those you know in Washington may bring this legislation to fruition.

There are some things you cannot do. You cannot make the prosecutors quit lying and manufacturing evidence. I am now told lying and manufacturing evidence is legal for prosecutors. It doesn't bring out the truth. You can't make Judges be fair because your biggest vocabulary word is discretion – to hell with the law if a judge decides he/she doesn't want to adjust the sentence for fairness. I have had several clients petition for adjustments under the youthful offender amendment only to be totally ignored – while the facts fit the Judge's discretion does not. Judicial discretion also deserves careful consideration when the Commission evaluates retroactivity. Discretion is essential to individualized sentencing, but discretion can also defeat the very purpose of an amendment when the circumstances that prompted the Commission to change a guideline are subsequently used as reasons to deny the benefit of that change.

I have seen this occur with the Commission's treatment of youthful offenders. I assisted a young man who was approximately twenty years old at the time of his drug offense and received a life sentence. **20 years old** with a **life** sentence..... at taxpayer expense. When relief was later sought based upon the Commission's recognition of youth and science as an important sentencing consideration, the court pointed to his troubling teenage history in deciding whether relief was warranted. Under discretion the Judge denied the petition. Science has determined that culpability as a youth can extend into the early 30's for some while the median age for maturity is 25 years old.

That illustrates the problem vividly. A troubled adolescence should not automatically become evidence against application of a policy intended to recognize the diminished maturity, vulnerability, impulsivity, susceptibility to influence, and capacity for change associated with youth. In appropriate cases, that history may be part of the reason the sentencing policy was changed in the first place.

The same danger exists with drug amendments. If the Commission recognizes that a courier, runner, addicted participant, or other low-level defendant may have been punished too severely because quantity, purity, or relevant conduct overstated actual culpability, retroactivity should provide a genuine opportunity for correction. It should not merely create another discretionary proceeding in which the characteristics that demonstrate the defendant's lesser role are transformed into reasons to preserve the original sentence. Someone 33rd on a 45 person indictment should not receive 15 years more then the primary operator. I have several clients on large indictments that got a LOT more time than the dealer/organizer.

Judicial discretion should permit consideration of genuine individualized public-safety concerns. It should not become a mechanism through which recognized sentencing disparities simply survive under another name.

I am angry that a Commission that recognizes the **COST** of incarceration is borne by taxpayers but is not doing anything to relieve that cost. And then the cost of the destruction of families. I have had 5 clients (all low or minimum custody) lose a parent (and one lost both parents) and the BOP would not even let them furlough for the funeral. There again is our "fair" justice system. I have had a bunch of clients - 5-10 that I know of - who have been through divorce proceedings this past year. Some had children and those children are now being kept from communicating with the AICs. All of this because of sentencing under the prior drug amendments without a way to bring their sentence to current levels and an optimistic look forward. Our system saddens me a great deal. I waffle between continuing to help and quitting. I am frustrated Judges will do nothing to implement the amendments (discretion – we don't HAVE to). Until the Judges **have** to rule according to the amendments without discretion, the amendments are useless for AICs sentenced on old guidelines.

Now you want to make it much more difficult to get retroactivity by requiring more votes to pass – more than a quorum - not simple majority. Why should it take four Commissioners to recognize and correct a defective or outdated sentencing guideline for tomorrow's defendant, but five Commissioners to allow a

court even to consider applying that correction to yesterday's defendant? Silent roadblock ahead. It now will never happen or IF it does, it will be with an amendment that will literally affect few. I never seen 5 voting people on a small Commission of ANY kind agree..... you are intentionally making it so retroactivity never happens – again our "fair" justice system.

Amendments are recognition of a problem in the sentencing guidelines. What once was should be no more. Yet prosecutors and PSR developers (are they properly trained) look for reasons to add time to a sentence and then congratulate themselves on a job well done. But the job is not well done if it doesn't abide by the spirit of the amendment as well as the law. Status quo survives all too often and all too well. If a sentencing guideline is a problem recognized today – shouldn't it apply to that same guideline yesteryear?

Judges adjudicate. Commission fabricates. Prosecutors roll their eyes and look for ways around changes. Only thing positive I can say is at least they don't hang people anymore.

Four votes are sufficient to change a sentencing guideline. It should not require five votes to permit a court to consider whether that same correction should apply to a person still imprisoned under the guideline the Commission determined needed changing.

Do not adopt the proposed five-vote requirement for retroactivity.

Thank you for your attention.

Working under grace,

Kind regards,

Paula Anthony, Paralegal

Paralegal Project
Paula Anthony, Paralegal
[redacted]

"Life is not about waiting for the storms to pass, it's about learning how to dance in the rain."
Sistas

Paralegal Project
Paula Anthony, Paralegal
[redacted]

16 October 2026

United States Sentencing Commission
Chairman Judge Carlton Reeves
Vice Chairman Judge Luis Restrepo
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Honorable Reeves and Restrepo and Commission:

Objection to Part B and Recommendations Regarding Public Participation

I find it particularly troubling that the Commission proposes increasing the affirmative votes required for retroactivity from four to five while simultaneously describing the purpose of its rulemaking review as improving transparency, public participation, and understanding of Commission proceedings.

Transparency is important. Public participation is essential. However, neither accomplishes much if the Commission creates additional procedural obstacles to correcting sentences imposed under guidelines it has subsequently determined should be amended.

I respectfully ask the Commission to identify the specific public-safety, legal, or administrative necessity supporting the proposed five-vote requirement. What problem exists under the present voting structure that requires this change? How does making retroactivity more difficult serve the Commission's statutory purposes?

The Commission must also consider the consequences of vacancies. A five-vote requirement could effectively prevent retroactivity even when every sitting commissioner supports it, depending upon the number of vacant seats. Justice should not depend upon whether all authorized positions happen to be filled.

I support greater public disclosure under Part F and increased public participation under Part E. But those objectives should include the people most directly affected by sentencing policy: incarcerated individuals and their families. Incarcerated people have little or no practical access to the Commission's website, proposed amendments, supporting studies, or public-comment procedures.

If the Commission genuinely intends to improve public participation, it should establish

practical means for incarcerated individuals to receive notice, understand proposed changes, and submit meaningful comments.

I also urge the Commission to publish clear explanations of its retroactivity decisions, including the reasons supporting or opposing retroactive application.

Finally, I remind the Commission that retroactivity does not mandate release. It allows sentencing courts to examine individual cases, consider public safety, evaluate rehabilitation, and determine whether a reduction is warranted.

The Commission should not make access to that individualized judicial review more difficult without demonstrating a compelling reason for doing so.

The Commission has an opportunity to improve public confidence in federal sentencing. Increasing transparency while simultaneously increasing barriers to relief risks accomplishing precisely the opposite.

I do not oppose the entire eight-part proposal. Parts C, E, and F contain changes that could genuinely improve participation and transparency.

Part B adds obstacles to relief for those who were incarcerated before 2024 than those who have been incarcerated since. The same crimes but not the same punishment. That is wrong on all counts. Previously incarcerated (prior to 2024) should have the opportunity of judicial review (and not the rubber stamp of denial just because it's a review of the sentence but a review that honestly considers all the factors) I am in favor of reducing the time in the guidelines for drug and associated activities and allowing for youthful acts to be disallowed in criminal history points (very much in favor – being young and dumb should not have the same punishment as fully developed adults) but to sentence people today with newer guidelines while those incarcerated before 2024 have received sentences (some nearly double today's guidelines) seems unfair and unjust. The crime isn't different but sentencing is more lenient then 3 years ago. I'm very much for that especially for drug and white collar crimes. But I am also in favor of judicial review for earlier sentence individuals.

“Retroactivity is not a promise of release; it is an opportunity for justice to be reconsidered in light of what we know today.”

Retroactivity does not guarantee a reduction in sentence, nor does it require the release of an individual who poses a danger to society. It simply permits the sentencing court to conduct an individualized review, considering the nature and circumstances of the offense, the defendant's actual level of culpability, age and maturity at the time of the offense, substance dependency, rehabilitation, institutional conduct, time already served, current public-safety risk, and the availability of family and community support upon release.

The sentencing judge is in a position to determine whether continued incarceration remains necessary to accomplish the purposes of sentencing under 18 U.S.C. § 3553(a).

A guideline amendment made retroactive opens the door to that review; it does not dictate the outcome.

By increasing the voting threshold for retroactivity, the Commission would make it more difficult for eligible individuals to even reach the courthouse door, regardless of how compelling their individual circumstances may be. The question is not whether every individual deserves a sentence reduction. The question is whether individuals should be denied the opportunity for meaningful judicial consideration solely because an additional commissioner did not vote in favor of retroactivity.

One thing I would definitely like the commission to consider is the research done on youthful offenders which says full development doesn't occur until mid-thirties in some and expand the youthful offender parameters to age 25.

SCIENTIFIC BASIS FOR CONSIDERING YOUNG-ADULT DEVELOPMENT

Research concerning adolescent and young-adult development has repeatedly examined the continuing maturation of executive functioning and behavioral control beyond adolescence.

Relevant research includes:

Laurence Steinberg, "A Social Neuroscience Perspective on Adolescent Risk-Taking," Developmental Review (2008).
Research addressing the development of impulse control, future planning, risk-taking, and susceptibility to peer influence.

Jay N. Giedd, "Structural Magnetic Resonance Imaging of the Adolescent Brain," Annals of the New York Academy of Sciences (2004).
Research concerning continuing structural development of the adolescent and young-adult brain, including areas associated with judgment and behavioral control.

B.J. Casey, Rebecca M. Jones & Todd A. Hare, "The Adolescent Brain," Annals of the New York Academy of Sciences (2008).
Research examining differences in behavioral and cognitive control during adolescence and the transition into adulthood.

National Research Council / Institute of Medicine, "The Science of Adolescent Risk-Taking" (2011).
Research addressing risk-taking, susceptibility to influence, developing judgment, and the transition from adolescence toward mature adulthood.

These authorities do not establish that every person under a particular age lacks responsibility for criminal conduct.

Rather, they demonstrate why chronological adulthood does not end the individualized

inquiry into maturity, judgment, susceptibility to influence, and capacity for change.

I recently received correspondence from a young man who reported receiving a life sentence for a drug offense committed when he was just 18 years old. I looked at his case but my client load is too heavy right now to take on another case. Although I recall the circumstances, I do not have sufficient information at hand to discuss the particulars of his case, but his account raises a serious question: Should someone who committed a non-homicide drug offense at 18 be denied any meaningful opportunity to demonstrate rehabilitation and personal growth? Really? 18 and never see society again for the rest of his life – that could be 70 years (or more) on the taxpayer dime. An 18-year-old sentenced to life imprisonment for a drug offense raises a question that should concern every member of this Commission: At what point does punishment cease to serve its intended purpose and become little more than permanent warehousing at taxpayer expense?

I am not suggesting that youth excuses criminal conduct or that every young offender deserves a sentence reduction. I am asking the Commission to recognize that an individual who committed an offense at 18, 20, or 25 years of age may be a substantially different person after 10, 15, or 20 years of incarceration.

The Commission should consider expanding its treatment of youthful offenders to include individuals who committed offenses before age 25, with particular attention to maturity, susceptibility to influence, addiction, decision-making, and the demonstrated capacity for rehabilitation. Such consideration should be individualized rather than based on an assumption that everyone matures at precisely the same age.

Judges considering reductions authorized by retroactive guideline amendments should have the opportunity, within the applicable statutory and guideline framework, to evaluate the person's actual culpability, institutional behavior, educational and vocational achievements, treatment participation, rehabilitation, current risk to public safety, time already served, and realistic prospects for successful reintegration into society.

These are not excuses for criminal behavior. They are relevant considerations in determining whether continued incarceration remains necessary.

The Commission should also recognize the disparity between low-level drug offenders and those who organize or profit from drug trafficking. Individuals suffering from addiction may act as couriers, runners, or distributors in exchange for drugs or repayment of debts. They may possess little information of value to prosecutors, while more culpable participants sometimes obtain substantial sentencing reductions through cooperation.

The absence of useful information should not be mistaken for the presence of greater culpability.

I have worked with incarcerated individuals and their families long enough to see the consequences of sentences that extend far beyond what appears necessary to protect the

public. I have also witnessed meaningful rehabilitation, educational achievement, personal responsibility, and genuine change.

I respectfully urge the Commission to reject Part B's proposed five-vote requirement and retain the existing voting threshold for retroactivity. I support the proposed improvements to transparency and public participation, particularly Parts C, E, and F, and encourage the Commission to ensure that incarcerated individuals have a practical opportunity to participate in proceedings affecting their lives.

A sentencing system should be capable of recognizing both the seriousness of an offense and the possibility that a human being can change.

The Commission has the authority to recommend and adopt sentencing policies that promote fairness, consistency, proportionality, and public safety. I respectfully ask that it not place additional procedural obstacles between those objectives and the individuals whose sentences may warrant reconsideration.

Working under grace
Kind regards,

Paralegal Project
Paula Anthony, Paralegal
Phoenix AZ

"Life is not about waiting for the storms to pass... it's about learning how to dance in the rain.." Sistas

THE SENTENCING PROJECT

October 26, 2026

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

Re: The Sentencing Project Comment on Proposed Amendment to the Rules of Practice and Procedure

Dear Chairman Reeves:

The Sentencing Project appreciates this opportunity to comment on the Commission's Proposed Amendments to the Rules of Practice and Procedure. The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice. We are eager to be a resource as you work to create just, equitable sentencing policies.

We urge the Commission to allow the attendance and non-voting participation of a member of the Federal Public and Community Defenders at all Commission meetings at which Commission staff are present, including non-public meetings.

Federal Defenders and Criminal Justice Act counsel represent the overwhelming majority of people charged with federal crimes. This depth of experience gives Defenders unique expertise in federal criminal law and the federal sentencing guidelines. The Department of Justice similarly has deep expertise based on practice and therefore has an *ex officio* non-voting seat at Commission meetings. The Sentencing Reform Act of 1984, however, which created the Sentencing Commission, omitted such a seat for the Defenders. As such, the Defenders are excluded from non-public commission meetings where important policies are developed and denied access to internal materials which influence policy decisions. TSP joins a broad array of stakeholders in our support for the concept of adding an *ex officio* Defender member to the Commission, including among the Judicial Conference of the federal courts,[1] the Council on Criminal Justice,[2] and academics,[3] among others.[4]

[1]Judicial Conference of the United States. (2004, March 16). *Report of the proceedings of the Judicial Conference of the United States*. Administrative Office of the United States Courts, 11. https://www.uscourts.gov/file/2131/download.

[2] Council on Criminal Justice. (2020). *Federal priorities task force report: 1. Reinvigorate the U.S. Sentencing Commission*. https://priorities.counciloncj.org/federal-priorities/rec1

[3] Osler, M. (2016). A "Holocaust in Slow Motion?": America's Mass Incarceration and the Role of Discretion. *DePaul Journal for Social Justice*, *7*(2). https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1006&context=jsj

[4] The Constitution Project. (2009). *Smart on crime: Recommendations for Congress and the executive branch*. https://static.prisonpolicy.org/scans/SmartOnCrime.pdf

The Commission is now evaluating whether to amend the Rules to allow a representative of the Committee on Criminal Law of the Judicial Conference of the United States and a representative of the Defenders to participate in meetings and public hearings of the Commission. Specifically, it would amend Rule 3.1 (Meetings) to allow the attendance of representatives of such institutions in either public meetings and nonpublic briefing sessions of the Commission or all Commission meetings at which Commission staff is present, except for those parts of meetings in which matters not related to policymaking or data are addressed. Additionally, the proposed amendment would amend Rule 3.4 (Public Hearings) to allow these representatives to participate in public hearings alongside commissioners and, as necessary, pose questions to witnesses.[5]

Adding a Defender representative will balance the voice of the Department of Justice on the Commission, strengthening policymaking. The Department's *ex officio* role allows it to participate in internal discussions, view non-public briefing material, and accordingly tailor its guidance to the needs of the Commission. Meanwhile, Defenders are denied access to internal material that shape policy decisions, such as staff briefings, memoranda, and data analyses. This imbalance is in contrast to the adversarial system and undermines the Commission's credibility. Creating an *ex officio* role for the Defenders would not only balance the Department's voice but improve the perceived legitimacy of the policymaking process.

Adding a Defender representative would also allow the Defenders to better fulfill their statutory mandate under 28 U.S.C. 994(o) to comment on the work of the Commission. The Defenders are required 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, and shall, at least annually, submit to the Commission a written report 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." Access to internal policymaking documents, discussions, and memoranda will improve the utility of the Defender's commentary.

The Sentencing Project thanks the Commission for this opportunity to provide comment. We urge the Commission to ensure the attorneys who are closest to individuals serving the sentences the Commission imposes have a voice. We are grateful for the Commission's continued openness to evidence-based reform and look forward to remaining a resource as this work continues.

Please reach out with any questions to Liz Komar, Senior Policy Counsel, at [redacted].

Many thanks,



Kara Gotsch
Executive Director
The Sentencing Project

[5] United States Sentencing Commission. (2026, August 27). *Proposed amendment: Rules of practice and procedure* ("reader-friendly" version). https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202608_rf-proposed.pdf.

B"H

TZEDEK
ASSOCIATION

Save A Life, Save A World

By the Grace of G-d

October 26, 2026

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Tzedek Association Comments on Proposed Amendments to the Rules of Practice and Procedure, and Supplemental Recommendations on Compassionate Release in Response to Recent Case Law

Dear Judge Reeves and Members of the Commission,

Tzedek Association again welcomes the opportunity to comment on proposed action by the Commission. These comments address the proposed amendments to the Commission's Rules of Practice and Procedure, 91 Fed. Reg. 56724 (Sept. 3, 2026), and include separately identified supplemental recommendations concerning compassionate release.

Tzedek is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian relief both in the United States and throughout the world. Tzedek is particularly committed to promoting reform of the current American sentencing system, informed by its deeply held belief in the dignity and worth of every human being. Tzedek seeks a system that is more humane, fair, and just. From this perspective, Tzedek offers its recommendations regarding the proposed changes to the Rules of Practice and Procedure and offers specific suggestions with respect to certain case law developments.

Comments on Proposed Amendments to Rules of Practice and Procedure

As an initial observation, which may be applied broadly to the compendium of proposed changes, Tzedek strongly urges the Commission to embrace reforms that

202.221.7513 I rabbimoshe@tzedekassociation.org I 571 Bedford Ave, Brooklyn, NY 11249

promote transparency at all stages of the process. In dealing with sentencing practices, which inevitably are emotionally charged, frequently misunderstood, and subject to mischaracterization, political exploitation, and outright demagoguery, there is no substitute for full public participation and engagement. The controversial issues that are inherent in establishing sentencing practices are best resolved through a full public airing of the various considerations that lead to a particular decision. Because the Commission formulates generally applicable sentencing policy rather than adjudicating individual cases, substantive policy communications and supporting materials should presumptively be public, subject to narrowly tailored protections for privileged or otherwise protected information. Indeed, the most challenging and sensitive issues are best addressed and more likely to garner public support when the many nuances and perspectives that shape a policy determination are fully disclosed. Tzedek recognizes and appreciates that the Commission has made a clear and consistent commitment to "embrace democratic values of accountability, representation, and transparency," to "facilitate public deliberation and participation regarding criminal justice policy," and to ensuring public engagement helps the Commission's work "reflect the values of all our nation's people."[1] Tzedek shares these comments in this spirit.

With that prefatory comment, Tzedek offers its perspectives on Parts B through F of the Proposed Amendments.

Part B Voting Rules for Commission Action

Tzedek unequivocally opposes the rule change that would increase the voting threshold for retroactive application. Similarly, in response to the issue for comment as to whether the Commission should require an elevated threshold for other action, Tzedek opposes any such rule change.

At the outset, Tzedek believes the proposed change raises serious questions concerning the Commission's legal authority to impose an additional voting requirement. Congress was quite specific in articulating the voting requirements that govern various actions by the Commission. The enabling statutes specify what constitutes a quorum, the vote required to promulgate guidelines and policy statements, and the vote required for all other actions. See 28 U.S.C. §§ 994(a) and 995(d). Although § 994(a) prescribes an "affirmative vote of at least four members

[1] Hon. Carlton W. Reeves & Con Reynolds, *Meeting the Demand for Democracy in Sentencing*, 37 Federal Sentencing Reporter 6 (2025).

of the Commission" as the requirement to adopt a guideline or policy statement, that language does not expressly authorize the Commission to impose a higher threshold. Rather, read together with § 995(d), the statute shows that Congress deliberately calibrated voting thresholds to the significance of the action: a simple majority of the members present for ordinary business, and four affirmative votes for promulgating guidelines and policy statements. Congress itself determined the threshold for the Commission's most consequential actions.

The statutory requirement is particularly relevant to retroactivity decisions, because the Commission authorizes retroactive application by amending the policy statement at USSG § 1B1.10. Tzedek recognizes that the Commission may interpret "at least four" as establishing a minimum and invoke its rulemaking authority under § 995(a)(1). But that authority is exercised "by vote of a majority of the members present and voting," 28 U.S.C. § 995(a), and a procedural rule adopted by a simple majority should not be used to raise a threshold Congress itself prescribed. More specifically, Rule 1.2(a) permits amendment of the Commission's Rules by a majority, and not fewer than three, of the voting members then serving. When five voting members are serving, three Commissioners could therefore adopt a procedural rule requiring five affirmative votes for retroactivity, even though Congress specified a minimum of four affirmative votes for promulgating the policy statement through which retroactivity is authorized. That disparity reinforces Tzedek's concern about using a procedural rule to raise the statutory voting requirement. If the Commission proceeds, it should explain why its rulemaking authority permits that result.

Apart from these statutory concerns, the proposed rule change is regressive and harmful as a matter of policy. First, the Commission's stated rationale, that retroactivity is an action of "heightened significance," does not justify the change. Retroactivity decisions already receive heightened procedural protection. Whenever the Commission considers an amendment for retroactive application, Rule 4.1A requires it to request public comment, instruct staff to prepare a retroactivity impact analysis where practicable, hold a public hearing, and vote at a public meeting at least 60 days before the amendment's effective date. The decision itself requires the same minimum of four affirmative votes Congress prescribed for promulgating any guideline or policy statement. The notice identifies no deficiency in that process and no empirical basis for making retroactive relief harder to obtain.

Second, retroactivity runs in only one direction. Section 994(u) authorizes the Commission to specify retroactive application only when it "reduces the term of

imprisonment recommended in the guidelines." The retroactivity mechanism under § 994(u) and § 3582(c)(2) authorizes sentence reductions, not increases, and under *Peugh v. United States*, 569 U.S. 530 (2013), the Ex Post Facto Clause bars a court from applying a guideline amendment that raises the applicable range to conduct that predates it. An elevated voting threshold for retroactivity therefore constrains nothing but potential relief for persons who were sentenced under a harsher set of guidelines that the Commission has decided and voted to amend. Its effect would be to make it structurally more difficult for eligible incarcerated individuals to benefit from thoughtful sentencing reforms the Commission has adopted. Making an amendment retroactive does not guarantee a sentence reduction; it permits eligible individuals to seek individualized judicial review.

The burden posed by requiring (without clear statutory authority) a super-majority vote for retroactivity is not hypothetical. The Commission has disclosed that three Commissioners may have voted to make retroactive Amendment 2 (relating to inflationary adjustments) of the amendments submitted to Congress on April 30, 2026, but that those votes alone would not have met what the Commission itself described as "the Sentencing Reform Act's four-vote threshold for retroactivity" (even though three votes represented a majority of the current five Commissioners at that time). See 91 Fed. Reg. 35802, 35803 (June 12, 2026). Retroactive relief is already difficult to secure under the current rule because an absolute majority is required by statute.

The proposed rule would create an additional barrier: an absolute majority of four Commissioners could support both an amendment reducing sentences and its retroactive application, yet eligible individuals would remain unable to seek relief under that amendment absent a super-majority vote. The bracketed proviso does not cure this problem, because it applies only when exactly four members are serving. Whenever five members are serving, retroactive relief would require a unanimous vote, giving any single Commissioner a veto. Tzedek and many other groups have long decried the failure to make sentence-reducing amendments retroactive. To adopt a rule that would make it even more difficult to secure relief for those individuals who might benefit from the Commission's adoption of new guidelines or policies that could warrant a reduction in their sentences is morally indefensible. This is an unwise and unjust proposed amendment and should be rejected.

In response to the issue for comment asking whether the Commission should require five affirmative votes for other actions, including amendments that may increase a term of imprisonment or all amendments to the guidelines, Tzedek

opposes any elevated threshold. For the reasons stated above, although advocates for more humane sentencing might be tempted to support a supermajority requirement for revisions that result in harsher sentences, the legal concerns remain the same. And to the extent that any such decision to enhance a penalty reflects careful consideration by the Commission of the statutory, policy and/or empirical justification for such action, it is unwise policy to deviate from the existing four-vote requirement.

Part C Participation in Meetings and Hearings of Representatives of the Committee on Criminal Law and the Federal Public and Community Defenders

In general, Tzedek believes that Congress should significantly expand the composition of the Commission to reflect broader relevant perspectives. The formulation of sentencing policy should include perspectives and expertise from a wider array of disciplines, most certainly including the defense perspective—both the public and private defense bar—but also other communities with expertise in penal policy and human development.[2] Short of that, Tzedek most certainly supports legislation to add a defense perspective in the same manner that the enabling statute currently provides for the Attorney General or the Attorney General's designee to serve as an ex officio nonvoting member of the Commission. See 28 U.S.C. §991(a).

---

[2] Several state sentencing commissions provide useful models for broader institutional and professional representation than the federal Commission's seven voting seats. Pennsylvania's Commission on Sentencing has eleven voting members, including four judges, four legislators, a district attorney, a defense attorney, and a law professor knowledgeable in criminal sentencing. See 42 Pa.C.S. § 2152(a). Virginia's Criminal Sentencing Commission has eighteen members, including the executive director of the Virginia Indigent Defense Commission or a designee. See Va. Code Ann. § 17.1-802(A). Minnesota's Sentencing Guidelines Commission includes a public defender, a person who works for an organization providing treatment or rehabilitative services to individuals convicted of felonies, an academic with a background in criminal justice or corrections, and a public member formerly convicted of and discharged from a felony-level sentence. See Minn. Stat. § 244.09, subd. 2. North Carolina's Sentencing and Policy Advisory Commission has twenty-nine members, including a criminal defense attorney recommended by the North Carolina Advocates for Justice, a representative of the North Carolina Bar Association, and a rehabilitated former prison inmate. See N.C. Gen. Stat. § 164-37. A 2016 overview of sentencing commissions in twenty-three jurisdictions reported an average membership of approximately seventeen and identified the federal and Oregon commissions as the smallest, with seven members each. See Alexis Watts, *The Composition of Sentencing Commissions*, Robina Inst. of Crim. L. & Crim. Just. (Aug. 5, 2016), https://robinainstitute.umn.edu/articles/composition-sentencing-commissions.

Accordingly, while urging the Commission to recommend that Congress expand the Commission as described above, Tzedek supports expanded participation by representatives of the Committee on Criminal Law and the Federal Public and Community Defenders. This endorsement includes their participation in public meetings and nonpublic briefing sessions of the Commission, the first of the bracketed alternatives in proposed Rule 3.1(c), and access to the same materials as the Commissioners, with the narrow, specific limitations included in the proposed rule. Tzedek does not support the broader alternative extending attendance to all Commission meetings at which Commission staff is present, which would give these two institutions a continuous role in the Commission's internal work that is not available to independent advocacy organizations, the private defense bar, or other stakeholders. It is exceedingly important that in implementing the proposal, the Commission adopt safeguards to ensure that the additional involvement of the two institutions in no way diminishes the opportunity for input from other stakeholders.

In this regard, should the Commission adopt the proposed revision to Rule 3.4 to permit representatives of the Committee on Criminal Law of the Judicial Conference and the Federal Public and Community Defenders to actively participate in public hearings, the Commission should take steps to ensure that this additional participation does not come at the expense of time allotted for presentations by other stakeholders and interested parties. The Commission should preserve adequate time for testimony from other stakeholders and clearly distinguish the designated representatives' questioning of witnesses from their presentation of formal testimony. Indeed, the Commission, remaining mindful of the extraordinary diversity of experiences and perspectives among the federal judiciary and the federal defense bar, should be ever attentive in its practices to the reality that representatives of the Committee on Criminal Law of the Judicial Conference and the Federal Public and Community Defenders cannot encompass the full range of views within those communities. Ensuring as many views as possible are heard will be a continuing Commission responsibility even if it adopts the pending proposal.

The substantive policy positions presented by these representatives, whether through testimony or nonpublic communications, should be made publicly available, subject to narrowly tailored protections for legally privileged or otherwise protected information. This would allow the wider community to assess and respond to their recommendations while preserving meaningful judicial and defense participation.

Part D Ex Parte Communications

Consistent with its preference for maximum transparency, Tzedek endorses Option 3 that would amend Rule 4.3 to permit all forms of ex parte communication with a full public disclosure requirement. Tzedek opposes the bracketed exceptions that would categorically exempt communications from disclosure based solely on the speaker's identity or institutional affiliation. Substantive communications concerning proposed sentencing policy should be disclosed, subject only to narrowly tailored protections for legally privileged information, personal privacy, and genuine security concerns. Any withholding should be accompanied by a public explanation of its basis, and reasonably separable, nonprotected material should be disclosed. Undisclosed efforts to influence sentencing policy undermine public confidence and deny other stakeholders a meaningful opportunity to respond.

In response to the issues for comment, Tzedek urges the Commission to apply the same disclosure requirement to every Commission action that proceeds by notice and comment, including proposed priorities and amendments to these Rules. The definition of ex parte communication should also reach substantive communications directed to Commission staff; otherwise, efforts to influence policy could be routed through staff to avoid disclosure.

Part E Increasing Transparency and Participation in the Commission's Work Agenda Setting

Tzedek wholeheartedly endorses the proposal to amend Rule 5.2 to make agenda-setting more participatory and transparent. Earlier and more expansive public input will enhance the Commission's capacity to discharge its responsibility to ensure that the Guidelines reflect the latest evolving notions of how sentencing policy can best achieve the purposes of sentencing.

Indeed, given the current statutory parameters of the size and composition of the Commission, maximizing public input in the annual amendment process is essential to minimize the potential deleterious effects of a narrow and insular perspective on the operation of the Guidelines. In implementing this reform, Tzedek urges the Commission to opt for the earliest month in the bracketed choices proposed in the amended Rules 5.2(a) and (b), and for the longest bracketed submission period, 60 days, in proposed Rule 5.2(a), so that the public has adequate time to prepare and support proposed priorities.

Part F Information Relevant to the Amendment Process

Again, for the reasons stated above, Tzedek wholeheartedly supports the proposed Rule 5.3(b) which would provide under subsections (1) and (2) for the public release of agendas, documents, briefings, and information provided to the Commission in preparation for its meetings, as well as disclosure of all minutes of any such meetings, including a list of participants, a summary of topics discussed relevant to priorities and the amendment process, and a record of the votes of each member on any such actions taken by the Commission. Disclosure must also be timely. Tzedek therefore supports the bracketed alternative in proposed Rule 5.3(b)(1) requiring release at least seven days before the scheduled meeting, rather than after adjournment. Materials relevant to proposed priorities or amendments should be released sufficiently before the applicable comment deadline and Commission decision to allow meaningful public review and response. If substantive new materials are released too late for that purpose, the Commission should provide an additional opportunity for comment before taking final action.

Tzedek also urges the Commission to narrow proposed Rule 5.3(c), particularly its broad references to "commissioner deliberations" and "legal opinions." These categories should not permit withholding substantive policy rationales or supporting factual analyses merely because they were discussed in a nonpublic meeting or incorporated into a legal memorandum. The rule should require narrowly tailored withholding, disclosure of reasonably separable, nonprotected material, and a public explanation of the basis for any withholding, while preserving legally privileged information, personal privacy, and genuine security protections.

Comment on Amendments Warranted in Response to Case Law Developments

In the Federal Register Notice of Final 2026-2027 Priorities, 91 Fed. Reg. 56732 (Sept. 3, 2026), the Commission has included as item (3) "Consideration of any amendments that may be warranted in response to any legislation or case law developments." Although the pending request for comments concerns the Rules of Practice and Procedure, Tzedek submits the following supplemental recommendations to address that separately adopted priority. Tzedek respectfully urges the Commission to respond to the Supreme Court's decisions in *Rutherford v. United States*, 608 U.S. 454 (2026) (consolidated with *Carter v. United States*, No. 24-860), and *Fernandez v. United States*, 608 U.S. 411 (2026), by clarifying and strengthening the compassionate release policy statement at USSG § 1B1.13

within the bounds of those decisions. The Commission should distinguish the grounds those decisions foreclose from the qualifying personal circumstances that continue to warrant individualized consideration. Compliance with the Court's holdings should not become the occasion for unnecessarily restricting other lawful grounds for relief.

In *Rutherford*, the Court held that the sentencing disparity created by Congress's nonretroactive amendment to § 924(c) cannot establish an extraordinary and compelling reason for compassionate release, either alone or in combination with other factors. In *Fernandez*, the Court held that compassionate release cannot serve as a vehicle for collaterally attacking the validity of a conviction. Tzedek recognizes that the Commission cannot override either holding through a policy statement. Nevertheless, those decisions do not eliminate the Commission's responsibility under 28 U.S.C. § 994(t) to describe qualifying extraordinary and compelling reasons for sentence reductions.

Accordingly, Tzedek recommends that the Commission review USSG § 1B1.13(b)(6), concerning unusually long sentences, and subsection (c), concerning changes in law, and issue precise guidance identifying the restrictions required by *Rutherford*. Any revision should avoid imposing categorical restrictions beyond those required by the governing statute and the Court's holding. The Commission should also clarify that *Fernandez's* restriction on challenges to the validity of a conviction does not foreclose consideration of independently qualifying medical conditions, age-related deterioration, family circumstances, or other comparable personal circumstances.

In particular, the Commission should preserve and clarify subsection (b)(5), concerning other reasons, so that courts can evaluate other qualifying circumstances, individually or in combination, that satisfy the provision's requirement of similarity in gravity to the enumerated reasons, consistent with the statute and these decisions. The Court in *Rutherford* expressly declined to "decide whether there are reasons beyond personal circumstances that could qualify as 'extraordinary and compelling,'" 608 U.S. at 467, and the Commission should not foreclose that question by policy statement. It should likewise reaffirm subsection (d)'s recognition that rehabilitation, although insufficient by itself, may be considered alongside other qualifying circumstances. Guidance should clearly distinguish the threshold determination that extraordinary and compelling reasons exist from the subsequent assessment of the § 3553(a) factors and the appropriate extent of any reduction. Eligibility for consideration is not an entitlement to

release; courts retain responsibility for evaluating public safety and whether a reduction is warranted in the individual case.

The Commission should also address questions the Court expressly left unresolved, including whether and under what circumstances substantial sentencing disparities among co-defendants, particularly those arising from post-sentencing developments, may constitute extraordinary and compelling reasons. See *Fernandez*, 608 U.S. at 418 n.1; *Rutherford*, 608 U.S. at 467 n.6. Tzedek urges the Commission to identify appropriate circumstances in which such disparities may warrant individualized consideration, while distinguishing them from reliance on nonretroactive statutory changes foreclosed by *Rutherford* and preserving *Fernandez's* prohibition on collateral attacks on convictions.

Finally, where the Court's interpretation forecloses relief that the Commission considers justified, the Commission should recommend corrective legislation to Congress. In particular, Tzedek urges the Commission to recommend legislation expressly permitting courts, in narrowly defined circumstances, to consider substantial sentencing disparities resulting from nonretroactive statutory changes, together with the individual's circumstances and rehabilitation. Such legislation could preserve individualized judicial review and public-safety safeguards without making every statutory sentencing reduction automatically retroactive.

In this regard, Tzedek directs the Commission's attention to its earlier submission urging consideration of these case law developments during the current amendment cycle. *See* Tzedek Association, Comment on Proposed Priorities for Amendment Cycle, 2026-2027, at 268-275 (July 16, 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202607/91FR35802_public-comment_R.pdf

Tzedek appreciates the opportunity to once again share its perspective on the important work of the Commission.

Sincerely,



Rabbi Moshe Margaretten[3]
President

[3] **Tzedek gratefully acknowledges the instrumental assistance and counsel of Norman L. Reimer and Professor Douglas A. Berman in the preparation of this submission.**

UNIVERSITY OF MINNESOTA

Twin Cities Campus

The Law School
Walter F. Mondale Hall

Room 96N
229–19th Avenue South
Minneapolis, MN 55455
[redacted]

October 26, 2026

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

Re: Proposed Amendment to the Sentencing Commission's Rules of Practice and Procedure to Create a More Robust Defender Presence at Commission Meetings and Deliberations[1]

Dear Judge Reeves:

Thank you for this opportunity to address the Commission's proposed amendments to its Rules of Practice and Procedure. We write specifically to address Part C of the Commission's proposed amendments: permitting a representative of the Federal Defenders to participate in meetings and public hearings of the Commission, including having access to the materials provided to Commissioners in preparation for the meeting and to ask questions of witnesses at Commission hearings.[2]

By way of background, the Clemency Project Clinic of the University of Minnesota Law School (the "Clinic") represents long-term incarcerated individuals in connection with their judicial and administrative efforts to obtain reductions in their sentences. The majority of the Clinic's clients are female federal prisoners serving decades-long sentences for drug offenses. Most of our clients were represented by the Federal Defenders or lawyers appointed under the Criminal Justice Act during the pendency

[1] The views expressed in this letter are those of the authors of the letter alone. The contents of this letter have not been reviewed or approved by the University of Minnesota or the University of Minnesota Law School.
[2] *Action: Notice and Request for Public Comment*, U.S. SENT'G COMM'N 14 (Sept. 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202609_fr_proposed-amdt.pdf.

of their federal cases—that is, they are among the 90% of federal criminal defendants represented by Federal Defenders and CJA counsel.[3]

Our Clinic has thus seen firsthand the devastating impact of severe sentencing guidelines on the lives of our clients and their families. Most notably, as outlined in our February 10, 2026 letter to the Commission addressing the elimination of purity distinctions in methamphetamine guidelines, our work has revealed to us extraordinary inter-district disparities in the treatment of similarly-situated individuals.[4] While the availability of mandatory-minimum penalties coupled with institutional culture plays a significant role in generating these disparities, it is readily apparent to us that the Sentencing Guidelines, and their disparate application in particular, drive the excessive sentences our clients are serving.

We therefore wholeheartedly support the Commission's proposal to create a more robust defense presence at its meetings and deliberations. Federal public defenders occupy a unique vantage point from which to evaluate the Sentencing Guidelines practice. This perspective is informed not only by the massive volume of cases they manage across every federal district but also by their organizational capability to identify and analyze systemic national trends.

Nevertheless, as detailed below, the defense bar's voice has long been muted due to minimal representation on the Commission and the absence of an *ex officio* position equivalent to that held by the Department of Justice. The Commission's proposal to create a dedicated, engaged role for Federal Defenders is a vital step toward rectifying this structural imbalance. It will ensure that Commission policy benefits from the insights of those who represent nearly 90% of all federal defendants, including CJA-appointed clients. In this way, it will assist the Commission in fulfilling its foundational mission to promulgate guidelines that promote certainty and fairness and reduce unwarranted sentencing disparities.[5]

---

[3] Defender Services, U.S. COURTS (2026), https://www.uscourts.gov/about-federal-courts/defender-services (explaining that Federal Defenders receive 60% of CJA appointments and the CJA panel receives the remainder).
[4] JaneAnne Murray et al., *Comment Letter on Proposed Amendment Eliminating Purity Distinctions in Methamphetamine Guidelines* 869–70 (Feb. 10, 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202602/90FR59660_public-comment_R.pdf#page=869 [hereinafter "February 2026 Comment Letter"].
[5] *See* 28 U.S.C. § 944(f).

The Commission Is and Has Been Imbalanced

Former prosecutors have dominated the composition of the United States Sentencing Commission whereas it is rare for commissioners to have defense experience, and rarer still is experience as public defenders. Of the Commission's total 39 commissioners, 26 have been prosecutors, while only four have worked as public defenders.[6] This disproportionality seems bound to continue, as the two most recent nominations to the commission both have prosecutorial, but no defense, experience.[7] This pattern is reflected across the federal criminal-legal sphere; judges currently on the federal bench with solely prosecutorial experience outnumber those with solely defense experience at a rate of four to one.[8]

Yet Congress always intended for the Commission to incorporate a holistic panoply of perspectives into its work. It expressly limited the number of members of the same political party that may sit on the Commission to ensure a balanced, bipartisan

---

[6] Judge William K. Sessions III, Judge Luis Felipe Restrepo, then-Judge Ketanji Brown Jackson, and Laura E. Mate had experience as public defenders prior to serving on the United States Sentencing Commission. *About the Commissioners*, U.S. SENT'G COMM'N (2026), https://www.ussc.gov/commissioners (discussing Judge Restrepo and Ms. Mate's careers); *Jackson, Ketanji Brown*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/jackson-ketanji-brown (discussing Justice Jackson's career); *Sessions, William K. III*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/sessions-william-k-iii (discussing Judge Sessions' career).

[7] Jason Manion, *Questionnaire for Non-Judicial Nominees*, U.S. SENATE COMMITTEE ON THE JUDICIARY 1–4 (July 3, 2026), https://www.judiciary.senate.gov/imo/media/doc/manion_sjq.pdf (listing the employment history of Jason Manion, nominated to be a USSC member); *Written Questions for John Peter Cronan, Nominee to be a Member of the United States Sentencing Commission*, U.S. SENATE COMMITTEE ON THE JUDICIARY 3 (Aug. 19, 2026), https://www.judiciary.senate.gov/imo/media/doc/d0bc1877-df62-7813-7012-ca290e4c8b48/2026-08-05_QFR-Responses_Cronan_97756d04-c118-44ac-973d-8a09deb557d7.pdf (discussing Judge Cronan's prosecutorial experience as part of his written responses to confirmation questions).

[8] Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INSTITUTE (May 27, 2021), https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates.

makeup.[9] And it requires the President to consult with advocates on behalf of prosecutors, defense attorneys, crime victims, law enforcement, and other interested parties before appointing voting members.[10] The continual marginalization of defense attorneys from the Commission spoils Congress's intention and efforts to staff it with a diverse array of legal perspectives.

But the tools exist to correct these missteps and reaffirm Congress's intentions for the Commission through the creation of an *ex officio* defense member or its analog. To guarantee the input of the Department of Justice into the Commission's work, Congress created an *ex officio* member from the DOJ.[11] This ensures the DOJ a voice in the non-public planning and discussions of the Commission. Similarly, the Chair of the U.S. Parole Commission serves as an *ex officio* member to incorporate this body's expertise as well.[12] While Part C of the Commission's proposed amendment to Rules 3.1 and 3.4 would not create a new *ex officio* position,[13] it finds an administrative solution to this problem that would achieve many of the same results.

Defender Perspective Adds Diversity and Nuance

Integrating a Federal Defender perspective provides an important counterweight to a Commission that has long been disproportionately shaped by prosecutorial interests. Recognizing this structural blind spot, Senators Booker and Durbin championed legislation to establish a permanent, non-voting seat on the Commission for a Federal Defender representative. As Senator Booker highlighted:

> Public defenders are on the frontlines, witnessing firsthand how sentencing policies impact low-income communities and communities of color, and can offer critical insight into issues like overcharging, plea pressure,

[9] 28 U.S.C. § 991(a) ("Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party.").
[10] *Id.* ("The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission[.]").
[11] *Organization*, U.S. SENT'G COMM'N (2026), https://www.ussc.gov/about/who-we-are/organization.
[12] *Id.*
[13] *See Action: Notice and Request for Public Comment*, *supra* note 2, at 14.

> and unequal access to resources. Adding a public defender to the Commission will help fill this blind spot and help ensure sentencing practices move toward a fairer, more balanced, and truly just system.[14]

First, the defender perspective is key to helping the Commission understand how the Guidelines operate in practice and their attendant consequences for defendants and their families and communities, especially the most economically and racially marginalized

That perspective is especially important in a system dominated by guilty pleas. In the federal criminal system, the overwhelming majority of cases are resolved through negotiated pleas with limited judicial discretion.[15] The sentencing options available under the Guidelines can give prosecutors substantial leverage over defendants when selecting charges and negotiating pleas. Even though the Guidelines are advisory,[16] courts have recognized the importance of the Guidelines in anchoring judges towards a particular sentencing range.[17] Thus, the Guideline range attached to a prosecutor's charges has very real consequences for a defendant's sentencing outcome, which gives prosecutors tremendous power in negotiations.

For example, the decision to charge a defendant with a firearm enhancement to a drug crime under 21 U.S.C. § 924(c)(1) would result in an additional five-to-10-year mandatory minimum, in addition to the base offense penalty. Offering to remove this charge as part of a plea may drastically change the defense's risk calculus and discourage defendants from litigating disputed facts at trial for fear of the increased prison time.

---

[14] *Booker, Durbin Reintroduce Legislation Aimed at Increasing Membership within the U.S. Sentencing Commission*, CORY BOOKER (Mar. 18, 2026), https://www.booker.senate.gov/news/press/booker-durbin-reintroduce-legislation-aimed-at-increasing-membership-within-the-us-sentencing-commission.
[15] Thea Johnson, *Plea Bargain Task Force Report*, A.B.A. CRIM. JUST. SEC. 6 (2023) (highlighting that 90% of all federal criminal cases were resolved via plea in 2018).
[16] *See United States v. Booker*, 543 US 220, 245 (2005).
[17] *See Molina-Martinez v. United States*, 578 US 189, 198–99 (2016) (citing *Peugh v. United States*, 569 US 530, 541–42 (2013)) ("The Guidelines are 'the framework for sentencing' and 'anchor ... the district court's discretion. Even if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence.'")

Public defenders are uniquely positioned to explain how this leverage shapes plea terms, factual concessions, and sentencing outcomes—information critical to the Commission's understanding of how sentencing policy plays out on the ground.

Public defenders have first-hand familiarity with how the Guidelines may operate to uniquely disadvantage particular types of defendants. Statistical analyses have identified significant inter-district and intra-district sentencing disparities. Our analysis of female defendants convicted of trafficking methamphetamine illustrates substantial inter-district disparities: In the Northern District of Texas, 61% of the 377 women in our sample received sentences of five to fifteen years, and 12.7% received sentences exceeding fifteen years; in the Southern District of California, by contrast, 87.7% of the 2,470 women in our sample received sentences of less than five years.[18] The Commission's own research also documents stark intra-district disparities, finding that sentence length can depend significantly on which judge is assigned a case.[19] Greater public-defender representation on the Commission is critical to understanding and addressing the systemic sentencing disparities arising from inconsistent application of the Guidelines.

Further, application of the Guidelines to women convicted of methamphetamine offenses results in relatively longer sentences regardless of her level of participation in the offense.[20] This fact is increasingly relevant as the number of women in federal prison grows,[21] with women now accounting for about 20% of people sentenced for methamphetamine-related crimes.[22] These disparities may be attributed to the fact that women are more likely to be embroiled in broad conspiracy schemes which come with long sentences and mandatory minimums.[23] As such, many of these women are

---

[18] February 2026 Comment Letter, *supra* note 4, at 869–70; JaneAnne Murray, *The Silent Tragedy of Female Incarceration in U.S. Federal Prisons*, SUBSTACK: SENT'G MATTERS (May 11, 2026), https://sentencing.substack.com/p/the-silent-tragedy-of-female-incarceration.

[19] *Intra-city Differences in Federal Sentencing Practices*, U.S. SENT'G COMM'N 11 (Jan. 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190108_Intra-City-Report.pdf.

[20] February 2026 Comment Letter, *supra* note 4, at 870–73; Murray, *supra* note 18.

[21] Kristen M. Budd, Dinesh Napal, & Joshua Rovner, *Incarcerated Women and Girls*, SENT'G PROJECT 1 (Dec. 4, 2025), https://www.sentencingproject.org/fact-sheet/incarcerated-women-and-girls.

[22] *Gender of Drug Trafficking Offenders*, U.S. SENT'G COMM'N (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-andsourcebooks/2022/TableD3.pdf.

[23] February 2026 Comment Letter, *supra* note 4, at 5.

serving extremely long sentences, despite only playing supportive roles in drug trafficking offenses. Many women end up serving time for drug crimes that were largely committed by their romantic, and often abusive, partners or were primarily driven by drug addiction.[24]

Through our Clinic's work representing female clients seeking federal clemency relief, we have witnessed judges routinely fail to apply the U.S.S.G. § 3B1.2. mitigating role adjustment, or conversely, apply the U.S.S.G. § 2D1.1(b)(1) firearms enhancement for guns belonging to their partners, the U.S.S.G. § 2D1.1(b)(5) importation enhancement when they had no personal knowledge of where their co-conspirator's drugs came from, or the USSG §2D1.1(b)(12) maintaining a drug premises enhancement where their partner dealt from the home where they raised their children. These patterns are visible to the defense attorneys working alongside these clients but not necessarily policymakers or prosecutors. This blind spot manifests in the *U.S. Sentencing Commission's 77 research topics, where women as a category*—much less the disparate impact of sentencing policies on women—*are not included*.[25]

Incorporating the public-defender perspective would give the Commission a wider foundation for evaluating whether the Guidelines promote fairness, proportionality, and justice for all individuals navigating the criminal system.

Second, public defenders can also play a meaningful role in decisions about retroactive policy changes because they possess direct, consequential knowledge of how these changes operate in practice. They have been key players on committees that successfully collaborated to implement retroactive improvements, so they can offer practical insights into what is feasible, what challenges might arise, and the institutional coordination necessary to make the process efficient.

This is particularly valuable when applied to proposed retroactive sentence reductions, as Amendment 782 exemplifies. Despite prospective concerns about the implementation process, an empirical study of six of the busiest districts for Amendment 782 filings concluded that stakeholders described the process as "for the most part, smooth and orderly."[26] Judges frequently worked with probation officers,

---

[24] *Id.*
[25] *Search By Topic*, U.S. SENT'G COMM'N (2026), https://www.ussc.gov/topic.
[26] Caryn Devins, *Lessons Learned from Retroactivity Resentencing after Johnson and Amendment 782*, 10 Fed. Cts. L. Rev. 39, 69, 71–72 (2018).

representatives from the U.S. Attorney's Office, and federal defender organizations to expedite resentencing. Judges also generally granted the full available sentence reduction to eligible individuals, often on their own motions without input from any parties. This evidence demonstrates that retroactive implementation need not be administratively unworkable: With effective coordination and informed participation from federal defenders, courts can deliver more proportionate and fair relief to eligible individuals in an efficient manner. The Commission should therefore draw on public defenders' institutional knowledge when evaluating the feasibility of retroactive measures, rather than allowing generalized concerns about implementation to foreclose consideration of retroactive relief.

Finally, it is important for decision-making bodies, such as the Commission, to have members from diverse professional backgrounds because groups that lack diversity tend to drift towards extreme positions. As Cass Sunstein explained, "[w]hen people find themselves in groups of like-minded types, they are especially likely to move to extremes."[27] One example of this appears in decisions made by federal court of appeals judges. Judges' decisions become more polarized when they sit on a panel with other judges that were appointed by a President from the same political party as the President who appointed them.[28] Rather than reaching a middle-ground compromise, discussion among a group of people who see a situation similarly can lead the group to make more extreme assessments than the individuals in the group would make alone.[29]

Given that a sweeping majority of Commissioners since inception have been current or former prosecutors, the Commission is in danger of experiencing a drift towards more extreme, punitive positions. A group that includes many experienced current and former prosecutors may even start to adopt more extreme policies than most members would have supported individually. By guaranteeing that there is at least a resident voice from the Federal Defenders, the Commission could help to combat a potential shift towards extremism. The presence of a Federal Defender would ensure that there is someone who would push back against views that may be common among prosecutors but not defense attorneys and criminal defendants. Just as the

---

[27] CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 2 (2009).
[28] *Id.* at 8–12.
[29] *Id.* at 14–16 (discussing a study of jurors that found amongst other things that "[i]n 27 percent of the cases, the jury's award was at least as high as that of the highest predeliberation judgment of the members of that particular jury" (emphasis removed)).

adversarial system produces the most just outcome in court, the introduction of an adversarial voice could help prevent prosecutorial consensus and aid the Commission in reaching the most just result.

Defender Presence Adds Legitimacy

While the outcome of a case will obviously impact a criminal defendant's view of the court, their perception of the procedural fairness in the adjudication of their case has been shown to be as important of a factor.[30] This was first shown in defendants appearing in traffic and misdemeanor court.[31] The data collected from hundreds of post-court interviews "point[s] to procedural justice as a key element in explaining support for legal authorities."[32] Skeptics contested that these results would not be replicated with defendants involved in more serious crimes, but subsequent research confirmed procedural justice contributes to satisfaction even in cases with high stakes, including prison time.[33] These studies suggest that for most criminal defendants, regardless of the outcome, the perception of fairness and justice in the system shape their support for the legal authority of the court.

And one's perception of fairness in the legal system directly impacts their willingness to recognize the system's authority and comply with its rules and decisions.[34] Without legitimacy in the eyes of the public, people will be unwilling to submit or acknowledge the system's authority. Thus, ensuring legitimacy through a fair and just system is crucial to keep the system functioning. Fair procedures can be created through participation as "people are more likely to rate the quality of decision making . . . to be high when the procedure includes opportunities for them to participate."[35]

---

[30] Tom R. Tyler, *The Role of Perceived Injustice in Defendant's Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 56 (1984).
[31] *Id.* at 54 (explaining the focus of the study was on a group that represents "ordinary" citizens more appropriately than people who committed more serious crimes).
[32] *Id.* at 70.
[33] Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV., 503 (1988).
[34] Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME AND JUSTICE 283, 284, 297 (2003).
[35] *Id.* at 300.

The Commission was created with fairness, justice, and transparency in mind.[36] Yet, the overconcentration of government attorneys on the Commission absent a public-defender counterbalance risks a perception that the Commission is lacking in precisely these criteria. This underscores the importance of a Federal Defender to be present in the planning and deliberation stages of the Commission's work that will impact their clients. Including a Federal Public Defender in the Commission's discussions will both create and provide a greater perception of procedural fairness that will afford the Commission, and the entire criminal-legal system, greater legitimacy.[37]

Defender Perspective is Consistent with State Commissions

Public-defender representation is a well-established feature of state sentencing commissions, reflecting the importance of incorporating the perspectives of attorneys on the front lines of the events in which sentencing decisions take place. This perspective is crucial, as it provides insight, rather than mere conjectures, into the nuances of sentencing and its impacts beyond just the numbers.

Minnesota is just one state of many that intentionally seeks the perspectives of public defenders in the development of sentencing policy. Minnesota expressly requires the Governor to appoint a public defender to its Sentencing Guidelines Commission upon the recommendation of the State Public Defender.[38] Connecticut follows the same practice.[39] Kansas, similarly, requires the Governor to appoint a public defender and a private defense attorney to its Sentencing Commission.[40] Maryland provides an *ex officio* seat for the Chief Public Defender or their designee on its sentencing

---

[36] *About*, U.S. SENT'G COMM'N (2026), https://www.ussc.gov/about ("The U.S. Sentencing Commission…was created by Congress in 1984 to reduce sentencing disparities and promote transparency and proportionality in sentencing.").
[37] Douglas A. Berman, *Might Structural Changes Be the Next Step for Federal Sentencing Reform?*, 34 FED. SENT'G REP. 213, 214 (2022) ("[T]here would be significant symbolism to a decision by Congress to seek to improve the functioning of the Sentencing Commission by adding a public defender representative to its ranks.").
[38] Minn. Stat. § 244.09, subd. 2(4) (2025) (requiring one member of the Sentencing Guidelines Commission to be a "public defender appointed by the governor upon recommendation of the state public defender").
[39] Conn. Gen. Stat. § 54-300(d)(6) (requiring one member of the commission to be "The Chief Public Defender").
[40] Kan. Stat. Ann. § 74-9102(a)(4), (5) (2026).

commissions.[41] Washington likewise mandates two defense attorneys to sit on its voting commissioners.[42] These examples demonstrate that including public defense perspectives in sentencing policymaking is a recognized practice across jurisdictions and helps ensure that sentencing decisions reflect input from all stakeholders.

Ultimately, public-defender representation on the United States Sentencing Commission would align federal sentencing policymaking with established state practices while ensuring that the perspectives of those who represent individuals directly affected by sentencing decisions are meaningfully considered.

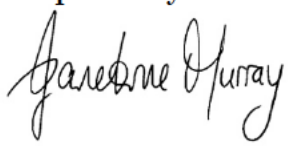
Conclusion

The Commission's Part C of its proposed amendment to Rules 3.1 and 3.4 provides an excellent first step towards incorporating the indispensable expertise of public defenders and criminal defense attorneys at large into its work. A congressionally-mandated *ex officio* pubic defender member would provide a more permanent solution to this persistent problem, but an internal rule-change is nonetheless a practical and expedient approach to bring defense attorneys into the conversation without delay. For these reasons, our clinic stands in staunch support of this proposed amendment and we support its institution at a most robust level, as recommended by NACDL: Rule 3.1(c) should provide that the Defender representative should attend all meetings the DOJ *ex officio* member attends; their role at public hearings should mirror the DOJ *ex officio* member's role; and they should receive all materials made available to the DOJ *ex officio* member.

[41] *Commissioners*, MD. STATE COMM'N ON CRIM. SENT'G POL. (2023), https://msccsp.org/about/commissioners/.
[42] *Member Appointment*, WASH. STATE SENT'G GUIDELINES COMM'N (2026), https://sgc.wa.gov/sgc/about/member-appointment/.

Again, thank you for the opportunity to submit these comments.

Respectfully submitted,



JaneAnne Murray
Vaughan G. Papke Clinical Professor of Law



Samuel Buisman
Hassan & Nazie Nemazee Fellow

Kate Reifenberg ('27)
Saed Yousuf ('27)
Deena Al-Ali ('28)
Ben Gellman ('28)
Hannah Kangas ('28)
Sreeja Kondeti ('28)
Meghan Parker ('28)

Clemency Project Clinic, University of Minnesota Law School

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
Criminal and Juvenile
Justice Clinic

Erica Zunkel
Clinical Professor of Law
Director, Criminal and Juvenile Justice Clinic
[redacted]

October 26, 2026

United States Sentencing Commission
Attention: Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Via Public Comment Portal

Re: Comment in Support of Part C of the Proposed Amendment to the Sentencing Commission's Rules of Practice and Procedure

Dear Commissioners:

I write in strong support of Part C of the Commission's proposed amendment to its Rules of Practice and Procedure. This amendment would allow a representative of the Federal Public and Community Defenders to participate in the Commission's meetings and public hearings. Adding a Defender voice to the Commission's deliberations is long overdue, will benefit the Commission's work, and will advance justice in the federal system.

The addition of a Defender representative is of great importance to me. I served for approximately seven years as a Trial Attorney at the Federal Defenders of San Diego, Inc., and, for the past fifteen years, have represented indigent individuals as a criminal defense attorney in both federal and state courts. I am currently a Clinical Professor of Law at the University of Chicago Law School, where I direct a criminal defense clinic, supervise students, and teach, study, and advise on issues relating to the criminal justice system. I have testified before the Commission regarding compassionate release and have submitted numerous comments to the Commission in recent years on a variety of issues.[1] These experiences have given me firsthand knowledge of the Commission's

[1] *See Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the United States Sentencing Commission* (Feb. 23, 2023) (written and oral statement of Erica Zunkel), https://perma.cc/7TY8-ZSWP; Erica Zunkel, Comment on Proposed Amendments to the Sentencing Guidelines (Mar. 13, 2023), *in* U.S. Sent'g Comm'n, *Public Comment on 2023 Proposed Amendments* 1148, https://perma.cc/48QJ-TAK8 (responding to Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7180 (Feb. 2, 2023)); Erica Zunkel, Comment on Proposed Priorities (July 15, 2024), *in* U.S. Sent'g Comm'n, *Public Comment on 2024–2025 Proposed Priorities* 1128,

processes and of how much the Commission's work matters to the federal criminal justice system. I submit this comment in my personal capacity; the views expressed here are my own and do not represent those of the University of Chicago.

I. What the Amendment Would Do

Part C would let a designated Defender representative take part in deliberations with commissioners, request information and documents, and present relevant information to the Commission. The representative would receive the same policy-related meeting materials as commissioners and could question witnesses at public hearings. Part C also contains reasonable limits: the representative could not vote, make or second motions, or attend portions of the meeting devoted to internal administrative matters. In short, Part C offers informed participation, not voting power.

The proposal brackets two options for which meetings the representative could attend: "[public meetings and nonpublic briefing sessions of the Commission]" or "[all Commission meetings at which Commission staff is present.]" I urge the Commission to adopt the second option. The Commission's most consequential decisions are often shaped well before any public vote, as staff present research and commissioners narrow the options. A representative who is absent from those sessions would be left responding to choices already made. For the same reason, I encourage the Commission to make clear that the representative will receive policy-related materials at the same time that they are provided to commissioners.

II. Defenders' Expertise Would Improve the Commission's Work

Few institutions see the day-to-day operations of federal sentencing as broadly as the Federal Defenders. Roughly nine in ten people facing federal charges are represented by a Federal Defender or by CJA panel counsel, and Defender offices operate in all but

---

https://perma.cc/Q8H2-9UWQ (discussing compassionate release in response to Proposed Priorities for Amendment Cycle, 89 Fed. Reg. 48029 (June 4, 2024)); Douglas A. Berman, Jeremy Haile & Erica Zunkel, Comment on Proposed Priorities (July 11, 2024), *in* U.S. Sent'g Comm'n, *Public Comment on 2024–2025 Proposed Priorities* 823, https://perma.cc/Q8H2-9UWQ (responding to Proposed Priorities for Amendment Cycle, 89 Fed. Reg. 48029 (June 4, 2024)); Letter from Erica Zunkel, Clinical Professor of Law, Maggie Wells & Jaden Lessnick, Univ. of Chi. L. Sch., to U.S. Sent'g Comm'n (Oct. 17, 2022), https://perma.cc/6HBJ-QTQP.

two of the nation's 94 judicial districts.[2] As a result, Defenders see, case after case and in nearly every district, how the guidelines and the Commission's policy choices play out for the people who are sentenced under them.

Yet that perspective is largely absent from the closed-door sessions in which the Commission develops much of its policy. A Defender at the table could identify practical problems before a proposal is finalized, help the Commission foresee how an amendment will actually operate in the courtroom, and strengthen both the substance of the Commission's work and the public's trust in it. Participation would also make Defenders' existing statutory role more meaningful. Under 28 U.S.C. § 994(o), Defenders must report to the Commission at least annually on the operation of the guidelines and may share observations about its work at any time. Those submissions are most useful when Defenders can see the data and analysis the Commission is relying on, and can offer input while the options are still open.

III. The Current Structure Is Imbalanced

When Congress created the Commission in the Sentencing Reform Act of 1984, it reserved nonvoting *ex officio* seats for the Department of Justice and the Parole Commission. It made no comparable provision for the defense. The Parole Commission still holds its seat today, even though Congress eliminated federal parole for new offenses nearly forty years ago. Meanwhile, the Department of Justice's *ex officio* member sits in on the Commission's closed meetings as options are framed and decisions are made and reviews the internal work product behind those decisions such as staff briefings and memoranda and data analyses. None of that material is shared with the defense.

This arrangement gives the prosecution an inside voice that the defense lacks. Our justice system rests on the premise that sound outcomes emerge when all parties are heard. A policymaking process that is dominated by one side invites the perception that the Department's views carry special weight inside the Commission, and that

[2] Admin. Off. of the U.S. Cts., *Defender Services – Annual Report 2024*, U.S. Cts., https://perma.cc/XKM5-FXA9 (last visited Oct. 26, 2026) (reporting that nearly 90 percent of federal criminal defendants are represented by appointed counsel); *Defender Services*, U.S. Cts., https://perma.cc/X287-PH9A (last visited Oct. 26, 2026) (reporting that federal defender organizations serve 92 of the 94 federal judicial districts).

perception can erode public trust in the Commission's work. Part C would go a long way toward correcting that imbalance.

IV. Defender Participation Is Widely Supported and Consistent with Best Practices

Defender participation in sentencing policymaking is neither novel nor controversial. The Judicial Conference of the United States, which sets policy for the federal judiciary, has endorsed a Defender *ex officio* seat on the Commission for more than two decades,[3] and the proposal has drawn support from legislators of both parties, from a broad array of criminal justice organizations, and from policy experts and scholars.[4] Most active state sentencing commissions already include a public defender or other defense lawyer, typically because the governing statute requires it. Closer to home, Defenders hold voting seats on the Judicial Conference's advisory committees on the Criminal, Appellate, and Evidence Rules, where their courtroom experience helps shape the rules that govern federal criminal practice. Part C would bring the Commission in line with these established practices.

V. The Commission Can Act Now, and Congress Should Follow

The Commission does not need to wait for Congress to adopt Part C. Under 28 U.S.C. § 995(a), the Commission has the power to set its own internal procedures, and the Commission has governed itself through written Rules of Practice and Procedure since 1997. Creating a Defender representative position falls comfortably within that authority.

---

[3] *See* Jud. Conf. of the U.S., *Report of the Proceedings of the Judicial Conference of the United States* 11 (Mar. 2004), https://perma.cc/EG6P-EFSC.

[4] *See, e.g.*, Sentencing Commission Improvements Act, S. 4136, 119th Cong. (2026); Federal Defender Ex-Officio Act, H.R. 1251, 114th Cong. (2015) (bipartisan bill sponsored by Rep. Robert C. Scott, D-Va., and Rep. Trey Gowdy, R-S.C.); Press Release, Sen. Cory Booker, *Booker, Durbin Reintroduce Legislation Aimed at Increasing Membership Within the U.S. Sentencing Commission* (Mar. 18, 2026), https://www.booker.senate.gov/news/press/booker-durbin-reintroduce-legislation-aimed-at-increasing-membership-within-the-us-sentencing-commission (listing endorsing organizations, including the Brennan Center for Justice, Due Process Institute, FAMM, NACDL, NLADA, The Sentencing Project, and Tzedek Association); *cf.* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 Va. L. Rev. 271 (2013) (documenting prosecutorial dominance of the Commission's membership).

Part C is an important step, but it is not a complete solution. Only Congress can create a statutory seat for a Defender. Still, by adopting Part C, the Commission would signal that it is committed to making sentencing policy through a balanced process that draws on every key participant in the system. I also urge the Commission to support legislation, such as the pending Sentencing Commission Improvements Act, that would create a Defender *ex officio* seat with the same standing that the Attorney General's designee holds today.

A balanced, informed deliberative process produces better sentencing policy and greater public confidence in it. For these reasons, I respectfully urge the Commission to adopt Part C, to select the broader bracketed option permitting the Defender representative to attend all Commission meetings at which Commission staff is present, and to support legislation establishing a permanent Defender *ex officio* seat.

Thank you for the opportunity to comment.

Sincerely,



Erica K. Zunkel
Clinical Professor of Law
Director, Criminal and Juvenile Justice Clinic
Director of Clinical and Experiential Learning
The University of Chicago Law School

Sofia P. Diaz
Clinical Student, Criminal and Juvenile Justice Clinic
The University of Chicago Law School, Class of 2027

ST. JOHN'S UNIVERSITY

SCHOOL OF LAW

October 26, 2026

Jelani Jefferson Exum
Dean & Rose DiMartino and Karen Sue Smith Professor of Law
St. John's University School of Law
8000 Utopia Parkway
Queens, NY 11439
[redacted]

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

Re: Comment on Part C of the Proposed Amendments to the Rules of Practice and Procedure (August 27, 2026)

Dear Chair Reeves, Vice Chairs, and Commissioners:

I write in strong support of Part C of the Commission's proposed amendments to Rules 3.1 and 3.4 to permit a representative of the Federal Defenders to participate in Commission meetings and public hearings.

As a sentencing scholar who has had the opportunity to participate in the Commission's roundtables and provide testimony, I have personally appreciated the Commission's respect for and encouragement of a broad range of perspectives on federal sentencing policy. These opportunities for engagement reflect an important commitment to thoughtful, informed policymaking. The proposed amendments would further that approach by ensuring that the perspectives of Federal Defenders, whose practical experience is indispensable to understanding the effects of sentencing policy, are heard not only in public forums but also during the substantive deliberations that shape the Commission's work.

Federal Defenders and Criminal Justice Act counsel represent the overwhelming majority of individuals charged with federal crimes and thus bring invaluable experience to questions of federal sentencing policy. Yet, unlike the Department of Justice, Defenders have historically lacked access to the Commission's non-public deliberations and the substantive materials that inform its policy decisions. This disparity limits the perspectives available to the Commission as it develops policies that can have profound effects on individuals, families, and communities.

The Commission's work would benefit substantially from meaningful Defender participation in all non-public meetings and deliberations involving substantive policy development, as well as timely access to the materials provided to commissioners. Access to staff analyses, policy memoranda, data, and other relevant information would enable Defenders to offer informed perspectives, identify potential unintended consequences, and contribute more effectively to the Commission's consideration of proposed policies. This participation would also advance Defenders' statutory responsibility under 28 U.S.C. § 994(o) to comment on the Commission's work.

A more balanced range of perspectives would strengthen the quality and fairness of the Commission's policymaking and reinforce public confidence in its independence and legitimacy. The proposed amendments are a meaningful step toward that goal. I encourage the Commission to ensure that the implementing rules provide for robust participation and contemporaneous access to substantive materials. I also encourage the Commission to support legislative action to establish a Federal Defender ex officio position, bringing its composition more fully in line with the importance of defense perspectives in federal criminal justice policymaking.

Thank you for the opportunity to comment on this important proposal.

Respectfully submitted,



Jelani Jefferson Exum
Dean & Rose DiMartino and Karen Sue Smith Professor of Law
St. John's University School of Law
8000 Utopia Parkway | Queens, NY 11439

College of Law
Clinical Law Program
University of Iowa
380 Boyd Law Building
Iowa City, Iowa 52242-1113
[redacted]

October 26, 2026

The Honorable Carlton W. Reeves
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South Lobby
Washington, D.C. 20002-8002

Re: Proposed Amendments to the Rules of Practice and Procedure, Part C.

Dear Judge Reeves,

I am writing to respond to the Commission's request for comment on the Proposed Amendment to its Rules of Practice and Procedure. Specifically, I am commenting on Part C of the proposal, the amendment that would add a representative of the Federal Public & Community Defenders to the Commission.[1]

Through my advocacy and research,[2] I have seen firsthand the value that a defender perspective can bring to the Commission's work, and I write to urge the Commission to add a defender representative to its ranks. The Commission has long recognized that the U.S. Sentencing Guidelines are only as sound as the information on which they are based. A defender representative would help further the Commission's mission to promote just and effective sentencing practices by: (1) providing valuable and candid qualitative information on the realities of sentencing, and (2) strengthening the Commission's legitimacy.

First, a defender representative on the Commission would improve the information on which the guidelines are based because defenders can provide a candid perspective that is otherwise lacking.

The Commission's research provides an unmatched statistical picture of what courts do at sentencing in the federal criminal legal system. The Commission is well positioned to collect quantitative data, and the data is indispensable. That said, the Commission's data describes only outcomes. It cannot convey how the people litigating the issues on which the

[1] U.S. Sent'g Comm'n, BAC 2210-40, *Rules of Practice and Procedure Proposed Amendments to the Sentencing Guidelines* 14–17 (Sept. 2026).

[2] I am the Herschel G. Langdon Professor of Trial Advocacy at the University of Iowa College of Law where I direct the Federal Criminal Defense Clinic and teach courses in criminal law, criminal adjudication, and the federal courts. I submit this letter in my individual capacity.

data is based—and their clients—experience the U.S. Sentencing Guidelines Manual in practice. Federal and community defenders, on the other hand, represent most of the people the U.S. Department of Justice ("DOJ") prosecutes in federal court.[3] They see case-by-case how guideline provisions, amendments, and sentencing practices operate on the ground and can provide that invaluable perspective as the Commission does its work.

As an example, when the Commission amends a guideline, defenders are among the first to see whether the amendments work as intended. Defenders can identify whether courts apply amendments consistently, whether new ambiguities emerge, whether the DOJ responds by changing charging or plea-bargaining practices (either positively or negatively), and whether the amendments reach those they were intended to impact.

The Commission's recent amendment to the supervised-release guidelines, Amendment 835,[4] provides a good example of how the defender perspective matters. At the outset, I commend the Commission on the stakeholder participation associated with Amendment 835. I took part in the November 2024 supervised release roundtable,[5] submitted written commentary,[6] and was invited to testify before the Commission.[7] Given this involvement, I have spoken with countless defenders across the country about the need to amend the supervised release guideline for the past several years. After the amendment took effect, I continued these conversations and have been met with exclamations from defenders about how little has changed in practice. I started to think about where Amendment 835 might be breaking down and decided to conduct a survey of defender offices across the nation about their perceptions of the impact of Amendment 835. That survey was deployed earlier this month.

Although the survey is ongoing, preliminary responses suggest that defenders' perceptions do more than measure a reform's impact after the fact; they help shape that impact from the outset. Specifically, defenders' assessments of Amendment 835's value appear to influence whether and how they litigate its provisions. Defenders who view the amendment as a meaningful opportunity for change are more likely to invoke it in

---

[3] *A Journalist's Guide to the Federal Courts*, Admin. Off. of the U.S. Courts (last visited Oct. 14, 2026) ("Nearly 90 percent of federal defendants are represented by court-appointed lawyers, through Judiciary funding under the Criminal Justice Act (CJA)."); *see also Defender Services*, Admin. Off. of the U.S. Courts (last visited Oct. 14, 2026) ("Nationwide, federal defenders receive approximately 60 percent of CJA appointments, and the remaining 40 percent are assigned to the CJA panel.").

[4] U.S.S.G. App. C, amend. 835 (effective Nov. 1, 2025).

[5] Sentencing Guidelines for U.S. Courts, 90 Fed. Reg. 26868, 26900 (May 9, 2025) ("In November 2024, the Commission held a roundtable on supervised release attended by judges, retired federal probation officers, providers of reentry services, academics, federal probation, government and defense community representatives, and a reentry program graduate.").

[6] Alison K. Guernsey, Comment Letter on *Proposed 2025 Amendments to the Federal Sentencing Guidelines Published January 2025: Supervised Release*, U.S. Sent. Comm'n (Mar. 3, 2025); Alison K. Guernsey, Reply Comment Letter on *Proposed 2025 Amendments to the Federal Sentencing Guidelines Published January 2025: Supervised Release*, U.S. Sent. Comm'n (Mar. 18, 2025).

[7] Alison K. Guernsey, Oral Testimony on *Proposed Amendments to the U.S. Sentencing Guidelines, Supervised Release*, U.S. Sentencing Comm'n (Mar. 13, 2025).

advocating for their clients. By contrast, those who see it as cosmetic devote their time and resources to other strategies, which potentially limits the amendment's ability to achieve its intended goals.

These preliminary findings underscore why defender representation on the Commission matters. If defenders' perceptions of an amendment influence whether and how they invoke it, then the practical success of guideline reform depends, in part, on whether the Commission understands how its work will be received and applied by the lawyers representing the people subject to the guidelines. A permanent defender representative would bring that perspective directly into the Commission's deliberations, helping it anticipate not only how a proposed amendment is likely to operate in theory, but also how it will be understood, litigated, and implemented in practice. That perspective could help the Commission identify obstacles to reform before they undermine an amendment's intended effects and develop reforms that are both sound on paper and meaningful in practice. Of course, no defender observations can or should replace the Commission's empirical work. Rather, they would complement and contextualize it, helping the Commission interpret what the numbers may mean and identify what the quantitative data alone may miss.

Additionally, the defender perspective is key to meaningful reform because defenders have a more limited institutional stake in demonstrating that existing sentencing practices are succeeding. Prosecutors, legislators, and, to some extent, the Commission, may have institutional incentives to view existing practices as effective. Defenders, by contrast, see firsthand the practical consequences when those practices fail. Their clients bear the cost of sentencing policies, giving defenders both an incentive and obligation to assess those policies with candor. Practice bears this out. Social scientists who have surveyed federal defenders have found that as "repeat players" they give detailed and sometimes sharply critical accounts of how practice works, particularly when promised anonymity.[8] Defenders themselves have surveyed defender offices to supply the Commission with information it lacked,[9] and members of Congress,[10] the Judicial Conference,[11] and the majority of state

[8] *See generally* Jessica A. Roth, Anna D. Vaynman, Steven D. Penrod, *Why Criminal Defendants Cooperate: The Defense Attorney's Perspective*, 117 NW U. L. Rev. 1351 (2023).

[9] *See, e.g.*, Letter from Fed. Pub. & Cmty. Defs., Comment on Proposed 2018 Amendments at 7 (Aug. 10, 2018).

[10] *See* Sentencing Commission Improvements Act, S. 4136, 119th Cong. (2026); *see also* H.R. 6793, 117th Cong. (2022) (proposing a non-voting defender member on the Commission); H.R. 1251, 114th Cong. (2015) (same).

[11] Press Release, Sen. Cory Booker, Booker and Durbin Introduce Legislation Aimed at Increasing Membership within U.S. Sentencing Commission (Nov. 30, 2021) ("'As the Judicial Conference has long recognized, a defender ex officio would make federal sentencing fairer and more just.'" (quoting Jon Sands, co-chair of the Federal Public & Community Defenders Legislative Committee & Federal Defender for the District of Arizona)).

sentencing commissions[12] have recognized that the defender perspective on a sentencing commission is a distinct and valuable one. Defender accounts can offer a useful corrective to official sources, which may be more inclined to report that a practice or reform has been operating as designed. In short, a defender perspective will make the Commission's work stronger and more likely to be successful in practice.

Second, a defender representative would strengthen the Commission's legitimacy. The Commission's ex officio membership currently includes a DOJ representative, which reflects the general perception of the importance of the prosecutorial perspective in the Commission's work. The defense bar is the other essential participant in a federal sentencing, yet it currently has no comparable seat at the table. Adding a permanent defender representative would balance the Commission's deliberations and signal that the perspectives of those tasked with explaining and negotiating the guidelines are valued in their policymaking. It would also enhance confidence that the guidelines reflect a broader range of experience in the courtroom.

* * *

In conclusion, I urge the Commission to adopt Part C of this proposal and add a permanent defender representative. A defender representative would strengthen the Commission's ability to develop evidence-based, equitable, and effective sentencing policy by ensuring that the experiences of the people who are subject to the guidelines and the insights of those who represent them are meaningfully considered in all deliberations.

Thank you for the opportunity to comment.

Sincerely,



Alison K. Guernsey
Herschel G. Langdon Professor of Trial Advocacy

[12] Alexis Watts, Univ. of Minn. Robina Inst., *The Composition of Sentencing Commissions* (Aug. 15, 2016) ("Most commissions contain both prosecutors and criminal defense attorneys, and some states also appoint attorneys outside of the criminal law field.").

Public Comment - Proposed Amendment on Rules of Practice and Procedure

Submitter:

Souled Outreach Ministries

Topics:

1. Rules of Practice and Procedure

Comments:

10/20/2026
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Re: Comments on Proposed Amendments to the Commission's Rules of Practice and Procedure — Parts B and C

Dear Chair Reeves and Members of the United States Sentencing Commission:

My name is Michael Hardesty, and I am writing to urge the Commission to reject Part B and adopt Part C of its proposed amendments to the Rules of Practice and Procedure.
These proposals matter because the Commission's decisions affect real people, families, and communities. The Commission should make it possible to extend fairer sentencing policies to people already serving sentences, while ensuring that the people most familiar with how the guidelines impact real people have a chance to access the same information as the Department of Justice.
Part B: Please reject the proposed five-vote requirement for retroactivity.
I strongly oppose Part B, which would require at least five affirmative votes for the Commission to make a sentencing-guideline amendment retroactive, rather than the existing four-vote threshold. This proposal would create an unnecessary and significant barrier to retroactivity, making it harder for people already serving federal sentences to benefit from sentencing reforms.
Retroactivity is an essential tool for fairness. When the Commission determines that a sentencing guideline should change, and that change actually is beneficial to sentenced people, it should not make it harder for people to benefit from that change.
The existing four-vote threshold provides an appropriate safeguard for consequential Commission decisions. Requiring an additional vote for retroactivity would risk allowing a

minority of commissioners to block relief, even when a majority of the Commission's members otherwise support making a reform retroactive. It would create an additional obstacle to correcting sentences that no longer reflect the Commission's current sentencing policies.

I believe people should have a fair opportunity to benefit when sentencing practices improve, or you have seen how outdated sentences can affect families and communities for years or decades. It is morally right. When there are two individuals incarcerated for the same crime, one is able to return back to society and the other is still behind prison walls. This is not a balance of justice.

Retroactivity helps bring federal sentencing practices into alignment with our evolving understanding of justice, fairness, and proportional punishment. A country who creates laws that support The First Step Act and The Second Chance Act. Yet is really enforced? We the families are asking the hard questions. Can we honor the letter and spirit of the law, and if so when?

The Commission should not make it harder to extend appropriate sentencing reforms to people who are already incarcerated. Retroactivity can offer a meaningful opportunity to correct excessive sentences, reunite families, and ensure that changes in sentencing policy reflect our current views of fairness. I urge the Commission to reject Part B and retain the existing four-vote threshold.

Part C: Please support meaningful participation by the federal defender community.

I strongly support Part C, which would allow representatives of the Federal Public and Community Defenders to participate in Commission meetings and public hearings.

It is long past time for the federal defender community to have a meaningful seat at the table with the Commission. The Department of Justice has a nonvoting representative on the Commission, yet the federal defenders who represent people accused of federal crimes have not had comparable representation. That imbalance is fundamentally unfair.

Federal defenders bring an essential perspective to sentencing policy. They work directly with people facing federal charges, understand how sentencing rules operate in courtrooms across the country, and see the consequences of sentencing decisions for individuals, families, and communities. Their experience can help the Commission understand the practical effects of its policies and identify opportunities to make the federal sentencing system more just and effective.

The Commission should hear from the full range of stakeholders affected by federal sentencing, including those who represent people facing the power of the federal government. Providing federal defenders with a seat at the table would improve the Commission's policymaking and help correct a longstanding imbalance in whose perspectives are represented.

I urge the Commission to adopt Part C and ensure that federal defenders can meaningfully participate in its meetings and public hearings, with access to relevant policymaking materials. We the families and friends of those incarcerated have watched other areas receive relief and down ward departures for the same crimes/infractions, while retro activity is and onward discussion with no traction. Our loved ones are still incarcerated while others are released.

Conclusion

The Commission's rules should promote fairness, informed decision-making, and meaningful participation. Part B would make it more difficult to extend appropriate sentencing reforms to people already sentenced. Part C would help ensure that the Commission hears from an essential and historically underrepresented perspective.

I urge the Commission to reject Part B and adopt Part C. These choices would help protect the

possibility of fairer sentences for people already incarcerated while making the Commission's work more inclusive and responsive to the realities of the federal criminal legal system. Thank you for considering my comments and for your work on federal sentencing policy.

Sincerely,
Dr. Michael Hardesty

Submitted on: October 20, 2026

Public Comment - Proposed Amendment on Rules of Practice and Procedure

Submitter:

Michael Harvey, George Mason University

Topics:

1. Rules of Practice and Procedure

Comments:

Dear Chair Reeves and Members of the United States Sentencing Commission:

I respectfully submit this comment regarding the Commission's proposed amendments to its Rules of Practice and Procedure, particularly the provisions governing retroactivity.

I urge the Commission to adopt procedures that provide meaningful, timely, and transparent consideration of retroactivity whenever an amendment reduces punishment, corrects an outdated guideline, adjusts monetary thresholds for inflation, or otherwise reflects the Commission's conclusion that an existing guideline should be changed.

I particularly urge the Commission during the 2026–2027 amendment cycle to revisit retroactivity for the 2026 inflationary adjustments affecting economic offenses, including the monetary tables used under §2B1.1.

The people who most urgently need consideration of a sentencing correction are often the people already incarcerated under the guideline that has been changed.

The Commission acknowledged during the 2026 process that three Commissioners may have favored retroactivity for Amendment 2 concerning inflationary adjustments. Nevertheless, the Commission did not solicit public comment or hold a retroactivity hearing for the amendments submitted to Congress on April 30, 2026.

That meant incarcerated people, their families, Federal Public Defenders, judges, prosecutors, researchers, victims, and other stakeholders never received a full opportunity to address whether those changes should benefit people already serving sentences.

I respectfully ask the Commission not to allow that missed opportunity to become permanent.

RETROACTIVITY IS A MATTER OF SENTENCING FAIRNESS

The Commission's own Rule 4.1A discusses retroactive application to "previously sentenced, imprisoned defendants."

Those words are important.

Consider two similarly situated defendants convicted of substantially similar economic conduct.

One is sentenced shortly before a guideline change. The other is sentenced shortly afterward.

If the later defendant receives the benefit of updated monetary thresholds while the earlier defendant remains incarcerated under thresholds the Commission has determined should be adjusted, the date of sentencing can become the primary reason for substantially different punishment.

That is difficult to reconcile with the federal sentencing system's goals of proportionality, consistency, and avoiding unwarranted sentencing disparities.

The Supreme Court's reasoning in Dorsey v. United States, 567 U.S. 260 (2012), is instructive, although Dorsey does not itself require a Sentencing Guidelines amendment to be retroactive.

The Court recognized the problem created when similarly situated defendants receive significantly different punishment because of timing and discussed "sentencing disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent."

The same fairness concern deserves consideration here.

If inflation has changed the real-world meaning of monetary thresholds enough that those thresholds should be adjusted for future defendants, the Commission should seriously examine whether people presently incarcerated under the older measurements should at least be permitted to ask their sentencing judges for reconsideration.

RETROACTIVITY DOES NOT MEAN AUTOMATIC RELEASE

Making an amendment retroactive does not open prison doors automatically.

Congress already created a careful mechanism in 18 U.S.C. §3582(c)(2).

When an applicable amendment is made retroactive, an eligible person may ask the sentencing court for a reduction. The judge can then consider the amended guideline range, public safety, institutional conduct, rehabilitation, the §3553(a) factors, and other legally appropriate circumstances.

Some motions will be granted. Some will receive partial reductions. Others will be denied.

That is individualized judicial review.

Retroactivity therefore does not require the Commission to choose between fairness and public safety. It simply gives courts authority to determine whether continued incarceration at the original length remains appropriate.

Without retroactivity, potentially deserving individuals may never receive that consideration.

PEOPLE ALREADY INCARCERATED SHOULD NOT BE AN AFTERTHOUGHT

When a sentencing policy is corrected only prospectively, the greatest human consequences fall upon people already serving sentences.

They are already separated from children, parents, spouses, and communities.

They are losing employment opportunities and earning capacity.

Children continue growing up without parents.

Aging and seriously ill parents continue waiting for their sons and daughters to return.

Taxpayers continue financing incarceration.

Some incarcerated individuals have spent years completing programming, accepting responsibility, paying restitution, mentoring others, maintaining employment, preparing for reentry, and demonstrating rehabilitation.

Those individuals deserve meaningful consideration when the Commission evaluates retroactivity.

Economic offenses are serious. Victims matter. Restitution matters. Accountability matters.

But accountability and proportionality are not opposites.

A sentence can punish wrongdoing while still being reconsidered when the sentencing policy used to calculate that punishment materially changes.

ECONOMIC AND FRAUD OFFENSES REQUIRE PARTICULAR ATTENTION

Economic-crime sentences can be heavily influenced by monetary calculations. Inflation therefore matters.

A dollar threshold established years earlier does not retain the same economic significance indefinitely.

If the Commission adjusts monetary thresholds because inflation has changed their real-world meaning, applying the correction only prospectively risks creating two classes of defendants:

Those sentenced after the new amendment who receive the benefit of updated economic measurements;

and

those sentenced earlier who continue serving imprisonment influenced by thresholds the Commission has now adjusted.

Justice should not unnecessarily depend upon which side of an effective date a person's sentencing hearing occurred.

THE COMMISSION SHOULD REVISIT THIS DURING THE 2026–2027 CYCLE

I respectfully ask the Commission to:

1. Preserve a meaningful and accessible process for retroactivity rather than making retroactive consideration unnecessarily difficult.

2. Give substantial consideration to currently incarcerated individuals whenever an ameliorative guideline amendment is considered for retroactivity.

3. Revisit the 2026 inflationary/economic-crime amendment during the 2026–2027 policymaking cycle and consider whether applicable portions should be included in §1B1.10(d).

4. Conduct a full retroactivity impact analysis examining the number of incarcerated individuals potentially affected, estimated sentence reductions, public-safety considerations, prison-population effects, incarceration costs, restitution implications, and time already served.

5. Allow incarcerated individuals, their families, Federal Public Defenders, judges, prosecutors, victims, academics, reentry organizations, and other stakeholders to comment specifically on retroactivity.

6. Where legally and procedurally permissible, act promptly rather than requiring incarcerated individuals to spend additional unnecessary months or years serving sentences that may ultimately qualify for judicial reconsideration.

RETROACTIVITY CAN BENEFIT THE ENTIRE FEDERAL SENTENCING SYSTEM

Appropriate retroactivity can do more than promote fairness for individual defendants.

It can reduce unnecessary incarceration costs and prison overcrowding.

It can reunite families.

It can return rehabilitated individuals to lawful employment.

It can allow individuals to earn income, pay taxes, support dependents, and continue paying restitution.

And it can strengthen public confidence in the legitimacy of federal sentencing.

It is difficult to explain why the federal sentencing system can determine that a sentencing measurement should change, give that correction to someone sentenced tomorrow, but refuse even to allow a federal judge to consider whether someone sitting in prison today deserves the same benefit.

Retroactivity does not guarantee freedom.

It guarantees consideration.

The sentencing judge can still say no.

But the judge should have the opportunity to say yes when the facts, amended guideline, rehabilitation, public safety, and purposes of sentencing justify a reduction.

The Sentencing Reform Act sought greater fairness, proportionality, consistency, and rationality in federal sentencing.

Those principles should benefit not only people entering federal court tomorrow, but also people currently living with sentences imposed under policies the Commission subsequently determines should be changed.

The Commission missed an important opportunity to conduct a full public retroactivity process concerning the 2026 inflationary adjustments.

Please do not allow that missed opportunity to become permanent.

During the 2026–2027 cycle, please revisit this issue.

Please hear from the people presently incarcerated.

Please study the actual human, fiscal, prison-population, public-safety, and sentencing-disparity consequences.

And where appropriate, please give federal judges the authority to reconsider these sentences.

A fairer sentencing system should not only benefit the next person sentenced.

It should also be willing to look backward at the people still serving sentences under the policies the system has chosen to change.

Respectfully submitted.

Submitted on: September 3, 2026

Public Comment - Proposed Amendment on Rules of Practice and Procedure

Submitter:

David Mcmaster, Joni & Friends Wheels for the World Ministry

Topics:

1. Rules of Practice and Procedure

Comments:

10/20/2026
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Re: Comments on Proposed Amendments to the Commission's Rules of Practice and Procedure — Parts B and C

Dear Chair Reeves and Members of the United States Sentencing Commission:
My name is David McMaster, and I am writing to urge the Commission to reject Part B and adopt Part C of its proposed amendments to the Rules of Practice and Procedure.

These proposals matter because the Commission's decisions affect real people, families, and communities. The Commission should make it possible to extend fairer sentencing policies to people already serving sentences, while ensuring that the people most familiar with how the guidelines impact real people have a chance to access the same information as the Department of Justice.

Part B: Please reject the proposed five-vote requirement for retroactivity.

I strongly oppose Part B, which would require at least five affirmative votes for the Commission to make a sentencing-guideline amendment retroactive, rather than the existing four-vote threshold. This proposal would create an unnecessary and significant barrier to retroactivity, making it harder for people already serving federal sentences to benefit from sentencing reforms.

Retroactivity is an essential tool for fairness. When the Commission determines that a sentencing guideline should change, and that change actually is beneficial to sentenced people, it should not

make it harder for people to benefit from that change.

The existing four-vote threshold provides an appropriate safeguard for consequential Commission decisions. Requiring an additional vote for retroactivity would risk allowing a minority of commissioners to block relief, even when a majority of the Commission's members otherwise support making a reform retroactive. It would create an additional obstacle to correcting sentences that no longer reflect the Commission's current sentencing policies.

In my position as a former inmate of the FBOP and now a Pastor that works closely in prison ministry as well as several other ministries throughout the United States, including Joni & Friends Wheels for the World ministry, and one of the largest local churches in the country, I have personally observed the affects of retroactivity of previous Commission amendments since 2013.

I have witnessed both the incredible positive effects of retroactivity upon thousands of inmates and their loved ones and families and communities, and tremendous savings to the US Taxpayer, and the negative effects when an amendment is not made retroactive and the thousands that often serve years, or even decades longer than current guidelines would require, and the tremendous negative impact upon the taxpayer, overcrowded prisons, shortage of staff at the FBOP, as well as the horrible impacts upon the families, especially the children, communities, and burden upon the local, state, and federal government social programs.

I was personally impacted by several non-retroactive amendments, which would have substantially lowered my sentencing, if approved by my sentencing court, by 5 - 9 years, and one retroactive amendment that shortened my sentence by 33 months.

Note: I was granted clemency and did not serve the remainder of my outstanding sentence, lessoned by 13 months.

Retroactivity is not a "get-out-of-jail-free-card." It is an opportunity for the court and the government to evaluate an inmate in light of what has been determined to be in the best interest of justice and the mandate of Congress upon the Commission and who that inmate is today, thus evaluating conduct and rehabilitation and recovery and acceptance of responsibility while incarcerated. It allows deserving inmates, who meet all the factors and criteria to be treated fairly, and to "earn" re-sentencing through an updated and clearer lens of justice.

Not too mention the tremendous savings to taxpayers and relieving of our understaffed BOP officials.

The Commission should not make it harder to extend appropriate sentencing reforms to people who are already incarcerated. Retroactivity can offer a meaningful opportunity to correct excessive sentences, reunite families, and ensure that changes in sentencing policy reflect our current views of fairness. I urge the Commission to reject Part B and retain the existing four-vote

threshold.

Part C: Please support meaningful participation by the federal defender community.

I strongly support Part C, which would allow representatives of the Federal Public and Community Defenders to participate in Commission meetings and public hearings.

It is long past time for the federal defender community to have a meaningful seat at the table with the Commission. The Department of Justice has a nonvoting representative on the Commission, yet the federal defenders who represent people accused of federal crimes have not had comparable representation. That imbalance is fundamentally unfair.

Federal defenders bring an essential perspective to sentencing policy. They work directly with people facing federal charges, understand how sentencing rules operate in courtrooms across the country, and see the consequences of sentencing decisions for individuals, families, and communities. Their experience can help the Commission understand the practical effects of its policies and identify opportunities to make the federal sentencing system more just and effective.

The Commission should hear from the full range of stakeholders affected by federal sentencing, including those who represent people facing the power of the federal government. Providing federal defenders with a seat at the table would improve the Commission's policymaking and help correct a longstanding imbalance in whose perspectives are represented.

I urge the Commission to adopt Part C and ensure that federal defenders can meaningfully participate in its meetings and public hearings, with access to relevant policymaking materials.

Conclusion

The Commission's rules should promote fairness, informed decision-making, and meaningful participation. Part B would make it more difficult to extend appropriate sentencing reforms to people already sentenced. Part C would help ensure that the Commission hears from an essential and historically underrepresented perspective.

I urge the Commission to reject Part B and adopt Part C. These choices would help protect the possibility of fairer sentences for people already incarcerated while making the Commission's work more inclusive and responsive to the realities of the federal criminal legal system.

Thank you for considering my comments and for your work on federal sentencing policy.

Sincerely,
David McMaster

Submitted on: October 20, 2026

Public Comment - Proposed Amendment on Rules of Practice and Procedure

Submitter:

Robert Henry Rivernider, Godcast on the Bobcast

Topics:

1. Rules of Practice and Procedure

Comments:

October 23, 2026

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Re: Public Comment on Proposed Amendments to the Rules of Practice and Procedure — Parts B, C, and F

Dear Chair Reeves and Members of the Commission:

My name is Robert Rivernider. I am a federal prisoner who was originally sentenced in December 2013 in the District of Connecticut to 144 months' imprisonment for fraud-related offenses. I am submitting these comments based on my direct experience with the federal sentencing system.

Part B — Retain the existing four-vote requirement for retroactivity

I oppose the proposed increase from four to five affirmative votes to authorize retroactive application of sentencing-guideline amendments.

My original sentencing proceedings involved an aggregate fraud-loss calculation of approximately $22 million. The sentencing court also considered the effects of the financial crisis, my comparatively limited personal benefit, and other circumstances relevant to my individual culpability.

My experience demonstrates why retroactivity matters. Sentencing guidelines evolve as the

Commission gains additional evidence about proportional punishment, economic offenses, and the consequences of enhancements based on aggregate financial losses.

When the Commission determines that an amendment should benefit individuals already sentenced, an additional voting requirement could prevent that reform from reaching people whose sentences were imposed under older policies.

I recognize that retroactivity does not automatically entitle every individual to a sentence reduction. Courts must still determine eligibility under the governing statutes and policy statements. Nevertheless, the Commission should preserve a meaningful process for considering relief.

I therefore request that the Commission retain the existing four-vote threshold.

Part C — Federal defender participation

I support meaningful participation by representatives of Federal Public and Community Defenders in Commission meetings and hearings.

Federal defenders possess firsthand knowledge of how sentencing enhancements, loss calculations, criminal-history provisions, and retroactivity rules operate in actual cases.

Their participation would help the Commission evaluate not only the intended consequences of sentencing policies but also their practical effects on incarcerated individuals and their families.

Part F — Transparency

I also support expanded public access to Commission meeting materials, minutes, and supporting analyses, subject to appropriate protections for confidential information.

Transparent policymaking would help incarcerated individuals, their attorneys, and the public understand the evidence supporting sentencing changes and decisions about retroactivity.

Conclusion

I respectfully request that the Commission reject Part B, adopt Part C, and strengthen transparency through Part F.

Sentencing reform should be informed by experience, supported by evidence, and accompanied by a meaningful opportunity to consider whether improvements should benefit individuals sentenced under earlier guidelines.

Respectfully submitted,

Robert Rivernider

VILLANOVA UNIVERSITY

CHARLES WIDGER SCHOOL *of* LAW
Caritas Clemency Clinic

October 26, 2026

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Re: Comments on Proposed Amendments to the Commission's Rules of Practice and Procedure - Parts B and C

Dear Chair Reeves and Members of the United States Sentencing Commission:

I write in my individual capacity as Director of the Caritas Clemency Clinic at Villanova University Charles Widger School of Law. Our Clinic works with incarcerated and formerly incarcerated people, as well as their families, to address excessive punishment and promote meaningful opportunities for second chances. Through this work, I have seen firsthand the long-lasting impact of lengthy federal sentences, the barriers people face when seeking relief, and the transformative growth that many achieve during their incarceration.

A principle that guides my approach to this work is simple, but one that more than twenty years of representing people who have caused harm to others—as nearly all of us have, in one way or another—has repeatedly affirmed: people are more than the worst thing they have ever done. No person should be defined by a single moment in time, but rather by the efforts they make to accept responsibility, overcome adversity, and build a different future. The experiences of those we serve demonstrate the human capacity for growth and change, particularly when people have access to education, treatment, family support, and other opportunities for rehabilitation.

Through my work as a law professor, clinic director, and advocate, I have witnessed the harmful consequences of excessively punitive sentencing policies and the obstacles that often prevent people serving federal sentences from benefiting from reforms enacted after their convictions. These experiences have reinforced my belief that sentencing policies must recognize the capacity of individuals to grow and change.

For these reasons, I urge the Commission to **reject Part B** of the proposed amendments, which would require at least five affirmative votes before a guideline amendment may be applied

retroactively, and to **adopt Part C**, which would allow representatives of the Federal Public and Community Defenders to participate in Commission meetings and public hearings.

Preserve the Four-Vote Requirement for Retroactivity

The Commission should reject Part B's proposal to require five affirmative votes for the retroactive application of sentencing guideline amendments.

Congress authorized the Commission to promulgate sentencing guidelines with four affirmative votes under 28 U.S.C. § 994(a), and that same threshold has governed the Commission's Rules of Practice and Procedure since 1997. The proposed departure from this longstanding framework lacks sufficient justification, particularly as our understanding of sentencing, public safety, and the criminal legal system continues to evolve.

Research in areas such as adolescent brain development, trauma, rehabilitation, racial bias, and sentencing disparities has deepened our understanding of human behavior, the administration of justice, and the ways in which punishment may be excessively harsh, disproportionate, or inconsistent with evolving understandings of justice and human dignity. As our knowledge evolves, the Commission should preserve pathways for people who are incarcerated to benefit from sentencing reforms that reflect that understanding, rather than erect additional barriers to relief.

Under Part B, the Commission could approve a guideline amendment with four votes but require five votes to make that same amendment retroactively applicable to people already serving federal sentences. This higher threshold would create an additional obstacle to revisiting sentences imposed under guidelines that the Commission has determined should be revised. When our understanding of sentencing and punishment evolves, people already serving sentences should have a meaningful opportunity to benefit from reforms informed by that knowledge.

While retroactive sentencing reform may present challenges distinct from prospective reform, those challenges should not become unnecessary barriers to correcting sentencing disparities and extending the benefits of fairer policies to people already incarcerated. Further, while retroactive amendments may create administrative demands and require careful deliberation by the Commission, those concerns do not justify a higher voting threshold. The Commission has successfully implemented major retroactive amendments in the past, including Amendment 782, which reduced guideline offense levels for most federal drug trafficking

offenses by two levels and was made retroactive through Amendment 788.[1] Existing procedures already provide important safeguards against unwarranted sentence reductions. Indeed, the Commission's own research found no statistically significant difference in recidivism rates between people released early under Amendment 782 and a comparable group of people who served their full sentences.[2]

For these reasons, the Commission should preserve the current four-vote requirement and continue to ensure that meaningful sentencing reforms remain available to those already serving federal sentences.

Ensure Meaningful Representation Through Defender Participation

I strongly support Part C, which would allow representatives of the Federal Public and Community Defenders to participate in Commission meetings and public hearings.

The Commission's decisions profoundly affect the lives of people facing federal prosecution, serving federal sentences, and attempting to rebuild their lives after incarceration. Yet the individuals most directly impacted by those decisions often have little opportunity to participate in the policymaking process. This disparity is particularly significant where government stakeholders already have a formal voice in Commission proceedings.

Federal Public and Community Defenders are uniquely positioned to help bridge that gap. Their attorneys and staff possess decades of experience representing individuals at every stage of the federal criminal process. They understand not only sentencing doctrine but also the practical realities of incarceration, barriers to communication with clients, challenges in obtaining records, and the obstacles individuals face when seeking post-conviction relief and successful reentry.

That perspective is essential. Data and sentencing statistics provide valuable information, but they cannot fully capture how sentencing policies affect individuals, families, and communities in practice. Defender participation would help ensure that the Commission's deliberations are informed by those real-world experiences and that the interests of people facing or serving federal sentences are represented alongside those of prosecutors and other institutional stakeholders.

---

[1] U.S. Sent'g Comm'n, *Guidelines Manual*, app. C, amend. 782 (effective Nov. 1, 2014); id., amend. 788 (effective Nov. 1, 2014).
[2] U.S. Sent'g Comm'n, *Retroactivity & Recidivism: The Drugs Minus Two Amendment* (July 2020).

Meaningful access for the Federal Public and Community Defenders would strengthen the Commission's decision-making process, promote transparency, and enhance public confidence that sentencing policy is being developed with the benefit of diverse and informed viewpoints. I therefore urge the Commission to adopt Part C and provide defenders with meaningful opportunities to participate in Commission meetings and public hearings, including access to relevant policymaking materials.

Conclusion

The Commission's Rules of Practice and Procedure should promote fairness, transparency, and informed decision-making. Accordingly, I urge the Commission to reject Part B and adopt Part C. Doing so would preserve meaningful opportunities for relief when sentencing policies change and would strengthen the Commission's processes by ensuring that a broader range of informed perspectives is heard.

Thank you for your consideration of these comments and for your continued work on federal sentencing policy.

Respectfully submitted,

Anton Robinson
Associate Professor & Director of the Caritas Clemency Clinic
Villanova University Charles Widger School of Law
299 N. Spring Mill Road
Villanova, PA 19085
[redacted]

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

Edwin F. Mandel Legal Aid Clinic
6020 South University Avenue | Chicago, Illinois 60637
[redacted]
www.law.uchicago.edu

Alison Siegler
Lillian E. Kraemer Clinical Professor in Public Interest Law
Founding Director, Federal Criminal Justice Clinic

October 26, 2026

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
Via Public Submission Portal

Re: Comment on Proposed Amendment to the Rules of Practice and Procedure Part C

Dear Judge Reeves, Vice Chairs, and Commissioners:

I respectfully submit the following comment in support of the United States Sentencing Commission's Proposed Amendment to its Rules of Practice and Procedure Part C, which would both (1) allow a representative of the Federal Public and Community Defenders to participate in Commission meetings; and (2) provide that Defender representative with the same meeting materials distributed to Commissioners.[1] I am the Lillian E. Kraemer Clinical Professor in Public Interest Law and Director of the Federal Criminal Justice Clinic at the University of Chicago Law School. Students and faculty in the Clinic provide direct representation for indigent clients charged with federal felonies while also engaging in research and policy work in the federal criminal system. I participated in the Commission's 2024 Drug Sentencing Roundtable, have previously testified before the Commission,[2] and have provided comments on other proposed changes to the Sentencing Guidelines.[3] I have also testified before Congress based on my

[1] *See* U.S. Sent'g Comm'n, PROPOSED AMENDMENT TO THE RULES OF PRACTICE & PROCEDURE PART C 7–8 (Aug. 27, 2026) [hereinafter U.S SENT'G COMM'N, PART C PROPOSED AMENDMENT], https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202608_rf-proposed.pdf.

[2] *See* Alison Siegler, Assistant Clinical Prof. & Dir., Fed. Crim. Just. Clinic, Statement Before the United States Sentencing Commission (Jan. 21, 2010), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100120-21/Siegler_Testimony.pdf. In addition to advocacy before the Commission, my Clinic has also provided written testimony in support of congressional legislation. *See, e.g.*, *Controlled Substances: Federal Policies & Enforcement: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 116th Cong. 84–169 (2021), https://www.congress.gov/117/chrg/CHRG-117hhrg44670/CHRG-117hhrg44670.pdf (statement of Alison Siegler, Erica Zunkel & Judith P. Miller, Fed. Crim. Just. Clinic); *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 223–239 (2013), https://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg88998.pdf (statement of Alison Siegler & Erica Zunkel, Fed. Crim. Just. Clinic).

[3] *See, e.g.*, Alison Siegler et al., *Comment Letter on Proposed Amendment: New Post-Offense Rehabilitation Guideline* (Feb. 10, 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202602/90FR59660_public-comment_R.pdf#page=906; Alison Siegler et al., *Comment Letter on Retroactivity of Amendments to the Drug Sentencing Guidelines* (June 2, 2025),

experience and expertise in the federal criminal system.[4] Prior to founding the Federal Criminal Justice Clinic, I was an Assistant Federal Public Defender for the Northern District of Illinois for six years.

I strongly support the changes proposed in Part C. As I explain below, the Sentencing Reform Act of 1984 ("the Act" or "the SRA") empowers the Commission to adopt this proposal and doing so is essential to begin rectifying a longstanding and problematic disparity between the prosecution and the defense—the two adversarial players in the federal criminal legal system. The changes would also improve the quality of the Commission's decision-making while aligning the Commission's composition with state-level commissions, best practices, and expert recommendations. As I further explain, option 2 (inviting the Defender representative to attend and participate in all Commission meetings at which Commission staff is present) is the best choice, but I recommend adding language to ensure that the Defender representative receives meeting materials at the same time as the Commissioners.

Congress required the Federal Defenders to provide input on the Commission's work whenever it would be useful, but the Commission's current composition frustrates this mandate.

The SRA created the Commission and charged it with establishing "sentencing policies and practices for the Federal criminal justice system" that, among other things, "assure the meeting of the [statutory] purposes of sentencing" and "provide certainty and fairness in meeting the purposes of sentencing."[5] To carry out this work, the Commission must "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system."[6] Thus, Congress made the Commission's promulgation of guidelines subject to the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553.[7] But "this provision[] establishes [only] *minimum* procedural requirements for outside consultation by the Commission."[8] Congress anticipated the Commission would "observe more extensive procedures than those required by section 553, at an earlier stage in the process of guideline development, to acquaint itself fully on the issues involved in the promulgation of specific guidelines."[9] Likewise, Congress expected the Commission to "consider as broad a cross-section of views and consult as diverse a group of interested parties as possible during all

---

https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202506/90FR19798_comment.pdf#page=93; Alison Siegler et al., *Comment Letter on Proposed Amendments to the Drug Sentencing Guidelines* (Mar. 3, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202503/90FR8968_public-comment_R.pdf#page=770.

[4] *The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 116th Cong. 30 (2019), https://www.youtube.com/watch?v=iQnb9eTjUf8 (testimony and statement of Alison Siegler, Director, Fed. Crim. Just. Clinic, Univ. of Chi. L. Sch.)

[5] 28 U.S.C. § 991(b)(1)(A)–(B); *see also id.* § 994(a) (describing Commission's duties to promulgate sentencing guidelines for federal defendants).

[6] 28 U.S.C. § 994(o).

[7] *Id.* § 994(x).

[8] S. Rep. 98-225, at 3363 (1983) (emphasis added).

[9] *Id.* at 3363–64.

stages of guideline development."[10] And Congress required the Federal Defenders to provide input to the Commission "whenever they believe such communication would be useful[.]"[11]

Despite these mandates calling for broad and diverse participation in the Commission's work at an early stage in the policymaking process and Defender input whenever useful, the Act includes a U.S. Department of Justice ("DOJ") designee as a nonvoting *ex officio* member, yet does not do the same for the Federal Defenders.[12] This position gives the DOJ access to internal meetings and materials where the Commission debates and develops important sentencing-related policies. In short, the DOJ community has a seat at the table where critical sentencing issues are discussed, debated, and decided.[13] Yet no comparable role exists for a representative of the Defender community, whose input and advice are entirely absent from Commission meetings and briefing sessions. In sum, the current makeup of the Commission keeps Defenders from participating fully in important discussions, debates, and decisions on federal sentencing policy, and from offering their insights and practical experience whenever such communication would be useful.

The SRA empowers the Commission to provide Defenders a similar level of access to, and influence over, the Commission's work as the DOJ currently enjoys.

Although the SRA provides an *ex officio* spot on the Commission for the DOJ and not the Federal Defenders, beyond establishing that spot, the SRA says nothing about the parameters of the DOJ *ex officio* member's role.[14] In fact, the SRA's only reference to how stakeholders should provide commentary to the Commission places the Defenders on equal footing with the DOJ, requiring both to submit observations, comments, and an annual written report that comments on the Commission's work and suggests changes to the Guidelines.[15]

Nevertheless, the role of the DOJ member has ballooned and become quite expansive compared to that of the Defenders,[16] giving the DOJ a far-reaching ability to influence the direction and development of federal sentencing policy. Among other things, the DOJ member

---

[10] *Id.* at 3364.
[11] 28 U.S.C. § 994(o).
[12] *See* 28 U.S.C. § 991(a).
[13] The DOJ representative is typically very high up in the Executive Branch. The longest-serving *ex officio* member rose to be a Principal Deputy Assistant Attorney General with the Office of Legal Policy during his tenure on the Commission. *See* DOJ, *Former Principal Deputy Assistant Attorney General Jonathan Wroblewski*, https://www.justice.gov/archives/olp/staff-profile/former-principal-deputy-assistant-attorney-general-jonathan-wroblewski. Tellingly, the Commission's website refers to the DOJ representative as an "Ex Officio *Commissioner*," rather than simply a "member," publicly identifying them as on a par with the actual Commissioners. U.S. Sent'g Comm'n, *About the Commissioners*, https://www.ussc.gov/commissioners. A former *ex officio* member also describes his role as "Ex Officio Sentencing Commissioner." Scott A.C. Meisler, *The Role & Responsibilities of the Department of Justice's Ex Officio Sentencing Commissioner*, 74 DEP'T OF JUST. J. OF FED. LAW & PRAC. 121, 121 (2026).
[14] 28 U.S.C. § 991(a).
[15] 28 U.S.C. § 994(o).
[16] *See* Meisler, *supra* note 13, at 126 ("The ex officio plays a multi-faceted role in [the Guidelines] amendment process.")

"represents the Department at the Commission's various sessions, including public hearings, public meetings, internal meetings, and—on occasion—roundtables dedicated to particular issues."[17] At these hearings and meetings, the DOJ member "appears on the dais with the voting Commissioners" "as they hear witness testimony concerning proposed amendments," may "question the witnesses on the public record," and, from the dais, "may make a statement addressing actions the Commission has taken (or failed to take)."[18] The DOJ member also "attends the Commission's internal meetings" where the Commissioners "discuss possible amendments" and "debate whether to promulgate" them.[19] And the DOJ member "participate[s] in the Commission's periodic meetings with members of its standing advisory groups."[20]

The DOJ member is additionally able to influence the on-the-ground application of the Guidelines by presenting alongside the Commissioners at conferences and training seminars, including annual, national trainings for federal judges and probation officers. Not only does this give the DOJ member's position the imprimatur of the Commission itself, but it also gives the Department immense power. At such trainings, the DOJ member can put the Department's gloss on the Guidelines and recent amendments, giving them substantial sway over how the judges who make sentencing decisions channel their discretion.

Nothing in the SRA prevents the Commission from granting a similar level of access to Defenders through this proposed change to its Rules of Practice and Procedure.[21] While it is a meaningful first step, this proposal will not create true parity between the DOJ *ex officio* nonvoting Commission member and the Defender representative. If Part C is adopted, the Defender representative still would not be able to participate to the same extent as the DOJ member. The Defender representative would not be allowed to attend "any portion of a [Commission] meeting dedicated to non-policy, non-data, or internal administrative matters . . . or in which the Commission will receive or share information that is inappropriate for public disclosure."[22] The Defender representative also would not receive any Commission materials "inappropriate for public disclosure."[23]

Thus, the only way to achieve true parity would be to ensure that legislative change is enacted that would put a Defender representative on equal footing with a DOJ representative. I urge the Commission to support a legislative amendment that would add a Defender representative in the same capacity as the DOJ representative.[24]

---

[17] *Id.* at 127.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 129.
[21] *See* 28 U.S.C. § 995(a)(1) (the Commission has the power to "establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out" its purposes).
[22] U.S SENT'G COMM'N, PART C PROPOSED AMENDMENT RULE 3.1.
[23] *Id.*
[24] *See, e.g.*, S.4136, Sentencing Commission Improvements Act (introduced March 18, 2026).

The DOJ ex officio member brings prosecutorial advocacy, not neutral decision-making, to its position on the Commission.

There is a basic fallacy that lies at the heart of the current disparity between the DOJ and Defenders—the notion that the DOJ's job is to pursue justice writ large, while the Defender community plays an adversarial, advocacy role. This defense of the current system ignores the fact that the DOJ and its constituent U.S. Attorney's Offices likewise play an adversarial role. The ABA's Model Rules of Professional Conduct recognize the bedrock assumption that prosecutors are ***advocates*** for their cause: "[The] prosecutor has the responsibility of a minister of justice and *not simply that of an advocate*."[25] Pretending that the DOJ's only role is as "a minister of justice" disregards that the federal prosecuting branch and its members are also "advocate[s]" on one side of an adversarial system. Moreover, the prosecutor's two roles often come into direct conflict, as scholars and the Supreme Court have long recognized: "Empirical data confirms that 'the more experience a prosecutor has, the more likely [they are] to express an interest in *obtaining convictions* over an interest in doing justice.'"[26] To see how prosecutors' adversarial role can trump their minister-of-justice duties we need look no further than *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny.[27]

As with all prosecutors, the DOJ member of the Commission is likewise an advocate on one side of an adversarial system. They are not simply an umpire, neutrally calling balls and strikes in the pursuit of "justice." Watch any public hearing of the Commission, read any of the DOJ's briefing, and the DOJ member's role as an advocate advancing an agenda is clear and unavoidable.[28] A former DOJ *ex officio* hammers this home in describing the "central role" the DOJ member plays in preparing the Department's annual report to the Commission, a document that "necessarily reflects the policy priorities and positions of the presidential administration"[29]:

---

[25] Model Rules of Pro. Conduct r. 3.8 cmt [1] (emphasis added).
[26] Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2149 (2010).
[27] *See, e.g.*, *Foster v. Chatman*, 578 U.S. 488, 514 (2016) (reversing a death sentence after finding that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury"); Br. For Former Prosecutors as *Amici Curiae* in Support of Petitioner at 2, *Foster v. Chatman* 578 U.S. 488 (2016), No. 14-8349, 2015 WL 4624173 (referencing empirical evidence that "prosecutors use peremptory strikes against black jurors at significantly higher rates than whites.").
[28] *See, e.g.*, Scott Meisler, *ex officio* Member, U.S. Sent'g Comm'n, *DOJ Comment on Proposed Amendments to the Sentencing Guidelines* 35 (Feb. 10, 2026), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202602/90FR59660_public-comment_R.pdf#page=249 (opposing proposed offense-level reduction for economic crimes based on argument that the defendant operated under coercion or duress: "[T]he Department believes that arguments concerning coercion or duress are already adequately addressed at the guilt phase and at sentencing as part of the [18 U.S.C. § 3553(a)] sentencing factors[.]"); *see also* Jonathan J. Wroblewski, *ex officio* Member, U.S. Sent'g Comm'n, *DOJ Comment on Proposed Amendments to the Sentencing Guidelines* 12 (Feb. 15, 2023) https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=387 (opposing proposed amendment limiting the use of acquitted conduct in determining the Guidelines range).
[29] Meisler, *supra* note 13, at 124.

"[T]he ex officio does substantial work internally to ensure that the Department's submissions to the Commission are . . . *persuasive, and in line with the Department's interests*."[30]

The DOJ member's role as a champion for policies that advance the prosecution's interests weighs heavily in favor of placing a member of the Defender community on the Commission. The Defender member would serve as a counterbalance, provide an alternative perspective, and bring well-researched data, case law, and scholarship to the Commission's meetings, hearings, and trainings that counters the information presented by the DOJ.

Part C will bring better balance to—and improve—the Commission's decision-making while mitigating the problematic impact of the current disparity.

It beggars belief that no comparable seat on the Commission exists for the Defender community, despite Federal Defenders' unique insight into the application and effect of the Sentencing Guidelines on the over sixty thousand people who are sentenced in federal courts each year.[31] There is no justification, statutory or otherwise, for continuing to grant one adversarial player such expansive and unfettered access to the Commission while excluding the other from the conversation.

There is every reason to give the Defender community an actual seat at the table so that they can share their proven expertise on sentencing law and policy with the Commission, and parity demands it. Federal defender organizations (along with CJA counsel) represent the vast majority of those who face federal prosecution.[32] Through their work, Defenders have a deep understanding of the legal and theoretical underpinnings of the Guidelines and the arc of federal sentencing law. They are also the only systemic actors who see the Guidelines' practical effect on people charged with federal crimes across the country. Indeed, the SRA already recognizes the value and insight that Defenders bring to sentencing matters by requiring them to submit an annual written report "assessing the Commission's work."[33]

The pernicious impact of the current disparity cannot be overstated. The DOJ's inside track gives it a profound ability to influence federal sentencing policy and advance federal prosecutors' advocacy goals. The DOJ *ex officio* member regularly advocates to the Commission to modify the Guidelines in ways that ratchet up sentences and channel judicial discretion in the direction of aggravation instead of mitigation, harshness instead of mercy.

For example, when I testified in person before the Commission in 2010,[34] Jonathan Wroblewski, who served as the DOJ *ex officio* member for over sixteen years, sat on the dais

---

[30] *Id.* at 129.
[31] *See* U.S. Sent'g Comm'n, *2025 Guideline Application Frequencies*, https://www.ussc.gov/research/data-reports/guideline/2025-guideline-application-frequencies (data on 66,662 federal sentencings in fiscal year 2025); U.S. Sent'g Comm'n, *2024 Guideline Application Frequencies*, https://www.ussc.gov/research/data-reports/guideline/2024-guideline-application-frequencies (data on 61,678 federal sentencings in fiscal year 2024).
[32] U.S. Courts, *Defender Services*, https://www.uscourts.gov/about-federal-courts/defender-services.
[33] 28 U.S.C. § 994(o).
[34] *See* U.S. Sentencing Commission Public Hearing 59–84 (Jan. 21, 2010), https://www.ussc.gov/sites/default/files/public_hearing_transcript.pdf.

with the Commissioners and vociferously opposed my proposal to amend the Guidelines.[35] Although he was technically a non-voting member, he is listed as "Commissioner Wroblewski" in the transcript.[36] I was recommending that the Commission vote for an amendment to lower sentences for a particular crime in order to reduce unwarranted *prosecutor-created* disparities. In questioning me and challenging my proposal, Mr. Wroblewski wore his advocate hat and presented himself as an adversary. His questions and statements made clear to the Commissioners that it was his position that "we shouldn't change the guidelines [as] you are suggesting."[37] When I responded, Mr. Wroblewski attempted to discredit me by leveling a biting accusation: "That's quite an indictment of a whole host of judges."[38]

Even at the time, I found it striking that someone with an adversarial perspective and axe to grind was given the same leeway to question me as the Commissioners themselves, and that there was no Defender member to serve as a counterbalance at the hearing. I was also aware that Mr. Wroblewski's *ex officio* position made him a known quantity to the Commission and gave him a gravitas that no opposing voice could match.

The proposed changes in Part C would begin to rectify the current disparity between the two adversarial stakeholders by allowing a Defender representative (along with a representative of the Committee on Criminal Law of the Judicial Conference of the United States) to attend Commission meetings, "engag[e] in deliberations with commissioners and other meeting participants, request[] information and documents, and present[] relevant information to the Commission," and also "receive the same meeting materials distributed to commissioners" (other than "information that is not related to policymaking or data, or is inappropriate for public disclosure").[39] The Defender representative would also be able to "actively participate" in public hearings, including by questioning witnesses.[40] While these changes would not put the Defender representative on completely equal footing with the DOJ *ex officio* member, the Defender community would nevertheless be able to share its essential perspective and expansive expertise on federal sentencing policy. This will not only improve the Commission's discussions and rule-making overall but also align the Commission's work with the spirit of our adversarial system, which is "premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on ***both*** sides of the question.'"[41]

---

[35] *See id.* at 74–77.
[36] *See id.*
[37] *Id.* at 74.
[38] *Id.* at 76. Years later, that ad hominem attack remains emblazoned on my mind. There I was, little more than ten years out of law school, visibly pregnant, and testifying at the Vice-Chair's invitation. The denunciation in Wroblewski's challenge temporarily derailed me. All I could manage in response was: "You are saying—I'm sorry." *Id.* After he repeated the question with a more civil framing, I recovered my footing. *Id.* at 77.
[39] U.S SENT'G COMM'N, PART C PROPOSED AMENDMENT RULE 3.1(C).
[40] *Id.* RULE 3.4.
[41] *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (internal quotation marks omitted and emphasis added).

Part C will increase the legitimacy of the Commission's decision-making in the eyes of the public and align its approach with best practices and expert recommendations.

The current imbalance between the DOJ and the Defender community creates a public perception that the Commission is disproportionately influenced by prosecutors.[42] Gathering various perspectives on important federal sentencing policies will help ensure that the public sees the Commission's work as legitimate and fair.

Further, implementing Part C's proposed changes will better align the Commission with state-level sentencing commissions, which largely mandate a public defender or criminal defense representative be included.[43] These changes will also bring the Commission up to par with the Judicial Conference's three criminal rules-related committees (the Advisory Committees on Appellate Rules, Evidence Rules, and Criminal Rules), each of which has Defender representatives serving as voting members.[44]

Likewise, Part C will align the Commission with expert recommendations. The Judicial Conference of the United States has long advocated for adding a Defender *ex officio* member to the Commission,[45] while for over 30 years, commentators have urged increased participation by the Defender community in the Commission's work.[46]

---

[42] *See* Rachel E. Barkow, *The Evolving Role of the United States Sentencing Commission*, 33 FED. SENT. REP. 3, 4 (2020) (noting "the [DOJ] literally has a seat at the table of every Commission meeting" while "there have been very few members [appointed to the Commission] with defense experience or experience working on criminal justice reform"); *see also* Hon. William K. Sessions III, *At the Crossroads of the Three Branches: the U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J. L. & POL. 305, 323 (2011) (noting that "[w]ith rare exceptions, and until recently, the [DOJ] strongly and consistently supported the 'one-way upward ratchet' in a large number of amendments to the guidelines").

[43] *See, e.g.*, Ala. Code § 12-25-3(a)(10)-(11); Ark. Code Ann. § 16-90-802(b)(3)(C); D.C. Code § 3-102(a)(1)(D); Kan. Stat. Ann. § 74-9102(4); Md. Code Ann. Crim. Proc. § 6-204(a)(7); Mo. Rev. Stat. § 558.019(7)(1); Nev. Rev. Stat. § 176.0133(1)(h)-(i); N.C. Gen. Stat. § 164-37(16); Ohio Stat. § 181.21(A); Utah Code § 75E-4-102(3)(b)(vi); Va. Code § 17.1-802(A)(7).

[44] *See* Advisory Committee on Appellate Rules 7 (Oct. 6, 2026), https://www.uscourts.gov/sites/default/files/document/2026-10_appellate_rules_committee_agenda_book_0.pdf; Advisory Committee on Criminal Rules 5 (Oct. 14, 2026), https://www.uscourts.gov/sites/default/files/document/2026-10_criminal_rules_agenda_book_9-24_final.pdf; Advisory Committee on Evidence Rules 8 (Oct. 15, 2026), https://www.uscourts.gov/sites/default/files/document/2026-10-evidence-rules-agenda-book.pdf.

[45] *See* Judicial Conf. of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 11 (Mar. 16, 2004), https://www.uscourts.gov/file/2131/download (adopting recommendation that "the Judicial Conference seek legislation that would authorize the Conference to appoint a federal defender to serve as an ex-officio, non-voting member of the United States Sentencing Commission").

[46] *See, e.g.*, Barkow, *supra* n. 42, at 9 ("Requiring a representative of the federal defenders to be an ex officio member could help balance the presence of DOJ, given that DOJ plays an outsize role in commenting on possible changes."); Mark Osler & Hon. Mark. W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration & the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117, 165 (2014) (calling the lack of a representative of the defense community on the Commission "a major and

Recommendations and Suggested Changes to Part C Proposal.

The Commission suggests two alternative formulations for the proposal: either allowing a Defender representative to attend and participate in (1) "public meetings and nonpublic briefing sessions of the Commission"; or (2) all "Commission meetings at which Commission staff is present."[47] I recommend the second formulation so that the Defender representative is permitted to attend *all* Commission meetings at which Commission staff is present. This would allow the Defender representative to attend nonpublic meetings that are not briefing sessions and would ensure greater parity between DOJ and Defender representation on the Commission.

Additionally, I recommend that Proposed Rule 3.1(c) be amended to insert the following bolded language: "To facilitate informed participation, the designated representatives shall receive the same meeting materials distributed to commissioners **at the time those materials are distributed to commissioners**." This will remove any ambiguity about when materials are distributed to the Defender and Criminal Law Committee representatives and will ensure that they can meaningfully participate in all Commission meetings they attend.

Thank you for considering these views, which I submit in my individual capacity. Please do not hesitate to reach out to me at [redacted] with any questions.

Sincerely,



Alison Siegler
Lillian E. Kraemer Clinical Professor in Public Interest Law
Founding Director, Federal Criminal Justice Clinic

serious structural flaw" that should be rectified to give the Commission "a much needed and more balanced perspective"); Hon. John Gleeson, *The Sentencing Commission & Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 646 (2008) (noting the Commission "lacks the balance of an *ex officio* position to represent the views of the defender community"); Abraham L. Clott, *Appointing a Federal Defender to the Sentencing Commission*, 8 FED. SENT'G R. 30, 30 (1995) (advocating for appointment of a Defender representative to "correct the imbalance that results from membership by a DOJ designee as an ex-officio Commissioner" and to "greatly add to the quality of Commission deliberations").

[47] U.S SENT'G COMM'N, PART C PROPOSED AMENDMENT RULE 3.1(C).

An AI Experiment, Part 7: Expanding the U.S. Sentencing Commission

The Commission has proposed giving the Federal Public Defenders and the Judicial Conference's Criminal Law Committee special status at its meetings and hearings. There's a better way to be inclusive.

JONATHAN J. WROBLEWSKI
6 MINUTES AGO

Share

In September, the U.S. Sentencing Commission published for public comment a series of proposed amendments to its Rules of Practice and Procedure. The proposals address, among other things, what Commission work is conducted in public, what policymaking materials — including legal and data analyses considered by the Commission — are released to the public, and how stakeholder and public involvement in policymaking is structured, including new rules on ex parte *communications.*

Part C of the proposed amendments would give representatives of the Judicial Conference's Criminal Law Committee and the Federal Public and Community Defenders special status among Commission stakeholders. It would allow them to attend most private Commission meetings, receive commissioners' meeting materials, be part of private deliberations, and question witnesses at public hearings. While I believe in a Commission with a more diverse set of voices — including the voice of the Federal Public Defenders — I think there is a much better way to accomplish it.

Thanks for reading Sentencing Matters Substack! Subscribe for free to receive new posts and support my work.

✓ Subscribed

When Judge Marvin Frankel first advocated for the creation of a sentencing commission, he envisioned one that would include many diverse members: "lawyers, judges, penologists, and criminologists . . . sociologists, psychologists, business people, artists, victims, and former or present prison inmates." A look at state and foreign sentencing commissions shows that Frankel's idea is not pie-in-the-sky. The experience of those commissions makes plain that Frankel was wise about how to construct a commission and that his vision is quite achievable.

In the last several decades, the U.S. Sentencing Commission has been made up almost exclusively of lawyers. Don't get me wrong, lawyers can be great. And a diverse set of lawyers is better still. But even more diversity — tapping into people with different skills and different backgrounds — would bring new thinking and new insights to the Commission, and, I strongly believe, result in better sentencing policy too. Part C does nothing to broaden the Commission's perspectives in these ways. It adds more lawyers and doubles-down on the adversarial design of the Commission's policymaking process.

Last month, the Commission invited me to a roundtable discussion of the Rules' amendment proposals, and I directly expressed these views to the commissioners and staff. Later, I asked Claude Cowork to take my notes, help me further research the makeup of other sentencing commissions, and draft a memorandum to the Commission with my views, together with a legislative proposal to expand the Commission along the lines I shared at the roundtable.

Here is that AI experiment with Claude Cowork.

Jonathan (to Claude): The Sentencing Commission is considering amending its Rules of Practice and Procedure to give representatives of the Federal Public Defenders and the Criminal Law Committee of the Judicial Conference greater access to Commission meetings — both public and private — and hearings. You can find a reader-friendly version of the proposal here — https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202608_rf-proposed.pdf. I was invited to a Commission roundtable last month, where I shared my view that rather than provide access to these particular organizations, the Commission should consider proposing to Congress legislation to expand the Commission's membership to not only include a defense attorney representative but also others as well. I have attached the notes I used at the roundtable that further explain my views.

I would like your help to research the makeup of U.S. state sentencing commissions as well as commissions in other countries (they often go by other names, like the "Sentencing Council" in England and Wales). Please prepare a formal memorandum to the Sentencing Commission of no more than seven pages that includes my arguments and the research you find and proposes that the Commission support a piece of legislation to expand the Commission's membership as discussed in my notes and in accordance with best practices you find in your research. Please provide footnotes so that the Commission and I can check your work. In addition, please draft up a proposed bill that would accomplish what you recommend in the memo.

Claude: *Ran 2 agents, used 2 tools, and 2 more tools.*

Ran 13 commands, read 5 files, and 8 more tools.

I've drafted the memo (6 pages, 22 footnotes) and the proposed bill. They're saved in your USSC Rules folder.

- - -

MEMORANDUM

TO: The Honorable Carlton W. Reeves, Chair, and Commissioners, United States Sentencing Commission

FROM: Jonathan Wroblewski and Claude Cowork

DATE: October 22, 2026

RE: Proposed Amendments to the Rules of Practice and Procedure, Part C — Recommendation That the Commission Support Legislation Broadening Its Membership

I. Summary of Recommendation

Part C of the Commission's proposed amendments to its Rules of Practice and Procedure would give representatives of the Judicial Conference's Committee on Criminal Law and the Federal Public and Community Defenders seats at nearly every Commission meeting — public and private — access to commissioners' meeting materials, a role in deliberations, and the right to question witnesses at public hearings.[1] We share the goal behind the proposal: the Commission would benefit from the participation of more — and more varied — voices in its work. But Part C is the wrong means to that end. It adds two more lawyers to a Commission that has been almost exclusively lawyers, it does so by an internal rule that confers quasi-membership without appointment or accountability, and it reinforces the adversarial, court-like model of policymaking that has not served the Commission or federal sentencing policy well.

We respectfully recommend that the Commission set Part C aside and instead exercise its statutory authority to recommend legislation to Congress[2] by endorsing a bill that would broaden the Commission's membership in line with the practice of state sentencing commissions and of sentencing councils abroad. A discussion draft of such a bill accompanies this memorandum [following the footnotes to this memorandum]. In brief, it would (1) expand the Commission from seven to eleven voting members, adding four seats while preserving existing seats; (2) require that at least one voting member have experience supporting victims of crime, at least one have personal experience of incarceration, at least one bring research or data expertise, at least one bring corrections, reentry, or behavioral health experience, and at least two be neither judges nor career lawyers; (3) direct the President to seek a Commission that collectively spans the fields that bear on sentencing, from criminal defense and corrections to criminology and data science; (4) add a federal defender as an *ex officio*, nonvoting member alongside the Attorney General's designee; and (5) create nonvoting congressional liaisons drawn from the staffs of the House and Senate Judiciary Committees.

II. Why Part C Is the Wrong Tool

The Commission is a policymaking body, not a court. Congress placed the Commission in the Judicial Branch, but its work is policymaking not judging: it exercises delegated authority to write guidelines that balance the competing values underlying sentencing.[3] Since *Booker*, its guidelines are advisory, so its influence depends on persuading judges, Congress, and the Executive Branch that its work is sound and worth following. Yet the Commission's processes have long mimicked adjudication: interested parties file written comment that functions as briefing, witnesses advocate their preferred outcomes at hearings rather than deliberate with others of different views, and commissioners then decide in private. What is structurally missing is public, reasoned deliberation among people who bring different knowledge and different perspectives to the table.

Part C doubles down on the courtroom model. The Attorney General's designee already sits on the Commission as an *ex officio* member. Adding a defender representative alongside a representative of the judges' Criminal Law Committee would recreate a courtroom of sorts at the Commission's table, with prosecution on one side, defense on the other, and the bench looking on. That structure invites each participant to press an institutional position rather than to reason together toward the public good. Three of the voting commissioners must already be federal judges,[4] so the Criminal Law Committee seat in particular adds little that is new.

Part C confers membership in all but name, without accountability. Under proposed Rule 3.1(c), the two designees would "engag[e] in deliberations with commissioners," receive the same meeting materials, and attend nonpublic briefing sessions (or, in the bracketed alternative, every meeting at which staff is present). They would be chosen by outside institutions, not appointed by the President or confirmed by the Senate, and they would answer to those institutions rather than to the public. The Commission's composition is set by Congress; a change of this significance should be made by Congress, too.

Part C is too narrow. Defenders have much to offer, and the absence of a defender seat when the prosecution has one is a real asymmetry. But the deeper problem is that the federal Commission is drawn almost entirely from one profession and acts too much along an adversarial model. When Judge Marvin Frankel first proposed a sentencing commission, he envisioned one that would include "lawyers, judges, penologists, . . . criminologists . . . sociologists, psychologists, business people, artists and . . . former or present prison inmates."[5] That vision is not utopian. As Part III of this memorandum shows, it describes how sentencing commissions are actually built across the United States and abroad.

III. The Federal Commission Is an Outlier

State sentencing commissions. A 2016 Robina Institute survey of 23 jurisdictions found that the average sentencing commission had about 17 members, that judges sit on nearly every commission, that most include both prosecutors and defense attorneys, that many include legislators, and that victims are "particularly well incorporated into most commissions."[6] The federal Commission, with seven voting members, was among the smallest and least varied. Since that survey, states have continued to broaden membership. Four states now reserve a seat for a person who has been incarcerated: North Carolina ("[a] rehabilitated former prison inmate"), Minnesota (added in 2023), Washington, and Michigan (whose reconstituted commission was created in 2024).[7] Victims or victim advocates hold designated seats in Minnesota, North Carolina, Washington, Michigan, Virginia, Maryland, Illinois, Alabama, Ohio, and Massachusetts (nonvoting).[8] Many commissions include corrections and probation officials, academic researchers, behavioral health or treatment professionals, and members of the public who are not lawyers.[9]

Legislators also serve on most of the commissions surveyed. Pennsylvania, Virginia, North Carolina, Kansas, Maryland, Illinois, Alabama, Michigan, and Ohio include legislators as voting members, and Washington and Oregon include them as nonvoting members.[10] The value of legislative participation is practical. Members who help shape a commission's work become invested in it and serve as its advocates when its recommendations reach the legislature. The trend is not uniform; Delaware in 2026 replaced its broadly constituted commission with one composed only of judges, prosecutors, and defense lawyers.[11] But the weight of state practice points strongly toward breadth.

Sentencing councils abroad. Every comparable body we reviewed guarantees non-judicial membership by statute, and the most developed models specify the kinds of experience the non-judicial members must bring.

- **England and Wales.** The Sentencing Council has 14 members: eight judicial and six non-judicial. Non-judicial members must have experience in criminal defence, criminal prosecution, policing, sentencing policy and the administration of justice, the promotion of the welfare of victims, academic study or research in criminal law or criminology, the use of statistics, or the rehabilitation of offenders.[12]
- **Scotland.** The Scottish Sentencing Council has six judicial members, three legal members (a prosecutor, an advocate, and a solicitor), and three lay members: a police constable, a person with knowledge of the issues faced by victims, and a person who is neither a judge nor a lawyer.[13]
- **Ireland.** The Sentencing Guidelines and Information Committee has eight judges and five lay members chosen through the Public Appointments Service to cover, collectively, "as many as possible of" the same nine fields listed in England and Wales. Lay members count toward the quorum, so the Committee cannot act without them.[14]
- **Australia and New Zealand.** The New South Wales Sentencing Council includes members drawn from law enforcement, prosecution, defence, Aboriginal justice, corrective services, juvenile justice, academia, and the community, two of whom represent victims of crime. Queensland requires at least one Aboriginal or Torres Strait Islander member. Victoria's council has included a statistician, a forensic psychiatrist, and a member with lived experience of the justice system.[15]

Who Sits on a Sentencing Commission?

Membership categories required by statute: the U.S. Sentencing Commission compared with selected councils abroad and state commissions

JURISDICTION	MEMBERS	DEFENSE	VICTIMS	LIVED EXPERIENCE	CORRECTIONS / REHABILITATION	RESEARCH / DATA	LEGISLATORS	LAY / PUBLIC SEATS
UNITED STATES — FEDERAL								
U.S. Sentencing Commission	7 + 2 NV*	—	—	—	NV*	—	—	—
SENTENCING COUNCILS ABROAD								
England & Wales	14	✓	✓	—	✓	✓	—	6 non-judicial
Scotland	12	✓	✓	—	—	—	—	3 lay
Ireland	13	✓	✓	—	✓	✓	Barred	5 lay
STATE SENTENCING COMMISSIONS								
Minnesota	13	✓	✓	✓	✓	✓	—	3
North Carolina	29	✓	✓	✓	✓	✓	6	1
Washington	25 + 4 NV	✓	✓	✓	✓	✓	NV	5
Michigan	15	✓	✓	✓	✓	—	4	—
Maryland	19	✓	✓	—	✓	✓	4	2
Pennsylvania	11	✓	—	—	NV	✓	4	—

✓ = seat or eligibility category required by statute · NV = nonvoting · — = no requirement.
* The two nonvoting ex officio members are the Attorney General's designee and the chair of the U.S. Parole Commission. Categories reflect statutory requirements, not the backgrounds of current members.
Sources: 28 U.S.C. § 991(a); Coroners and Justice Act 2009, sch. 15 (UK); Criminal Justice and Licensing (Scotland) Act 2010, sch. 1; Judicial Council Act 2019, §§ 24–25 (Ir.); Minn. Stat. § 244.09; N.C. Gen. Stat. § 164-37; Wash. Rev. Code § 9.94A.860; 2024 Mich. Pub. Act 273; Md. Code, Crim. Proc. § 6-204; 42 Pa. C.S. § 2152.

England and Wales also offers a cautionary lesson. In 2025 the Sentencing Council's revised guideline on pre-sentence reports provoked a confrontation with the government. Parliament first legislated to override the guideline and then, in the Sentencing Act 2026, required the Council to obtain the consent of the Lord Chief Justice and the Lord Chancellor before issuing definitive guidelines.[16] Broad membership did not by itself protect the Council's legitimacy. What it lacked was a durable working relationship with the elected branches. That is why the proposal below pairs broader membership with a structured role for congressional staff. [More on this on our Substack next week.]

IV. Design Principles Drawn from Best Practice

The research suggests five principles for reforming the federal Commission:

- **Specify experience, not just institutions.** The English and Irish statutes list fields of knowledge rather than reserving seats for particular organizations. That approach brings expertise without turning members into institutional delegates, and it fits the federal appointment process.
- **Guarantee a minimum of non-lawyer seats.** Scotland and Ireland reserve lay seats, and many states include public members. A floor ensures that the Commission is not composed entirely of lawyers.

- **Include the people sentencing most directly affects.** Victims and people who have served prison sentences hold designated seats in a growing number of jurisdictions. Their experience is knowledge the Commission cannot obtain from briefs.
- **Bring in empirical and data expertise.** England, Wales, and Ireland expressly value statistics and research. Advances in data science, including machine learning, make that expertise more important for a body whose statutory purposes include reflecting "advancement in knowledge of human behavior."[17]
- **Connect the Commission to the legislature.** Legislative participation is common in the states and could have helped England and Wales. In the federal system, it must be structured with care to respect the separation of powers.

V. The Recommended Legislation

The accompanying discussion draft, the Sentencing Commission Membership Modernization Act, would implement these principles. Its principal provisions are as follows.

- **Eleven voting members, with no seat eliminated.** The bill would expand the Commission from seven to eleven voting members appointed by the President with the advice and consent of the Senate. It would keep the requirement of at least three federal judges and allow no more than six members from one party. All seven existing seats would remain. No sitting commissioner's term would be shortened, and none would become ineligible for reappointment. The reform adds perspectives to the Commission without displacing anyone.
- **Required perspectives, filled through the new seats.** Of the voting members, at least one would need substantial experience supporting or advocating for victims of crime. At least one would need to have served a sentence of imprisonment. At least one would need expertise in criminological or social science research, statistics, or data science. At least one would need experience in corrections, probation, reentry, or behavioral health treatment. At least two would need to be neither judges nor persons engaged primarily in the practice of law in the preceding ten years. One member could satisfy more than one requirement. The four new seats are enough to meet every requirement, and the bill directs that the initial appointments to those seats do so.
- **Collective expertise.** Following the Irish model, the President would seek a Commission that collectively has experience in as many as possible of the following: criminal defense; prosecution; law enforcement; corrections, probation, and reentry; victims' welfare; behavioral health; criminology and the social sciences; statistics and data science, including machine learning; and the effects of the justice system on minority, rural, and tribal communities.

- **Federal defender *ex officio* member.** A federal public or community defender would join the Attorney General's designee as a nonvoting ex officio member, as proposed in S. 4136 and its predecessors.[18] This would end the asymmetry between prosecution and defense. Because the seat comes within a broader reform, it adds one voice among many instead of setting up a contest between two.
- **Congressional liaisons.** The chair and ranking member of each Judiciary Committee could each designate one committee staff member as a nonvoting liaison. Liaisons would not be members of the Commission. They could attend public meetings, hearings, and staff briefings on data and policy, receive the related materials, and share information. They would be excluded from nonpublic deliberations and votes. Liaisons would give Congress an early and informed view of the Commission's reasoning and give the Commission advocates on the Hill.
- **Conforming changes and transition.** With all seats filled, promulgating guidelines would take six votes, a majority. When seats are vacant, it would take a majority of the voting members then serving, and never fewer than four. A depleted Commission would not face a supermajority hurdle. The four new seats would have staggered initial terms.

VI. Anticipated Objections

Size and efficiency. An eleven-member Commission would still be smaller than the average state commission and than the English, Scottish, and Irish councils, which have 12 to 14 members. Many state bodies of 15 to 30 members function well. A larger Commission needs more Senate confirmations, and the Commission has gone without a quorum before, most recently for more than three years before August 2022.[19] Because a quorum depends on the members then serving, and because the bill ties the promulgation vote to the members then serving, vacancies in the new seats would not stall the Commission. Eleven seats strike a balance. They make room for the new perspectives without the confirmation burden of a much larger body.

Expertise. Guidelines drafting requires legal skill, and the bill preserves a substantial legal core, including at least three judges. Non-lawyers bring a different kind of expertise: knowledge of victimization, incarceration, reentry, and data that lawyers often lack. Councils in England, Wales, and Ireland have shown that judicial and lay members can draft guidelines together.

Separation of powers. *Mistretta* upheld the Commission's unusual structure.[20] Adding voting members appointed by the President and confirmed by the Senate raises no new Appointments Clause question. The liaison provision is drafted cautiously. The D.C. Circuit held that placing congressional agents on the Federal Election Commission as nonvoting *ex officio* members violated the separation of powers, and the Supreme Court has invalidated arrangements that give Congress or its agents control over the execution of the laws.[21] For that reason the draft makes liaisons non-members with no vote, no motions, and no presence at nonpublic deliberations or votes. Their role is to receive information that is largely public under the Commission's own Part F proposal, and to share it. The Commission's position differs from the FEC's in any event. Its guidelines are already submitted to Congress, which may modify or disapprove them before they take effect.[22] If the Commission prefers greater caution, the liaison provision can be severed without affecting the rest of the bill.

Politicization. The bill keeps the party-balance requirement and Senate confirmation. Broadening the Commission's experience does not make it more partisan. If anything, a Commission whose members reason together across professions and perspectives is better placed to resist pressure from any single constituency.

VII. Conclusion

The impulse behind Part C is sound: the Commission should hear from more people, and the defense bar deserves a voice equal to the prosecution's. But adding two institutional representatives by rule would leave the Commission dominated by lawyers and more like a court and be a direct affront to Congress' decision on the Commission makeup. The better course is for the Commission to use its authority under 28 U.S.C. § 995(a)(20) to ask Congress for a Commission that matches what Judge Frankel envisioned and what states and other countries have built: broader in experience, connected to the people it affects, grounded in data, and engaged with the legislature it advises. We urge the Commission to withdraw Part C and to support legislation along the lines of the accompanying draft.

---

[1] U.S. Sent'g Comm'n, *2026 Proposed Amendment to the Commission's Rules of Practice and Procedure* (Reader-Friendly Version) 8–9 (Aug. 27, 2026) (proposed Rules 3.1(c), 3.4), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202608_rf-proposed.pdf.

[2] 28 U.S.C. § 995(a)(20) (authorizing the Commission to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy"), https://www.law.cornell.edu/uscode/text/28/995.

[3] *See* Mistretta v. United States, 488 U.S. 361, 384–85, 388–97 (1989) (describing the Commission as "a peculiar institution within the framework of our Government" whose rulemaking is not a judicial function).

[4] 28 U.S.C. § 991(a), https://www.law.cornell.edu/uscode/text/28/991.

[5] Marvin E. Frankel, *Criminal Sentences: Law Without Order* 119–20 (1973), *as quoted in* Nancy Gertner, *Neuroscience and Sentencing*, 85 Fordham L. Rev. 533 n.21 (2016), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5241&context=flr.

[6] Alexis Watts, *The Composition of Sentencing Commissions*, Robina Inst. of Crim. L. & Crim. Just. (Aug. 5, 2016), https://robinainstitute.umn.edu/articles/composition-sentencing-commissions.

[7] N.C. Gen. Stat. § 164-37, https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_164/GS_164-37.html; Minn. Stat. § 244.09, subd. 2, https://www.revisor.mn.gov/statutes/cite/244.09 (as amended by 2023 Minn. Laws ch. 52, art. 6); *see also* Minn. Sent'g Guidelines Comm'n, *About*, https://mn.gov/sentencing-guidelines/about; Wash. Rev. Code § 9.94A.860(3), https://app.leg.wa.gov/RCW/default.aspx?cite=9.94A.860; 2024 Mich. Pub. Act 273 (codified at Mich. Comp. Laws § 769.34a), https://ombudsman.legislature.mi.gov/documents/2023-2024/publicact/pdf/2024-PA-0273.pdf. When the Robina survey was published, only North Carolina had such a seat. Watts, *supra* note 6.

[8] *See* statutes cited *supra* note 7; Va. Code Ann. § 17.1-802, https://law.lis.virginia.gov/vacode/title17.1/chapter8/section17.1-802/; Md. Code Ann., Crim. Proc. § 6-204, https://mgaleg.maryland.gov/mgawebsite/Laws/StatuteText?article=gcp&section=6-204&enactments=false; 730 Ill. Comp. Stat. 5/5-8-8(c), https://lig.ilga.gov/legislation/ilcs/documents/073000050K5-8-8.htm; Ala. Code § 12-25-3, https://sentencingcommission.alacourt.gov/about-us/statute/; Ohio Rev. Code § 181.21, https://codes.ohio.gov/ohio-revised-code/section-181.21; Mass. Gen. Laws ch. 211E, § 1, https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleI/Chapter211E/Section1.

[9] *E.g.*, Minn. Stat. § 244.09, subd. 2 (corrections commissioner, probation officer, treatment provider, academic, and three public members); Wash. Rev. Code § 9.94A.860 (academic in criminology or sociology, behavioral health professional, tribal representative, and five public members); N.C. Gen. Stat. § 164-37 (academic, business representative, and member of the public not licensed to practice law); Md. Code Ann., Crim. Proc. § 6-204 (criminal justice expert and two public representatives).

[10] 42 Pa. Cons. Stat. § 2152, https://law.justia.com/codes/pennsylvania/title-42/chapter-21/section-2152/; Kan. Stat. Ann. § 74-9102 (legislators "shall serve as voting members"), https://kslegislature.gov/li/s/statute/074_000_0000_chapter/074_091_0000_article/074_091_0002_section/074_091_0002_k.pdf; Or. Rev. Stat. § 137.654, https://oregon.public.law/statutes/ors_137.654; *see also* statutes cited *supra* notes 7–8.

[11] S.B. 179, 153d Gen. Assemb. (Del. 2026) (85 Del. Laws ch. 367), https://legis.delaware.gov/BillDetail/142445; Del. Code Ann. tit. 11, § 8903A, https://delcode.delaware.gov/title11/c089a/index.html.

[12] Coroners and Justice Act 2009, c. 25, § 118 & sch. 15, paras. 1, 4 (UK), https://www.legislation.gov.uk/ukpga/2009/25/schedule/15.

[13] Criminal Justice and Licensing (Scotland) Act 2010, asp 13, sch. 1, https://www.legislation.gov.uk/asp/2010/13/schedule/1.

[14] Judicial Council Act 2019, §§ 24, 25(3), 28(4) (Act No. 33/2019) (Ir.), https://www.irishstatutebook.ie/2019/en/act/pub/0033/sec0024.html; https://www.irishstatutebook.ie/2019/en/act/pub/0033/sec0025.html.

[15] NSW Sentencing Council, *Meet the NSW Sentencing Council*, https://sentencingcouncil.nsw.gov.au/content/dcj/sentencing-council/sentencing-council-home/about-us/meet-the-nsw-sentencing-council.html; Penalties and Sentences and Other Legislation Amendment Act 2016 (Qld) (inserting pt. 12, § 201), https://www.legislation.qld.gov.au/view/whole/html/asmade/act-2016-031; Sentencing Advisory Council (Vic.), *About Us*, https://www.sentencingcouncil.vic.gov.au/about-us. New Zealand's never-established Sentencing Council would have sought expertise in risk assessment, offender reintegration, victims' welfare, and "the effect of the criminal justice system on Māori and people from minority cultures." Sentencing Council Act 2007, sch. 1, cl. 1 (N.Z.) (repealed 2017), https://legislation.govt.nz/act/public/2007/25/en/latest/.

[16] Sentencing Act 2026, c. 2, § 20 (UK), https://www.legislation.gov.uk/ukpga/2026/2/section/20; Sentencing Council, *Statement on the Council's Decision Relating to the Sentencing Bill 2025 and Publishing Definitive Guidelines* (Nov. 6, 2025), https://sentencingcouncil.org.uk/latest/statement-on-the-council-s-decision-relating-to-the-sentencing-bill-2025-and-publishing-definitive-guidelines/.

[17] 28 U.S.C. § 991(b)(1)(C).

[18] Sentencing Commission Improvements Act, S. 4136, 119th Cong. (2026), https://www.govinfo.gov/content/pkg/BILLS-119s4136is/html/BILLS-119s4136is.htm; *see also* S. 851, 118th Cong. (2023); S. 3286, 117th Cong. (2021), https://www.govinfo.gov/content/pkg/BILLS-117s3286is/html/BILLS-117s3286is.htm; H.R. 6793, 117th Cong. (2022); Federal Defender Ex-Officio Act, H.R. 1251, 114th Cong. (2015) (bipartisan bill introduced by Reps. Scott and Gowdy), https://bobbyscott.house.gov/media-center/press-releases/scott-gowdy-introduce-federal-defender-ex-officio-act.

[19] U.S. Sent'g Comm'n, *Commission Regains a Quorum for the First Time in Three Years* (News Release, Aug. 5, 2022), https://www.ussc.gov/about/news/press-releases/august-5-2022; *see* 28 U.S.C. § 995(d) ("A simple majority of the membership then serving shall constitute a quorum for the conduct of business.").

[20] Mistretta, 488 U.S. at 380–412.

[21] FEC v. NRA Political Victory Fund, 6 F.3d 821, 826–27 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994); *see* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276–77 (1991); Bowsher v. Synar, 478 U.S. 714, 726–27 (1986); Buckley v. Valeo, 424 U.S. 1, 126–41 (1976) (per curiam).

[22] 28 U.S.C. § 994(p).

- - -

DISCUSSION DRAFT — October 2026

119TH CONGRESS
2D SESSION

[S./H.R. ___]

To amend title 28, United States Code, to broaden the membership of the United States Sentencing Commission, to establish congressional liaisons to the Commission, and for other purposes.

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sentencing Commission Membership Modernization Act of 2026".

SEC. 2. FINDINGS.

Congress finds the following:

(1) Since its creation by the Sentencing Reform Act of 1984, the United States Sentencing Commission has consisted of seven voting members and *ex officio* nonvoting members representing the Attorney General and the United States Parole Commission, and the only statutory requirement relating to the professional background of its members is that at least three voting members be Federal judges.

(2) Sentencing policy requires the balancing of competing values and draws on knowledge from many fields, including criminal defense and prosecution, law enforcement, corrections and reentry, the needs of victims of crime, behavioral health, criminology and the social sciences, and statistics and data science.

(3) State sentencing commissions have, on average, more than twice as many members as the United States Sentencing Commission has voting members, and many include defense attorneys, victims or victim advocates, corrections and probation officials, academic researchers, members of the public, persons who have been incarcerated, and legislators.

(4) The sentencing councils of England and Wales, Scotland, and Ireland are established by statute with designated non-judicial members having experience in fields such as criminal defence, prosecution, policing, the welfare of victims, research, statistics, and the rehabilitation of offenders.

(5) Expanding the Commission while preserving each of its existing seats allows these perspectives to be added without displacing the judicial, legal, and policy experience that sitting members bring.

(6) Because the sentencing guidelines are advisory, the effectiveness of the Commission depends on its ability to persuade the courts, Congress, and the executive branch that its work is sound, and that ability is strengthened by a membership that brings broad experience and perspectives to the Commission's deliberations and by an informed working relationship with Congress.

SEC. 3. MEMBERSHIP OF THE UNITED STATES SENTENCING COMMISSION.

(a) IN GENERAL.—Section 991(a) of title 28, United States Code, is amended to read as follows:

"(a) ESTABLISHMENT AND MEMBERSHIP.—

"(1) ESTABLISHMENT.—There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of eleven voting members and two nonvoting members.

"(2) APPOINTMENT OF VOTING MEMBERS.—The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, corrections and probation officials, senior citizens, victims of crime, individuals who have been incarcerated, researchers in criminology and related disciplines, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs.

"(3) REQUIRED COMPOSITION.—Of the voting members of the Commission—

"(A) at least three shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States;

"(B) at least one shall have substantial experience in supporting, advocating for, or providing services to victims of crime;

"(C) at least one shall be an individual who has served a term of imprisonment imposed upon conviction of a criminal offense and who has completed that term of imprisonment;

"(D) at least one shall have substantial expertise in criminological or social science research, statistics, or data science;

"(E) at least one shall have substantial experience in corrections, probation, supervised release, the reentry of individuals into the community, or behavioral health treatment; and

"(F) at least two shall be individuals who are not judges and who were not engaged primarily in the practice of law during the 10-year period preceding appointment.

"(4) COUNTING OF MEMBERS.—A member who satisfies more than one of the requirements of subparagraphs (B) through (F) of paragraph (3) may be counted toward each requirement that the member satisfies.

"(5) COLLECTIVE EXPERTISE.—In making appointments under paragraph (2), the President shall seek to ensure that the voting members of the Commission, viewed collectively, possess knowledge of and experience in as many as possible of the following areas:

"(A) Criminal defense.

"(B) Criminal prosecution.

"(C) Law enforcement.

"(D) Corrections, probation, supervised release, and the reentry of individuals into the community.

"(E) The rights and welfare of victims of crime.

"(F) Mental health, substance use disorder, and other behavioral health treatment.

"(G) Criminology, sociology, psychology, economics, and other social sciences.

"(H) Statistics, data science, and computational methods, including machine learning.

"(I) The effects of the criminal justice system on communities, including racial and ethnic minority, rural, and tribal communities.

"(6) POLITICAL BALANCE.—Not more than six of the voting members of the Commission shall be members of the same political party, and of the three Vice Chairs, not more than two shall be members of the same political party.

"(7) NONVOTING MEMBERS.—The following shall be *ex officio*, nonvoting members of the Commission:

"(A) The Attorney General, or the designee of the Attorney General.

"(B) A Federal public defender or a community defender, designated by the Defender Services Office of the Administrative Office of the United States Courts.

"(8) REMOVAL.—The Chair, Vice Chairs, and voting members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.".

(b) CONGRESSIONAL LIAISONS.—Section 991 of title 28, United States Code, is amended by adding at the end the following:

"(c) CONGRESSIONAL LIAISONS.—

"(1) DESIGNATION.—The chair and the ranking minority member of the Committee on the Judiciary of the Senate, and the chair and the ranking minority member of the Committee on the Judiciary of the House of Representatives, may each designate one employee of the respective committee to serve as a congressional liaison to the Commission.

"(2) STATUS.—A congressional liaison—

"(A) shall not be a member of the Commission;

"(B) shall not vote, make or second any motion, or exercise any authority of the Commission; and

"(C) shall not be counted for purposes of determining a quorum.

"(3) PARTICIPATION.—A congressional liaison—

"(A) may attend public meetings and public hearings of the Commission;

"(B) may attend briefings at which Commission staff present data, research, or policy analysis to the Commission, other than any portion of a briefing at which information that the Commission determines is inappropriate for public disclosure is presented;

"(C) shall be provided, as soon as practicable, any materials relating to data, research, or policy analysis that are distributed to the Commission in connection with a meeting, hearing, or briefing that the liaison is permitted to attend, except materials or portions of materials that the Commission determines are inappropriate for public disclosure; and

"(D) may provide information to the Commission.

"(4) LIMITATION.—A congressional liaison shall not attend any portion of a nonpublic meeting at which the voting members of the Commission deliberate upon or vote on any matter.

"(5) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to affect the authority of Congress under section 994(p) or to confer upon any committee of Congress, or any employee thereof, any authority over the Commission.".

SEC. 4. CONFORMING AMENDMENTS.

(a) PROMULGATION OF GUIDELINES.—Section 994(a) of title 28, United States Code, is amended by striking "at least four members of the Commission" and inserting "a majority of the voting members of the Commission then serving, but not fewer than four voting members,".

(b) PAROLE COMMISSION.—The third sentence of section 235(b)(5) of the Sentencing Reform Act of 1984 (18 U.S.C. 3551 note) is amended by striking "nine members, including two" and inserting "14 members, including 3".

SEC. 5. TERMS OF INITIAL APPOINTEES TO NEW SEATS; TRANSITION.

(a) INITIAL TERMS.—Notwithstanding section 992(a) of title 28, United States Code, of the four additional voting members of the United States Sentencing Commission first appointed under section 991(a) of such title, as amended by this Act, two shall be appointed for terms expiring on October 31, 2029, and two shall be appointed for terms expiring on October 31, 2031, as designated by the President at the time of appointment.

(b) PRESERVATION OF EXISTING MEMBERSHIP.—Nothing in this Act shall be construed to terminate or shorten the term of any member of the United States Sentencing Commission serving on the date of enactment of this Act, or to render any such member ineligible for reappointment.

(c) COMPLIANCE WITH COMPOSITION REQUIREMENTS.—The President shall make the initial appointments to the four additional voting seats created by this Act in a manner that satisfies the requirements of subparagraphs (B) through (F) of section 991(a)(3) of title 28, United States Code, as amended by this Act, to the extent those requirements are not satisfied by members then serving. Thereafter, the President shall make appointments to fill vacancies in a manner that maintains compliance with such requirements.

(d) DESIGNATION OF DEFENDER MEMBER.—The designation required under section 991(a)(7)(B) of title 28, United States Code, as amended by this Act, shall be made not later than 90 days after the date of enactment of this Act.

SEC. 6. SEVERABILITY.

If any provision of this Act or an amendment made by this Act, or the application of such provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of this Act and the amendments made by this Act, and the application of such provision or amendment to any other person or circumstance, shall not be affected.

SEC. 7. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect on the date of enactment of this Act.

- - -

Drafter's Notes (not part of the bill text)

1. Section 3(a) restates 28 U.S.C. § 991(a) in full, carrying forward the existing language on the Commission's establishment, Senate confirmation, the Chair and Vice Chairs, the Judicial Conference list of judges, and removal for cause. Before introduction, the restatement should be checked against the official text of the U.S. Code and reviewed by the Office of the Legislative Counsel.

2. Section 3(a), new § 991(a)(7)(B), uses the defender-designation language of the Sentencing Commission Improvements Act, S. 4136, 119th Cong. (2026), to build on existing bipartisan proposals.

3. Section 3(b), the congressional liaison provision, is drafted to keep liaisons out of membership, voting, and nonpublic deliberations, in light of FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), and related separation-of-powers precedent. It is severable (section 6) and may be dropped without affecting the rest of the bill.

4. Section 4(a) amends the promulgation vote in 28 U.S.C. § 994(a), now "at least four members of the Commission." With all 11 seats filled, promulgation would require 6 votes, a majority. If seats are vacant, it would require a majority of the voting members then serving, but never fewer than 4. This keeps a vacancy-depleted Commission from being held to a supermajority. The Commission lacked a quorum for more than three years before August 2022.

5. Section 4(b) follows the conforming amendment in S. 4136. It accounts for the 4 new voting members and the new defender member, together with the Parole Commission Chair's nonvoting membership under § 235(b)(5) of the Sentencing Reform Act.

6. Sections 3(a) (new § 991(a)(3)) and 5(b)–(c) are designed so that the four new seats can satisfy the new composition requirements. No sitting commissioner loses a seat, has a term shortened, or becomes ineligible for reappointment.

7. Section 5(a) staggers the terms of the four new seats to fit the existing six-year term cycle under 28 U.S.C. § 992(a). The dates should be adjusted to the actual date of enactment and to current terms.

Public Comment - Proposed Amendment on Rules of Practice and Procedure

Submitter:

Hanalei Aipoalani

Topics:

1. Rules of Practice and Procedure

Comments:

September 21, 2026

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs – Rules of Practice and Procedure Comment

RE: Public Comment on Proposed Amendments to the Rules of Practice and Procedure (91 FR 56724) – Part B: Voting Thresholds for Retroactive Application

Dear Commissioners:

I appreciate the opportunity to submit public comment regarding the United States Sentencing Commission's proposed amendments to its Rules of Practice and Procedure, published on September 3, 2026.

This letter specifically addresses Part B of the proposed amendments, which seeks to amend Rule 2.2(b) to raise the voting threshold required to make a guideline amendment available for retroactive application from four members to at least five members.

While I understand the Commission's desire to evaluate internal policymaking procedures and ensure consensus on matters of heightened significance, raising the retroactivity voting requirement to five members creates a severe risk of structural gridlock. Securing five affirmative votes is a high barrier that can inadvertently deny thousands of individuals equitable relief, particularly during periods when the Commission operates with vacancies.

To prevent institutional paralysis and ensure that retroactivity is evaluated fairly and consistently, I strongly urge the Commission to modify Part B by implementing an explicit procedural mandate. Specifically, the Commission should add the following directive to Rule 2.2:

"There SHALL be a vote for EVERY amendment proposed on retroactive application to the USSG Guidelines, requiring minimally 2 votes if a 5th commissioner is not able to attend."
Integrating this provision achieves several vital objectives:
1. Mandatory Consideration: It eliminates administrative gatekeeping by guaranteeing that every single proposed amendment is formally evaluated and explicitly voted upon for retroactive application.
2. Protections Against Absenteeism and Vacancies: Requiring a minimum of two affirmative votes to pass retroactivity in instances where a fifth commissioner cannot attend protects the functionality of the Commission. It ensures that the lack of a full seven-member slate or temporary absences will not automatically result in the denial of retroactive equity.
3. Balance of Power: It ensures that a majority of a sitting or attending quorum can successfully advance justice and relief rather than allowing vacancies or minor absences to act as a functional, unvoted veto.
Thank you for your dedicated service and for considering these recommendations to safeguard fairness, accessibility, and transparency within the federal sentencing system.

Sincerely,
Mr. Jonathan Villegas-Escobar and Mr. Hanalei Aipoalani
via
Mr. Hanalei Aipoalani

Submitted on: September 22, 2026

From: ~^! BEASLEY, ~^!CANYON
Subject: [External] ***Request to Staff*** BEASLEY, CANYON, [redacted]
Date: Sunday, September 6, 2026 6:18:51 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To:
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hello,
I'd like to make a comment regarding the amendments proposed in the latest USSC Posting.
Regarding Rule 5.3 (b) (1) there should be generalized/substantive bullet points regarding the USSC's private meeting and deliberations and should include comments made by the Chair, Vice Chair, and any other members to ensure full transperancy and accountability in the battle for criminal justice reform. It is important that all discussions can be viewed by the public. Thank you

Jeremy Bryan

September 3, 2026

United States Sentencing Commission

One Columbus Circle, N.E.

Suite 2-500, South Lobby

Washington, D.C. 20002-8002

Attention: Public Affairs – Rules of Practice and Procedure

Submitted via comment.ussc.gov

Re: Public Comment on Proposed 2026 Amendment to the Rules of Practice and Procedure — Part B (Voting Threshold for Retroactive Application)

Dear Commissioners:

I write to submit public comment on the proposed 2026 amendment to the Commission's Rules of Practice and Procedure, and specifically to **oppose Part B**, which would raise the voting threshold for designating a guideline amendment as retroactive under §1B1.10(d) from four affirmative votes to five.

Rather than raising the fixed threshold, I urge the Commission to **tie the retroactivity vote to a simple majority of sitting commissioners** — four of seven when the Commission is at full membership, three of five under the current composition. That change would preserve majoritarian legitimacy, insulate retroactivity from being defeated by vacancies alone, and remain faithful to the framework Congress designed.

1. Retroactivity should require a majority, not a supermajority.

A decision to extend a guideline amendment retroactively is, at its core, a decision that the Commission's current view of appropriate sentencing should reach individuals still serving under a range the Commission has now determined was too high. That is a majoritarian determination, and it should be made by a majority of the Commission's confirmed members. The proposed five-vote rule converts that majority requirement into a supermajority — five of seven is roughly a 71% threshold — without any corresponding elevation of the analysis, scrutiny, or public process required under §1B1.10 comment. n.4.

2. A fixed vote floor is the wrong architecture given the Commission's operating reality.

The Commission has operated without a full complement of commissioners for most of the last decade, including a five-year period below quorum from 2018 through 2023. It is currently operating with five of seven seats filled, with additional vacancies anticipated. A fixed five-vote requirement means a single vacancy, recusal, or absence can make retroactivity structurally impossible — even where every sitting commissioner supports it. That result cannot be reconciled with 28 U.S.C. § 994(u), which contemplates that the Commission will "specify in what circumstances and by what amount" sentences may be reduced when it lowers a range. A rule that permits the answer to be "never, regardless of merit, because of vacancies" is not a rule Congress authorized.

3. A majority-of-sitting-members rule tracks the Sentencing Reform Act's design.

Congress imposed a four-vote requirement in 28 U.S.C. § 994(a) at a time when the Commission was expected to be at full seven-member strength. A majority-of-sitting-members rule preserves the substance of that requirement — majority rule — while accommodating the practical reality of periodic vacancies. It also mirrors the approach federal courts and agencies routinely take when quorum-based majorities govern collegial decision-making.

4. The 2026 amendment cycle illustrates the problem the proposed rule would worsen.

Three commissioners voted in favor of retroactive application of Amendment 2 (the inflationary adjustments). Under a majority-of-sitting-members rule, that vote would have carried — three of five confirmed commissioners is a clear majority of the Commission as constituted. Under the current four-vote rule, retroactivity failed by a single vote. Under the proposed five-vote rule, retroactivity would have failed by two votes, and would fail again in any future cycle in which the Commission continues to operate below full membership.

The practical result of the proposed change is that thousands of individuals currently serving sentences under guideline ranges the Commission has already determined were too high would be denied any avenue for the relief the Commission itself has endorsed on a prospective basis. That outcome creates precisely the kind of unwarranted sentencing disparity — based solely on sentencing date — that 28 U.S.C. § 991(b)(1)(B) directs the Commission to avoid.

5. Recommended language.

I respectfully urge the Commission to revise Rule 2.2 to provide that the decision to make an amendment available for retroactive application shall require the affirmative vote of **a majority of the voting members then in office**, provided that a quorum of the Commission is present at a public meeting.

6. Comment on other parts.

I support Part C (Defender and Judicial Conference Criminal Law Committee participation in Commission meetings and public hearings), Part E (a more participatory priority-setting process), and Part F (public disclosure of meeting materials and minutes). These transparency

and participation measures advance the Commission’s legitimacy without narrowing the substantive relief available to previously sentenced individuals.

Thank you for the opportunity to comment.

Respectfully submitted,

Jeremy Bryan

September 3, 2026

From: ~^! CLOSE, ~^!THOMAS J
Subject: [External] ***Request to Staff*** CLOSE, THOMAS, [redacted]
Date: Tuesday, September 1, 2026 7:49:01 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: USSC
Inmate Work Assignment: Law Clerk

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I wish to express approval of the Commission's thoughtful amendments in a general sense. I think all of the amendments are well meaning and have the potential to be impactful.

However, I wish to express disagreement with Part B of the proposed amendments. There have been very few amendments approved for retroactive application in recent decades, meaning that inmates of the present are treated differently than inmates of the past. This invariably leads to greater sentencing disparity - a goal which the commission purports to work against. If passed, this amendment will virtually guarantee that future changes will have a small impact moving forward, and neuter the commission's recent utility and thoughtful impact upon sentencing.

Otherwise, I approve wholeheartedly of all of the proposed amendments.

From: ~^! CRIMMINS, ~^!THOMAS WILLIAM
Subject: [External] ***Request to Staff*** CRIMMINS, THOMAS, [redacted]
Date: Wednesday, October 21, 2026 2:19:01 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: re: Proposed Changes to Rules of Practice and P...
Inmate Work Assignment: not really assigned

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Of the proposed changes to the Rules of Practice and Procedure, Parts B and C have the most potential implications for those of us under BoP custody, especially those of us who feel our sentences were excessive, so my comments are directed to those proposals.

My comments for Part C are shortest: Yes! Allow a representative of the Federal Public and Community Defenders to participate in meetings and public hearings of the Commission. In the future, consider inmates, too, via webinars.

I have the most concern about the Part B proposes changes. The USSC has previously expressed awareness that the federal prisons have problems, including with overcrowding and understaffing - a problem that exists partly because of how overcrowding creates workplace conditions that make it harder to hire and keep good staff - and the USSC may have also expressed awareness of a bunch of physical facilities that can't be maintained within any reasonable budget (a number of BoP prisons have been closed recently for this reason) - and part of the problem is in the sentencing guidelines which can mandate sentences that are excessive "without any expression of rational justification." (Quoting Senior US District Judge John L. Kane in the US District Court for the District of Colorado in _US_v_Cheever_, July 18, 2016.)

Judge Kane cites the requirement of 18USC section 3553(a) that a sentence will not be "greater than necessary." Beyond this is what I mean by "excessive."

The USSC is not entirely responsible for the excessive sentencing. Judge Kane was complaining about guidelines mandated by Congress. But likely if such guidelines are to be fixed, the USSC will be involved and the issue of retroactivity will arise.

I understand how retroactivity faces the question of "does it burden the prison and judicial systems with the task of figuring out who, of the hundreds of thousands of inmates currently in BoP custody, the retroactivity changes apply to?" A potentially massive undertaking! Costly, yes! But that cost, when weighed against the "Cost of Incarceration" (FY 2024: $47,162 per year per inmate) would be relatively small - though requiring an up-front expense that government bureaucracies find hard to do. When it's a matter of reducing a sentence by ten to fifteen years, say, over half a million dollars can be saved, and it would not cost anything close to that amount to find that person and apply the retroactivity.

A vote to apply retroactivity should not be slowed. The members of the USSC are reasonable people - at least 3 are federal judges (28USC section 991(a)) who are well-vetted and should be trusted to discern the issue as it comes up.

From: ~^! HINKLE, ~^!MARCUS ALEXANDE
Subject: [External] ***Request to Staff*** HINKLE, MARCUS, [redacted]
Date: Thursday, September 10, 2026 7:33:44 AM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: Chair Carlton Reeves
Inmate Work Assignment: RISE- FCI Milan

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Regarding your Rules and Procedures amendments; specifically Rule 5.4 Advisory Groups:

I request the Commission consider expanding the list of potential advocates and advisors to include but not limited to Correctional Service employees, administrators and incarcerated citizens. The Commission's work directly impacts these individuals and communities of people, and their voice is worthy of this consideration.
Of course, certain limitations and standards of conduct should be created to ensure the impartiality and integrity of any persons given a role to advise the Commission. Which, if I had the influence and responsibility to do so, I would use the language describing citizens' eligibility to become advisers as: "citizens whom have a direct role or community interest in the authority of the Commission" and go on to set integrity standards for an advisor's role. This language includes judges, prosecutors, probation officers, and victim advocacy groups. And it also includes a larger reach to incarcerated citizens, the formerly incarcerated, correctional employees and any other citizen who wishes to responsibly participate in the public engagement of the Commission.

I also ask that you consider language to disqualify a potential advisor for conflicts of interests in their advice. A corporation sponsor who directly benefits financially from the Commission's decisions, for example, should be disqualified. An organization whose mission is specific to legislative changes to the Commission's authority or decisions, should be disqualified. Whatever language or standard of qualification and disqualification should be made public.

We are nearing the year of 2027, as you have shared it is the 30th anniversary of the creation of the present rules and procedures. So much has changed since then when I was an infant in diapers. Today, the Commission has the ability to, in theory, have an app for public interest and education of the Commission. It's website is more navigable, using easier to understand language, and more people have access to it than 30 years ago. When considering all of this in context, I ask you to dream big enough to implement Rules and Procedures that not only reflect upon the changes of the last 3 decades, but has emergent definitions that can be adaptable to the changes in the next 5. Be realistic, but do not shy away from being idealistic because there may come a day soon where what we believe is not possible becomes common reality.

Thank you for your consideration and national service!

AIC Marcus Alexander Hinkle-Kith [redacted]
Allah's Advocate Student With Our Most Faithful Redeemer
Someone's Sun, Center of Their Universe

PUBLIC COMMENT ON THE PROPOSED 2026 AMENDMENT TO THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE

RE: PART B (RULE 2.2, VOTING RULES FOR ACTION BY THE COMMISSION) AND PART H (FURTHER REVISIONS TO THE RULES)

Comment period closes October 26, 2026

I respectfully urge the Commission not to adopt Part B, and to adopt instead a rule preserving retroactivity questions that fail for want of a quorum's worth of confirmed members rather than for want of merit.

The difficulty this Commission has faced is a shortage of votes, not a surplus of them. In the cycle just completed, three members were reported to favor making the inflationary-adjustment amendment available for retroactive application, and the Commission's own impact analysis indicated that retroactive application of two of the 2026 amendments would have made roughly 5,000 federal prisoners eligible to seek relief under 18 U.S.C. section 3582(c)(2). That relief was foreclosed not because a majority of the sitting members opposed it, but because two seats on a seven-member Commission were vacant and the statutory four-vote threshold of 28 U.S.C. section 994(a) could not be met. Raising the threshold to five would compound that problem rather than solve it: with five members serving, a five-vote rule is a unanimity rule, and the bracketed proviso for a four-member Commission gives no relief at all to a Commission of five, six, or seven members with one dissenter. The practical effect would be to transfer the retroactivity decision from the Commission to the pace of the confirmation calendar, and to give a single member an absolute veto over relief for thousands of sentenced individuals. If the Commission's concern is that retroactivity decisions warrant unusual deliberation, that concern is better met through the hearing and public-comment procedures of Rule 4.1 than through a vote count that the Commission's own membership levels make unreachable.

I recognize that the Commission cannot lower the four-vote minimum, which Congress fixed in 28 U.S.C. section 994(a). But nothing in the Sentencing Reform Act makes a failed retroactivity vote final, and the Commission retains continuing authority under 28 U.S.C. section 994(u) to specify in a later cycle that an earlier amendment applies retroactively. The obstacle is procedural rather than statutory. Rule 2.2(d) permits a motion to reconsider only from a member on the prevailing side or one who did not vote, and requires four affirmative votes merely to reconsider. A retroactivity question that draws three votes and dies is therefore frozen in place: the three members who supported it cannot move to revisit it, and the four votes needed to reopen the question are the very votes that were unavailable. When new members are later confirmed and seated, the question does not return to the table on its own. I ask the Commission to correct that by adding a subsection to Rule 2.2 along the following lines:

(e) Preservation and Reconsideration of Retroactivity Determinations. If a motion to make an amendment available for retroactive application under 28 U.S.C. section 994(u) receives the affirmative vote of at least three members at a public meeting but does not receive the number of votes required by subsection (b), the question shall not be deemed finally resolved. The question shall be placed on the agenda of the first public meeting held after the number of members then serving has increased, and shall be included among the proposed priorities published under Rule 5.2 for each subsequent amendment cycle until the Commission resolves it by a vote satisfying subsection (b). A motion to place such a question on the agenda may be made by any member and shall require the affirmative vote of a majority of the members then serving. The limitations of subsection (d) shall not apply to a question preserved under this subsection.

A rule of this kind costs the Commission nothing. It does not lower any threshold Congress has set, does not compel any outcome, and does not disturb any amendment already submitted to Congress. It simply ensures that when a majority of the seated Commissioners has concluded that fairness to previously sentenced individuals warrants

retroactive application, that conclusion is held open for a full vote rather than extinguished by a vacancy. Retroactivity questions are unlike most Commission business in that the cost of delay falls on identifiable people who are serving prison terms that the Commission has already determined to be greater than its current guidance would recommend. Those individuals should not lose the opportunity for relief because of the calendar on which the Senate happens to act.

Respectfully submitted,

Gregory C. Kapordelis

From: ~^! KNIGHT-LOPEZ, ~^!CHRISTOPHER,
Subject: [External] ***Request to Staff*** KNIGHT-LOPEZ, CHRISTOPHER, [redacted]
Date: Tuesday, September 1, 2026 9:18:56 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: Sentencing Commission
Inmate Work Assignment: Rule 2.2 Public Comment

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Public Comment Section: Rule 2.2 Voting Rules By Commission

Suggested Text: Action to make an amendment available for retroactive application to previously sentenced. imprisoned defendants (See 28 USC Sub Sect 994(u); 18 USC Sub Sec 3582(c)(2)) shall require the affirmative vote of A SIMPLE MAJORITY of members serving on the Commission. Provided, however that if there are only four members serving. on the Commission, the affirmative vote of THREE members at a public meeting shall suffice to authorize such action.

Reason: The appearance of unanimous consent without reflection of simple voting majority does not reflect precedent set by both the house of representatives and/or the Senate. Given the institution of democratic principles, whereby the precedent is set by majority of simple majority vote, a departure of this norm creates situations which are undemocratic. The very nature of dissent is necessary to enshrine the respect of democracy by those who do not represent the majority vote. It teaches respect for the process, respect for voting and also teaches an important quality "tolerance of differing opinions".

Org Drawbacks: Unanimous consent on four participants creates a "Zero Sum Game" quality which is detrimental to democracy. It is a "winner takes all" mentality which creates open hostility between the super majority and a single dissent. Moreover, a single dissent can result in a super minority acting in a "control" position which is by nature the "antithesis" of democracy. In this respect a single person can hold hostage necessary public policy. It can resemble tyranny and allow opportunities for unjust outcomes, corruption, and bribery (due to the nature of how much power a single person can wield). Moreover, it creates opportunity for massive inefficiency and failure to do what the Commission is intended to do. This worded policy is done so in a manner whereby the entire purpose of this Commission can be made obsolete by: rogue actors, bad actors, or egoism. It is poorly worded and creates too many opportunities to undermine democracy through a single person.

From: ~^! MORRIS, ~^!RANDALL ALLEN
Subject: [External] ***Request to Staff*** MORRIS, RANDALL, [redacted]
Date: Monday, September 7, 2026 1:34:15 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: Proposed Rule 2.2(b) amendment
Inmate Work Assignment: Suicide Companion

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Regarding Part B the proposed Rule 2.2(b) amendment, in which public comment is solicited regarding retroactive application shall require an affirmative vote of at least 5 members, I say it should be 4.

The U.S. represents more than 16% of ythe world's incarcerated, despite that it only accounts for just over 4% of the world's population. (The Development of Mass Incarceration in the U.S. from 1619-Present, 2026, Northeastern University School of Law). Due to extreme sentencing enhancements and high mandatory minimums, prisoners in the U.S. who were 55 and older rose from 2% in 1991 to 15% in 2021. (Prison Policy Imitative, The ageing prison population: Causes, costs, and consequences, Aug. 2, 2023).

Is it any wonder that the average rate of recidivism in the U.S. remains above 50% when its prisoners are serving excessively long sentences in virtual education deserts, just to be released much older and in worse physical, mental, and financial shape than when they entered. Then, they face the forever-public "Scarlet Letter" stigma of the felony record, which other countries automatically expunge after a set time of prison post-release good behavior.

In fact, according the Brennan Center for Justice, 450,000 such people release from prison in the U.S. every year. Perhaps
James Baldwin best captures the essence of this point with this thought-provoking analogue, "The most dangerous creation of any society is the man who has nothing to lose." At this rate, the chances that such a "creation" will end up living next door to you is ever-increasing, and perhaps on both sides of you.

The shelves groan from the weight of decades of empirical data extolling the the humanity of the restorative justice and carceral systems of Northern Europe and Scandinavia, who consistently experience recidivism rates of less than half that of the U.S., despite that that they have drastically lower sentencing, mandated prisoner access to college curriculum, dignified prisoner treatment, disuse of supervised release, rare life sentences, no death penalty, and earned expungement of felony convictions. (Prison Systems in Northern Europe versus the United States: Differences in Treatment and Success Rates, Binghampton University; Lessons Learned From Germany: Avoiding Unnecessary Incarceration and Limiting Collateral Consequences, Fair and Just Prosecution, 2020; The Nordic Carceral System: Examining Scandinavian Exceptionalism, Nordic Review of International Studies, 2023).

We do not need to make it easier to lengthen sentences, we need to make it easier with 4 votes instead of 5.

October 25, 2026

Attn: Public Affairs Comments
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C., 20002-8002

RE: Proposed Amendment to the Rules of Practice and Procedure – Parts B and C

Dear United States Sentencing Commission:

I respectfully submit this comment in my individual capacity as a law student participating in the Caritas Clemency Clinic at Villanova University Charles Widger School of Law. Through my clinical work with incarcerated individuals serving lengthy federal sentences, I have gained insight into the substantial barriers they face in understanding their legal options and obtaining the assistance and resources necessary to pursue post-conviction relief, including potential sentence reductions.

These experiences inform my perspective on two proposed amendments to the Commission's Rules of Practice and Procedure. I urge the Commission to reject Part B, which would increase the number of affirmative votes required to make a Guidelines amendment retroactive from four to five. I also urge the Commission to adopt Part C, which would expand opportunities for representatives to participate meaningfully in Commission proceedings.

I. Part B: Opposition to the Proposed Voting Threshold Increase

I respectfully urge the Commission to reject Part B and retain the existing voting framework under Rule 2.2(b). Requiring five affirmative votes to make a Guidelines amendment available for retroactive application would impose an unnecessary procedural barrier to extending sentencing reforms to individuals already serving federal sentences. Congress has established a requirement of at least four affirmative votes for the promulgation of Guidelines and amendments.[1]

Although decisions concerning retroactive application warrant careful consideration, their significance alone does not establish a need for a heightened voting threshold. Importantly, existing procedural safeguards and individualized judicial review already provide meaningful protections against unwarranted sentence reductions. Under the existing statutory and Guidelines framework, a court must determine whether an individual is eligible for a sentence reduction and whether such relief is warranted after considering the applicable sentencing factors.[2] Together, these requirements help ensure eligibility for retroactive relief does not guarantee a sentence reduction.

Beyond these existing safeguards, the Commission should also consider the role of retroactivity in addressing sentencing disparities. Retroactive application serves an important role in promoting fairness, proportionality, and consistency. As federal sentencing standards evolve, individuals sentenced under earlier Guidelines may continue serving longer sentences than similarly situated individuals sentenced under revised Guidelines. When a Guidelines amendment is made retroactive, eligible individuals may

---

[1] 28 U.S.C. § 994(a)

[2] *See* 18 U.S.C. §§ 3553(a), 3582(c)(2); *see also* U.S. Sent'g Guidelines Manual § 1B1.10(a)–(b) (U.S. Sent'g Comm'n 2025).

seek judicial consideration of whether a sentence reduction is appropriate on a case-by-case basis. A heightened voting threshold could therefore restrict opportunities for individualized judicial review and perpetuate disparities in sentence lengths.

The consequences of restricting these opportunities may be especially pronounced for individuals who already face obstacles to seeking relief. Through my clinical work, I have observed the difficulties those serving lengthy federal sentences face in understanding their legal options and obtaining assistance to pursue relief. These challenges are also reflected in recent research. A 2026 Ithaka S+R study examined the availability of law library services for incarcerated patrons. Among surveyed libraries, seventy percent identified post-sentencing relief as a common inquiry, but only twenty percent reported providing legal research assistance.[3] Additionally, eighty-nine percent of the libraries received requests by mail, with interviewees describing correspondence delays even over relatively short distances.[4] Although not limited to federal facilities, the study highlights broader barriers to timely legal assistance. For individuals already navigating these obstacles, a heightened voting threshold for retroactive application could further limit fair opportunities to seek sentence reductions.

Nor do concerns about the finality of criminal judgments and institutional consensus necessarily justify imposing an additional procedural barrier. Existing eligibility requirements and judicial review help preserve the finality of sentences while permitting carefully limited relief. Moreover, evidence concerning the effects of retroactive relief provides additional context for evaluating such concerns. In a 2020 study of Amendment 782, the Commission found no statistically significant difference in recidivism rates between individuals released early under the retroactive amendment and a comparable group who had served their full sentences.[5]

II. Part C: Support for Expanded Judicial Branch Participation

I respectfully support adopting Part C of the proposed amendment, which would allow a representative of the Committee on Criminal Law of the Judicial Conference of the United States and a representative of the Federal Public and Community Defenders to participate in meetings and public hearings of the Commission.

Federal Defenders bring valuable insight into the practical operation of the Guidelines and the challenges incarcerated individuals face when seeking post-conviction relief. Their experience can help inform the Commission of barriers not readily apparent from sentencing data alone, including difficulties obtaining records and navigating procedures for sentence reductions. Through my clinical work, I have observed similar challenges, particularly in communicating with individuals serving lengthy federal sentences and obtaining the information necessary to evaluate potential avenues for relief. These experiences underscore the importance of incorporating perspectives informed by direct legal representation into the Commission's policymaking process.

---

[3] Tommaso Bardelli, Sindy Lopez, Tammy Ortiz & Laura Brown, Serving Incarcerated Patrons: Barriers, Innovations, and Lessons from Law Libraries Across the United States (July 13, 2026), https://sr.ithaka.org/publications/serving-incarcerated-patrons/

[4] *See id.*

[5] U.S. Sent'g Comm'n, *Retroactivity & Recidivism: The Drugs Minus Two Amendment* 6 (July 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf

Adopting Part C would also strengthen the Commission's policymaking process by ensuring practical experience with the Guidelines informs its deliberations. Research on participatory policymaking emphasizes the importance of inclusiveness, representativeness, access to information, and meaningful influence in promoting the quality and legitimacy of the policymaking process.[6] The proposed changes would help ensure these representatives can contribute substantively to discussions rather than participate solely as observers.

* * *

For these reasons, I respectfully urge the Commission to reject Part B and adopt Part C. Retaining the existing four-vote threshold for retroactive application would preserve opportunities for individualized consideration of sentence reductions, while expanding judicial branch participation would incorporate valuable practical perspectives into the Commission's policymaking process. Thank you for considering my comments.

Respectfully,

Eleanor Mulvenon

Eleanor Mulvenon
Law Student

[6] Teddy Moysan & Francisco Ródenas-Rigla, *The Participatory Processes in Public Policy-Making: A Scoping Review*, 14 *Societies*, art. 244, at 1–2, 13 (2024), https://www.mdpi.com/2075-4698/14/12/244

Public Comment - Proposed Amendment on Rules of Practice and Procedure

Submitter:

Brooke Rogers

Topics:

1. Rules of Practice and Procedure

Comments:

I write to comment on Part D of the Commission's proposed amendment to Rule 4.3.

I support Option 3, which would require public disclosure of all ex parte communications on the merits of a pending amendment. A bright-line rule best serves the transparency purposes behind this broader rules review. Option 2's reliance on whether a communication is "significant" or "of substantial significance" invites exactly the kind of case-by-case dispute a clear rule should avoid, and the public has no way to test that judgment without already knowing what was left undisclosed. A categorical requirement removes both the discretion and the appearance of selective transparency that accompanies it.

I also support retaining the proposed carve-out for the Federal Public and Community Defenders, alongside the other listed institutional actors. Defender input reflects an institutionalized, adversarial perspective on how proposed guideline changes will function in practice, structurally analogous to the Criminal Division of the Department of Justice, also included in the carve-out, which represents the government's institutional viewpoint in the same proceedings. Treating either party's communications as "ex parte" in the same sense as a lobbyist or outside interest group would mischaracterize what they actually are: the routine, expected input of the two institutional parties whose work the guidelines most directly govern.

This carve-out also works in tandem with Part C of the proposed amendment, which would grant the Federal Public and Community Defenders a formal seat at Commission meetings and hearings. It would be inconsistent to invite defenders into the room through Part C while treating their informal communications as suspect under Part D.

For these reasons, I urge the Commission to adopt Option 3's disclosure requirement generally, while preserving the carve-out for the Federal Public and Community Defenders and the other listed institutional actors.

Respectfully submitted,
Brooke Rogers
3L, SMU Dedman School of Law

Submitted on: October 3, 2026

From: ~^! SMITH, ~^!LAWRENCE E
Subject: [External] ***Request to Staff*** SMITH, LAWRENCE, [redacted], BUT-F-B
Date: Wednesday, September 2, 2026 9:33:47 AM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: Staff
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To the United States Sentencing Commission:

My name is Lawrence Earl Smith Jr, Federal Register [redacted]. I am currently serving a federal sentence of one year and one day. I respectfully submit this comment not as an attorney or police expert, but as a person directly affected by the federal sentencing and correctional system.

I appreciate the Commission's willingness to examine its Rules of Practice and Procedure and, particularly, its stated goals of increasing transparency, public participation, and understanding of the Commission's work. I respectfully ask the Commission to consider not only how these procedural rules appear institutionally, but how they affect the men and women who are actually serving federal sentences.

For us, questions about sentencing policy, retroactivity, transparency, and access to the Commission are not theoretical. Days matter. Months matter. Retroactivity matters.. When a person is serving a relatively short sentence, a policy decision that is delayed or made nonretroactive may become meaningless to the individual before he or she ever has an opportunity to benefit from it.

Retroactivity Proposed Part B
I respectfully urge the Commission to exercise caution before adopting the proposed requirements that five members must vote affirmatively before an amendment may be made retroactive.

I understand the retroactivity is a significant decision and should receive careful consideration. But I am concerned that creating a higher voting threshold for retroactive relief than for promulgating an amendment could unintentionally make relief more difficult for people who already been sentenced.

If the Commission determines, after research, public comment, and deliberation, that a guideline or policy should be changed because the previous approach no longer produces the fairest or most appropriate sentencing outcomes, the people sentenced under the earlier policy should not become an afterthought.

There is a fundamental fairness concern when two similar individuals can revive materially different consequences merely because one sentenced shortly before a policy changed and another shortly afterwards.

I therefore respectfully recommend that the Commission not impose a five- vote requirement that unnecessarily restricts retroactivity. At minimum, if elevated voting requirement is adopted, the Rules should ensure that vacancies or an incomplete Commission cannot prevent meaningful consideration or retroactivity.

I encourage the Commission to require that whenever it adopts a potentially sentence- reducing amendment, it publicly explain its decision regarding retroactivity, including the nu,beer of incarcerated people potentially affected, the estimated sentence impact, public safety considerations, and the reasons supporting the Commission's decision.

My own experience has changed how I understand these issues.
Before entering the federal system, terms such as guidelines amendments, retroactivity, policy statements, sentence calculations, and administrative procedures could seem technical and distant. Once you are incarcerated, those words represent something very different.

They represent time away from your children and family, the date you may return home, your agility to rebuild your life, and whether a change intended to improve fairness reaches you before your sentence has already been served.

I respectfully ask the Commission to:
1. Reconsider the proposed five- vote threshold for retroactive application of amendments and avoid creating unnecessary procedural barriers to retoactive relief
2. Support expanded participation by Federal Public and Community Defenders
3. Require meaningful disclosure od substantive ex parte communications concerning pending policymakers matters
4. Adopt the proposed reforms makign the Commissions priority setting process more open and participatory
5. Require timely public disclosure of the research , dats, meeting materials, and records that materially inform sentencing policy.

Respectfully submitted,

Dr.Lawrence E. Smith Jr, Ph.D
Federal Register No. [redacted]

Public Comment - Proposed Amendment on Rules of Practice and Procedure

Submitter:

Angela Whittamore

Topics:

1. Rules of Practice and Procedure

Comments:

October 20, 2026

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Dear Chair Reeves and Members of the United States Sentencing Commission,

My name is Angela Whittamore. I am a registered nurse, a board-certified Psychiatric-Mental Health Nurse Practitioner, a mother, and someone whose family has been directly affected by the federal criminal justice system. I am writing to strongly urge the Commission to reject Part B and adopt Part C of the proposed amendments to its Rules of Practice and Procedure.

I understand the importance of accountability, public safety, and appropriate consequences for criminal conduct. However, I also believe our justice system should recognize rehabilitation, proportional punishment, and the importance of ensuring that sentencing policies evolve as our understanding of fairness improves.

Part B: Opposing the Five-Vote Requirement for Retroactivity

I strongly oppose the proposal to increase the number of affirmative votes required to make sentencing guideline amendments retroactive from four to five.

When the Commission determines that sentencing guidelines should be revised because previous policies resulted in unnecessarily harsh or disproportionate sentences, individuals already serving those sentences should have a meaningful opportunity to benefit from those improvements.

Increasing the voting requirement would create another barrier for incarcerated individuals and their families, potentially preventing deserving individuals from benefiting from reforms that reflect a more balanced approach to sentencing.

My Personal Experience

My perspective comes from personal experience. My partner and the father of my youngest child is currently involved in the federal criminal justice system and awaiting sentencing. We share a young baby, and I am also raising other children who have been affected by his absence.

As a mother, I have experienced firsthand how federal incarceration affects far more than the individual facing sentencing. Children lose daily contact with their fathers, families experience emotional and financial hardship, and parents are left trying to maintain stability while facing uncertainty about the future.

I am not asking that individuals be excused from accountability for their actions. I believe people should take responsibility for their mistakes. However, I also believe that a person's worst decisions should not automatically define the entirety of their future or eliminate the possibility of meaningful rehabilitation.

Throughout this experience, I have spent countless hours researching federal sentencing guidelines, mandatory minimum sentences, sentencing enhancements, mitigating-role adjustments, and opportunities for rehabilitation. I have learned how complicated federal sentencing can be and how even small changes in sentencing policies can have enormous consequences for individuals and families.

I have also come to understand that a sentence is not simply a number of months or years. For a child, it represents birthdays, holidays, school milestones, and precious years of growing up without a parent physically present. For families, it represents years of emotional, financial, and psychological challenges.

As a psychiatric mental health professional, I understand the importance of accountability, behavioral change, treatment, and rehabilitation. I have witnessed the capacity individuals have to change when given appropriate resources, support, and opportunities.

I believe our federal sentencing system should encourage rehabilitation rather than create unnecessary obstacles to second chances.

Although my partner has not yet been sentenced, I recognize how important retroactivity is for families whose loved ones are already incarcerated. If the Commission determines that a sentencing policy should be changed, individuals serving sentences under the previous policy should not be unnecessarily excluded from consideration for relief.

A sentencing reform should not lose its value simply because an individual was sentenced before the reform took effect.

For these reasons, I respectfully urge the Commission to reject Part B and preserve the existing four-vote threshold for retroactivity.

Part C: Supporting Federal Defender Participation

I strongly support Part C, which would allow representatives of the Federal Public and Community Defenders to participate more meaningfully in Commission meetings and public hearings.

The Department of Justice has an established voice in federal sentencing policy. I believe the attorneys who represent individuals facing federal prosecution should have a meaningful opportunity to contribute their perspectives as well.

Federal defenders understand the real-world application of sentencing guidelines. They see how mandatory minimum sentences, sentencing enhancements, criminal history calculations, and mitigating factors affect the individuals they represent.

They also understand the challenges faced by families navigating a system that can be difficult to understand and overwhelming to experience.

Through my own family's experience, I have realized how important it is that sentencing policies be developed with input from individuals who understand both the legal framework and its human consequences.

Providing federal defenders with meaningful participation and access to relevant policymaking materials would help ensure that the Commission considers a broader and more balanced range of perspectives.

Fair and informed sentencing policy requires hearing from both the prosecution and the defense.

Conclusion

I respectfully urge the United States Sentencing Commission to reject Part B and adopt Part C.

I believe federal sentencing policies should promote accountability while recognizing the importance of rehabilitation, fairness, proportionality, and family stability.

Our justice system should continue evolving as we learn more about effective sentencing practices. When reforms are adopted, individuals already serving sentences should have a fair opportunity to benefit from them, and the people who represent federal defendants should have a

meaningful voice in shaping those reforms.

Behind every federal sentence is a human being, and often a family of children, parents, and loved ones whose lives are profoundly affected.

I ask the Commission to consider those families when making decisions that will influence federal sentencing policy for years to come.

Thank you for your time, consideration, and continued work toward a fairer and more effective federal sentencing system.

Respectfully,

Angela Whittamore, MSN, APRN, PMHNP-BC
Palm Bay, Florida

Submitted on: October 20, 2026

UNITED STATES SENTENCING COMMISSION
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
www.ussc.gov