

**FEDERAL DEFENDER
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April 18, 2025

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: Defender Comment on Criteria for Selecting Guideline
Amendments Covered by §1B1.10**

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide comment on the criteria the Commission uses for selecting guideline amendments for retroactive application under §1B1.10.

Section 1B1.10's background commentary lists three non-exhaustive criteria the Commission has historically relied on when making retroactivity determinations after adopting an amendment lowering the guidelines range for certain individuals: (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range made by the amendment; and (3) the difficulty of applying the amendment retroactively.¹ Since 1989, advocates have referred to these and other relevant factors to advocate for or against retroactivity, and the Commission has relied on the same to make ameliorative amendments either retroactive or prospective only.²

Most recently, in August 2023, the Commission cited principally to these criteria to make retroactive Parts A and B of Amendment 821 (the

¹ See USSG §1B1.10 (Background) (identifying these concepts as “[a]mong the factors considered by the Commission” in identifying retroactive amendments).

² USSC, [Issue for Comment: Criteria for Selecting Guideline Amendments Covered by §1B1.10](#), at 1 (Dec. 2024) (noting the non-exhaustive list of criteria were originally promulgated in the §1B1.10 policy statement in 1989).

Criminal History Amendment).³ But at its August 2024 public meeting, the Commission announced it would not vote on whether to make retroactive four 2024 ameliorative guideline amendments. Instead, Chair Reeves explained the Commission was “heed[ing] the calls” of stakeholders who asked the Commission “to identify clear principles that will guide its approach to retroactivity.”⁴ One such stakeholder, former DOJ *ex officio* Commissioner Jonathan Wroblewski, publicly criticized the retroactivity criteria and other §1B1.10 background commentary as “bland and unhelpful,” because advocates can reasonably analyze these criteria “and come to opposite conclusions.”⁵ He claimed the Commission has failed, over the years, to explain how these criteria should be “measured and assessed against one another” and to set forth guiding principles on how to apply the listed factors and “how they weigh against the interests of finality.”⁶ He then called on the Commission to develop a reasoned set of principles from the §1B1.10 criteria to provide the public better transparency into its retroactivity decision-making.⁷

In December 2024, the Commission published an Issue for Comment (IFC) on the criteria for selecting guideline amendments covered by §1B1.10.⁸ The Commission requests feedback regarding: whether it should provide further guidance or brightline rules on how to apply the criteria and, if so, what that guidance should be (IFC 1); whether any listed criteria are more appropriately addressed in the Commission’s Rules of Practice and Procedure (Rules) rather than §1B1.10 (IFC 2); and whether it should retain and

³ USSG, App. C, [Amend. 825](#), Reason for Amendment (Nov. 1, 2023). This decision was split, with three Commissioners voting against retroactivity for both parts and four Commissioners voting in favor. See USSC, [Tr. of Pub. Meeting on the Proposed Retroactive Application of the 2023 Criminal History Amendments](#), at 58–59 (Aug. 24, 2023).

⁴ USSC, [Tr. of Public Meeting on the Proposed Retroactive Application of Certain 2024 Amendments](#), at 10 (Aug. 8, 2024).

⁵ See generally [Reply Statement of Jonathan J. Wroblewski to USSC on the Proposed Retroactive Application of Certain 2024 Amendments](#), at 2 (July 17, 2025).

⁶ *Id.* at 2, 4.

⁷ *Id.* at 4–5.

⁸ See generally Retroactivity Criteria Issue for Comment.

incorporate into §1B1.10 language in Rule 4.1A that “[g]enerally, promulgated amendments will be given prospective application only” (IFC 3).

Below, Defenders address each of these questions in turn.

I. The Commission should maintain the existing retroactivity criteria but may wish to draw from its organic statute to provide further guidance or modify these criteria (IFC 1).

A. The current standard is workable.

As an initial matter, Defenders do not agree with Mr. Wroblewski that the current standard is unworkable simply because different advocates can make reasoned but opposing arguments under this standard. That stakeholders can interpret the retroactivity criteria in “diametrically opposite ways”⁹ simply reflects the nature of legal standards and advocacy. In litigation, opposing parties use the same legal standard to advocate for opposing outcomes every day. In the sentencing context, defense attorneys frequently rely on the § 3553(a) factors to argue for probation or time served, while the government uses those same factors, in the same case, to suggest a lengthier prison term is warranted. In the policy space, where the Commission exercises wide discretion to make judgment calls consistent with broad statutory directives, it is even more appropriate and expected that stakeholders with diverse and distinct backgrounds, perspectives, interests, and ideologies would make reasoned but opposing arguments.

After reviewing these stakeholder comments and hearing testimony, and after its own internal discussion and debate, the Commission—a policymaking body—does as was intended: It makes policy decisions on whether amendments should be made retroactive based on the strongest arguments under the relevant standard.¹⁰ Mr. Wroblewski’s criticism misunderstands the value of the retroactivity criteria—they do not identify

⁹ See Wroblewski Reply, at 3.

¹⁰ See §1B1.10 (Background) (“The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants.”).

some objectively indisputable outcome, but guide advocates in advancing policy arguments for or against retroactivity.

Nor does the fact that one set of commissioners declined to make the recency amendment retroactive while other commissioners chose to make the similar status points amendment retroactive prove the current standard fundamentally flawed. As with different judges at every level of the state and federal court systems, different commissioners will view and weigh the same factors differently. There are inevitable distinctions in sentences despite similar facts from one courtroom to the next, with some judges developing reputations as tough sentencers while others are more lenient. And there are frequent dissenting opinions applying the same statutory or constitutional provisions to the same set of facts as those in the majority. These are realities of legal and policy decision-making in our flexible, discretionary legal tradition, not aberrations. They reflect a legal system working as intended, not one that is broken.

Moreover, the Commission's standard for making retroactivity decisions has been established, well-recognized, and has proven workable for the last three-and-a-half decades. While experienced policy attorneys are adept at arguing for or against retroactivity for the same amendment using the same criteria, the decision is ultimately left to the sound discretion of the Commission, as envisioned by the Sentencing Reform Act (SRA).¹¹ The Commission has been able to determine, after reviewing advocates' arguments, in which direction it believes the factors weigh.

Although Defenders see no need to significantly alter the current standard, in the next section we suggest ways, consistent with congressional directives, that the Commission could elaborate on the purpose and magnitude prongs of its three-factor test to provide stakeholders additional guidance. For ease, at the end of that section, Defenders include a sample, redline of the relevant §1B1.10 background paragraph that incorporates our suggestions.

¹¹ See *Dillon v. United States*, 560 U.S. 817, 826 (2010) (discussing the “substantial role Congress gave the Commission with respect to sentence-modification proceedings” including both “whether to amend the guidelines, §994(o), and whether and to what extent an amendment will be retroactive, §994(u)”).

B. Any additional guidance in §1B1.10 should come from congressional mandates in the Commission’s organic statute.

As discussed above, the current §1B1.10 criteria provide a helpful foundation, and sufficient transparency to the public, for guideline amendment retroactivity decisions. And, because the criteria are not exhaustive,¹² commentators and the Commission can and do rely on additional factors, where appropriate, to either flesh out or expand upon the existing criteria. That said, if the Commission believes explicit further guidance is needed, it should look to factors Defenders, other advocates, and past Commissions have raised during retroactivity amendment cycles. Many, if not all, of these considerations come from the Commission’s obligations outlined in 28 U.S.C. §§ 991 and 994.

In creating the Commission and tasking it with the important and complex job of establishing national sentencing policy, Congress identified the most-salient factors for the Commission to bear in mind when carrying out its duties. And they are not mere suggestions, but *mandates* that the Commission must follow. These factors include, for instance, the requirement that the Guidelines reflect advancement in knowledge of human behavior as it relates to the criminal justice process,¹³ promote fairness in sentencing,¹⁴ reduce unwarranted racial and other disparities,¹⁵ and advance the statutory sentencing purposes in § 3553(a).¹⁶ Especially critical, the Guidelines must be “formulated to minimize the likelihood that the Federal prison population

¹² See USSC, [Issue for Comment: Criteria For Selecting Guideline Amendments Covered by §1B1.10](#) at 1 (Dec. 2024) (“The Background Commentary to 1B1.10 . . . provides a non-exhaustive list of criteria the Commission typically considers” and “[t]his non-exhaustive list of criteria has remained substantively unchanged since the Commission originally promulgated the policy statement at §1B1.10 in 1989.”).

¹³ 28 U.S.C. § 991(b)(1)(C).

¹⁴ *Id.* § 991(b)(1)(B).

¹⁵ See *id.* § 994(f) (mandating that the Commission pay “particular attention to the requirements . . . [for] reducing unwarranted sentencing disparities”).

¹⁶ *Id.* § 991(b)(1)(A). Critically, in addition to identifying three non-exhaustive criteria relevant to the retroactivity decision, §1B1.10’s background commentary explains that “[t]he listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing”

will exceed the capacity of the Federal prisons”¹⁷—an attribute retroactivity is exceptionally able to address.

1. Advancement in knowledge of human behavior as it relates to the criminal justice process

As the Commission seeks to balance its “mission of implementing data-driven sentencing policies with its duty to craft penalties that reflect the statutory purposes of sentencing,”¹⁸ commentators and the Commission alike have historically relied on § 991(b)(1)(C) during retroactivity amendment cycles. This is particularly true when empirical evidence, such as scientific data and sociological assessments, support the underlying amendment.¹⁹

For instance, in applying Parts A and B of Amendment 821 retroactively, the Commission noted these amendments were driven by updated recidivism data, as well as data on court sentencing practices, reflecting advancements in knowledge related to the criminal justice process.²⁰ That year, both Defenders and NACDL argued that because Amendment 821 was grounded in recidivism research and data reflecting advancement in knowledge of human behavior, it should be applied

¹⁷ *Id.* § 994(g).

¹⁸ See USSG, App. C, [Amend. 825](#), Reason for Amendment (Nov. 1, 2023) (explaining decision to apply Amendment 821 retroactively).

¹⁹ See, e.g., [Defender Comments on USSC’s 2007 Proposed Retroactivity Amendments](#), at 5 (Oct. 31, 2007) (“[T]he Commission has acted in response to scientific data and sociological assessments in order to remedy unwarranted disparity and to reduce disproportionately severe sentences as compared with other drugs.”); USSC, [Tr. of Public Meeting on Retroactive Application of Amend. 750](#), at 21 (June 30, 2011) (Comm’r Howell) (describing amendment as “the culmination of many years of Commission research, data collection, analysis, and reports that persuaded us that the steps we took in 2007, 2008, 2010, and today are the right ones.”); USSC, [Tr. of Public Meeting on Retroactive Application of Amend. 782](#), at 11 (Aug. 24, 2023) (Chair Reeves) (“The Commission originally believed status points were consistent with the existing empirical research assessing components of recidivism and patterns of career criminal behavior. But the most recent data proves we were wrong.”).

²⁰ See Amend. 825, RFA (“The purpose of these targeted amendments is to balance the Commission’s mission of implementing data-driven sentencing policies with its duty to craft penalties that reflect the statutory purposes of sentencing and to reflect ‘advancement in knowledge of human behavior as it relates to the criminal justice process.’”).

retroactively.²¹ And when, in June 2011, the Commission voted to make Parts A and C of Amendment 750 retroactive, Commissioner Howell remarked that, among the “lofty” statutory responsibilities the Commission must consider when making retroactivity determinations, is whether the amendment “reflect[s] to the extent practicable, advancements in knowledge of human behavior as it relates to the criminal justice process.”²²

Likewise, the legislative history of the SRA, encouraging retroactivity if the guidelines amendment is a result “of a change in the community views of the offense,” supports including § 991(b)(1)(C) as a further guidepost.²³ The two considerations are remarkably similar. Accordingly, if the Commission wishes to add guidance to “the purpose of the amendment,” Defenders recommend adding language from § 991(b)(1)(C).

2. Ensuring fairness and reducing unwarranted disparities

The Commission’s organic statute also prioritizes “certainty and fairness” and reducing “unwarranted disparities” by referencing these factors in two separate provisions.²⁴ Adding to this, some past Commissioners have, on occasion, cited “fundamental fairness” concerns as a justification for

²¹ [Defender Comments to USSC on Retroactivity of the 2023 Amendments](#), at 14 (June 23, 2023) (“When the Commission amends the guidelines to better reflect advancement in knowledge of the criminal justice process, the benefit of that knowledge should be shared among all to whom it applies.”); [NACDL Comments to USSC on Retroactivity of the 2023 Amendments](#), at 4 (June 23, 2023) (“As the Commission has been tasked by Congress to establish sentencing policies that ‘reflect advancement in knowledge or human behavior as it relates to the criminal justice process,’ the Commission’s recent studies make clear that including status points and over-punishing zero-point offenders do not further the purposes of sentencing. NACDL cannot think of a more compelling reason for retroactivity than the data-supported conclusion that human beings may be serving unnecessarily lengthy prison terms without it.”).

²² USSC, [Tr. of Public Meeting on Retroactivity of Amendment 750](#), at 23 (June 30, 2011) (Comm’r Howell).

²³ [S. Rep. 98-225](#), at 180 (1983) (“[I]f there is a major downward adjustment in the guidelines because of a change in the community view of the offense, the Commission may conclude that this adjustment should apply to persons already serving sentences.”)

²⁴ See 28 U.S.C. §§ 991(b)(1)(B), 994(f).

making certain amendments, including 750 (Parts A and C) (“Fair Sentencing Act”) and 706 (“Crack Minus Two”), retroactive.²⁵ Seizing upon these statements, some commentators and Commissioners have argued that an amendment that does not, in their view, redress a fundamental unfairness or serious miscarriage of justice, should not be made retroactive.²⁶ Defenders disagree.

While determining an amendment addresses a fundamental fairness concern should be a sufficient basis for retroactivity, it should not be elevated to a necessary factor for two reasons. First, nothing in § 994(u) or its legislative history supports fundamental fairness as a prerequisite to retroactivity. The phrase appears nowhere in the statute and fairness is only one of multiple purposes identified by the SRA.²⁷ Indeed, the Commission has made many amendments retroactive without specifically finding the amendment redresses a fundamental unfairness or serious miscarriage of justice.²⁸ Second, the concept of redressing a fundamental unfairness or serious miscarriage of justice is just as malleable as the other criteria the

²⁵ See, e.g., USSC, [Tr. of Public Meeting on Retroactivity of Amendment 750](#), at 13, 17 (June 30, 2011) (Vice Chair Jackson); *id.* at 37 (Vice Chair Carr).

²⁶ See, e.g., [Statement of Sapna Mirchandani on behalf of Defenders to USSC on Retroactivity of Criminal History Amendment to §4A1.1 \(Status Points\) and §4C1.1 \(Zero-Point Offenders\)](#), at 3–4 (July 19, 2023) (citing to 2023 letters from the CLC and DOJ); USSC, [Public Meeting Minutes](#), at 2 (Sept. 16, 2010) (reflecting that Commissioners Howell, Jackson, and Castillo voted against making the recency amendment retroactive in part because that amendment was “not intended to address a fundamental fairness issue like the crack cocaine amendment”). *But compare* USSC, [Tr. of Public Hearing on Retroactivity of 2014 Drug Amendment](#), at 252–53 (June 10, 2014) (VC Jackson) (suggesting that Amendment 782 (“Drugs Minus Two”) did not address the same kind of fundamental fairness concerns as “crack retroactivity”) *with* USSC, [Public Meeting Minutes](#), at 8 (July 18, 2014) (reflecting that Vice Chair Jackson voted in favor of retroactivity of Amendment 782).

²⁷ See generally 28 U.S.C. § 991 *et seq.*

²⁸ See [FAMM Comments Supporting Retroactivity of 2024 Amendments](#), at 3–4 (July 22, 2024) (discussing instances where the Commission made amendments retroactive without an explicit finding that fundamental fairness necessitates retroactivity); [Statement of Mary Price on behalf of FAMM to USSC on Retroactivity of 2023 Criminal History Amendment](#), at 1 (July 10, 2023) (“[E]ven if the Commission finds addressing fundamental fairness is not one of the anticipated outcomes of retroactivity, the Commission has historically made prior amendments retroactive without a finding of fundamental fairness.”).

Commission is now examining.²⁹ Nonetheless, ameliorative amendments that lead to fairer sentencing outcomes deserve special consideration in the retroactivity context, and the Commission may wish to highlight this factor to elaborate on the purpose prong.

Relatedly, the Commission has justified retroactivity decisions as needed to ameliorate longstanding, unwarranted racial disparities in sentencing. For example, to support retroactive application of Amendment 750, Commissioner Howell explained:

Among the purposes of sentencing that we must try to achieve are fairness, proportionality, and avoiding unwarranted sentencing disparities. And to my mind, retroactive application of Parts A and C of our guidelines—FSA guideline amendment helps to achieve those purposes of the Sentencing Reform Act. I share the view of the Congressional Black Caucus that retroactive application of the Fair Sentencing Act guideline changes would help address racial disparities and excessive sentences for crack offenders and undo a long history of injustice in federal sentencing.³⁰

And in 2023, when discussing the importance of retroactively applying the status points amendment, Commissioner Gleeson said:

The comments we received could not establish more clearly that Black and Brown people in our country have been arrested and

²⁹ Compare USSC, [Tr. of Public Meeting on Retroactivity of Amendment 821](#), at 29–30, 43–44, 46 (Aug. 24, 2023) (statements on behalf of commissioners voting against retroactivity of Parts A and B of Amendment 821 in part because, in their view, those amendments fail to address issues of systemic unfairness) *with id.* at 48–49, 54 (Comm’r Gleeson) (disagreeing and arguing that Amendment 821 redressed a fundamental unfairness affecting thousands of predominantly Black and Brown individuals “based on assumptions we now know from the data are wrong”).

³⁰ USSC, [Tr. of Public Meeting on the Retroactive Application of Amend. 750](#), at 24 (June 30, 2011); *see also* [Congressional Black Caucus Comments to USSC Supporting the Retroactive Application of Parts A and C of Amendment 750](#), at 1 (May 26, 2011) (“While both Democrats and Republicans acknowledged that the federal cocaine laws were exacerbating racial and sentencing disparities, the CBC recognizes that making this amendment to the sentencing guidelines retroactive is the next step in correcting this 25-year-old injustice.”).

convicted and then found themselves in the status of being under supervision at disproportionately higher rates for decades. And not for justifiable reasons There's no such thing as fully remedying a racial disparity that's been baked into our criminal justice system for so long. But making these amendments retroactive will have a tangible effect on thousands of people of color.³¹

Because increasing fairness in sentencing and reducing unwarranted disparities are critical congressional mandates the Commission and stakeholders have historically relied on to support retroactivity, it makes sense to offer further explicit guidance grounded in these ideals.

3. Minimizing the likelihood that the federal prison population will exceed the capacity of the federal prisons

One essential and particularly timely duty of the Commission, as set forth by Congress, is to “take into account the nature and capacity of the penal, correctional, and other facilities and services available,” and to “formulate[] [sentencing guidelines] to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons[.]”³² Considering the Bureau of Prisons’ serious infrastructure and staffing needs, overcrowding, history of systemic abuse, and current administration upheaval, the “BOP lacks the capacity to safely and humanely hold the people sentenced to federal prison.”³³ And despite the commands of 28 U.S.C. § 994(g), the BOP has long operated beyond any semblance of adequate capacity.³⁴ Given the BOP’s myriad problems, retroactivity decisions should include consideration of § 994(g). Indeed, § 994(g) is a particularly intuitively

³¹ USSC, [Tr. of Public Meeting on Retroactivity of Amendment 821](#), at 48–51 (Aug. 24, 2023).

³² 28 U.S.C. § 994(g).

³³ [Defender Comments on the USSC’s 2025 Proposed Amendments on Drugs](#), at 13 (Mar. 3, 2025).

³⁴ *See id.* at 9 (Mar. 3, 2025) (“[T]he OIG has issued over 100 reports in the past 20 years that have identified recurring issues that impede the BOP’s efforts to consistently ensure the health, safety, and security of all staff and inmates within its custody.” (citation and quotation marks omitted)).

sound consideration given its direct connection to current (as opposed to forward-looking) prison capacity issues.

As with addressing empirical advancements, fairness, and unwarranted disparities, the Commission has previously relied on the number of individuals impacted by amendments and has cited § 994(g) to support retroactivity.³⁵ Specifically, the Commission emphasized its obligation to alleviate federal prison overcrowding in adopting Amendment 782,³⁶ and applying the amendment retroactively.³⁷ More generally, when discussing the “magnitude” factor for retroactivity determinations, Defenders and other commentators have highlighted not just the extent of the reduction in the guideline range, but the overall “impact of retroactivity,” including the number of people who would potentially be released from the BOP early, and their demographic makeup.³⁸ Thus, the Commission should consider

³⁵ See, e.g., USSC, [Tr. of Public Meeting on Retroactivity of 2014 Drug Amendment](#), 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 Public Meeting on Retroactivity of Amendment 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 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.”).

³⁶ USSG, App. C, [Amend. 782](#), Reason for Amendment, at 68 (2014) (“The amendment was also motivated by the significant overcapacity and costs of the Federal Bureau of Prisons In response to these concerns, the Commission considered the amendment an appropriate step toward alleviating the overcapacity of the federal prisons.”).

³⁷ USSG, App. C, [Amend. 788](#), Reason for Amendment, at 83 (2014).

³⁸ See, e.g., [Defender 2023 Retroactivity Comment](#), at 5–7, 11–12 (discussing the overall impact of making retroactive Amendment 821, Parts A and B); see also [PAG Comment on Retroactivity of the 2023 Criminal History Amendment](#), at 4 (June 23, 2023) (stating in discussion of “magnitude” that retroactivity would “impact[] a significant number of Defendants, a majority of whom will benefit from a reduction of up to 12 months. The Commission has previously determined that when a substantial number of defendants are affected, retroactivity is justified.”); [FAMM Comments on Retroactivity of Criminal History Amendment](#), at 6 (June 23, 2023) (“Taken together, the changes [in both criminal history amendments] would have a significant impact on nearly 18,000 individuals incarcerated in the federal Bureau of

expanding its “magnitude” factor to better reflect its statutory obligations in § 994(g) by focusing not just on the extent of the change in the guidelines range but on the overall *impact* of the amendment, including the number and type of people who retroactivity would affect.³⁹

4. A revised retroactivity standard

If the Commission decides to expand upon the retroactivity criteria as Defenders recommend above, we suggest the following revisions to the third paragraph of §1B1.10’s background commentary:

The Commission considers the following non-exhaustive factors when
~~Among the factors considered by the Commission in selecting the~~
amendments **included to include** in subsection (d): ~~were~~

- 1) the purpose of the amendment, **including the Commission’s obligations to ensure sentencing policies reflect “the advancement in knowledge of human behavior as it relates to the criminal justice process,” provide “fairness in meeting the**

Prisons, significantly shortening sentences for up to 12 percent of the current population . . .”).

³⁹ Defenders understand that this “impact” factor initially appears in tension with “administrability,” given that larger numbers of eligible individuals filing motions for sentence reductions result in larger numbers of cases for all stakeholders. On the other hand, history has shown that the criminal system’s stakeholders can manage even massive amendment pools. With each retroactivity period, defense attorneys, probation officers, prosecutors, and courts become more proficient in handling retroactivity motions. See [Defender Comments on the Proposed Retroactivity of USSC’s 2024 Amendments](#), at 4–5 (June 21, 2024). Predictions that retroactivity would overwhelm the courts and lead to “chaos,” see [Reply Statement of Jonathan J. Wroblewski to USSC on the Proposed Retroactive Application of Certain 2024 Amendments](#), at 4 (July 17, 2025); [Statement of Mary Leary on behalf of VAG to USSC on Retroactivity of Certain 2024 Amendments](#), at 3 (June 21, 2024) (claiming that retroactivity will cause “chaos” in the courts), have not come to pass. See [Defender 2024 Retroactivity Comments](#), at 5 (pointing out that DOJ’s speculation that roughly half of the BOP population would file motions for retroactive relief under Amendment 821 did not happen and was highly unlikely given the Commission’s own retroactivity report data). Thus, while Defenders think administrability will inevitably be a consideration, actual difficulties pale in comparison to the often-dire forecasts advanced, and an increased-but-manageable workload should never outweigh the Commission’s mandated policy considerations.

purposes of sentencing,” and avoid “unwarranted sentencing disparities,” under 18 U.S.C. §§ 991(b)(1)(B) and (C);

- 2) the magnitude impact of making the amendment retroactive, including the magnitude of the change in the guideline range made by the amendment, the number of people who will potentially be entitled to retroactive sentence reductions, whether the amendment will decrease racial disparities, and retroactivity’s ability to help alleviate BOP overcrowding and the financial costs of incarceration under 28 U.S.C. §994(g); and
- 3) the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection(b)(1).

II. The criteria for determining retroactivity belong in §1B1.10 (IFC 2).

The Commission also requests comment on whether its retroactivity criteria are more appropriately addressed in its Rules of Practice and Procedure,⁴⁰ rather than the Background Commentary to §1B1.10. Defenders believe the Commission should either list these criteria in both places or leave them in the policy statement rather than move them only to the more obscure Rules.

After thirty years, the Commission’s process of soliciting comments for amendments to the guidelines is familiar to stakeholders.⁴¹ And when the Commission is considering making amendments retroactive, stakeholders know to look to §1B1.10 for guidance on making their arguments, as they have done for decades. The Commission’s Rules are no doubt less familiar to

⁴⁰ The Commission established these rules in 1997 pursuant to 28 U.S.C. § 995(a)(1) and other provisions of its 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.” USSC, Rules of Practice and Procedure, [Rule 1.1](#) (Application and Purpose) (Aug. 2016). The Commission made clear that its rules “are not intended to create or enlarge legal rights for any person.”

⁴¹ The Sentencing Commission’s publicly available comments on retroactivity stretch back to 1996.

stakeholders.⁴² In our view, keeping the criteria in §1B1.10 or listing them in both places would help ensure robust retroactivity notice and comment.

Additionally, moving the retroactivity criteria from the policy statement to the Rules risks undermining certainty, fairness, and transparency. Under Rule 1.2, a majority of all serving Commissioners may vote to temporarily “suspend any rule contained herein and/or adopt a supplemental or superseding rule”⁴³ In contrast, the Commission typically does not amend or set aside Guideline commentary and policy statements without stakeholder involvement. Stakeholders, including impacted people, deserve to know and weigh in on what criteria the Commission will consider to make its retroactivity determination.

III. The Commission should not establish a presumption against retroactivity and should remove the first sentence in Rule 4.1A (IFC 3).

Finally, the Commission requests comment on whether the first sentence of Rule 4.1A of the Commission’s Rules of Practice and Procedure should be retained. The first paragraph of Rule 4.1A states:

Generally, promulgated amendments will be given prospective application only. However, in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants (see 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2)), the Commission shall . . . [take certain procedural steps before an amendment is made retroactive].⁴⁴

Some stakeholders have argued that Rule 4.1A constitutes a presumption against retroactivity.⁴⁵ The Commission should not employ a

⁴² In fact, the last time the Commission solicited comment on its Rules of Practice and Procedure, it received only one response: from the Federal Public and Community Defenders. See [Public Comment from June 1, 2016](#) (containing only a comment authored by Defenders).

⁴³ See USSC, Rules of Practice and Procedure, [Rule 1.2](#) (Rules Amendment Procedure) (Aug. 2016).

⁴⁴ See USSC, Rules of Practice and Procedure, [Rule 4.1A](#) (Retroactive Application of Amendments) (Aug. 2016) (emphasis added)

⁴⁵ See [Statement of Mary Leary on behalf of VAG to USSC on Retroactivity of Certain 2024 Amendments](#), at 2 (June 21, 2024), at 2 (“The entire analysis of

presumption against retroactivity and should strike the above-italicized language to make clear no such presumption exists.

The pertinent statutes, 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2), do not establish (and §1B1.10 does not contain) a presumption against retroactivity of guideline amendments. Instead, Congress provided the Commission the specific authority to determine whether and to what extent an amendment should be made retroactive.⁴⁶ The statutory text is devoid of any implicit or explicit discouragement or limitation. If Congress had wanted to dictate that there should be a presumption against retroactivity, Congress could have easily done so and would have. Congress could, for example, have provided further criteria or limitations on how the Commission should exercise its authority. It did not.

Nonetheless, there have been attempts to read a presumption into the statute based upon a pair of sentences in the SRA's legislative history indicating that the Senate Judiciary Committee did "not expect that the Commission will recommend adjusting existing sentences when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines."⁴⁷ Reading that provision as favoring a narrow retroactivity power is flawed for two reasons. First, if Congress intended to create a presumption against retroactivity in certain circumstances, it needed to do so in the statutory text and not in a statement

retroactivity begins with the presumption that any amendments to the Guidelines are presumed to not be retroactive. The Rules of Practice and Procedure are explicit on this point, 'Generally, promulgated amendments will be given prospective application only.');" [DOJ Comment to USSC on the Proposed Retroactive Application of Certain 2024 Amendments](#), at 2–3 (June 21, 2024) ("The Commission's own rules suggest caution in making amendments retroactive: the Rules of Practice and Procedure recognize that, '[g]enerally, promulgated amendments will be given prospective application only.'").

⁴⁶ See *Dillon v. United States*, 560 U.S. 817, 826 (2010) (describing the "substantial role Congress gave the Commission" for retroactive guideline matters); see also 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." (emphasis added)).

⁴⁷ [S. Rep. 98-225](#), at 180.

in one chamber’s committee report. And the Senate report is particularly unhelpful in this context because, to Defenders’ knowledge, there is no other discussion of that expectation in the SRA’s decade-plus drafting history. Second and more importantly, the equivocal statement (speaking of “expectations” of use instead of what the statute requires) is limited to circumstances where an amendment causes “isolated instances [of changed guidelines]” or “minor downward adjustments”⁴⁸ and is immediately followed by the Committee expecting that another class of changes will be retroactive—namely, where “there is a major downward adjustment in guidelines because of a change in the community view of the offense.”⁴⁹ None of this language contemplates or sets forth a presumption against retroactivity.

Simultaneously with § 994(u)’s silence (and that of its legislative history) as to any presumption against retroactivity, other core congressional directives do not support any such presumption. For instance, the Commission is tasked with “provid[ing] certainty and fairness in meeting the purposes of sentencing and avoiding unwarranted sentencing disparities,” neither of which are supported by a presumption against retroactivity.⁵⁰ Indeed, failing to make amendments retroactive leads to unjust temporal disparities by allowing individuals to continue serving sentences the Commission has determined under § 994(o) no longer meet the purposes of punishment. What, in fact, could be more unfair and create more uncertainty and unwarranted disparity than the date of one’s sentencing driving the punishment? As the Criminal Law Committee observed to support applying Amendment 782 retroactively: “We do not believe that the date a sentence was imposed should dictate the length of imprisonment. Rather, it should be the defendant’s conduct and characteristics that drive the sentence whenever

⁴⁸ Notably, the Senate Report was necessarily written prior to the Commission’s creation and thus prior to any draft of the Guidelines Manual. We now know a single-level decrease in offense level or criminal history will equate to months or years of incarceration. Nothing in the legislative history’s reference to “minor” adjustments indicates that the Committee would have viewed obtaining freedom months or years earlier as “minor.”

⁴⁹ [S. Rep. 98-225](#), at 180.

⁵⁰ 28 U.S.C §§ 991(b)(1)(B), 994(f).

possible.”⁵¹ Likewise, a presumption against retroactivity conflicts with the Commission’s duty to minimize the likelihood that the BOP population will exceed its capacity.⁵²

To the extent that certain stakeholders rely on *Teague v. Lane*⁵³ to support a presumption against retroactivity based on finality concerns, they are misguided.⁵⁴ *Teague* addresses federal habeas law and the finality of state criminal convictions.⁵⁵ In contrast, retroactivity determinations under § 994(u), §1B1.10, and § 3582(c)(2), concern *sentencing* finality,⁵⁶ which, as legal scholars and stakeholders have made clear, is “different in kind” from conviction finality and addresses fundamentally different concerns.⁵⁷ This is, of course, compounded by the inherent flaws of *Teague*, a decision widely considered to have been poorly decided.⁵⁸

Because there is no textual or legislative support for a presumption against retroactivity, the Commission’s organic statute militates against such a presumption, and reliance on conviction finality is misplaced, the

⁵¹ USSC, [Tr. of Public Hearing on Retroactivity of 2014 Drug Amendment](#), at 20 (June 10, 2014).

⁵² 28 U.S.C. § 994(g).

⁵³ 489 U.S. 288, 309 (1989).

⁵⁴ See, e.g., 2024 DOJ Retroactivity Statement, at 2 n.81; Wroblewski Reply, at 2.

⁵⁵ See, e.g., *Teague*, 489 U.S. at 292 (describing holding of case as adopting an earlier Justice’s “approach to retroactivity for cases on collateral review”).

⁵⁶ [Testimony of Adeel Bashir on behalf of Defenders to the USSC](#), at 35:40–36:46 (July 15, 2024) (arguing that federal habeas cases, including *Teague*, which concern conviction finality, are “in an entirely different universe” from sentence finality in retroactivity determinations).

⁵⁷ See, e.g., Douglas A. Berman, [Re-Balancing Fitness, Fairness, and Finality for Sentences](#), 4 Wake Forest J. L. & Pol’y 151, 170 (2014); see also *id.* at 152 (“[C]ourts and commentators have long recognized that the determination of guilt and the imposition of punishment involve distinct stages of criminal adjudication calling for different rules and procedures . . .”).

⁵⁸ See, e.g., John Blume & William Pratt, [Understanding Teague v. Lane](#), 18 N.Y.U. Rev. L. & Soc. Change 325, 326 (1991) (arguing that *Teague* “departed from the doctrinal purposes underlying retroactivity and made the law hopelessly complex and unworkable”); *Edwards v. Vannoy*, 593 U.S. 255, 293 (2021) (Gorsuch, J., concurring) (writing that the Court’s precedents “illustrate how mystifying the whole *Teague* project has been from its inception”).

Commission should clarify, as follows, in its Rules that no presumption against retroactivity exists:

~~Generally, promulgated amendments will be given prospective application only. However, [I]n those cases in which the Commission is~~
~~considerings~~ an amendment for retroactive application to previously sentenced, imprisoned defendants (*see* 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2)), the Commission shall— . . . [sets forth procedural steps taken when considering if an amendment should be made retroactive].

* * *

The Federal Public and Community Defenders appreciate the Commission's consideration of our views and 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
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cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
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Hon. Candice C. Wong, Commissioner
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