

**FEDERAL DEFENDER
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June 18, 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: Defender Comment on 2026 Unmanned Aircraft Proposed
Amendment**

Dear Judge Reeves:

The Federal Public and Community Defenders appreciate the opportunity to comment on the Commission's proposed amendment on the use of unmanned aircraft, which implements the Congressional directive in the SAFER SKIES Act.¹ The proposed amendment would create a new guideline at §3B1.6 providing a tiered enhancement of either 4 or 6 levels for offenses involving the use of an unmanned aircraft (drone), with different options for when the 6-level increase would apply. It would also amend the statutory index to refer the Act's newly-created felony offense to §2A5.2. The Commission further raises five "Issues for Comment" (IFC), which we address below.

Defenders understand that Congress has mandated the Commission to increase penalties for offenses involving drones.² We encourage the Commission to implement this mandate as narrowly as possible. As with all guidelines created from directives, the Commission is not exercising its

¹ See generally [2026 Proposed Guidelines Amendment, Unmanned Aircraft](#) (Apr. 16, 2026).

² See SAFER SKIES Act, Pub. L. 119-60, §8605(e), 139 Stat. 718, 1944 (2025).

“characteristic institutional role.”³ The proposed enhancements are not borne from thoughtful study or guided by the purposes of sentencing, but are dictated by Congress’s political process.⁴ As such, they are less useful to judges attempting to discern sentences that will further the purposes of sentencing, and, thus, likely to be disparately applied.⁵

³ *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

⁴ This directive is particularly problematic Congressional decision-making. It comes from a provision, subjected to limited debate, and tacked on to over 1,200 pages of must-pass, time-sensitive legislation. *See generally* National Defense Authorization Act for Fiscal Year 2026, Pub. L. 119-60, 139 Stat. 718 (Dec. 18, 2025) (“NDAA of FY2026”). The Commission is thus left to guess at why Congress felt 4- and 6-level increases were appropriate.

⁵ Commentators, including the Commission itself, have long derided directive-based amendments. *See* USSC, [*Mandatory Minimum Penalties in the Federal Criminal Justice System*](#) at 122 (1991) (“[S]pecific directives, while clearly within the congressional prerogative, are potentially in tension with the fundamental Sentencing Reform Act objectives of delegating to an independent expert body in the judicial branch of the government the finer details of formulating sentencing policy, and revising that policy in light of actual court sentencing experience over time.”); *see also, e.g.,* [Defenders’ Comment on the USSC’s 2025-2026 Drug Offenses Proposed Amendments](#) at 3-8 (Mar. 3, 2025) (renewing decades of criticism from Defenders and others regarding Commission decisions to abandon its empirical approach in favor of politics when designing §2D1.1 and grafting a statutory mandatory minimum scheme onto the Guidelines); Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U. of Tol. L. Rev. 649, 665-66 (2016) (discussing “[c]ongressional micro-management of the Guidelines”). Further, courts are both empowered and willing to disregard directive-driven guidelines. *See, e.g., United States v. Dais*, 482 F. Supp. 3d 800, 803 (E.D. Wisc. 2020) (noting that a Chapter 3 adjustment “was enacted pursuant to a congressional directive and absent empirical evidence” and that “[s]uch guidelines do not exemplify the Sentencing Commission’s exercise of its characteristic institutional role and are generally entitled to less respect” (citations omitted)); *see also Kimbrough*, 552 U.S. at 109-10 (differentiating instances where Commission acts without “exercis[ing] its characteristic institutional role” as those instances do not create the same “rough approximation” of what § 3553(a) seeks); *United States v. Henderson*, 649 F.3d 955, 962-63 (9th Cir. 2011) (allowing courts to reject child pornography guideline as a matter of policy because the guideline’s reliance on directives meant the guideline does not reflect the Commission’s institutional role).

Further, the proposed enhancements are not supported by empirical evidence, which supports implementing the directive as narrowly as possible.

The Commission's data show that cases involving the use of a drone are exceedingly rare, accounting for no more than 0.1% of all cases over the last two fiscal years. And, in those rare drone-involved cases, judges generally found the current guideline ranges either sufficient or too high: nearly half (56) of the 113 identified cases involving drones resulted in below-guidelines sentences while only 2% resulted in above-guidelines sentences.⁶

Also telling, for the most common crime types involving drones—immigration and drug trafficking—the average sentences imposed were below the current average guideline minimums.⁷ For immigration cases involving drones, the average sentence was 8 months while the average guideline minimum was 11 months.⁸ For drug-trafficking cases involving drones, the average sentence was 79 months while the average guideline minimum was 97 months.⁹

Moreover, 58% of the people sentenced in the 113 identified cases involving drones were in Criminal History Category I.¹⁰ Criminal History Category I is associated with lower recidivism rates and thus less appropriate for long sentences.¹¹

⁶ USSC, [Public Data Briefing Slideshow](#) at 26 (2026).

⁷ *Id.* at 27-28.

⁸ *Id.* at 27.

⁹ *Id.* at 28.

¹⁰ *Id.* at 9.

¹¹ See e.g., USSC, [Recidivism of Federal Offenders Released in 2010](#) at 27 & fig. 14 (Sep. 2021) (showing rearrest rate of 42% for people with one criminal history point versus rearrest rates between 49% and 81% for people who had between 2 and “13 or more” criminal history points). The Data Briefing does not identify what portion of the CHC I people had zero criminal history points. To the extent that people with zero points are impacted, the enhancements are inconsistent with the Commission's recent empirically-guided efforts to reduce sentences for people with zero criminal history points, reflecting their lower recidivism rates, and to

Finally, the data briefing shows that the enhancements are likely to fall most heavily on Hispanic individuals, who accounted for 49% of cases involving drones during the relevant time period.¹² More broadly, the data suggest that nearly three-quarters of the individuals who will be affected by these enhancements are non-white.¹³ The Commission's overarching directive to avoid unwarranted sentencing disparities counsels caution here.¹⁴

Where, as here, the Commission must increase the guidelines despite substantial reasons not to, it is imperative that it do no more than the statute requires. Therefore, Defenders encourage the Commission to:

- Adopt Option 1's approach to the 6-level increase at §3B1.6(a)(1), applying that enhancement only in cases where the statutory sentencing enhancement applies (*see* pp. 5-8).
- Add a *mens rea* requirement of "knowledge" to the proposed §3B1.6(a)(2) (*see* pp. 8-10).
- Include the bracketed language in §3B1.6(b) that "use" does not mean "mere possession" and add language to prevent double-counting (*see* pp. 10-11).
- Instruct courts, in the statutory index, to use §2X5.2 for a misdemeanor first offense and §2A5.2 only for second and subsequent (felony) offenses (*see* pp. 11-12).

implement 28 U.S.C. § 994(j). *See* USSG, App. C., [Amend. 821](#) (Nov. 1, 2023), Reason for Amendment.

¹² [Public Data Briefing Slideshow](#) at 8.

¹³ *Id.*

¹⁴ *See* 28 U.S.C. §§ 991(b)(1)(B); 994(f).

I. Section 3B1.6(a)(1): Option 1 provides the narrowest, simplest approach, which is appropriate given the severity of the 6-level enhancement.

In December 2025, Congress passed the SAFER SKIES Act (“the Act”) as part of the National Defense Authorization Act for Fiscal Year 2026.¹⁵ The Act created a series of new statutory sentencing enhancements for offenses involving drones.¹⁶ It also directed the Sentencing Commission to add: (1) at least a 6-level increase to a person’s base offense level when a statutory enhancement applies (for “knowingly operating a drone during, in relation to, or in furtherance of” another felony offense under 6 U.S.C. § 124n-1(c)); and (2) at least a 4-level increase in other cases involving drones.¹⁷

The Commission proposes two options in response to the directive. Option 1 applies the 6-level enhancement only if the person was convicted of the aggravating statutory enhancement at § 124n-1(c). Option 2 applies the 6-level enhancement regardless of whether the person was convicted under the enhanced penalty provision at § 124n-1(c), as long as they were convicted of a felony offense not based solely on operating a drone and “knowingly operated [a drone] during, in relation to, or in furtherance of that offense.”

Option 1 is better for two primary reasons. *First*, a 6-level increase is extremely harsh, and Option 1 is the narrowest option that complies with the

¹⁵ Pub. L. No. 119-60, § 8601-07 (2025).

¹⁶ *First*, the Act created a felony penalty of up to 5 years in prison for repeated violations of 49 U.S.C. § 46307 (violation of national defense airspace)—a first offense remains a misdemeanor, punishable by up to 1 year in prison. *Id.* at § 8605(b) (codified at 49 U.S.C. § 46307). *Second*, the Act raised the statutory maximum penalty for any felony offense not based solely on the operation of an unmanned aircraft—by either five years or double the statutory maximum for the underlying felony (whichever is less)—if the convicted person knowingly operated an unmanned aircraft during, in relation to, or in furtherance of such offense. *Id.* at § 8605(c) (codified at 6 U.S.C. § 124n-1(c)). *Third*, the Act increased by five years the statutory maximum penalties under 18 U.S.C. § 1791 for knowingly using an unmanned aircraft to introduce contraband into a prison. *Id.* at § 8605(d) (codified at 18 U.S.C. § 124n-1(d)).

¹⁷ *Id.* at § 8605(e).

statutory text.¹⁸ In addition to the concerns we raise above about applying directives (and particularly *this* directive) over-broadly, consider the levels involved with other enhancements for similar or considerably more egregious conduct. Take, for example, sophisticated means—an enhancement the Commission recently considered expanding to include using emerging technologies, potentially including unmanned aircraft.¹⁹ Unless the offense level floor applies, sophisticated means triggers a 2-level increase.²⁰ Use of a special skill also garners a 2-level bump.²¹ What’s more, consider *dissimilar*, more serious conduct: a person receives a 4-level increase for committing a rape where the victim is under 12 years old,²² or for using a dangerous weapon during a robbery.²³ And a person receives a 6-level increase for conduct like inflicting greater-than-serious bodily injury on aggravated assault victims,²⁴ or sexually exploiting a victim during a kidnapping.²⁵ Clearly then, a 4- or 6-level enhancement for committing an offense that involved the use of a drone is unusually severe.

These increases are also excessive relative to the base offense level that often applies in these cases. As the Commission’s data briefing notes, in fiscal years 2024 and 2025, the most common use for drones was to deliver contraband to people in prison—most commonly, controlled substances or

¹⁸ Congress required the 6-level increase only when “the enhanced penalties of subsection (c) apply.” Pub. L. No. 119-60, § 8605(e)(2). In other words, Congress *did not* mandate a 6-level increase in the absence of a conviction under § 124n-1(c) where the government proves by a preponderance at sentencing that those elements were met.

¹⁹ See [2026 Proposed Amendments to the Sentencing Guidelines](#) at 155-68 (Dec. 12, 2025).

²⁰ USSG §2B1.1(b)(10)(C). The Commission’s Issue for Comment #3 identifies sophisticated means enhancements as one possible area of overlap with the proposed enhancements.

²¹ USSG §3B1.3.

²² USSG §2A3.1(b)(2)(A).

²³ USSG §2B3.1(b)(2)(D).

²⁴ USSG §2A2.2(b)(3)(E).

²⁵ USSG §2A4.1(b)(5).

cellphones.²⁶ Section 2P1.2 applies to possessing or providing contraband in a prison. Unless a cross-reference applies for distribution of a controlled substance,²⁷ §2P1.2(a) assigns a base offense level based on the nature of the smuggled contraband. Where the contraband was a cellphone or certain controlled substances, the base offense level is 6.²⁸ In other words, if applied in a prison contraband case involving a cellphone or certain controlled substances, the proposed enhancements would result in offense-level increase of 66% or even 100%.²⁹ Again, the scope of the increases—particularly the 6-level increase—militates strongly in favor of the narrowest possible approach, along with maintaining the offense-level increases at 4 and 6 levels, rather than going any higher.³⁰

Second, Option 1 is easier than Option 2 to interpret and apply and, as such, will result in less litigation. Under Option 1, courts need not struggle over whether the 6-level enhancement applies. Courts need only look at the statute(s) of conviction. Consider the Commission’s recent clarification that §2D1.1(a)(1)-(4)’s enhanced base offense levels are based on the offense of conviction, not conduct.³¹ Prior to that amendment, a circuit conflict arose over whether those enhancements applied even in cases where a person was not subject to the relevant enhanced statutory penalties.³² Now it’s clear they

²⁶ USSC, [Public Data Briefing Transcript](#) at 8 (May 13, 2026); *see also* [Public Data Briefing Slideshow](#) at 22 (showing 47% of cases involving prison contraband).

²⁷ USSG §2P1.2(c).

²⁸ USSG §2P1.2(a)(3) (providing for a base offense level of 6 “if the object was . . . a mobile phone or similar device, or a controlled substance (other than LSD, PCP, methamphetamine, or a narcotic drug)”).

²⁹ These increases are excessive even when looking at the more-harshly-punished controlled substances in §2P1.2. Section 2P1.2(a)(2) applies a base offense level of 13 to contraband cases involving methamphetamine, LSD, PCP, or narcotics. A 4- or 6-level increase to a BOL 13 would represent a 31% or 46% increase based solely on the means of smuggling.

³⁰ *See* IFC #2; IFC #4.

³¹ *See* USSG, App. C, [Amend. 830](#) (Part D) (Nov. 1, 2024).

³² *Compare United States v. Johnson*, 706 F.3d 728, 732 (6th Cir. 2013) (holding the district court “was still permitted to take into account” a prior conviction when determining whether to apply §2D1.1(a)(1) even though the government did not file an information under § 851 and therefore the statutory enhancement did not apply),

apply only if “the defendant is convicted of an offense under” the relevant enhancement statute. Equally clear—Option 1 is consistent with this common-sense approach.³³

II. Section 3B1.6(a)(2): Consistent with the statutory directive, the 4-level enhancement should include a *mens rea* requirement.

The current proposal at §3B1.6(a)(2) is broader than the directive requires because it lacks a *mens rea* requirement. As currently phrased, the 4-level enhancement applies even to a person who did not know the offense involved the use of a drone. And, as the Commission observed in its data briefing, many of the drone-involved cases from fiscal years 2024 and 2025 involved multiple individuals jointly engaged in criminal activity.³⁴ Indeed, in 42% of drone-involved cases, the sentenced individual’s own conduct did not include using a drone.³⁵ And, in 46% of cases in which the offense involved the use of a drone, the identity of the person who operated the drone was unknown.³⁶ As a result, in many cases, the “court would ultimately have to make a determination as to whether the relevant conduct of a particular sentenced individual included the use of an unmanned aircraft.”³⁷ Doing so

with *United States v. Lawler*, 818 F.3d 281, 284 (7th Cir. 2016) (holding §2D1.1(a)(2) applies “only when death is an element of the crime that is admitted by the defendant or proven beyond a reasonable doubt”) and *Greenough*, 669 F.3d at 575 (same); see also *United States v. Sica*, 676 F. Appx. 81, 86 (2d Cir. 2017) (collecting additional decisions indicating a wider circuit split).

³³ As was done in the §2D1.1 enhanced base offense levels context, Defenders are amenable to adding language that would allow the parties to agree to the 6-level increase in the absence of a statutory sentencing enhancement under § 124n-1(c).

³⁴ [Public Data Briefing Transcript](#) at 4.

³⁵ [Public Data Briefing Slideshow](#) at 15. Even among the 58% of cases where the sentenced individual’s conduct involved a drone, the pilot was the person being sentenced in only 28 cases. *Id.* at 16.

³⁶ *Id.* at 17.

³⁷ [Public Data Briefing Transcript](#) at 4.

would require the court to assess what was, and was not, reasonably foreseeable to the person being sentenced.³⁸

As Defenders have previously underscored, the “reasonable foreseeability” standard, which “effectively imposes a negligence standard for a co-conspirator’s crime,”³⁹ is entirely appropriate in civil tort law, “but is inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrongdoing.”⁴⁰ Enhancements that lack a knowledge or intent requirement are antithetical to § 3553(a) concerns of just punishment and deterrence: they do not promote just punishment because they do not meaningfully distinguish culpability between actors,⁴¹ and they do not promote deterrence because “a person cannot be deterred from doing what [they do] not know is being done.”⁴²

As a result, we have encouraged the Commission to add a *mens rea* requirement to enhancements that lack a scienter element throughout the Guidelines Manual.⁴³ Here, that would mean modifying proposed §3B1.6(a)(2) to state (with proposed additions in red text):

If the offense involved the use of an unmanned aircraft **and the defendant knew the offense would involve the use of an unmanned aircraft**, increase by [4] levels.

³⁸ See USSG §1B1.3(a)(1)(B)(iii).

³⁹ [Defenders’ Annual Letter to the USSC](#) at 11 (Sep. 14, 2022) (citations omitted).

⁴⁰ [Defenders’ Annual Letter to the USSC](#) at 16 (July 15, 2024) (quoting *Elonis v. United States*, 575 U.S. 723, 737-38 (2015)).

⁴¹ See *Ruan v. United States*, 597 U.S. 450, 458 (2022) (discussing how *mens rea* is necessary to separate wrongful conduct from otherwise-innocent conduct).

⁴² *United States v. Handy*, 570 F. Supp. 2d 437, 480 (E.D.N.Y. 2008).

⁴³ See, e.g., [Defenders’ Annual Letter to the USSC](#) at 7 (May 21, 2026); [Statement of Deirdre D. von Dornum on behalf of Defenders to USSC on Circuit Conflicts](#) at A-15-19 (Feb. 27, 2024); [Defenders’ Comment on the USSC’s 2023 Firearms Offenses Proposed Amendments](#) at 20–27 (Mar. 14, 2023); [Defenders’ Annual Letter to the USSC](#) at 9-11 (Sep. 14, 2022).

To the Commission's credit, the Commission has increasingly included *mens rea* requirements in upward adjustments in recent years.⁴⁴ Continuing this trend here would not contravene Congress's directive. Rather, the directive is silent as to *mens rea*, which "by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element."⁴⁵ Quite the opposite, the Supreme Court has "repeatedly held that mere omission from a criminal enactment of any mention of criminal intent should not be read as dispensing with it."⁴⁶

III. Section 3B1.6(b): The Commission should define "use" as more than mere possession and include language to prevent double counting.

In bracketed text at §3B1.6(b)(2), the Commission proposes to clarify that a person does not "use" a drone for purposes of the adjustment by merely possessing it. The Commission should include this language, which is fully consistent with the ordinary meaning of the term "use." "Use" requires not just possession but employing or seeking to benefit from the thing being used.⁴⁷ This language is also consistent with how the Commission

⁴⁴ See, e.g., USSG App. C, [Amend. 833](#), Reason for Amendment (Nov. 1, 2025) (altering but maintaining *mens rea* requirement for fentanyl misrepresentation); USSG App. C, [Amend. 819](#), Reason for Amendment (Nov. 1, 2023) ("The Commission determined that the [privately manufactured firearms enhancement] should apply only to those defendants who knew or consciously avoided knowing that the firearm was not marked with a serial number."); USSG App. C, [Amend. 801](#), Reason for Amendment (Nov. 1, 2016) (resolving circuit split over whether child pornography distribution enhancement required knowing *mens rea* in favor of including *mens rea*).

⁴⁵ *Staples v. United States*, 511 U.S. 600, 605 (1994).

⁴⁶ *Elonis*, 575 U.S. at 734 (cleaned up).

⁴⁷ See [Use](#), Merriam-Webster Dictionary (defining "use" as, *inter alia*, "to put into action or service," "to benefit from the use of," and "to carry out a purpose or action by means of").

distinguishes the terms “use” and “possession” in other contexts.⁴⁸ Nothing in the SAFER SKIES Act requires “use” to reach passive presence.

Further, §3B1.6(b) should include language to prevent double counting given that there are already SOC’s in the Manual that could potentially be interpreted to reach the use of a drone.⁴⁹ Thus, the Commission should add a new provision stating:

(3) If the conduct establishing an adjustment under this provision is the conduct establishing an enhancement under Chapter Two or Chapter Three, apply the greater of the adjustment or this provision.

Because of the directive’s requirement that the Commission increase sentences for using drones by at least 4 or 6 levels, the Commission is likely foreclosed from allowing another provision to result in a lower offense level increase than §3B1.6. Defenders’ proposed language ensures that this won’t happen—meeting the directive’s mandate without going beyond it.

IV. The Statutory Index should make clear that §2A5.2 applies only to second and subsequent violations of 49 U.S.C. § 46307.

Finally, the Commission proposes to amend Appendix A (the Statutory Index) to reflect the new statutory maximum applicable to second and subsequent convictions under 49 U.S.C. § 46307.⁵⁰ Presently, the Statutory Index refers all violations of § 46307 to §2X5.2, the guideline applicable to misdemeanors not covered by a different guideline. This was appropriate prior to the SAFER SKIES Act, as all § 46307 convictions were previously

⁴⁸ See, e.g., USSG §2B3.1(b)(2) (distinguishing brandishing and possessing a dangerous weapon or firearm from using a dangerous weapon or firearm and providing a greater adjustment for use).

⁴⁹ In IFC #3, the Commission identified several such SOC’s, including §§2D1.1(b)(3)(A) (importing or exporting controlled substances with certain aircraft), 2B1.1(b)(10)(C) (sophisticated means in a fraud offense), 2T3.1(b)(1) (involving sophisticated means when evading import duties or receiving/trafficking smuggled property), and 3B1.3 (abuse of position of trust or use of special skill).

⁵⁰ See IFC #5 (asking whether this reference is the appropriate approach).

misdemeanors. After the Act, first offenses remain misdemeanors, but subsequent violations are now felonies carrying a five-year maximum prison term. Thus, the Commission proposes to refer subsequent violations to §2A5.2 by adding that guideline to the Statutory Index entry for § 46307 alongside the current §2X5.2 reference.

Defenders agree that §2A5.2 is the best fit for subsequent convictions; however, as done elsewhere in the Appendix, the Commission should clarify that this provision applies only to subsequent (felony) convictions. We propose the following:

49 U.S.C. § 46307	2X5.2,
	2A5.2 (felony provision only)

This would ensure that courts do not erroneously apply §2A5.2 to the misdemeanor version of the offense.⁵¹

V. Conclusion

Complying with the SAFER SKIES Act will necessarily require the Commission to abdicate the exercise of its characteristic institutional role to carefully consider and study proposed guideline changes before enacting them. Defenders urge the Commission to do the least harm by adhering closely to the statutory directive's lowest mandated increases.

We appreciate the Commission's consideration of our views and look forward to continuing to work together to improve federal sentencing policy.

⁵¹ The Statutory Index includes other parenthetical clarifications, like for 7 U.S.C. § 2156 and 18 U.S.C. § 1716, which clarify that the guideline references pertain to "felony provisions only," and 18 U.S.C. § 1001, which directs courts to §2B1.1 generally, but instead to §2J1.2 when the same provision triggers a different statutory maximum.

Hon. Carlton W. Reeves
June 18, 2026
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Very truly yours,



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