

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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July 27, 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 Priorities for the 2026-2027 Amendment Cycle

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide comments on the Commission's 2026-27 proposed priorities.¹ In light of the 40th anniversary of the *Guidelines Manual* and the 30th anniversary of the Commission's Rules of Practice and Procedure, the Commission aims to reexamine the guidelines and federal sentencing practices and to review its internal operating procedures with an eye toward greater public transparency and public involvement.² We welcome these laudatory goals.

Because the Commission has set its proposed priorities largely around process (as opposed to specific guideline changes), this letter, too, focuses primarily on public engagement, transparency, and other process concerns. Should the Commission ultimately decide to take up substantive guidelines issues this amendment cycle, Defenders encourage the Commission to revisit the suggested guideline reforms in our May 2026 Annual Letter.³

¹ [Proposed Priorities for 2026-2027 Amendment Cycle](#) (June 10, 2026).

² See *id.* at Proposed Priorities 1 & 2.

³ See [Defenders' Annual Letter to the USSC](#) at 1-15 (May 21, 2026).

I. The Commission should correct a longstanding imbalance of viewpoints by adding a defender representative during this amendment cycle.

The Commission's membership structure has long been criticized for including a DOJ *ex officio* member without a comparable role for Federal Defenders.⁴ For many years, Defenders have urged the Commission to support legislation to formally end this imbalance by adding a Defender *ex officio*. For nearly as long, we have encouraged the Commission to use its existing authority to at least reduce the imbalance by inviting a defender representative to participate in the Commission's work. Indeed, adding a defender representative would bring the Commission in line with the Judicial Conference's practices: Defenders are represented on each of the Conference's three criminal rules-related committees,⁵ and the Conference's Committee on Criminal Law includes a non-voting Defender liaison.

In this regard, Defenders are heartened to see themes of public engagement, transparency, and the structure of stakeholder involvement in the Commission's first two proposed priorities. With this pair of proposed priorities, the Commission can vocally support pending legislation to add a Defender *ex officio*,⁶ and can add a defender representative in the interim (or at least seek public input about whether to do so).

⁴ See, e.g., Rachel E. Barkow, *The Evolving Role of the United States Sentencing Commission*, 33 Fed. Sent. Rep. 3, 4, 9 (2020); Mark Osler & Hon. Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DePaul J. for Soc. Just. 117, 165-66 (2014); 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 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, 322 (2011); Hon. John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Plea Sentence Bargains*, 36 Hofstra L. Rev. 639, 646 (2008).

⁵ Judicial Conference of the United States, [List of Committee Members PDF, June 1, 2026 – Sept. 30, 2026](#) at 5, 10, 12 (listing Federal Public and Community Defenders as voting members of advisory committees on the rules of appellate procedure, criminal procedure, and evidence).

⁶ [Sentencing Commission Improvements Act](#), S. 4136, 119th Cong. (2026) (adding a Federal Public or Community Defender as an *ex officio* nonvoting member

Defenders have spoken and written at length about how the Commission can, and why it should, add a defender representative, and we urge you to revisit those letters.⁷ Importantly, nothing in the SRA restricts Commission members from granting defenders access to non-public meetings and materials. Quite the opposite, the SRA expressly empowers the Commission to create its own rules of practice and procedure.⁸ The Commission has rightly understood that power as allowing it to shape who it meets with,⁹ what materials it considers,¹⁰ and which internal materials become available to others.¹¹ Adding a defender representative simply

of the U.S. Sentencing Commission). Of note, this legislation would align the Commission with essentially every state sentencing commission. Among the 23 states with active sentencing commissions, 14 specifically mandate a public defender representative, including [Connecticut](#), [Delaware](#), [D.C.](#), [Illinois](#), [Kansas](#), [Louisiana](#), [Maryland](#), [Massachusetts](#), [Minnesota](#), [Missouri](#), [Nevada](#), [New Mexico](#), [Ohio](#), and [Virginia](#). Another 8 states—[Alabama](#), [Arkansas](#), [New York](#), [North Carolina](#), [Oregon](#), [Pennsylvania](#), [Utah](#), and [Washington](#)—mandate a criminal defense attorney representative, whether from the public or private defense bars. The only active sentencing commission without a mandatory defense presence is West Virginia. However, West Virginia’s Sentencing Commission is a subcommittee of the broader Governor’s Committee on Crime, Delinquency, and Correction (*see* W.Va. Code § [15-9-1](#), [15-9-4](#)), which is required to include a public defender. *Id.* § [15-9-1\(b\)\(11\)](#).

⁷ In addition to letters to the Commission outside of the public comment process dated August 29, 2024, August 11, 2023, and as long ago as April 13, 2007, Defenders have regularly encouraged the Commission to create a Defender representative and support a statutory *ex officio* in numerous amendment cycle comments. *See, e.g.*, [Defenders’ 2025 Annual Letter to the USSC](#) at 12-14 (May 16, 2025); [Defenders’ 2022 Annual Letter to the USSC](#) at 27-28 (Sep. 14, 2022); [Defenders’ Comment on the USSC’s 2012-2013 Proposed Priorities](#) at 36-38 (July 23, 2012).

⁸ *See* 28 U.S.C. § 995(a)(1) (empowering the Commission to “establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out” its duties). *Accord generally* USSC, [Rules of Practice & Procedure](#) (Aug. 18, 2016) (relying upon 28 U.S.C. § 995(a)(1) as authority for same).

⁹ *See, e.g.*, Commission Rule 3.3(3) (authorizing nonpublic commission meetings); *cf.* Rule 4.3 (establishing the Commission’s own limitation on *ex parte* communications).

¹⁰ *See, e.g.*, Commission Rule 5.3 (directing Staff Director to prepare “relevant data, reports, and other information for consideration by the Commission”).

¹¹ *See id.* (authorizing Staff Director to make Rule 5.3 materials publicly available); *see also* Commission Rule 6.2 (identifying a discrete set of materials

involves bringing the Defender program more formally within the reach of these rules.

And doing so makes sense: a defender representative would assist the Commission in preparing amendments and other publications by providing a “distinct and essential perspective,”¹² which is sometimes missing at crucial stages in your process. Sentencings are adversarial proceedings, often involving significant debate over how to interpret guideline provisions and whether to abide by their recommendations. Without Defender feedback, Commissioners risk overlooking key details of these debates, which could impact implementation.

II. As the Commission considers the state of the Federal Guidelines system at this pivotal 40-year mark, it should engage with a broad and diverse array of stakeholders.

The Commission proposes to evaluate the federal guidelines system considering the statutory purposes of sentencing, relevant legal developments, and its mission as set forth in the SRA. It identifies a variety of means to do so, including “regional public hearings, symposiums, roundtable discussions, conferences, and other tools”¹³ Defenders encourage this work and offer additional ideas to ensure its success.

Defenders commend the Commission for engaging meaningfully with impacted people over the last several amendment cycles, through its impacted witness panels and the creation of its Sentence Impact Advisory Group. But, for a more complete and current picture of how its sentencing policies impact people, the Commission should hear from *currently* incarcerated people of varying custody levels and in diverse geographic regions. Thus, in addition to holding regional hearings, roundtables,

always available for public review); USSC, [Public Access to Sentencing Commission Documents & Data](#) (Aug. 2018).

¹² Press Release, Sen. Cory Booker, [Booker and Durbin Introduce Legislation Aimed at Increasing Membership within the U.S. Sentencing Commission](#) (Nov. 30, 2021).

¹³ [2026-2027 Proposed Priorities](#) at Priority 1.

conferences and the like, we urge the Commission to visit BOP facilities and halfway houses.

During these visits, the Commission should tour BOP facilities (with eyes wide open and a healthy amount of skepticism). Defenders have written extensively about the Commission’s statutory obligation to factor prison capacity into its policy decisions.¹⁴ While the public record speaks for itself—depicting a federal prison system that is overcrowded, understaffed, inhumane, and dangerous¹⁵—it is imperative that Commissioners explore facilities for themselves, while doing their best to avoid an overly curated experience. For instance, Commissioners could ask to see spaces beyond itineraries, to taste the food, to sit in a cell, and to have the door slam closed. It would be useful for Commissioners to experience a sliver of what incarcerated people experience all day, every day, while bearing in mind the comfort that comes from knowing the visits are limited in duration.

Beyond prison visits, the Commission should explore sentencing practices in districts of varying sizes across the country. With 94 judicial districts and hundreds of sentencing judges, “standard” practices are anything but standard. Commissioners should investigate variation in Guideline adherence and other sentencing practices by meeting with attorneys and judges around the country and observing sentencings in geographically and culturally diverse districts (*i.e.*, in large urban areas like New York City, high-volume border districts, and rural small-caseload courtrooms in middle America). At each venue, the Commission should invite certain stakeholders to attend or, at a minimum, publicly memorialize its conversations and observations.

¹⁴ See, e.g., [Defenders’ Comment on the USSC’s 2025 Proposed Drug Offense Amendments](#) at 8-13 (Mar. 3, 2025) (describing crises within the Bureau of Prisons and the Commission’s statutory obligations to avoid overcrowding).

¹⁵ See, e.g., DOJ Office of the Inspector General, [Top Management and Performance Challenges Facing the DOJ](#) at 1-6 (2024) (describing widespread staffing shortages, crumbling infrastructure, and contraband as among the many challenges facing the Bureau of Prisons); BOP Press Release, [Federal Bureau of Prisons Announces Facility Closures and Operational Changes](#) (July 1, 2026) (discussing closures of 6 lower security facilities “to address decades of deferred maintenance and extreme staffing challenges,” meaning fewer facilities will be available for the same or increasing numbers of incarcerated individuals).

Following these road trips, the Commission might augment its research agenda and reports with its newfound insights and consider what, if any, policy changes these insights compel.¹⁶ Defenders would, of course, welcome the opportunity to be involved in this process.

III. The Commission should provide more information to the public.

As its second proposed priority, the Commission may examine its own Rules of Practice and Procedure to determine how it can enhance transparency and public engagement. Defenders encourage the Commission to adopt this priority and amend its rules to create a default policy of widely sharing all materials the Commission considers in preparing its research reports, special coding projects, impact analyses, proposed and final amendments, and other tools and publications.¹⁷ As Defenders have long asked, this includes providing greater transparency in the Commission's data collection and publication processes by releasing the "dynamic" dataset underlying the JSIN tool, refining certain variables in its Individual Datafiles to avoid user confusion, and routinely collecting and publishing data on probation and supervised release revocation proceedings.¹⁸

¹⁶ As we advocated in our Annual Letter, the Commission should also update its data and research publications on supervised release and alternatives to incarceration—two topics Commissioners might pay particular attention to as it tours courtrooms. [Defenders' 2026 Annual Letter to the USSC](#) at 14-15.

¹⁷ While not the focus of this letter, Defenders have previously urged two other rule changes to improve the guideline amendment process, and we continue to do so. *First*, the Commission should remove language from Rule 4.1A that some advocates and Commissioners have treated as establishing a substantive presumption against making retroactive ameliorative guideline amendments. See [Defenders' Comment on the USSC's Criteria for Selecting Guideline Amendments Covered by §1B1.10](#) at 14-18 (Apr. 18, 2025) (listing reasons why there should not be a presumption against retroactivity). *Second*, the Commission should codify a routine practice of revising its loss tables to account for inflation. See [Defenders' Comment on the USSC's 2026 Proposed Amendment](#) on Inflationary Adjustments at 6 (Feb. 10, 2026).

¹⁸ See, e.g., [Defenders' Comment on the USSC's 2025-2026 Proposed Priorities](#) at 28-30 (July 18, 2025); Letter of Heather Williams & Tina Woehr to Sean Marlaire Re: Revised Statement of Reasons Form (July 17, 2025) (urging PPSO Criminal Law Policy Division to work with the Sentencing Commission to ensure Statement of Reasons form captures more information regarding judicial decisions on sentences). To the extent that further public access requires revisiting the Commission's

Compared with most other agencies, the Commission has an unusual amount of discretion over what it shares with the public. While the Commission must adhere to the Administrative Procedure Act's notice and comment rulemaking requirements,¹⁹ it is not subject to the APA's lawsuit provisions or the Freedom of Information Act.²⁰

But the Commission should not allow what it *must* share to limit what it *does* share. As an example, compared to most government agencies, the Commission creates a paltry public record of its decisions. Significantly, and unlike other agencies, the Commission's record provides little if any insight into the Commission's intentions and resolutions of disputed issues. It explains its proposed amendments but often does so by referring to others' contentions instead of the Commission's own interests.²¹ The Commission releases some data presentations, but not for every amendment and with much of its underlying data unavailable for exploration.

The Commission holds hearings on many, but not all, amendments. And the hearings on each topic are relatively abbreviated, typically consisting of brief panels that include a standard set of participants. Likewise, those panels are not optimal for a fruitful back-and-forth discussion among Commissioners and participants. Rather, Commissioners question panelists, who must think on their feet, and panelists do not always have the opportunity to respond to one another (much less collaborate with one another). The Commission votes in public, but typically only on amendments it adopts. It only rarely explains its decisions, which sometimes include major changes from the originally proposed amendments. And while the

Memorandum of Understanding with the Administrative Office of the U.S. Courts, *see* USSC, [Public Access to Sentencing Commission Documents & Data](#) at 6-7 (2018), Defenders encourage it to do so. *See, e.g.,* [Defenders' Comment on the USSC's 2024-2025 Proposed Priorities](#) at 16-17 & n. 42 (May 15, 2024) (asking Commission to revisit its 1988 data-sharing agreement with the AO).

¹⁹ 28 U.S.C. § 994(x).

²⁰ *See generally* § 991 *et seq.*

²¹ *See, e.g.,* [2026 Proposed Guidelines Amendment, Career Offender](#) at Synopsis (Jan. 30, 2026) (detailing comments and criticism regarding Career Offender received over the years without expressing Commission's opinion about the same).

Commission produces reasons for the amendments, those explanations often pale in comparison to other agencies' rulemaking justifications.²²

This record falls far short of what other rulemaking agencies regularly produce. In contrast to the Commission, an ordinary agency's administrative record consists of "all materials that might have influenced the agency's decision."²³ This means an administrative record will usually "include all documents and materials that the agency directly or indirectly considered"²⁴ Though subject to limitations like the deliberative process and attorney-client privileges, this requirement is expansive. Administrative agencies regularly disclose materials far beyond the Commission's ordinary record, including internal memoranda and documents considered and relied upon by agency subordinates who provided recommendations on decision-making.²⁵

This lack of access to, and transparency in, the Commission's process really matters. The Commission's policies directly shape the lives and liberty of tens of thousands of individuals sentenced for federal crimes every year and impact those individuals' families and broader communities. Public confidence in our criminal legal system is crucial to its efficacy, and the Commission can increase public confidence in our federal sentencing system by ensuring the public fully understands its decisions. Thus, the Commission should share with the public as much information as possible, while

²² For example, APA-bound agencies often produce hundreds of pages explaining their rulemaking and include direct responses to comments lodged during the notice and comment period. *See, e.g.,* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (providing 217-page explanation and justification for eventually enjoined and rescinded immigration rule).

²³ *See, e.g., Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989); *Forest County Potawatomi Community v. United States*, 270 F. Supp. 3d 174, 178 (D.D.C. 2017).

²⁴ *Forest Cty Potawatomi Community*, 270 F. Supp. 3d at 178.

²⁵ *See Regents of the Univ. of Cal. v. DHS*, No. C 17-05211, 2017 WL 4642324, at *2 (N.D. Cal. Oct. 17, 2017) (noting an administrative record includes "not only documents that literally passed before the eyes of the final agency decision maker but also documents that were considered and relied upon by subordinates who provided recommendations to the decision-maker" (cleaned up)).

simultaneously aiming to level the playing field between the DOJ (with its much broader access to internal materials) and the rest of the public.²⁶

IV. There should be no rush to amend §1B1.13(b)(6).

The Commission proposes as a third priority, “Consideration of any amendments that may be warranted in response to any . . . case law developments.” Defenders presume the Commission may be considering amending its reduction-in-sentence policy statement at §1B1.13(b)(6) following the Supreme Court’s decision in *Rutherford v. United States*.²⁷ However, no immediate action is needed. *Rutherford* did not invalidate §1B1.13(b)(6); it simply held that “Congress’s nonretroactive change to § 924(c)—considered by itself or in combination with other factors—cannot make a [person] eligible for compassionate release” under 18 U.S.C. § 3582(c)(1)(a) and §1B1.13(b)(6).²⁸ Lower courts are currently considering whether and how *Rutherford* impacts other types of claims that might be raised under §1B1.13(b)(6). The Commission should let this litigation play out and decide, at a later time, whether and how to respond.²⁹

²⁶ This is not to say the Commission should prepare a litigation-ready administrative record at every instance, but it should take steps to narrow the wide gulf between the public’s access to the Commission’s work and that of other administrative bodies. If the Commission is hesitant to expand public disclosures, it should, as a lesser measure, provide more of this information to Defenders and its advisory groups, who are obligated by statute and the Commission’s rules to provide input on the Commission’s proposed policies. To most thoroughly and effectively do so, these groups must be fully informed.

²⁷ 146 S. Ct. 1320 (2026).

²⁸ *Id.* at 1335.

²⁹ If the Commission chooses to amend this policy statement now, at most it should add language to §1B1.13(b)(6) clarifying that non-retroactive changes in sentencing law cannot render a person eligible for a sentence reduction under § 3582(c)(1)(A) (although they can be considered as part of the discretionary § 3553(a) analysis, where other “extraordinary and compelling reasons” exist). *Rutherford v. United States*, 146 S. Ct. 1320, 1333 (2026); *see also* Br. of the United States, *Rutherford v. United States*, 2025 WL 2808970, at *37 (Sept. 25, 2025) (explaining why it is acceptable for courts to consider non-retroactive legal changes at the second, discretionary phase of the analysis, although according to the government it was not acceptable to consider such changes at the first, eligibility phase).

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

Very truly yours,



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Federal Public Defender
Chair, Federal Defender Sentencing
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Sentencing Resource Counsel
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