

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](#)).

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 Priorities](#) 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.

Hon. Carlton W. Reeves

October 26, 2026

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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