

**Federal Public and Community Defenders
Comment on Proposal to Amend USSG §1B1.13
(Proposal 1)**

March 14, 2023

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At the recent hearing on reductions in sentence under 18 U.S.C. § 3582(c)(1)(A), the witness who spoke on behalf of Federal Public and Community Defenders (Kelly Barrett, First Assistant Federal Defender for the District of Connecticut) focused on the amended §1B1.13 as proposed. As Attorney Barrett said both in her written testimony (attached) and at the hearing, Defenders are generally very pleased with the proposed amendments. We have suggested changes to a few provisions, to ensure that they encompass all circumstances that may be extraordinary and compelling, and we've also explained why we think the third option for the proposed subsection (b)(6) is best. But the Commission is on the right track.

This Comment builds on Attorney Barrett's testimony by speaking to three matters that Defenders have not yet addressed. First, the Comment answers the legal questions the Commission posed in its issues for comment on §1B1.13:

- whether the proposed amendment—in particular proposed subsections (b)(5) and (b)(6)—exceeds the Commission's authority under 28 U.S.C. § 994(a) and (t), or any other provision of federal law; and
- whether the proposed amendment—in particular proposed subsections (b)(5) and (b)(6)—is in tension with the Commission's determinations regarding retroactivity of guideline amendments under §1B1.10.

In addressing these questions, we are mindful of arguments raised at the recent hearing regarding, *inter alia*, 28 U.S.C. § 2255, retroactivity doctrine, and separation of powers. After thorough consideration, we have no doubt that the Commission has the legal authority to promulgate §1B1.13 as proposed, including (b)(5) and any of the options for (b)(6).

Second, this Comment addresses a handful of issues related to the proposed enumerated categories (other than (b)(5)) that were raised at the recent hearing, in order to clarify Defenders' positions.

Third, this Comment discusses how the proposed amendments reflect sound policy. Again, we focus on concerns raised around the recent hearing: the circuit conflict over legal changes; finality and certainty in sentencing; and the burden that § 3582(c)(1)(A) motions may place on federal courts.

I. Congress granted the Sentencing Commission broad policy-making authority to describe what should be considered “extraordinary and compelling.”

“Extraordinary and compelling,” by its terms, is a broad, inclusive standard, which this Commission is charged with fleshing out. Some have argued that § 3582(c)(1)(A) has some very significant limitations (beyond the “rehabilitation alone” limitation), but those arguments aren’t grounded in statutory text or legislative history. Instead, they are grounded in decades of federal practice and culture, which developed in the shadow of the Bureau of Prison’s policy decision not to file sentence-reduction motions except in the direst medical cases. But neither the BOP’s inaction in this space nor the Commission’s past quiescence have limited the terms of the governing statutes or the Commission’s authority.

A. As a matter of plain text, “extraordinary and compelling” is broad, adaptable, and inclusive.

The “preeminent canon of statutory interpretation” holds that “the legislature says in a statute what it means and means in a statute what it says there.”¹ Section 3582(c)(1)(A)’s text uses broad, adaptable language for its threshold standard: “extraordinary and compelling reasons.” It also requires that any reduction under the provision be “consistent with applicable policy statements issued by the Sentencing Commission.” And elsewhere, Congress instructed the Commission to

describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.²

Putting these together, the inclusive standard, “extraordinary and compelling,” has no limitations other than that “rehabilitation . . . alone” cannot justify a sentence reduction. The Sentencing Commission is tasked with elaborating on this standard and guiding courts in applying it.

¹ *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (cleaned up).

² 28 U.S.C. § 994(t).

As Attorney Barrett discussed at the recent hearing, this is *not* a “compassionate release” statute.³ By its terms, § 3582(c)(1)(A) is not—and never has been—limited to medical conditions or the like. It isn’t limited to circumstances that are personal to the defendant either. Section 3582(c)(1)(A) is capable of encompassing any circumstance—factual or legal—that an English-speaker would say was *extraordinary* (“beyond what is usual”; “exceptional”) and *compelling* (“tending to compel”; “having a powerful and irresistible effect”) in the sentence-reduction context,⁴ as guided by the Commission’s policy choices.

B. Legislative history supports this plain-text reading of § 3582(c)(1)(A).

The legislative history of § 3582(c)(1)(A), which was enacted as part of the Sentencing Reform Act of 1984 (“SRA”), confirms that Congress’s intent was not to create a narrow mechanism akin to state compassionate-release statutes. Instead, Congress meant to create what it did in fact create: an inclusive judicial sentence-reduction mechanism. And it tasked the Commission with describing what sorts of circumstances could trigger that mechanism.

At this point, the Commission has seen several references to the main Senate Report discussing the SRA, which described § 3582(c)(1)(A) as a “safety valve” that would apply

regardless of the length of sentence, to the unusual case in which the defendant’s circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner.⁵

³ Compare 18 U.S.C. § 3582(c)(1)(A) with, e.g., Conn. Gen. Stat. § 54-131k (“Compassionate parole release”); Kan. Stat. § 22-3728 (“Functional incapacitation release”); Md. Code. Ann., Corr. Servs. § 7-309 (“Medical parole”); N.J. Rev. Stat. § 30:4-123.51e (“Compassionate release”). Similar statutes exist in most states, providing a mechanism for release from prison based on a very serious medical condition or advanced age.

⁴ *The Random House Dictionary of the English Language* 417, 686 (2d ed. unabridged 1987).

⁵ S. Rep. No. 98-225, at 121 (1983), as reprinted in 1984 U.S.C.C.A.N. 3304; available at <https://www.ojp.gov/pdffiles1/Digitization/93948NCJRS.pdf>.

Elsewhere in this Report, the SRA’s drafters said, similarly, that § 3582(c)(1)(A) was intended to apply to “unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances,” including “cases of severe illness” and also “cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence.”⁶

Thus, § 3582(c)(1)(A) was specifically designed to permit sentence reductions not only for medical circumstances, but also for “other” extraordinary and compelling circumstances.⁷

And this safety valve, along with the other safety valves at § 3582(c), may have been essential to the SRA’s enactment. The Senate Report, which was issued the year before passage, notes that there were those “who would retain parole on the ground that it was a valuable ‘safety valve’ designed to shorten lengthy sentences.”⁸ It describes congressional testimony explaining that parole was “really unnecessary in order to deal with that occasional case where, in a determinate sentencing scheme, an offender receives a sentence which turns out to be manifestly unfair or ‘wrong,’ particularly in light of post sentence developments.”⁹ And it explains that § 3582(c)(1)(A) would serve this purpose, as a “safety valve” within the new sentencing scheme.¹⁰

C. Decades of inaction by the BOP did not alter the original meaning of “extraordinary and compelling.”

Nearly 40 years after Congress enacted the SRA, some legal actors are having a hard time accepting that Congress would enact an open-ended judicial sentence-modification provision as part of an act that created a determinate sentencing scheme—even in the face of both plain text and clear legislative history. This is likely because § 3582(c)(1)(A) was essentially dormant for most of those years, due to the BOP’s policy decision to file

⁶ *Id.* at 55–56.

⁷ *See id.*

⁸ *Id.* at 46–47 n.34.

⁹ *Id.* at 53–54 n.74 (citing congressional testimony presented in 1979 by Judge Harold Tyler).

¹⁰ *See id.* at 55–56.

§ 3582(c)(1)(A) motions in only the most dire medical cases.¹¹ We have been living with determinate sentencing all that time, and have come to understand it as a system in which sentences are reduced on the back end for just one reason: good time credit.

This is not a rule from on high. In Wisconsin, for example, the state legislature enacted a determinate sentencing scheme in the late 1990s (known there as “truth in sentencing,” or “TIS”) in which not only parole but also good time credit was abolished.¹² But that state’s common-law system of judicial sentence reduction, which predated TIS, never went away.¹³ Indeed, rather than abolishing the common-law scheme, a year into TIS the state legislature—a legislature committed to truth in sentencing—added a second, statutory mechanism for judicial sentence reduction.¹⁴ So, in Wisconsin, a determinate sentencing system is one in which sentences are reduced on the back end for just one reason: judicial sentence reduction.

This is not to advocate for Wisconsin law. It is to illustrate that it is federal culture and practice that cause some to treat determinate sentencing as incompatible with judicial sentence reduction. And it is federal culture and practice that’s likely the origin of the notion that a plain-language interpretation of § 3582(c)(1)(A) somehow violates the SRA—although § 3582(c)(1)(A) is part of the SRA.

When Congress was drafting § 3582(c)(1)(A) in the early 1980s, in contrast to now, drafters were not operating with a backdrop of 30-plus years

¹¹ See *United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020) (describing the history of BOP’s inaction under § 3582(c)(1)(A)).

¹² See Michael B. Brennan et al., *Fully Implementing Truth-in-Sentencing*, 75-Nov. Wis. Law. 10, at 10, 15 (2002).

¹³ See Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 Wm. & Mary L. Rev. 465, 521 (2010) (“[A]lthough [Wisconsin] abolished parole and good time credit in 1999, it never abandoned the practice of sentence modification or imposed any legislative restrictions on its use.”). Under the Wisconsin system, the sentencing court may (as a matter of discretion) modify a sentence if it finds that there is a circumstance that is highly relevant to the sentence that was not known to the court at the time of original sentencing, or if the sentence is “unduly harsh or unconscionable.” *State v. Harbor*, 797 N.W.2d 828, 837–38 & n.8 (Wis. 2011).

¹⁴ See *id.*; see also Wis. Stat. § 973.195 (“Sentence Adjustment”).

of federal practice and culture influenced by BOP inaction on sentence-reduction motions. Instead, Congress was drafting § 3582(c)(1)(A) with the backdrop of a parole system in which the sentencing court had limited control over the sentence an individual would actually serve. In most cases, a person became eligible for parole after serving one-third of the imposed sentence, with the parole decision focused on rehabilitation.¹⁵

Judicial sentence reduction (in just about any form) looks nothing like the parole system that the SRA abolished. Judicial sentence reduction has “deep historical roots.”¹⁶ The Supreme Court approved of it back in 1931, in rejecting a government argument that the practice invaded the executive branch’s commutation power.¹⁷ And prior to passage of the SRA, federal law had two judicial sentence-reduction provisions: the old Fed. R. Crim. P. 35 and 18 U.S.C. § 4205(g). These provisions operated differently, but each gave sentencing courts broad authority to reduce sentences—including based on legal, rather than purely factual, circumstances.¹⁸

Congress, of course, repealed the old Rule 35 and § 4205(g). Section 3582(c)(1)(A) is narrower: there must be “extraordinary and compelling” circumstances; any reduction must be consistent with Commission policy statements; and rehabilitation alone is insufficient. But when Congress enacted the SRA it would have understood that parole and judicial sentence reduction were very different, such that it is entirely sensible that Congress

¹⁵ See S. Rep. No. 98-225, *supra* note 5, at 38–40.

¹⁶ Klingele, *supra* note 13, at 498.

¹⁷ See *United States v. Benz*, 282 U.S. 304, 311 (1931).

¹⁸ See, e.g., *United States v. Diaco*, 457 F. Supp. 371, 376 (D.N.J. 1978) (reducing a sentence under § 4205(g) based on disparities among co-defendants); *United States v. Noriega*, 40 F. Supp. 2d 1378, 1380 (S.D. Fla. 1999) (reducing a sentence under Rule 35 based on the “nature of the confinement” and “the considerable disparity between Defendant’s sentence and the sentences actually served by his co-conspirators”); *United States v. Vaughn*, 598 F.2d 336, 337 (4th Cir. 1979) (referring to the district court’s grant of a Rule 35 motion based on the defendant’s “positive change” post-sentencing); see also *United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir. 1968) (“Rule 35 is intended to give every convicted defendant a second round before the sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim.”).

would eliminate the former but retain the latter.¹⁹ It is only decades later—decades during which the BOP thoroughly neglected § 3582(c)(1)(A)—that the various parts of the SRA now strike some as discordant.

D. Prior policy statements also did not alter the original meaning of “extraordinary and compelling.”

Legal actors and courts may be influenced in their thinking on § 3582(c)(1)(A) not only by the BOP’s decades of inaction, but also by the fact that §1B1.13 has never enumerated any “extraordinary and compelling” circumstances outside of the health, age, and family contexts. But the history of §1B1.13 shows that this, too, goes back to the BOP’s inaction.

For well over 20 years, there was no policy statement regarding § 3582(c)(1)(A). The Commission prioritized the matter in 2006 but ultimately promulgated a policy statement that did no real work:

A determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of subdivision (1)(A).²⁰

This was just an “initial step,” with the Commission intending to further describe the criteria for § 3582(c)(1)(A) in the next amendment cycle.²¹

For the next amendment cycle, the American Bar Association submitted a proposed §1B1.13 that had some similarities with the current

¹⁹ Professor Klingele has explained that judicial sentence reduction has significant advantages over parole. First, the process is more transparent: proceedings occur on the record, in the jurisdiction where the crime occurred, with both parties and any victim able to weigh in and the sentencing court required to justify the reduction. *See* Klingele, *supra* note 13, at 515–16. Second, the process promotes accountability: proceedings “invite[] the offender to revisit in a concrete way his offense and the community in which he committed it,” and also enhance judicial accountability. *Id.* at 517. “Moreover, to the degree that the early release decision invites reexamination of the normative question of whether the offender has been sufficiently punished for his offense, courts—not parole boards—have traditionally been arbiters of justice with respect to the outer limits, at least, of the quantum of punishment merited in any given case.” *Id.* at 535.

²⁰ USSG §1B1.13 comment. (n. 1(A)) (2006).

²¹ *Id.* at comment. (“Background”).

proposal, including that it covered certain legal changes.²² The government, in contrast, asked the Commission essentially to cede policymaking to the BOP, which filed § 3582(c)(1)(A) motions only in the rarest medical cases. The government acknowledged in its submission to the Commission that the statute was not limited to medical circumstances.²³ But it said that if the Commission were to issue a policy statement that went beyond the sorts of cases in which the BOP would file motions, “[a]t best,” that policy statement “would be a dead letter.”²⁴ “At worst,” it would incite prisoners to file lawsuits against the BOP.²⁵

The government went on to discuss policy justifications for the BOP’s inaction on § 3582(c)(1)(A). In the government’s view, in order to promote finality and certainty in sentencing, § 3582(c)(1)(A) should be used only in cases of terminal illness with a life expectancy of one year or less or in cases of profound disability (like a vegetative state).²⁶ With terminal illness, the person’s imprisonment would soon end anyway, at his death.²⁷ And with profound disability, upon release, the person would nevertheless

carr[y] his prison in his body and mind, and will not in any event be living in freedom in any ordinary sense if released from a correctional hospital facility to be cared for in some other setting.²⁸

In other words, according to the government, a sentence reduction in these circumstances was acceptable specifically because it would not afford an incarcerated individual any meaningful relief.

²² See Letter from Robert D. Evans on behalf of the ABA to the U.S. Sentencing Comm’n, attach. (July 12, 2006) (detailing proposed §1B1.13 policy statement for sentence-reduction motions under § 3582(c)(1)(A)), *available at* <https://bit.ly/3ZOzOdY>.

²³ See Letter from Michael J. Elston on behalf of the DOJ to the Sentencing Comm’n, at 2 n.1 (July 14, 2006), *available at* <https://bit.ly/3mxN3RW>.

²⁴ *Id.* at 4.

²⁵ *Id.*

²⁶ See *id.* at 3–4.

²⁷ See *id.* at 4.

²⁸ *Id.*

The Commission in 2007 ultimately promulgated a more descriptive §1B1.13, but one that was quite narrow and deferential to the BOP.²⁹ This did not, of course, alter the governing statute.

In 2016, Defenders advocated for amendments to §1B1.13 that might encourage the BOP to file more motions.³⁰ The government continued to urge the Commission to defer to the BOP, suggesting that since the BOP was the gate-keeper, §1B1.13 should simply cross-reference the BOP’s “Reduction In Sentence” program statement.³¹ The Commission ultimately adopted the broader §1B1.13 that currently is in effect—at least, it’s in effect as applied to BOP-filed motions.³² Again, this did not alter § 3582(c)(1)(A).

Between 2016 and now, Congress made a transformational change to § 3582(c)(1)(A): it eliminated the BOP as gatekeeper.³³

At the recent hearing on §1B1.13, some witnesses opposing the Commission’s proposed amendments emphasized that Congress intended the First Step Act’s amendment to § 3582(c)(1)(A) to be procedural (allow defendant’s to file motions), not substantive (alter the standard). But that is precisely the point: Nothing in the First Step Act of 2018 altered the statute’s plain text or the original meaning of “extraordinary and compelling”—just like neither the BOP’s inaction nor the Commission’s quiescence in this space altered the standard. Section 3582(c)(1)(A)’s standard, as discussed, has always been broad and adaptable and inclusive. And now, without the BOP controlling motions under § 3582(c)(1)(A), the Sentencing Commission can finally promulgate a meaningful, effective policy statement for sentence reductions under the statute.

²⁹ See USSG §1B1.13 (2007).

³⁰ See Statement of Marianne Mariano before the Sentencing Comm’n, at 12–15 (Feb. 17, 2016). This statement is appended to and incorporated into Defenders’ Public Comment on Proposed Amendments for 2016 (March 21, 2016), *available at* <https://bit.ly/41XlUIp>.

³¹ See Letter from Michelle Morales on behalf of the DOJ to the Sentencing Comm’n, at 4, 6–8 (Feb. 12, 2016)), *available at* <https://bit.ly/3ZYehjf>.

³² USSG §1B1.13.

³³ See First Step Act of 2018, Pub. L. No. 115-391 § 603(b), 132 Stat. 5194, 5239 (2018) (hereinafter “FSA”).

II. The Commission’s proposed amendments to §1B1.13 are both authorized and lawful.

The Sentencing Commission’s policymaking authority in this space, conferred by 18 U.S.C. § 3582(c)(1)(A) and 28 U.S.C. § 994(a) and (t), permits it to promulgate the proposed §1B1.13, including subsection (b)(5) and any of the three options for (b)(6). Moreover, no other provision of law prohibits the amendments.

A. The Commission is authorized to amend §1B1.13 as proposed.³⁴

As discussed, § 3582(c)(1)(A)’s “extraordinary and compelling” standard is broad and open-ended, and § 994(t) directs the Sentencing Commission to “describe” what sorts of circumstances “should” meet that standard. With these provisions, Congress created expansive authority for judicial sentence reduction as a safety valve within the new determinate sentencing scheme, and it charged the Commission with fleshing out this authority. The Commission’s proposed amendments fulfill this charge.

Congress did erect one limitation on the Commission’s authority: rehabilitation alone cannot be an extraordinary and compelling reason. And the proposed amended §1B1.13 respects that limitation. There is no basis for reading any other limitation into the statute.³⁵

Beyond §§ 3582(c)(1)(A) and 994(t), another section—§ 994(a)(2)(C)—directs the Commission to promulgate policy statements, including for § 3582(c)(1)(A), “that in the view of the Commission would further the purposes set forth in [18 U.S.C. §] 3553(a)(2).” This only confirms the Commission’s broad authority to provide guidance with respect to what sort of “extraordinary and compelling reasons” for sentence-reduction will further the purposes of sentencing.

³⁴ Defenders have suggested some changes to the Commission’s proposed policy statement. To be clear, the Commission is also authorized to promulgate the amended §1B1.13 as proposed *and expanded upon by Defenders*.

³⁵ *See Concepcion v. United States*, 142 S. Ct. 2389, 2402 (2022) (“Drawing meaning from silence is particularly inappropriate in the sentencing context, for Congress has shown that it knows how to direct sentencing practices in express terms.”) (internal quotation marks and citation omitted).

The proposed policy statement furthers the purposes set forth in § 3553(a)(2) in many ways, including these:

- *3553(a)(2)(A)*: The proposed §1B1.13 permits a sentence-reduction where what the sentencing court understood to be “just punishment” at the time of sentencing no longer holds—because, *e.g.*, the sentence has become overly punitive due to medical risk or prison assault, or changes in law reflect a different societal understanding of what punishment is just.
- *3553(a)(2)(B) & (C)*: The proposed policy statement permits courts to reduce sentences where deterrence and/or public-protection are no longer significant factors, although they may have been paramount at sentencing. This is certainly true for someone who fits within one of the medical or age categories. And the “other reasons” category would cover situations like the example Attorney Barrett raised, regarding understanding of youth brain development, where human knowledge relevant to deterrence and recidivism has advanced since sentencing.³⁶ The policy statement also permits courts to reduce a sentence where release would affirmatively *advance* deterrence and/or public-protection interests, as with a release for family circumstances.³⁷
- *3553(a)(2)(D)*: The enumerated medical categories, along with “other reasons,” permit sentence reductions where it is only in the community that an individual can access essential medical or rehabilitative services. The proposed (b)(4) also advances this sentencing factor, by permitting a sentencing court to remove a victim of sexual or physical abuse from the carceral environment where the abuse occurred, so the victim can heal.

As the government has noted, in the absence of a policy statement, some circuit courts have held that “extraordinary and compelling,” as a

³⁶ See Statement of Kelly Barrett before the Sentencing Comm’n, attached, at 13 n.25 (Feb. 23, 2023) (citing *United States v. Morris*, 2022 WL 3703201, at *8–9 (D. Conn. Aug. 26, 2022, and *United States v. Mendez-Zamora*, 2022 WL 9333452, *2 (D. Kan. Oct. 14, 2022)).

³⁷ See *id.* at 4 n.9 (citing Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 Fam. L. Q. 191, 196 (2006)).

matter of statutory interpretation, cannot encompass legal changes.³⁸ But those courts are wrong. “Extraordinary and compelling” is plainly broad enough to include not just factual but also legal circumstances—not *all* legal circumstances; just those that are “extraordinary” (unusual; exceptional) and “compelling” (having a powerful and irresistible effect). The Commission appreciates this: the proposed subsection (b)(5) encompasses a legal change only if it reveals that the individual’s sentence is “inequitable.”

It borders on absurd to suggest that a person would not use the terms “extraordinary” and “compelling” to describe *any* legal change—even one that reveals that an individual’s sentence is inequitable by, say, eliminating the mandatory life sentence that previously applied to his offense.³⁹

Finally, to the extent that there is a question, Option 3 for subsection (b)(6) complies with § 944(t)’s directive.⁴⁰ Section 1B1.13’s enumerated categories “describe” *specific* circumstances that “should be considered extraordinary and compelling.”⁴¹ Option 3 of (b)(6) “describe[s]” what *additional* circumstances “should be considered extraordinary and compelling”: those that the sentencing court—with its better understanding of the case and context—deems extraordinary and compelling.⁴²

In sum, Defenders have no doubt that the Commission is authorized to promulgate the proposed amended §1B1.13. Indeed, unwarranted restrictions on the “extraordinary and compelling” standard would subvert congressional intent that courts be able to entertain sentence-reduction motions in a variety of circumstances, where those circumstances are extraordinary, compelling, and reflect more than rehabilitation alone.

³⁸ See Letter from Jonathan J. Wroblewski on behalf of the DOJ to the Sentencing Comm’n, at 7 & 7 n.6 (Feb. 15, 2023) (collecting cases).

³⁹ Cf. *Kemp v. United States*, 142 S. Ct. 1856, 1865 (2022) (Sotomayor, J., concurring) (explaining that in the Fed. R. Civ. P. 60(b)(6) context “extraordinary circumstances” include “a change in controlling law.”)

⁴⁰ Attorney Joshua Matz suggested at the hearing that the Commission might add language specifying that the “other circumstances” should be of similar “gravity” to the enumerated circumstances. We have no objection to this language, so long as it is clear that they need not be similar in kind or nature.

⁴¹ See 28 U.S.C. § 994(t).

⁴² See *id.*

B. The proposed §1B1.13(b)(5) and (b)(6) do not violate any other provision of law.

The proposed §1B1.13(b)(5) and at least the open-ended options for (b)(6) have garnered opposition from the Department of Justice, the Victims Advisory Group, and some in law enforcement. To the extent that the debate is over what can fit within the words “extraordinary and compelling,” that is addressed above. To the extent that the debate is about policy concerns, those are addressed below.

This section is focused on dispelling any concerns that (b)(5) and an open-ended (b)(6) are illegal in some other way—that even if those subsections are authorized under 18 U.S.C. § 3582(c)(1)(A) and 28 U.S.C. § 994, promulgating them would violate some other law. Three provisions have been raised as possibly conflicting with (b)(5) and/or (b)(6): § 2255, nonretroactivity rules related to statutory changes in law, and constitutional separation-of-powers principles.

28 U.S.C. § 2255. A motion for judicial sentence modification is fundamentally different from a habeas corpus petition—or, more precisely for federal prisoners, a motion under § 2255.

As discussed, § 3582(c)(1)(A) is a discretionary “safety valve”: Where “extraordinary and reasons” exist, and a sentence reduction would be consistent with this Commission’s policy choices, the sentencing court has discretion (upon considering § 3553(a) factors) to release the individual from custody, reduce the sentence, or deny the motion outright. In contrast, habeas corpus fundamentally is “a means of contesting the lawfulness of restraint and securing release.”⁴³ The Supreme Court has “often” made the point that habeas corpus is specifically a remedy for ascertaining whether a person “is rightfully in confinement or not.”⁴⁴

⁴³ *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020).

⁴⁴ *Id.* (internal quotation marks omitted). The Supreme Court cited the following for the proposition that it had “often” made this point: *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“It is clear . . . from the common-law history of the writ . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody”); *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (similar); *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (similar).

Section 2255 was enacted in 1948 as a substitute for the traditional habeas remedy with respect to federal prisoners, allowing collateral attacks to be filed in the underlying criminal case rather than a separate civil action, but it covers the same substantive claims for relief, and in the same way.⁴⁵ Section 2255 contains an exclusivity provision prohibiting anyone who can file a motion under that section from filing a civil habeas corpus petition, unless the § 2255 remedy is “inadequate or ineffective to test the legality of his detention.”⁴⁶ But § 2255 has never said anything about § 3582(c) or any other mechanism for sentence reduction—statutes that predated § 3582(c), executive clemency, parole, good time credit.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”), which imposed strict procedural limits on habeas corpus petitions filed by state prisoners (under 28 U.S.C. § 2254) and on § 2255 motions, in order to “curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.”⁴⁷ Nothing in AEDPA’s text or history speaks to any form of sentence reduction—judicial or otherwise. This makes sense: AEDPA puts procedural limits on habeas filings to protect the finality of judgments, especially in capital cases arising from state courts. And § 3582(c) is an express exception to the principle of finality,⁴⁸ with § 3582(c)(1)(A) invoking discretionary powers to modify the length of a sentence rather than mandating relief from illegal judgments.

This is all to say that § 3582(c)(1)(A) and § 2255 (both before and after it was amended by AEDPA) serve fundamentally different purposes. The former is a discretionary act of mercy, reducing what is (at least as a matter

⁴⁵ See *Hill v. United States*, 368 U.S. 424, 427 (1962).

⁴⁶ 28 U.S.C. § 2255(e). The Supreme Court is currently reviewing the contours of this provision and will soon decide under what circumstances the § 2255 remedy is inadequate or ineffective to test the legality of detention, such that a federal prisoner is permitted to file a habeas corpus petition under 28 U.S.C. § 2241. See *Jones v. Hendrix*, No. 21-857 (U.S., argued Nov. 1, 2022). We would not expect the outcome of *Jones* to be relevant to any issue before the Commission.

⁴⁷ H.R. Conf. Rep. 104-518, at 111 (1996), as reprinted in 1996 U.S.C.C.A.N. 944, 944.

⁴⁸ *Concepcion*, 142 S. Ct. at 2399 n.3 (stating of § 3582(c) that “[n]o one doubts the importance of finality. Here, however, the Court interprets a statute whose very purpose is to reopen final judgments.”).

of law) a valid sentence; the latter governs vindication of a right to relief from illegal detention. And thus, expanding §1B1.13's description of "extraordinary and compelling" as permitted by § 3582(c)(1)(A) does not—and cannot—usurp § 2255 any more than a presidential pardon or sentence commutation.⁴⁹

Nonretroactivity. The proposed §1B1.13 says nothing about nonretroactive statutory amendments. But Defenders, like everyone else, read subsection (b)(5) to potentially encompass, for example, the First Step Act's dramatic amendments to sentencing law that reduced minimum penalties for some from life imprisonment or its functional equivalent, to a sentence that a person could expect to survive. Thus, (b)(5) implicates the debate over nonretroactive legal changes that has divided the circuit courts.

As discussed above, to the extent the circuit split is about whether the phrase "extraordinary and compelling" can encompass changed legal circumstances, the circuits answering that question in the negative are plainly wrong. And as discussed below, Defenders are hopeful that when the Commission adopts (b)(5), those circuits will reconsider their caselaw.

The focus here is on whether retroactivity rules, as a matter of law, preclude "extraordinary and compelling" from being interpreted (consistent with plain text) to include a legal change that renders a sentence inequitable if the change isn't retroactively applicable in all cases. And whether we are talking about general background retroactivity principles, or the specific retroactivity/applicability provisions of §§ 401 and 403 of the First Step Act of 2018, the answer to this question is: no.

There are two general background principles of retroactivity at play. The first is the federal saving statute, 1 U.S.C. § 109, which has been interpreted to provide that an ameliorative penalty statute does not abate sentences for offenses committed prior to the statute's enactment, unless the statute indicates otherwise.⁵⁰ The second is the SRA, which provides that the

⁴⁹ This is not to say that a pro se individual might not file what in substance truly is a § 2255 motion or habeas petition, captioned as a § 3582(c)(1)(A) motion. Just the same, an individual might file something captioned under § 3582(c)(1)(A) that in substance is a § 1983 lawsuit, or a motion for bail, or just about anything else. But this sort of mislabeling is common in pro se cases, and courts are capable of addressing it on a case-by-case basis.

⁵⁰ See *Dorsey v. United States*, 567 U.S. 260, 273-75 (2012).

version of the Guidelines Manual that applies in a case is the one in effect at sentencing,⁵¹ supporting that “in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.”⁵²

Several courts of appeal have taken from these background principles that “[w]hat is ‘ordinary’ and routine” in federal sentencing “cannot also be extraordinary and compelling.”⁵³ But general nonretroactivity rules mean only that an ameliorative statute does not, on its own, entitle anyone to resentencing. They do not limit § 3582(c)(1)(A), the SRA’s judicial sentence-reduction mechanism. And Congress’s decision in an ameliorative statute not to require resentencing of everyone sentenced under the prior regime says nothing about whether a court has discretion to find, as part of an “individualized assessment,” that extraordinary sentencing disparities between the current and former regimes present extraordinary and compelling reasons for sentence reduction in a particular case.⁵⁴

Nor do the specific applicability provisions of §§ 401 and 403 of the First Step Act impose any such limitation. Both provisions provide limited retroactivity similar to the SRA rule described above: the new lower statutory penalties apply to pending cases, so long as a sentence for the offense has not been imposed as of the date of enactment.⁵⁵ Certainly, neither provides for full retroactivity. But neither prohibits a court from acknowledging that the impact of this once-in-a-generation legislation on an individual case can be extraordinary and compelling, especially where it exposes that a sentence that is still being served (perhaps with no end in sight) is inequitable. As many courts of appeal have correctly recognized,

there is a significant difference between automatic vacatur and resentencing of an entire class of sentences—with its avalanche of applications and inevitable

⁵¹ See 18 U.S.C. § 3553(a)(4)(A)(ii).

⁵² *Dorsey*, 567 U.S. at 280 (citations omitted).

⁵³ *United States v. McCall*, 56 F.4th 1048, 1055 (6th Cir. 2022) (citation omitted); see also *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (collecting cases and describing the circuit split).

⁵⁴ *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020).

⁵⁵ See FSA, §§ 401(c), 403(b).

resentencings—and allowing for the provision of individual relief in the most grievous cases.⁵⁶

Thus, there is “nothing inconsistent about Congress’s paired First Step Act judgments: that not all defendants convicted under [the prior legal regime] should receive new sentences, but that the courts should be empowered to relieve some defendants of those sentences on a case-by-case basis.”⁵⁷

In the future, Congress could, of course, include with an ameliorative criminal statute a statement that the legislation cannot be considered in § 3582(c)(1)(A) proceedings. But absent such a statement, “extraordinary and compelling” may be interpreted to include inequities exposed by future legislation as well. To conclude otherwise would lead to the counterintuitive result of excluding from the district court’s “extraordinary and compelling” calculus the reality that an individual may be serving decades in prison under a flawed sentencing regime that all agree is bad policy.

Separation of powers. Two circuit opinions have raised the specter of constitutional separation of powers in connection with § 3582(c)(1)(A), but those opinions should not give the Commission pause.⁵⁸

The Seventh Circuit has suggested that permitting a sentencing court to reduce a sentence under § 3582(c)(1)(A) based largely on a concern that it is overly harsh, although the sentence was lawfully imposed under a mandatory-minimum scheme that “Congress enacted, and the President signed, into law,” would “offend[] principles of separation of powers.”⁵⁹ The Seventh Circuit did not cite to any authority here and no other court has picked up this thread. And there is no separation-of-powers problem:

⁵⁶ *McCoy*, 981 F.3d at 286–87 (cleaned up); see also *United States v. Chen*, 48 F.4th 1092, 1099 (9th Cir. 2022); *United States v. Ruvalcaba*, 26 F.4th 14, 27 (1st Cir. 2022); *United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021).

⁵⁷ See *McCoy*, 981 F.3d at 287 (cleaned up).

⁵⁸ The Victims Advisory Group also has argued that the proposed (b)(5) violates “separation of powers.” But VAG is using that term as shorthand for the notion that a broad interpretation of § 3582(c)(1)(A) is incompatible with determinate sentencing and/or would work an “end run” around habeas proceedings, neither of which are about constitutional separation of powers. See Written Testimony of Mary Graw Leary on behalf of VAG, at 12–14 (Feb. 2023), available at <https://bit.ly/3LcvJMN>.

⁵⁹ *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021).

Congress enacted § 3582(c)(1)(A) and the President signed it into law. So reducing a lawful sentence—even one that was previously mandatory—as permitted by § 3582(c)(1)(A) cannot violate separation-of-powers principles any more than with Rule 35 or the former § 4205, or any other duly enacted sentence-reduction statute.

The D.C. Circuit has raised “separation of powers” in a different context, stating that “separation-of-powers considerations” counsel against courts using the “general” authority in § 3582(c)(1)(A) to cancel out a more “precise” congressional pronouncement on retroactivity: § 403(b) of the First Step Act.⁶⁰ But this is not about the constitutional doctrine of separation of powers; it’s about a potential conflict between two statutes: § 3582(c)(1)(A) and § 403(b). That potential conflict is addressed above, in the nonretroactivity section.

C. Neither subsection (b)(5) nor (b)(6) of §1B1.13 creates tension with USSG §1B1.10.

The Commission’s proposed amendments to §1B1.13—including (b)(5) and (b)(6)—are not in tension with § 1B1.10. The two provisions serve very different purposes and operate in different ways. Section 1B1.13 guides discretionary sentence reductions where there are extraordinary and compelling circumstances that arise, or at least come to the court’s attention, after sentencing. Section 1B1.10 is a mechanism for applying retroactive guideline amendments in run-of-the-mill cases. Motions under the provisions will be filed in different circumstances, and application of the provisions is distinct. The relationship between the two is not dissimilar to the relationship of §1B1.13 to general statutory retroactivity provisions, which is discussed above.

⁶⁰ *Jenkins*, 50 F.4th at 1198.

III. Defenders object to others’ suggestions that would narrow enumerated categories, place burdens on incarcerated individuals that they cannot meet, or categorically exclude some individuals from seeking a sentence reduction.

Defenders do not attempt to address in this Comment all the suggestions that others have proposed for §1B1.13. It should be clear that we object to all proposals that would eliminate, narrow, or complicate any category that the Commission has proposed. Indeed, we have suggested ways that the Commission should expand several of the enumerated categories, and we have advocated for an open-ended (b)(6) (Option 3).⁶¹

There are a few proposals, though, that require a response: (1) the government’s redlining of §1B1.13, (2) NAAUSA’s notion that incarcerated individuals must have independent medical documentation from at least two medical professionals to fit within certain categories; and (3) all proposals that would preclude individuals convicted of specified crimes from seeking relief under § 3582(c)(1)(A).

A. Most of the government’s suggestions for the enumerated categories are either problematic or unnecessary.

Subsection (b)(1)(D). The government suggests three changes to the proposed (b)(1)(D): (1) adding the word “imminent” before “risk”; (2) adding the words “and extraordinary” before “outbreak”; and (3) using the phrase “due to personal medical risk factors and custodial status” to modify the subsection’s reference to risk of “severe medical complications or death.”⁶²

As Attorney Barrett explained in her witness statement, Defenders urge the Commission to expand (b)(1)(D) so that it covers additional kinds of ongoing emergencies, if they create a risk of severe medical complications or

⁶¹ As noted above, in footnote 40, Attorney Joshua Matz has suggested that with Option 3 for subsection (b)(6), the Commission might want to clarify that “other reasons” should be similar in “gravity” (although not necessarily nature or subject matter) to the enumerated categories. Defenders do not object to such an amendment.

⁶² Letter from Jonathan J. Wroblewski on behalf of the DOJ to the Sentencing Comm’n, at 4 (Feb. 15, 2023) (hereinafter, “Wroblewski letter”), *available at* <https://bit.ly/4221ga1>.

death that cannot reasonably be mitigated.⁶³ We hope the Commission adopts our suggested change. But regardless of whether the Commission accepts our proposal for (b)(1)(D), it should reject the government’s proposals for that subsection.

The government’s first proposal—“imminent”—makes the category less clear: Is it sufficient that an infectious disease is sweeping the nation? Must it already be in the state where the movant is incarcerated? In the specific prison? Must people in that prison already be dead or dying?

There can be no credible concern that courts would apply (b)(1)(D) to risks that are theoretical or distant; the proposal requires that the infectious disease or emergency be “ongoing” and that it has created a risk of death or severe medical complications that cannot be mitigated. Further, discouraging courts to act quickly where there is an ongoing emergency that has already created this sort of risk could be deadly; many incarcerated individuals died during the COVID pandemic while waiting for courts to decide § 3582(c)(1)(A) motions or after courts denied their motions because the risk was thought to be not yet sufficiently imminent.⁶⁴

The government’s second proposal for (b)(1)(D)—“and extraordinary”—is unnecessary and, again, would make the subsection *less* clear. The point of §1B1.13’s enumerated categories is that the Sentencing Commission has determined that these circumstances should be considered extraordinary and compelling, such that a court is authorized to determine, as a matter of discretion, whether it would be appropriate to reduce the sentence.

The government claims that the word “extraordinary” is needed to prevent individuals from filing motions regarding, *e.g.*, seasonal flu. But the

⁶³ Statement of Kelly Barrett before the Sentencing Comm’n, attached, at 8 (Feb. 23, 2023) (hereinafter, “Barrett Statement”).

⁶⁴ See Meg Anderson, *As COVID spread in federal prisons, many at-risk inmates tried and failed to get out*, NPR (Mar. 7, 2022), <https://www.npr.org/2022/03/07/1083983516/as-covid-spread-in-federal-prisons-many-at-risk-inmates-tried-and-failed-to-get->; see also Federal Criminal Defense Clinic, Iowa College of Law, *Compassionate Release*, <https://law.uiowa.edu/compassionate-release> (last accessed Feb. 28, 2023) (explaining that of the 281 deaths the clinic tracked through January 31, 2022, 74 had filed a motion for compassionate release with the federal courts; three of those motions were granted, but the people were not released in time).

proposed subsection covers only risk of “severe medical complications or death,” and the vast majority of people cannot credibly claim that typical, seasonal infectious diseases creates such a risk. At the same time, if there is a severe flu outbreak that places a particular individual at “increased risk of suffering severe medical complications or death,” there is no sound policy reason for precluding a judge from considering evidence that the individual’s circumstances warrants sentence reduction.

Our concern with the third proposal—the addition of “due to personal medical risk factors and custodial status”—is that it assumes that any future health emergency will look like COVID-19. The seriousness of risk from a disease can be personal (think: COVID risk factors) or universal (think: Ebola). If in the future there is an infectious disease or other emergency situation hitting federal prisons that creates a risk of severe medical complications or death that cannot be mitigated in the prison system, whether that risk is personal or more widespread is quite irrelevant to the men and women who would be trapped within that system.

Subsection (b)(3). For the proposed subsection regarding family circumstances, the government proposes: (1) substituting the word “establishes” for “presents”; (2) adding the phrase “when the defendant would be the only available caregiver for the individual in question” to (b)(3)(D); and (3) defining “immediate family member.”⁶⁵

Defenders are pleased that the government largely supports the proposed (b)(3), including the bracketed (b)(3)(D), which is essential to the function of this subsection. We think the government’s first suggested change is simply unnecessary. Any court would interpret “presents” in this context similar to how one would interpret a doctor saying a patient “presents” with a fever and cough. In other words, it does not reference a mere *claim*. If the Commission thinks this requires clarification, though, we suggest different language. All the other subsections refer to facts as determined by the court, rather than as established by the defendant. Thus, for consistency, (b)(3)(D) could simply begin with “There exist”:

There exist circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other

⁶⁵ Wroblewski Letter at 4–5.

immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member.

With the family-circumstances category, our strongest objection is to the government’s second suggestion—“only available caregiver”—as it potentially relates to minors. With minors, the goal is not simply to ensure that *some* adult can care for them. Indeed, if no family is available, the State will place a minor in foster care. A federal court must be able to recognize that a minor needs care more particularly from a parent or, as relevant to (b)(3)(D), from another specific person who has played a parental role in the minor’s life—*e.g.*, grandparent, aunt, or unmarried partner of a parent.

We do not object to the government’s third suggestion—its definition of “immediate family member”—so long as the Commission promulgates (b)(3)(D), so that relationships similar to that of an immediate family member can be respected by the courts. If the Commission declines to promulgate (b)(3)(D), then any definition of “immediate family member” would need to be much more expansive.

Subsection (b)(4). The government proposes four changes to the prison-assault category: (1) modify the subsection with “[w]hile in custody for the offense of conviction,”; (2) broaden the subsection to cover any assault or abuse committed “at the direction of” a BOP employee or contractor; (3) also broaden it to cover not only any “correctional officer or other employee or contractor of the Bureau of Prisons”, but also “any other individual who had custody or control over the inmate”; and (4) require that the assault or abuse be “established by a conviction in a criminal case, an administrative finding of misconduct, or a finding or admission of liability in a civil case.”⁶⁶

Defenders have urged the Commission to expand the proposed (b)(4) so that it covers sexual or physical abuse of an incarcerated individual by *anyone* where it causes serious bodily injury; and sexual or physical abuse by a prison employee, contractor, or volunteer, without the need for a showing of serious bodily injury.⁶⁷

⁶⁶ *Id.* at 5–6.

⁶⁷ *See* Barrett Statement at 8–11.

The government’s second and third suggestions are good ones. With the second suggestion, we hope the Commission extends (b)(4) to abuse by *anyone* that causes serious bodily injury. But if the Commission were to reject that part of our proposal, certainly, it should at least extend (b)(4) to abuse by any person acting under the direction of a prison authority figure.

As to the third suggestion, Defenders and the government are both proposing to extend (b)(4) to cover prison authorities beyond BOP employees and contractors. We suggested “prison employee, contractor, or volunteer.” But the government’s suggestion—“correctional officer or other employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the inmate”—may be even better.

We object to the government’s other proposals.

As for its first suggestion for (b)(4), the government has not explained why the subsection should begin with “[w]hile in custody for the offense of conviction.” Is the government concerned that claims will be raised regarding abuse inflicted sometime in the past? That could be solved by starting the section with: “After sentencing.”

More likely, the government does not want anyone to come within (b)(4) if they were abused after sentencing while in state custody, before transferring to federal prison. But far from limiting (b)(4) in this way, the Commission should clarify that the subsection *does* cover this sort of abuse. As discussed in Attorney Barrett’s witness statement, § 3582(c)(1)(A) is not a mechanism for punishing bad government actors; it permits a court to reduce a sentence, as a matter of discretion, if new circumstances call that sentence into question.⁶⁸ And prison abuse can be such a circumstance.

The government’s most troubling suggestion for (b)(4) is that it should apply only where abuse is “established by a conviction in a criminal case, an administrative finding of misconduct, or a finding or admission of liability in a civil case.” No question, a court considering any motion under (b)(4) would consider the existence, or lack thereof, of a criminal or administrative proceeding regarding the alleged abuse. And an individual who chooses to file a § 3582(c)(1)(A) motion before any such proceeding has concluded runs the

⁶⁸ See *id.* at 8–9.

risk of a quick denial.⁶⁹ But it would be folly to return to the BOP control over whether and when an individual can file a sentence-reduction motion. This would be true regardless of the basis for the motion, and it is doubly so where we are talking about potential BOP misconduct. Further, while we presume that federal prosecutors act in good faith in making charging decisions, there are legitimate reasons other than innocence that a prosecutor might not charge a perpetrator with a crime.

Beyond the fact that the government cannot be permitted to control the adjudication of a § 3582(c)(1)(A) motion that may be based on official conduct, the government's proposal is unworkable for at least two other reasons. First, delay: criminal cases take years to resolve, and administrative proceedings can take even longer.⁷⁰ Second, the inaccessibility of administrative and investigative materials. Defenders have a hard enough time getting medical records from the BOP on behalf of the individuals who are the subject of those records. We cannot imagine how we'd be able to access records of administrative proceedings against individuals who we do not represent, or law enforcement investigative materials.

B. NAAUSA's notion that enumerated categories based on medical circumstances must be accompanied by independent medical evaluations would undermine those categories.

The National Association of Assistant U.S. Attorneys (NAAUSA) has asked the Commission to limit and narrow §1B1.13's enumerated categories in many ways, all of which we disagree with. But NAAUSA's suggestion that §1B1.13(b)(1)(C) and (D) require incarcerated persons to provide the court

⁶⁹ This will not always be true: an individual (perhaps a cooperator) who was hospitalized after being stabbed, or a woman who became pregnant by a correctional officer, might have no trouble at all proving their grounds for sentence reduction.

⁷⁰ See Statement of Heather E. Williams before the Sentencing Comm'n, at 3 (Feb. 24, 2023) ("BOP's Office of Internal Affairs, responsible for investigating staff misconduct, has an 8,000-case backlog, with some reports pending for more than five years. The process for handling reported misconduct under the Prison Rape Elimination Act (PREA) is a failure. The DOJ has, at times, assigned PREA complaint investigations to correctional staff who were themselves sexually assaulting women in their care."), available at <https://bit.ly/401npU2>.

with “independent medical documentation from at least two medical professionals”⁷¹ is not just bad policy, it is likely *impossible*.

For an incarcerated person who is acting pro se, it would almost certainly be impossible. But even where someone is represented, it wouldn’t be much better. The BOP does not permit incarcerated persons to bring their own medical professionals into prisons for independent assessments. And even a court order to permit this might not help: prisons are almost always located far from defense counsel and the medical experts they might retain.

In cases involving medical circumstances, where the basis for the motion is not plain from BOP records, Defenders typically do have a doctor review the records to opine about the medical condition. But there is no need for the Commission to require even that. If an individual does not provide the sentencing court with strong support for his or her motion, it will be denied—even in the absence of any restriction in §1B1.13. The NAAUSA’s notion that a movant obtain “independent medical documentation” from not just one but two medical professionals would be laughable, if we weren’t talking about our clients’ lives and health.

C. Law enforcement groups’ position that individuals convicted of certain crimes should be excluded from § 3582(c)(1)(A) relief is untenable.

Some in law enforcement, as well as victim advocates, have asked the Commission to preclude individuals convicted of violent crimes from seeking relief under § 3582(c)(1)(A). It could probably go without saying that this would be a terrible idea, but Defenders cannot leave it unsaid.

As a preliminary matter, the Commission lacks the authority to take this action. Section 994(t) directs the Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction.” Section 3582 obligates courts to “ensure that [any] reduction is consistent with the Commission’s applicable policy statements.” Neither statute empowers the Commission to exclude altogether a category of persons from the sentence-reduction scheme that Congress created.

⁷¹ Written Testimony of Steven Wasserman on behalf of the NAAUSA, at 2 (Feb. 15, 2023), *available at* <http://bit.ly/422X2yZ>.

Moreover, this would be terrible policy. Even determining which offenses might be excluded would be fraught; the definition of what is a “violent” crime is a perennial source of litigation in the federal courts. And however such a category might be defined in this context, it would inevitably impact some number of persons with circumstances that warrant a sentence reduction. Some of the formerly incarcerated individuals who spoke at the hearing on §1B1.13 illustrate as much.

Defenders are not insensitive to victims’ concerns about notice. Most of our cases (*e.g.*, controlled-substance and firearm-possession cases) do not involve victims. But when there is a victim, we expect them to get notice and an opportunity to be heard, and we have no quarrel with that. In many courts, this is already happening with sentence-reduction motions. Indeed, it may already be required by 18 U.S.C. § 3771(a).

We are, however, concerned with the government’s request that §1B1.13 state that “*the court* must provide reasonable notice to any victims” and that it do so “[b]efore *granting* any motion for compassionate release.”⁷² A U.S. Attorney’s Office is the entity that would have a relationship with any victims, and a system for communicating with them. Courts, in contrast, are not set up for this. Also, the notion that notice would be issued only upon a court’s decision to “grant” a sentence reduction seems designed to discourage grants. While Defenders do not speak for crime victims, we cannot imagine they would prefer to get notice of sentence-reduction proceedings only after the court has presumptively decided the matter. Therefore, any notice provision should require the government, not the court, to provide notice, consistent with § 3771(c).

⁷² Wroblewski Letter at 9 (emphasis added).

IV. The amendments the Commission has proposed, including subsections (b)(5) and (b)(6), make the right policy call.

Defenders have suggested some revisions for the proposed §1B1.13 but, again, the Commission is on the right track. At the recent hearing, Attorney Barrett described some of the policy benefits of the proposed amendments, including that, far from exacerbating disparities, the proposed amendments will provide federal courts with a valuable tool for reducing unwarranted disparities that plague our justice system. Attorney Barrett also talked about some of the men and women who have been released under § 3582(c)(1)(A) who are thriving and enriching their communities; they illustrate that the human cost of a restrictive §1B1.13 would be too high. Here, we focus on three policy concerns that others raised at the hearing: the possibility that subsection would perpetuate the circuit split regarding legal changes; finality and certainty; and administrability.

A. The circuit split regarding legal changes is subject to change and should not dissuade the Commission from making the right policy call on §1B1.13, including by promulgating the proposed (b)(5).

The circuit split over whether legal changes can constitute an “extraordinary and compelling” reason for sentence reduction arose in the absence of a policy statement that applies to defendant-filed motions under § 3582(c)(1)(A). If and when the Commission adopts a policy statement that applies to such motions and interprets “extraordinary and compelling” to encompass a situation where “the defendant is serving a sentence that is inequitable in light of changes to the law,” Defenders are confident that circuit courts will revisit their pre-amendment caselaw.

And when they do so, there is good reason to think the Commission’s description of “extraordinary and compelling” will control, such that the circuit courts would resolve the split on their own. First, some courts may find that the amended policy statement does not conflict with their own precedent. The proposed (b)(5) does not cover the mere fact of a legal change; it applies only where legal changes reveal that an individual defendant’s sentence is “inequitable.” Further, to the extent that a circuit court finds that the Commission’s interpretation of “extraordinary and compelling” does

conflict with its own precedent, as Professor Erica Zunkel has explained, the Commission’s interpretation “must prevail.”⁷³

In the worst case scenario, some form of the present circuit split would persist and the issue would go to the Supreme Court for resolution. This possibility should not dissuade the Commission from doing the job Congress gave it to do: determining what is the best policy for § 3582(c)(1)(A). If the question whether § 3582(c)(1)(A)’s phrase “extraordinary and compelling” is capable of encompassing legal changes that renders a sentence inequitable goes to the Supreme Court, under the analyses described earlier in this brief, that Court should answer the question affirmatively.

And in the end, the human beings who would be affected by the Commission’s proposed amendments are worth it. The worst-case scenario for the Commission (a policy statement that is examined by the Supreme Court) is not comparable to the worst-case scenario for the men and women who may be serving sentences—including life sentences—that are fundamentally inequitable.

B. Finality and certainty are valid policy interests, but they are of lesser weight in this context and must be balanced against other important interests.

A number of objections to the Commission’s proposed, expanded §1B1.13 focus on concerns about “finality” and “certainty.” Some of these evocations are in the context of arguing that a broad reading of § 3582(c)(1)(A)—that is, one that is consistent with the section’s plain text—encroach upon, *e.g.*, § 2255 or nonretroactivity rules; those arguments are addressed above (Section II). Some of the evocations are free-standing, though, as if “finality” and “certainty” were *statutes* that the policy statement could *violate*.

But detached from a specific statute that protects finality or certainty in sentencing, these are just policy interests. The BOP for more than three decades elevated those particular interests above all others—even human dignity. Back in 2006, the government emphasized finality and certainty in

⁷³ Statement of Erica Zunkel before the Sentencing Comm’n, at 9 (Feb. 23, 2023) (citing *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982–83 (2005)), available at <http://bit.ly/3T7bAJI>.

justifying the BOP’s decision to file sentence-reduction motions only in cases of terminal illness or where a disability was so profound that, if released, the person would still “carr[y] his prison in his body and mind, and will not in any event be living in freedom in any ordinary sense.”⁷⁴

Now that the Sentencing Commission is capable of making meaningful policy for § 3582(c)(1)(A), it need not follow the BOP’s lead. Indeed, it *should not*. Section 3582(c)(1)(A)’s sentence reduction for “extraordinary and compelling reasons” is an express exception to the SRA’s general principle of finality for criminal sentences.⁷⁵ It was designed as a safety valve that could protect other, competing interests. The legislative history suggests two potential competing interests: compassion and fairness.⁷⁶ But ultimately it gave the task of making policy decisions in this space to this Commission.

As for certainty, the SRA codified a determinate sentencing scheme that would advance certainty and truth in sentencing *in a particular way*, which included judicial sentence reduction under § 3582(c)(1)(A). The nationwide move from parole to determinate sentencing that started in the 1980s was grounded in part on “structural deficits” in the parole system.⁷⁷ The SRA abolished parole. But it retained good-time credit and it also created a sentence-reduction mechanism at § 3582(c)(1)(A) that would “keep[] the sentencing power in the judiciary where it belongs” and be subject to this Commission’s policy choices.⁷⁸

Thus, the Sentencing Commission need not, and should not, elevate policy interests in finality and certainty over the interests that animated the creation of the very statute at issue here.

⁷⁴ Letter from Michael J. Elston, *supra* note 23, at 4.

⁷⁵ § 3582(c); *see also Concepcion*, 142 S. Ct. at 2399 n.3 (“No one doubts the importance of finality. Here, however, the Court interprets a statute whose very purpose is to reopen final judgments.”).

⁷⁶ *See* S. Rep. No. 98-225, *supra* note 5, at 55–56 (referring to cases involving “severe illness” and also cases involving “unusually long sentences”).

⁷⁷ Klingele, *supra* note 13, at 495; *see also id.* at 474–76 (describing these deficits in more detail).

⁷⁸ S. Rep. No. 98-225, *supra* note 5, at 121.

C. There is no reason to think that a §1B1.13 that is capable of capturing all extraordinary and compelling cases will overtax the justice system.

Some have raised concerns that the proposed amendments to §1B1.13 would create problems related to administrability. But these concerns are colored by our experiences during the recent COVID-19 pandemic.⁷⁹ There is every reason to think that post-pandemic, sentence-reduction proceedings will be entirely manageable—regardless of what policy statement the Commission promulgates.

There is no question: at the height of the COVID-19 pandemic, the volume of § 3582(c)(1)(A) motions was hard to manage—not just for courts and prosecutors, but for Defenders too. To be clear, Defenders feel honored and privileged that we were able to help many of our vulnerable clients get out of unsafe conditions in our nation’s federal prisons. We wish we could have done more; we are heartbroken for the many men and women who died during this period in BOP custody, far from family or comfort.

But the volume and the urgency of § 3582(c)(1)(A) motions during the pandemic at times felt overwhelming. It did not help that, at the time, the courts were still sorting out how the newly amended § 3582(c)(1)(A) would operate; there was no applicable policy statement in most circuits; and we were also facing other unprecedented challenges in the courts and in all of our own family lives. However, as could have been anticipated, post-pandemic, § 3582(c)(1)(A) filings have plummeted.⁸⁰

If there had not been a pandemic, there likely still would have been some sort of surge in § 3582(c)(1)(A) filings after § 603 of the First Step Act for the first time permitted defendants to file their own motions for relief.⁸¹

⁷⁹ See, e.g., Oral Testimony of Hon. Randolph D. Moss at the Commission’s Public Hearing on Compassionate Release (Feb. 23, 2023) (explaining in his opening statement that sentence-release proceedings have consumed tremendous judicial resources, with reference to experiences during the pandemic).

⁸⁰ See *USSC Compassionate Release Data Report*, tbl. 1 (Dec. 2022), <https://bit.ly/3JAexzj>.

⁸¹ Professor Klingele predicted that this sort of surge would follow new legislation in her article on judicial sentence mechanisms that was published in 2014. Klingele, *supra* note 13, at 528.

And when the Commission issues its first-ever policy statement addressed to defendant-filed § 3582(c)(1)(A) motions, there may well be another surge. But in the absence of a pandemic, any surge should be manageable and will level off. Jurisdictions with robust mechanisms for judicial sentence reduction “appear to do so efficiently and without detriment to the court’s ability to manage other demands on its time.”⁸² Federal courts are well-equipped to adjudicate § 3582(c)(1)(A) motions, and Defenders are eager to continue to help courts in this endeavor.

What’s more, there is no evidence that the “extraordinary and compelling” legal standard has a significant impact on filing. The Second and Seventh Circuits, for example, are similar in terms of the number of criminal cases filed in their district courts.⁸³ Yet in the Seventh Circuit, where the circuit court has read § 3582(c)(1)(A) far more restrictively than in the Second Circuit, district courts have seen more, not fewer, § 3582(c)(1)(A) motions.⁸⁴ The Eleventh Circuit has the nation’s most restrictive “extraordinary and compelling” standard, but the number of filings in district courts within that circuit is greater than in the Ninth Circuit, where there is both a generous standard and more criminal cases.⁸⁵

Now that Congress has permitted individuals to file their own motions under § 3582(c)(1)(A), there is no policy statement that could reduce the volume of sentence-reduction motions to pre-2018 levels. But in the post-pandemic future, even with a significantly broadened §1B1.13, there is no reason to think this will be unmanageable. And ultimately, the fact that the number of sentence-reduction motions going forward will be substantially higher than it was pre-First Step Act is a solution, not a problem: § 3582(c)(1)(A) is finally capable of functioning as the safety valve it was always meant to be.

⁸² *Id.*

⁸³ See USSC, *2021 Sourcebook of Federal Sentencing Statistics* tbl. 1 (2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Table01.pdf>.

⁸⁴ *USSC Compassionate Release Data Report*, *supra* note 80, at tbl. 3.

⁸⁵ *Id.* Incidentally, this data report also shows that there is considerable variation in the grant/denial rates in the Eleventh Circuit, evidencing that a narrow “extraordinary and compelling” standard does not result in uniformity. *Id.*

**Before the United States Sentencing Commission
Public Hearing on Compassionate Release**

Statement of Kelly Barrett, First Assistant Federal Public
Defender for the District of Connecticut, on Behalf
of the Federal Public and Community Defenders

February 23, 2023

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Before the United States Sentencing Commission
Public Hearing on Compassionate Release
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Hon. Chair Reeves, Vice-Chairs, and Commissioners: Thank you for holding a hearing on this important topic and for giving me the opportunity to testify on behalf of the Federal Public and Community Defenders.

My name is Kelly Barrett and I am the First Assistant to the Federal Public Defender for the District of Connecticut. Since the First Step Act of 2018 enabled individuals to seek sentence reductions under 18 U.S.C. § 3582(c)(1)(A) on their own behalf, I have spearheaded my office's efforts under that statute. I have filed numerous § 3582(c)(1)(A) motions for my own clients and also helped facilitate the work of other attorneys for their clients.¹ Many of those motions were granted, some with the government's agreement, and many others were denied. With my clients who have prevailed, we are richer for having them back home—working, caring for their families, and sharing their talents with their communities.

Indeed, my former § 3582(c)(1)(A) clients aren't just doing well; they are *thriving*. More than a dozen of those clients have successfully graduated from the District of Connecticut's rigorous reentry court, and three of those graduates now mentor others in reentry court. The day before the Commission holds this hearing, another of my clients will be graduating.

This statement goes through the Commission's proposed amendments to §1B1.13, with an eye toward Issues for Comment 2, 3, and 4. Defenders will address the legal questions about the Commission's authority and whether there is any potential tension between §1B1.13 and other laws (Issues for Comment 1 and 5) in our written comments, which are due March 14. Of course, at the hearing, I will endeavor to answer any questions that Commissioners may have regarding any of the proposed amendments.

¹ Commissioners may note that I refer to motions for sentence reduction under § 3582(c)(1)(A), rather than "compassionate release." As the Second Circuit has explained: "It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions." *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020).

I. Introduction

My circuit—the Second Circuit Court of Appeals—was one of the first to hold that the current USSG §1B1.13 does not apply to defendant-filed motions, and courts have broad discretion to determine whether the individualized circumstances presented in a particular case constitute “extraordinary and compelling reasons” for a sentence reduction.² Judges in the District of Connecticut have exercised that discretion carefully and reduced sentences in many cases where “circumstances [were] so changed” that it “would be inequitable” to maintain the sentence as originally imposed.³ These are the kinds of cases to which Congress intended § 3582(c)(1)(A) to apply; that section was meant to function as a “safety valve”—one controlled by judges, not a parole board—in the newly determinate federal sentencing scheme.⁴

Defenders commend the Commission for proposing amendments to §1B1.13 that provide guidance while also granting courts discretion to consider the entire constellation of circumstances that might warrant a sentence reduction in a particular case. With these changes, § 3582(c)(1)(A) would be able to serve as a meaningful safety valve.

The past few years have served as a laboratory for the Commission, as district judges have had great discretion in determining which circumstances present extraordinary and compelling reasons for sentence reduction. The proposed amendments show that the Commission is listening to judges: the Commission is proposing to add new enumerated categories to §1B1.13 based on circumstances that judges have found to be extraordinary and compelling—*e.g.*, serious medical needs that are not being met, prison assault, and legal changes.⁵

² See *Brooker*, 976 F.3d at 236–37.

³ S. Rep. No. 98-225, at 121 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3304. This is a quote from the Senate Report on the Sentencing Reform Act of 1984 that Defenders discussed in a recent letter to the Commission. See Defender Comment on the Commission’s Proposed Policy Priorities, at 3 n.11 (Oct. 17, 2022).

⁴ See S. Rep. No. 98-225, at 121 (1983).

⁵ This is how the Commission is meant to work: “The statutes and the Guidelines . . . foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.” *Rita v. United States*, 551 U.S. 338, 350 (2007).

Also, the Commission has proposed options for an open-ended catchall category, which reflects something we all learned from the recent pandemic: we cannot know what the future holds. It is essential that courts have discretion to recognize extraordinary and compelling circumstances that we cannot even imagine today, or that may arise only in a single case. As Defenders have said before, Congress’s legal standard for § 3582(c)(1)(A)—“extraordinary and compelling reasons”—is not reduceable to a finite list.

II. The proposed amendments to §1B1.13 give clear guidance to federal courts while retaining flexibility.

Since Congress empowered individuals to file § 3582(c)(1)(A) motions on their own behalf, all the circuits that have decided the issue except one have held that the current §1B1.13 is not applicable to defense-filed motions.⁶ Thus, in most of the country, there has been no Commission guidance on how to apply § 3582(c)(1)(A), which makes it unsurprising that different courts have applied the section differently. The proposed amendments to §1B1.13 will go far to reduce unwarranted disparities.⁷

The proposed §1B1.13’s enumerated circumstances (sub. (b)(1)–(5)) address the Commission’s obligation to provide “criteria” and also “examples” of extraordinary and compelling reasons.⁸ They appropriately capture the kinds

⁶ See *United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *United States v. Brooker*, 976 F.3d 228, 235–36 (2d Cir. 2020); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1108 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021). But see *United States v. Bryant*, 996 F.3d 1243, 1252 (11th Cir. 2021).

⁷ In the past, the DOJ has raised concerns about disparities in this context. See DOJ Public Comment on the Proposed Priorities, at 5 (Sept. 12, 2022). It is impossible to ascertain from motion grant/denial rates whether disparities are unwarranted or are based on distinctions between individualized circumstances. It is the Defenders’ experience that it is a combination of these. And the Commission should endeavor to reduce only *unwarranted* disparities. See *Gall v. United States*, 552 U.S. 38, 55 (2007) (approving of the effort to reduce not just unwarranted disparities but also “unwarranted similarities” among defendants who are not similarly situated).

⁸ 28 U.S.C. § 994(t).

of circumstances that courts have found, in individual cases, may warrant a sentence reduction:

- *The proposed sub. (b)(1) appropriately expands the health-related circumstances that may warrant sentence reduction to include medical conditions that pose treatment challenges in prison and also infectious disease.* The former provides a path to complex medical care—while our clients can still benefit from it—that is removed from litigation about who is to blame for health-care failures. The latter reflects what we’ve all learned the hard way: infectious diseases can be difficult or impossible to manage in the prison setting.
- *Subsection (b)(3) recognizes that someone who is not an individual’s minor child may require their care.* This does not only benefit our clients and their families. It benefits the public by easing communities’ caretaking responsibilities and also by reducing recidivism risk.⁹ It is essential that the amendment include the bracketed sub. (b)(3)(D) to capture circumstances that may be extraordinary and compelling in unusual cases. Family and kinship relationships are not one-size-fits-all. This is true generally and can also relate to varying cultural norms, which are entitled to respect.
- *The bracketed sub. (b)(4) acknowledges that sometimes imprisonment is more punitive and traumatic than the sentencing court intended or society can bear.* Prison rape and assault are real. And no judge would have intended such a violation. By acknowledging that some individuals are victimized while in custody and that this can impact the appropriateness of the sentence originally imposed, this proposed amendment promotes healing and rehabilitation.
- *The bracketed sub. (b)(5) appreciates that a sentence imposed under a legal scheme that is now understood to be overly harsh can epitomize “extraordinary” and “compelling.”* It would harm the

⁹ See Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 Fam. L. Q. 191, 196 (2006) (“The single best predictor of successful release from prison is whether the former inmate has a family relationship to which he can return. Studies have shown that prisoners who maintain family ties during imprisonment are less likely to violate parole or commit future crimes after their release than prisoners without such ties.”).

credibility of our justice system to prohibit judges from recognizing this reality. By expressly endorsing the consideration of legal changes in the extraordinary-and-compelling analysis, regardless of whether a change would have retroactive application as a general matter, sub. (b)(5) will encourage circuit courts that have prohibited this practice to revisit pre-amendment caselaw, reducing disparities and protecting the credibility of the federal criminal justice system.

III. A few simple changes to the proposed enumerated circumstances would improve §1B1.13.

As discussed below, an open-ended catchall category is essential to the functioning of §1B1.13: it captures circumstances that we cannot foresee, or that would be too rare or idiosyncratic for an enumerated category. But even with a catchall, care must be taken with the enumerated circumstances. A court analyzing a circumstance that is close to, but does not quite fit within, an enumerated category may think that the Commission intended to delineate the boundaries of that category and feel compelled to deny the motion. We urge the Commission to clarify or broaden language proposed in three of the enumerated categories.

A. Subsection (b)(1)(C) should refer to medical care that is not being provided in a timely or “effective,” rather than merely “adequate,” manner.

Again, we commend the Commission for proposing the new sub. (b)(1)(C). Most Defenders have had clients who suffered from medical conditions that could have been managed far better, or even cured, in the community, but unfortunately they got much worse in prison.

One of my own cases, *United States v. Cruz*, 3:15-cr-96-VLB, doc. 402 (D. Conn. Dec. 19, 2022), provides an example. The motion containing the medical information in that case was filed under seal, but Ms. Cruz has given me permission to provide it to the Commission upon request. To summarize, after sentencing, Ms. Cruz was diagnosed with multiple sclerosis. Her condition was managed effectively while she served a state sentence but, once she was transferred from state to federal prison, all treatment stopped (apparently due to the need for multiple layers of BOP approval) and her health deteriorated. Thankfully, the government did not oppose our motion for

sentence reduction and the court granted it. Now Ms. Cruz is home with her family, getting treatment, and doing well. Other courts around the country have granted § 3582(c)(1)(A) motions in numerous similar cases, so that other individuals could get needed treatment.¹⁰

¹⁰ See, e.g., *United States v. English*, 2022 WL 17853361, at *7 (E.D. Mich. Dec. 22, 2022) (where Mr. English had several significant health concerns, including multiple tumors, but the BOP had no treatment plan, “BOP’s gross mismanagement of English’s serious health conditions, even if they are not yet life-threatening, presents an extraordinary and compelling reason for release”); Order, *United States v. Halliday*, No. 3:17-cr-267-JAM, doc. 176, at 1–2 (D. Conn. Aug. 11, 2022) (“I conclude that Halliday has shown that he suffers from a gravely serious eye disease—keratoconus—that has advanced to a great degree and imminently threatens permanent blindness unless promptly subject to sophisticated medical treatment. . . . Halliday’s best hope for retaining his eyesight is to seek treatment by an eye specialist in the outside community as soon as possible.”); *United States v. Verasawmi*, 2022 WL 2763518, at *10 (D.N.J. July 15, 2022) (“In these atypical circumstances, where Verasawmi suffers from a complex array of serious conditions, some of which the BOP has failed to treat diligently, the Court cannot simply wait until [life-threatening] outcomes materialize.”); Order, *United States v. Green*, No. 3:16-cr-63-SLF, doc. 198, at 10–11 (D. Alaska Mar. 29, 2022) (granting § 3582(c)(1)(A) relief based on aggressive prostate cancer that appeared to have metastasized to other parts of Mr. Green’s body while he waited for testing and treatment, and the BOP still did not have a treatment plan in place); *United States v. Russell*, 2022 WL 18542444, at *4 (D.N.J. Mar. 9, 2022) (“The surest and perhaps only path towards the proper treatment [Mr. Russell] urgently needs is his release from prison.”) (quoting the motion); *United States v. McPeck*, 2022 WL 429249, at *9 (N.D. Iowa Feb. 11, 2022) (collecting cases where courts found that “BOP delays in treatment of serious disorders can constitute or contribute to finding extraordinary and compelling circumstances”); *United States v. Bandrow*, 473 F. Supp. 3d 778, 787 (E.D. Mich. 2020) (“Elkton’s inability to provide care for Bandrow’s hematuria further weighs in favor of compassionate release. Despite knowing about Bandrow’s hematuria since January 2020, and being alerted that his condition was a ‘serious illness/critical illness’ on June 4, 2020, FCI Elkton has been unable to provide Bandrow with the CT urogram and urology consultation he needs to address this issue.”); *United States v. Almontes*, 2020 WL 1812713, at *1, *6–7 (D. Conn. Apr 9, 2020) (granting relief to an individual in need of urgent spinal surgery related to a previously broken neck, where the BOP had delayed treatment for years and his health was deteriorating); *Bruno v. United States*, 472 F. Supp. 3d 279, 284 (E.D. Va. 2020) (“In addition to Petitioner’s status as HIV-positive, the Court is also concerned that his mental health needs are being neglected during his term of incarceration. . . . This outcome is plainly unacceptable, as Petitioner was sentenced based in large part on his need for mental health treatment for his Bipolar Disorder.”).

Defenders presume that the BOP is rarely deliberately indifferent—the Eighth Amendment standard.¹¹ The beauty of sub. (b)(1)(C) is that it does not attempt to assign blame or remedy harm. Instead, it permits the court to reduce a sentence *before* there is harm—or at least further harm—so that a person who urgently needs complex or specialized medical care can access it.

Our concern is with the word “adequate,” as it appears in the phrase “that is not being provided in a timely or *adequate* manner.” That word may discourage courts from granting § 3582(c)(1)(A) relief so that an individual can get medical care in the community (where other factors militate in favor of release) in all but the most extreme circumstances. And where circumstances are extreme, §1B1.13 may not even be needed; that’s what the deliberate-indifference standard addresses. Section 3582(c)(1)(A) and §1B1.13(b)(1)(C) serve a different purpose.

In *Green*, a case in footnote 10 involving aggressive prostate cancer, the government opposed the motion on the ground that the BOP was providing “adequate” care.¹² But the court explained that nothing in § 3582 or §1B1.13 “require[d] the defendant to show that the BOP is not providing *adequate* medical care in order to be granted compassionate release.”¹³ Thus, the court did not have to assign a grade to the BOP’s care of Mr. Green. It was enough that Mr. Green needed far more aggressive and urgent care than he was getting in BOP custody, and the § 3553(a) factors supported release.¹⁴

To ensure that courts have the discretion to consider sentence reductions in cases like Mr. Green’s, where an individual needs access to urgent medical care in the community, Defenders recommend a stronger word than “adequate.” We suggest “effective.” As in: “The defendant is suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or *effective* manner.” This is a small change that could make a big difference in some cases.

¹¹ See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹² Order, *United States v. Green*, No. 3:16-cr-63-SLF, doc. 198 (D. Alaska Mar. 29, 2022) (quoting the government’s motion).

¹³ *Id.* at 4 (emphasis added).

¹⁴ See *id.*

B. Subsection (b)(1)(D) should encompass *any* emergency situation that threatens the lives or health of individuals in prison that cannot be mitigated.

As currently drafted, sub. (b)(1)(D) applies only to an “infectious disease” or a “public health emergency.” This is too narrow, given the reality of other emergency situations that may pose a health threat to the prison population. For example, it is easy to imagine a catastrophic weather event that prevents the BOP from protecting inmates’ health and safety. And if such an event happened over a large enough area, and the aftermath extended for a long enough period, individuals could face significant health threats that the BOP would not be able to mitigate.

But if the proposed sub. (b)(1)(D) were expanded solely to include extreme weather events, that would be overly narrow, too, given other events that could occur: *e.g.*, war, geological disaster, economic collapse. Defenders hope that we never see any of these circumstances in our lifetimes, and it would not make sense for the Commission to write a doomsday provision into the §1B1.13 policy statement. But the Commission should broaden sub. (b)(1)(D) to cover *any* emergency situation that poses a health threat to imprisoned individuals that cannot be appropriately mitigated.

C. The Commission should expand sub. (b)(4) in two ways in order to reach all prison abuse that may warrant a sentence reduction.

The bracketed sub. (b)(4), regarding people who have been the victim of physical or sexual abuse in prison, would be a positive change, but it covers only abuse that was perpetrated by a BOP employee or contractor and only if it resulted in “serious bodily injury.” The new subsection is well-meaning but these two limitations mean that it would not apply to circumstances that many—or even most—judges would find extraordinary and compelling.

First, there is no reasoned justification for limiting sub. (b)(4) to circumstances where the perpetrator is a BOP employee or contractor. With both sexual and physical abuse, the harm is real regardless of the identity of the perpetrator. Many Defenders have seen our clients return from prison with visible scars from injuries inflicted by other inmates and emotional scars

from violent rape. For victims of violent attacks while in prison, the fact that a BOP employee or contractor was not the perpetrator is utterly irrelevant.

Limiting sub. (b)(4) to situations where the perpetrator was a BOP employee or contractor makes the provision seem less like an illustrative example of an “extraordinary and compelling reason[]” for sentence reduction and more like compensation for harm inflicted by the government. In reality, the government can bear responsibility for inmate-on-inmate assault. But more importantly, the point of § 3582(c)(1)(A) is not to assign responsibility for harm, and it’s not to reduce a sentence in order to punish the government.

The point is that a particular individual’s circumstances might so change during their term of imprisonment that it would be inequitable to maintain the sentence as originally imposed. And sexual and physical abuse are life-changing no matter who the assaulter is: a federal employee or contractor,¹⁵ a state or local correctional officer (which might arise where the individual is serving both state and federal sentences or where he is in transit to a federal facility),¹⁶ or a fellow inmate.¹⁷

¹⁵ See, e.g., *United States v. Brice*, 2022 WL 17721031, at *4 (E.D. Pa. Dec. 15, 2022) (holding that prison guards’ sexual assault of the individual was an extraordinary and compelling reason for sentence reduction).

¹⁶ Cf. *United States v. Brocoli*, 543 F. Supp. 3d 563, 568–69 (S.D. Ohio 2021) (“[A]lthough Mr. Brocoli was investigated, charged, and sentenced in the federal system, he has nevertheless been detained in state-level institutions for a significant portion of his incarceration. During his incarceration in these state institutions, he reports having been severely abused and victimized. . . . For these reasons, the Court finds that Mr. Brocoli has demonstrated extraordinary and compelling reasons that could justify his release.”).

¹⁷ See, e.g., Mot. for Compassionate Release Due to Serious Medical Condition at 3–4, *United States v. Smith*, No. 3:11-cr-194-14, doc. 2260 (M.D. Tenn. March 31, 2022) (granted by Order dated Dec. 15, 2022, doc. 2285) (explaining that the individual was (mistakenly) believed to have cooperated with the government, which resulted in him being beaten so severely that he went into a coma and likely would require permanent nursing care); *United States v. Wise*, 2020 WL 4251007, *2–3 (N.D. Ohio June 25, 2020) (granting § 3582(c)(1)(A) motion based in part on medical conditions for an individual who had been brutally attacked in prison in 2007, causing spinal fractures, a broken jaw, a broken nose, and lingering neurological problems); cf. *United States v. Pinson*, 835 F. App’x 390, 392 (10th Cir. 2020) (affirming a district court judgment where the court had apparently accepted that it could be extraordinary and compelling that the individual had been subjected to “serious violence by other inmates, including rape,” but had denied the motion based on §

Second, Defenders are also concerned about the proposed sub. (b)(4)'s "serious bodily injury" requirement. The Guidelines define "serious bodily injury" as

injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.¹⁸

This limitation may make sense as applied to abuse by fellow inmates. Unfortunately, low-level violence in prison is not extraordinary; it is all too common. This is among the reasons that ending mass incarceration is a moral imperative for our nation. But it means that courts are likely to think that inmate-inflicted abuse in prison is extraordinary only when it causes significant injury or involves non-consensual sexual assault.

However, the situation is different where a prison employee, contractor, or volunteer (*e.g.*, clergy member, teacher) is the perpetrator. In that situation, it is the gross imbalance of power that makes a sexual act "abusive." *See* 18 U.S.C. § 2243 (sexual abuse of a minor or ward). And it is this same imbalance of power that makes physical abuse of an imprisoned individual by a person with authority more than simple assault—it's a civil rights violation.

In this situation, there should be no need for an individual to make a showing of harm—and certainly not "serious bodily injury"—before a court can recognize that it is extraordinary and compelling.

3553(a) factors). I have also reviewed a redacted version of a § 3582(c)(1)(A) motion that was filed under seal on behalf of a transgender woman who was housed in male prisons, where she was repeatedly attacked and raped. That motion was withdrawn before the court ruled on it, after the individual's BOP sentence expired. Motion to Withdraw Document, *United States v. Gerald P.*, No. 4:04-cr-29-TRM-SKL-1, doc. 326 (E.D. Tenn. Jan. 27, 2023). As with the other sealed document discussed in this statement, if it would be helpful, the client has granted permission for me to provide the Commission with a copy of the § 3582(c)(1)(A) motion upon request.

¹⁸ USSG §1B1.1, comment. (n. 1(M)).

Perhaps “serious bodily injury” was chosen for the proposed sub. (b)(4) because it applies anytime there has been sexual abuse as defined at 18 U.S.C. §§ 2241 or 2242, whereas the generally lower standard, “bodily injury,” does not.¹⁹ But in many sexual assault cases in which a BOP employee or contractor was the perpetrator, the offense comes within 18 U.S.C. § 2243 (sexual abuse of a minor or ward), but not necessarily §§ 2241 or 2242.²⁰ Thus, the limitation of sub. (b)(4) to circumstances that involve a “serious bodily injury” threatens to undermine even the core purpose of this proposed enumerated circumstance.

In order to address both of our concerns, Defenders recommend that the Commission alter sub. (b)(4) so that it reads:

VICTIM OF ABUSE.—The defendant was a victim of sexual or physical abuse in prison, where such abuse resulted in serious bodily injury or where it was perpetrated by a prison employee, contractor, or volunteer.

IV. An open-ended catchall category is essential to §1B1.13’s ability to capture unforeseeable and unique circumstances that are extraordinary and compelling.

Since the Sentencing Commission created a policy statement at §1B1.13, it has always had an open-ended catchall category. In the past, that category has turned on the BOP’s discretionary judgment; that was out of necessity, since the BOP effectively controlled § 3582(c)(1)(A) motions until passage of the First Step Act of 2018.²¹ Now that the BOP no longer controls these motions, the Commission need not reverse course; it should just update the entity that exercises discretion.

¹⁹ Compare USSG §1B1.1, comment. (n. 1(B)) with §1B1.1 comment. (n. 1(M)).

²⁰ In the context of the coercive relationship between a prison authority and an imprisoned person, consent is a thorny issue. That’s why sexual abuse of a minor or ward is a serious felony regardless of force, threat, or consent, which are the elements that define §§ 2241 and 2242.

²¹ When the BOP controlled sentence reductions under § 3582(c)(1)(A), as the Commission is aware, the BOP effectively abdicated its responsibility to seek sentence reductions. See *Brooker*, 976 F.3d at 231–32 (recounting this history).

The presence of an open-ended catchall category (like Option 3 for the proposed sub. (b)(6)) further defines the “criteria to be applied”²² in these proceedings and is essential to the functioning of §1B1.13, and we appreciate that the Commission has proposed it as an option. Before 2020, the Commission did not think to include risks related to infectious disease in §1B1.13; now we know. But we do not know all that we still do not know.

And beyond our inability to predict the future, it would not make sense for the Commission to include every conceivable occurrence that might, in an individual case, warrant a sentence reduction. Consider a few situations that have been recognized as among the extraordinary and compelling reasons for sentence reduction in my own district in recent years:

- *BOP services halted.* Our client was at the point of his sentence where ordinarily he would be receiving transitional services and transferring to a halfway house but, because of circumstances outside of his control (the pandemic), he was receiving no transitional or supportive services.²³
- *BOP rules increased sentence.* The parties and the sentencing court understood that the sentence would be fully concurrent to a state sentence, but the BOP deemed the federal sentence to be consecutive and thus our client was slated to serve a sentence far longer than the sentencing court had intended.²⁴
- *Youth at the time of sentencing.* In the more than 20 years since our client was sentenced to life in prison for serious offenses committed

²² 28 U.S.C. § 994(t). The Commission acts well within its policy-making authority in this space when it decides, as a matter of policy, that the sentencing court should have broad discretion to recognize unusual extraordinary and compelling reasons when they arise.

²³ See Order, *United States v. Coleman*, 3:17-cr-216-AWT, doc. 92 (D. Conn. May 20, 2020); see also Unopposed Mot. 4–5, *United States v. Coleman*, 3:17-cr-216-AWT, doc. 91 (D. Conn. May 18, 2020). Similar situations have arisen elsewhere. See, e.g., *United States v. Fraga*, 2020 WL 5732329, at *3 (D. Mass. Sept. 24, 2020) (granting release to home confinement where, if not for the pandemic, Mr. Fraga already would have been transferred to a halfway house or residential facility).

²⁴ See *United States v. Castillo*, 2021 WL 1781475, at *3 (D. Conn. Feb. 22, 2021). Again, similar situations have arisen elsewhere. See, e.g., *United States v. Comer*, 2022 WL 1719404, *5 (W.D. Va. May 27, 2022).

when he was 18 years old, society's and the courts' understanding of brain development had evolved considerably, calling into question the appropriateness of the sentence.²⁵

- *Sentence lengthened by civic duty.* Our client's time in the RDAP program²⁶ was cut short when the government transported him to testify before a grand jury. If he'd been able to complete RDAP he would have been released already, but because the government pulled him out of prison for a civic duty he was still in prison.²⁷
- *Family emergency.* Our client had just 20 days left to serve on his sentence under home confinement in New Jersey, and he was doing well. His mother was in hospice care in Georgia and would die any day. Given the short time left on our client's sentence, the court found that our client's need to be with his mother was extraordinary and compelling and granted his § 3582(c)(1)(A) motion.²⁸

"Extraordinary and compelling" findings arising from idiosyncratic circumstances in other districts include: saving the life of another person while in prison²⁹; risk of death at a halfway house related to cooperation with the

²⁵ See *United States v. Morris*, 2022 WL 3703201, at *8–9 (D. Conn. Aug. 26, 2022). Again, similar situations have arisen elsewhere. See, e.g., *United States v. Mendez-Zamora*, 2022 WL 9333452, *2 (D. Kan. Oct. 14, 2022).

²⁶ The BOP's Residential Drug Abuse Program (RDAP) is an intensive treatment program, where completion of the program results in a sentence reduction. See Federal Bureau of Prisons, *Substance Abuse Treatment*, https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp; Families Against Mandatory Minimums, *Frequently Asked Questions about the Residential Drug Abuse Program (RDAP)* at 1 (May 2012), <https://famm.org/wp-content/uploads/FAQ-Residential-Drug-Abuse-Program-5.3.pdf>.

²⁷ See *United States v. Wooten*, 2020 WL 6119321, at *8 (D. Conn. April 27, 2021).

²⁸ See Unopposed Emergency Mot., *United States v. Oreckinto*, No. 3:16-CR-026 (JAM), doc. 137 (D. Conn. Feb. 13, 2021) (granted by Order, doc. 138 (Feb. 13, 2021)).

²⁹ See *United States v. Pimental-Quiroz*, 2021 WL 915141, at *4 (W.D. Wash. Mar. 10, 2021) (finding that Mr. Pimental-Quiroz "put himself at risk when he assisted a female corrections officer who was being assaulted by a mentally ill inmate"); see also *United States v. Meeks*, 2021 WL 9928774, at *3 (N.D. Ill. Dec. 15, 2021) (recognizing as extraordinary and compelling that the individual saved the life of a fellow inmate who was attempting suicide).

government³⁰; unwarranted disparities among co-defendants that emerged after sentencing³¹; childbirth and inability to bond with a newborn while incarcerated³²; unwarranted reincarceration after release to CARES Act home confinement³³; and psychological problems manifesting in a child upon separation from her incarcerated parent.³⁴

These sorts of circumstances do not relate to any enumerated category that the Commission has proposed. But also, it would not make sense to create an additional category for, say, saving someone's life or being pulled out of RDAP for grand jury service. These are too idiosyncratic. However, an open-ended §1B1.13(b)(6) ensures that sentencing courts are able to identify

³⁰ In the case in which this arose, all documents were filed under seal and cannot be shared. But it is no secret that halfway houses can expose vulnerable individuals to new violence. *See, e.g., 1 wounded in shooting near halfway house in New Orleans*, 4WWL (Feb. 10, 2022), <https://www.wwltv.com/article/news/crime/1-wounded-in-shooting-near-halfway-house/289-e975d60a-c908-48d1-b712-06974e995000>.

³¹ *See United States v. Edwards*, 2021 WL 1575276, at *1–2 (D. Md. Apr. 22, 2021); *see also United States v. Conley*, 2021 WL 825669, at *4 (N.D. Ill. Mar. 4, 2021) (granting relief under § 3582(c)(1)(A) in a stash-house case in which Mr. “Conley was the next to least culpable, yet received the longest prison sentence by double based on outrageous and disreputable law enforcement tactics”). Pre-Sentencing Reform Act, at least one court in a published case reduced a sentence under a predecessor statute—18 U.S.C. § 4205, which permitted the BOP to seek a sentence reduction below an otherwise mandatory-minimum—based on disparities among co-defendants. *See United States v. Diaco*, 457 F. Supp. 371, 376 (D.N.J. 1978).

³² *See United States v. Garcia-Zuniga*, 2020 WL 3403070, at *2–3 (S.D. Cal. June 19, 2020).

³³ *See* Mot. for Emergency Status Hearing, *United States v. Levi*, No. 8:04-cr-235-DKC, doc. 2086 (D. Md. July 2, 2021) (granted by Order, doc. 2086 (July 6, 2021)). It is my understanding that Gwen Levi will testify before the Commission, so the Commission is likely familiar with her case. But for a narrative of what occurred, *see* Kristine Phillips, *Woman who was arrested after missing officials’ phone call while in computer class is headed home*, USA Today (July 7, 2021), <https://www.usatoday.com/story/news/politics/2021/07/06/gwen-levi-headed-home-after-judge-approves-compassionate-release/7877359002/>.

³⁴ *See* Order, *United States v. Ochoa*, No. 18-cr-03945-BAS-1, doc. 70 at 8 (S.D. Cal. Feb. 19, 2021) (“In light of the pandemic, the closed schools, and the serious difficulties L. has been experiencing—namely, his reported deterioration in mental health and suicidal ideation—the Court finds this showing constitutes ‘extraordinary and compelling circumstances’ to support reducing Ms. Ochoa’s sentence to allow her to better care for her minor child.”).

circumstances like these as extraordinary and compelling when they encounter them—in appropriate cases, on an individualized basis.

Of the three options the Commission has presented for the new §1B1.13(b)(6), the third option is the best. The proposed third option gives sentencing courts nothing more than the same meaningful discretion that the Commission has long afforded the BOP.³⁵ It does not preclude relief in circumstances that courts may reasonably find—indeed, have reasonably found—to be extraordinary and compelling reasons for sentence reduction, and its meaning is clear.

Option 1 is overly restrictive. Option 1 is limited to circumstances that are “similar in nature and consequence” to §1B1.13’s enumerated circumstances. Thus, it wrongly suggests that those enumerated categories have entirely covered the kinds of circumstances that may present an extraordinary and compelling basis for sentencing relief. But none of us—including the Commission—is omniscient, nor can we see the future.

The circumstances that supported relief in the idiosyncratic cases bulleted above are not similar in nature to any of the enumerated circumstances in sub. (b)(1) through (b)(5). What’s more, none of them make sense as a new enumerated category, given that they are so unusual and fact-specific.

Beyond what has arisen in actual § 3582(c)(1)(A) cases, it is not hard to imagine hypothetical fact-bound circumstances that, in a particular case, might be an extraordinary and compelling reason for sentence reduction:

- An individual co-owns a grocery store; while he is incarcerated, the other co-owner becomes incapacitated and the store is in danger of shutting down, which would negatively impact not just the defendant and his family but also the neighborhood’s access to fresh, affordable food.
- An individual’s spouse and children are killed in a tragic accident and no one else is able to plan memorials or ensure that the family home is not foreclosed upon, and also the sentencing court wants to encourage the individual to start rebuilding his life post-tragedy.

³⁵ See USSG §1B1.13, comment. (n. 1(D)).

- An individual who suffers from Tourette’s Syndrome has been repeatedly threatened in prison for involuntarily saying offensive things, leading to near-permanent solitary confinement.³⁶
- The BOP erroneously releases an individual from prison who successfully serves his term of supervised release and then lives as a law-abiding citizen in the community for years, before the error is discovered and he is sent back to prison.

Perhaps some of these circumstances will never arise; but it is inevitable that there will be circumstances that are similarly extraordinary, compelling, and utterly distinct from any enumerated category. None of these circumstances would guarantee a sentence reduction, of course, but a court facing such a circumstance should be able to decide whether a reduction is warranted. Option 1 of the proposed options for sub. (b)(6) could be read to categorically bar relief in all these circumstances, regardless of other factors.

Option 2 of sub. (b)(6) could create uncertainty. Option 2 is not necessarily problematic. It is preferable to Option 1: it acknowledges that circumstances that are unrelated to §1B1.13’s enumerated categories could warrant § 3582(c)(1)(A) relief. Also, it evokes § 3582(c)(1)(A)’s legislative history, in which a Senate Report referred to the provision as a “safety valve” that would apply whenever an individual’s circumstances were “so changed” that it would be “inequitable” to maintain the original sentence.³⁷

The Defenders’ concern is that the phrases “changes in the defendant’s circumstances” and “intervening events” do not have established meanings in this context, and so present uncharted litigation territory. Different courts could interpret the phrases differently. And given that the Commission has previously adopted the language of Option 3, there is no need to promulgate a new, untested standard.

If Option 2 is ultimately chosen, we would urge the Commission to adopt the language both outside and inside the brackets, so that courts would understand that sub. (b)(6) covers not only circumstances that are personal to

³⁶ This hypothetical is based on a real situation, where a § 3582(c)(1)(A) motion may be filed in the future.

³⁷ See S. Rep. No. 98-225, at 121 (1983), *see also supra* note 3.

the individual, but also circumstances related to outside events that may impact the propriety of a particular sentence.³⁸ Or, even better, the Commission could simplify Option 2:

The circumstances as understood at sentencing have so changed that it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of his or her sentence.

Also, if the Commission chooses Option 2, it should retain—either within sub. (b)(6) or elsewhere—the clarification that “the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.”³⁹ Indeed, it would be sensible for the Commission to retain this language regardless of sub. (b)(6). Defenders just note that it would be particularly important to retain the language if the Commission chooses Option 2 for sub. (b)(6), given uncertainties with the language. The Commission appears to have deleted this commentary as an accident of restructuring §1B1.13 so that it is no longer dependent on BOP action, not as a substantive policy choice, but some judges may assume otherwise.

Option 3 is the best, and simplest, option. Option 3 respects the courts' ability to exercise discretion under Congress's substantive standard no less than the Commission has always respected the BOP. This is consistent with one of the purposes of the Sentencing Reform Act: to keep sentencing decisions in the judiciary. And Option 3 is not overly restrictive; it is clear; and it will allow courts to transparently grant relief in cases that cry out for relief.

³⁸ The drafters of the Model Penal Code's new sentence modification provision that is modeled, in part, on § 3582(c)(1)(A) have explained that while application of such provision “will usually focus on circumstances having to do with the prisoner, or the prisoner's behavior,” it is meant to be “flexible enough to reach compelling changes of circumstances outside the institution.” *Model Penal Code: Sentencing* § 305.7 (Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmary, Exigent Family Circumstances, or Other Compelling Reasons), comment b. (Am. L. Inst., Proposed Official Draft 2017).

³⁹ USSG §1B1.13 comment. (n. 2).

V. Conclusion

Almost 20 years ago, Justice Kennedy gave a speech in which he criticized the legal profession for “losing all interest” after someone is judged guilty and the appeal ends.⁴⁰ “We have a greater responsibility,” he said; “As a profession, and as a people, we should know what happens after the prisoner is taken away.”⁴¹

To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.⁴²

This really speaks to § 3582(c)(1)(A). When Congress in 1984 abolished parole, it decided that under the new determinate sentencing system, there needed to be a way for courts to address changed circumstances—to find out what happened after someone was taken away to prison—where those circumstances may render the sentence inequitable as imposed. There needed to be an adaptable safety valve: § 3582(c)(1)(A).

In fulfilling its obligation to set policy for sentence reductions under § 3582(c)(1)(A), the Commission has recognized our incarcerated clients’ humanity, and that they are not frozen in time at sentencing—they, their families, and larger forces change during their incarceration. The Commission has proposed a policy statement that would allow § 3582(c)(1)(A) to serve as a meaningful safety valve that can respond to these changes, as Congress intended, when they render the sentence in a particular case inequitable.

Defenders appreciate that you have given us the opportunity to suggest changes and comment on options that would improve and strengthen the Commission’s proposals. At the hearing, I look forward to addressing any questions or concerns Commissioners may have.

⁴⁰ Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html.

⁴¹ *Id.*

⁴² *Id.*