

The Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC, 20002-8002

Re: Federal Register Notice of Proposed 2026-2027 Priorities, 91 Fed. Reg. 35802

Dear Judge Reeves,

Thank you for the opportunity to comment on the United States Sentencing Commission's proposed priorities for the 2026-2027 year. We are a group of constitutional and administrative law scholars and clinicians who study and litigate good governance and government transparency issues. We welcome the Commission's engagement with these matters, especially its consideration of possible amendments to its Rules to improve public access to the Commission's records and meetings.¹

I. Public Access to Criminal Justice Records Is Crucial to the Legitimacy of the Criminal Justice System and to Broader Democratic Processes

Openness is not only a hallmark of the American criminal system; it is an essential ingredient with roots dating back to the Founding.² As the Supreme Court explained in *Richmond Newspapers*: “When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.”³ Without such an outlet, the “natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful ‘self-help.’”⁴ And these negative effects only grow when the criminal system withdraws from public scrutiny.

The *Richmond Newspapers* Court was writing about the public's right to observe criminal trials. But in the modern era, trials are vanishingly rare. They occur in only a minuscule proportion of criminal cases. According to the latest data maintained by the federal judiciary, more than 98% of criminal defendants convicted and sentenced in 2025 entered guilty pleas.⁵ They did so to avoid incurring the “trial penalty”—the statistical reality that defendants who choose to exercise their constitutional right to a trial are sentenced significantly more harshly if they are convicted than defendants who plead guilty to the same crimes.⁶ A 2018 data analysis by

¹ See Proposed Priorities for Amendment Cycle, 91 Fed. Reg. 35802 (June 12, 2026) (request for comment).

² U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

³ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (citations omitted).

⁴ *Id.*

⁵ *U.S. District Courts—Criminal Defendants Terminated, by Type of Disposition and Offense, During the 12-Month Period Ending December 31, 2025*, U.S. CTS., <https://www.uscourts.gov/data-news/data-tables/2025/12/31/statistical-tables-federal-judiciary/d-4> [<https://perma.cc/ZZM4-YLJ6>]. According to this data, 77,447 federal criminal defendants were convicted and sentenced during the 12-month period ending on December 31, 2025. Of those 77,447 individuals, 76,154 entered guilty pleas.

⁶ NAT'L ASS'N OF CRIM. DEF. LAWS., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 20-21 fig.1 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [<https://perma.cc/J57J-54DD>].

the National Association of Criminal Defense Lawyers calculated the average post-trial sentence as 227% higher than the average post-plea sentence, resulting in an average sentence that was longer by 7.5 years.⁷

In short, our modern criminal system has largely replaced open-to-all trials with an inscrutable process of closed-door plea negotiations. In this system, criminal sentences are among the *only* aspects that provide the opportunities for public catharsis and a sense of collective justice that the Founders were focused on. These sentencing decisions have an incalculable effect on the lives of criminal defendants and their families.

The First Amendment right of access guarantees the public’s right to attend any single criminal sentencing hearing.⁸ But the sentencing hearings themselves offer little insight into how the decision was reached.⁹ Those most affected by criminal justice decisions—defendants and victims alike—do not have sufficient information about how these sentencing decisions are produced.¹⁰ It is crucial that the public also understand how the broader sentencing process functions.¹¹ This requires access to the records and proceedings of the United States Sentencing Commission.

Sentencing decisions are dominated by the Commission’s Sentencing Guidelines. According to the Sentencing Commission’s most recent quarterly report, judges sentence within the Guidelines’ range approximately 60% of the time. This figure, in fact, significantly underrepresents the Guidelines’ influence, because the vast majority of above- or below-Guidelines sentences are driven by deviation regimes, not solely judicial discretion.¹² When sentencing comes down to judicial discretion, “the guidelines exert a *greater* influence” than they do in cases where less discretion is available.¹³ When courts impose within-Guidelines sentences, those sentences are also extremely difficult to overturn on appeal. As the Congressional Research Service has explained, “trial courts are afforded considerable deference,” unless the sentence imposed was “shockingly high, shockingly low, or justified on a ground which the law will not accept.”¹⁴

⁷ *Id.*

⁸ *See, e.g.,* United States v. Alcantara, 396 F.3d 189, 196 (2d Cir. 2005) (“There is little doubt that the First Amendment right of access extends to sentencing proceedings . . .”); *In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986); *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 177 (5th Cir. 2011).

⁹ Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2191 (2014) (citing Nancy Gertner, *From “Rites” to “Rights”: The Decline of the Criminal Jury Trial*, 24 YALE J.L. & HUMANS. 433, 436-37 (2012)).

¹⁰ *Id.*; Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 916 (2006).

¹¹ Bibas, *supra* note 10 (observing that using “low-visibility procedures run by insiders,” including decision-making around sentencing, obstructs substantive law and “obstructs victims’ sense of vindication, catharsis, and healing”).

¹² U.S. SENT’G COMM’N, QUARTERLY DATA REPORT, 1ST QUARTER RELEASE, PRELIMINARY FISCAL YEAR 2026 DATA, THROUGH DECEMBER 31, 2025, at 11 tbl.8 (2026), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_1st_FY26.pdf [<https://perma.cc/VM9M-GAZW>]. These deviations include below-guidelines sentences that are driven by the federal-cooperator adjustments in § 5K1.1 or the Early Disposition Program set out in § 3F1.1. *Id.* Only around 18% of sentences imposed in 2025 were below the applicable guidelines range without being driven by either the government’s request for a lower sentence or by the formalized adjustments. *Id.*

¹³ U.S. SENT’G COMM’N, THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING 6 (2020) (emphasis added), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf#page=9 [<https://perma.cc/W2SM-F8C5>].

¹⁴ CONG. RSCH. SERV., HOW THE FEDERAL SENTENCING GUIDELINES WORK: AN OVERVIEW 40 (2015) (internal quotation marks omitted), https://www.congress.gov/crs_external_products/R/PDF/R41696/R41696.9.pdf [<https://perma.cc/TNP6-A992>].

Put differently, the current criminal system affords the public an extraordinarily narrow window for public participation and scrutiny. The narrowness of this window demands correspondingly deep and broad transparency measures, especially because the stakes for public participation are so high. Without sufficient public access, the criminal system risks losing its legitimacy and falling into pervasive and corrosive public distrust.

Recent studies suggest that this is already occurring. A 2024 Gallup poll demonstrated that Americans' confidence in the judicial system recently plummeted to a record-low 35%—a sharper drop than for any other institution, including the national government, the military, and financial institutions.¹⁵ These effects are particularly prominent among racial minorities, especially Black Americans.¹⁶ But confidence in the courts has dropped across the ideological spectrum—the effect holds both among people who believe the system is too harsh and among people who believe the system is not tough enough.¹⁷

By contrast, improving the transparency of the criminal system has a strong, positive impact on the public's perception of its fairness and legitimacy. For example, jurors—who have the opportunity to see the operation of the criminal system firsthand—consistently report that the experience increases their perception of the judicial system and its fairness.¹⁸ Importantly, the positive effects of “procedural justice” improvements remain in some studies even when the substantive decisions are held constant.¹⁹

II. Enhanced Public Records Disclosures by the Sentencing Commission Would Improve Sentencing Commission Decision-Making Processes

Public records disclosures play a meaningful role in cultivating this kind of transparency and boosting the public's perceptions of legitimacy and fairness. Studies show that public records disclosures not only serve as a powerful check against corruption,²⁰ but they also substantively

¹⁵ Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, GALLUP (Dec. 17, 2024), <https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx> [<https://perma.cc/5AR3-XMEJ>].

¹⁶ KIANA COX, PEW RSCH. CTR., MOST BLACK AMERICANS BELIEVE U.S. INSTITUTIONS WERE DESIGNED TO HOLD BLACK PEOPLE BACK 16-17 (2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/06/RE_2024.06.15_Black-Americans-and-US-Institutions_REPORT.pdf [<https://perma.cc/T7ZN-8J9E>].

¹⁷ See Megan Brennan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023), <https://news.gallup.com/poll/544439/americans-critical-criminal-justice-system.aspx> [<https://perma.cc/88JJ-TLUX>].

¹⁸ Shawn Patterson Jr. et al., *To Know Courts Is to Love Them?*, 109 JUDICATURE, no. 3, 2026, at 25, <https://judicature.duke.edu/articles/jury-service-civic-education-public-trust-courts/> [<https://perma.cc/X2UP-JMTL>].

¹⁹ See, e.g., Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, NAT'L INST. JUST. J., no. 248, Mar. 2002, at 23, 28 (citing L.W. Sherman, H. Strang, & G.C. Barnes, *Stratification of Justice: Legitimacy of Hierarchical and Egalitarian Sentencing Procedures* (1999) (unpublished manuscript) (on file with Fels Center of Government, University of Pennsylvania), <https://www.ojp.gov/pdffiles1/jr000248e.pdf> [<https://perma.cc/R6AM-U2CJ>]; CLAIRE HAMILTON & LYNSEY BLACK, IR. DEPT. OF JUST. & EQUAL., AN EVIDENCE REVIEW OF CONFIDENCE IN CRIMINAL JUSTICE SYSTEMS 80-81 (2019) (finding that the more information a person has about a criminal sentence and why it was imposed, the more likely they are to agree it was fair); Juan Pablo Ripamonti, *Does Being Informed About Government Transparency Boost Trust? Exploring an Overlooked Mechanism*, 41 GOV'T INFO. Q., no. 3, 2024, at 6 (concluding that government disclosures of information significantly boosted trust among some members of the public).

²⁰ Adriana S. Cordis & Patrick L. Warren, *Sunshine as Disinfectant: The Effect of State Freedom of Information Act Laws on Public Corruption*, 115 J. PUB. ECON. 18 (2014) (presenting evidence that strengthening freedom of information laws increases corruption conviction rates in the short term and may deter corruption in the long term).

improve on-the-ground decision-making in ways that promote the public good.²¹ Journalists routinely rely on federal and state public records laws to engage in deep and sustained reporting on government. One study of submissions to the Investigative Reporters and Editors' annual journalism prize, for example, found that approximately one-quarter of stories about government wrongdoing relied on a federal or state public records request.²²

Further, improving the public's access to the Sentencing Commission's records would bring the Commission in line with the practices of many peer agencies and decision-making bodies. The Administrative Office of the U.S. Courts, for example, discloses records related to every stage of its rulemaking process, including agendas, meeting minutes, committee reports, preliminary drafts of proposed rule changes, Congressional and Supreme Court rules packages, rules suggestions, and public comments received about proposed amendments.²³ It also publishes detailed information regarding caseloads, wiretap applications, and judicial business, including strategic planning resources for the judiciary and judges' own financial disclosures.²⁴

These disclosures mirror transparency measures undertaken by myriad other legislative and judicial bodies that, like the Sentencing Commission, are exempt from most provisions of the Freedom of Information and Administrative Procedure Acts. The Government Accountability Office, for instance, voluntarily promulgated its own FOIA-like transparency regime,²⁵ and it posts nearly all of its audit and evaluation reports and legal decisions on GAO.gov.²⁶ When the GAO's reports contain confidential or sensitive information, the GAO discloses the existence of a "restricted version" and separately prepares an unclassified version that it releases publicly.²⁷ The Library of Congress and the Congressional Budget Office likewise publish vast quantities of information about their decision-making and analytical processes.²⁸

III. The Sentencing Commission Should Consider Enacting Affirmative Disclosure Policies for Certain Categories of Records

The Sentencing Commission has an opportunity to reverse the growing sense of public distrust by adopting and maintaining transparency mechanisms that will assure the public that the system is working fairly. We urge the Commission to adopt the following transparency measures and policies:

1. Extend transparency measures to nonpublic meetings where feasible

²¹ Stephen Kosack & Archon Fung, *Does Transparency Improve Governance?*, 17 ANN. REV. POL. SCI. 65 (2014) (collecting studies).

²² JAMES T. HAMILTON, DEMOCRACY'S DETECTIVES 158 tbl. 5.2 (2016).

²³ *Records of the Rules Committees*, U.S. CTS., <https://www.uscourts.gov/forms-rules/records-rules-committees> [<https://perma.cc/7QVL-EX5F>].

²⁴ *Statistical Reports*, U.S. CTS., <https://www.uscourts.gov/statistical-reports> [<https://perma.cc/XMD6-NU3X>].

²⁵ 4 C.F.R. pt. 81 (2025).

²⁶ *Reports & Testimonies*, U.S. GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/reports-testimonies> [<https://perma.cc/FP76-QCD7>].

²⁷ *Restricted Reports*, U.S. GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/reports-testimonies/restricted> [<https://perma.cc/4Q54-J8V6>].

²⁸ See, e.g., 36 C.F.R. pt. 703 (2025); *Annual Reports*, LIBR. OF CONG., <https://www.loc.gov/about/reports-and-budgets/annual-reports/> [<https://perma.cc/ZA2V-U4VR>]; *Legal Reports*, LIBR. OF CONG., <https://www.loc.gov/research-centers/law-library-of-congress/legal-reports/> [<https://perma.cc/B6HU-4ZZP>]; *Transparency*, CONG. BUDGET OFF., <https://www.cbo.gov/about/transparency> [<https://perma.cc/83L6-XCTY>].

The public's trust in agency decision-making extends only as far as its oversight measures, and the Commission has left a significant gap by failing to disclose information related to its nonpublic meetings. The Commission should adopt disclosure policies that extend to these nonpublic meetings so that the public can monitor and understand the Commission's decision-making processes. At a minimum, the Commission should disclose the dates of any nonpublic meetings held, their attendees, the matters discussed, the details of any votes taken,²⁹ and any materials prepared for or reviewed at the nonpublic meeting, including those addressed in point 4, below. To the extent disclosure would reveal sensitive information or have a chilling effect on policymaking discussions, the Commission could safeguard parts of these records through segregation and redaction measures.³⁰

2. Make Prison Impact Assessments available to the public before proposed amendments to the Guidelines are considered and adopted

Prison Impact Assessments provide invaluable information to the public about the impact that a proposed amendment is likely to have on the number of people in federal prison and the length of time they will spend there. Making these assessments available *before* the proposed change is adopted will ensure that public comment on the policy is accurately informed and will communicate to affected stakeholders that the Commission has fully considered the impact an amendment will have before deciding to adopt it. To the extent that formal Prison Impact Assessments are not prepared before a proposed amendment is adopted, the Commission should release any preliminary prison impact assessments that are created and considered in connection with proposed amendments.

3. Make available to the public records of all votes or actions by Commissioners

The Commission should consider making public all records of minutes, actions, decisions, or votes by the Commission, including those taken at nonpublic meetings. Under 28 U.S.C. § 995(e), the Commission is obligated to “maintain and make available for public inspection a record of the final vote of each member on any action taken by it.”³¹ Making all final decisions public—not just those adopted in public meetings—allows the public to better understand and monitor the Commission's policymaking work. It also brings the Commission's operations in line with the statutory transparency obligations that bind other federal agencies.³²

²⁹ 28 U.S.C. § 995(e) (“Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member on any action taken by it.”).

³⁰ For a discussion of best practices for segregating and redacting documents in related contexts, such as under FOIA, see, for example, DEP'T OF JUST., GUIDE TO THE FREEDOM OF INFORMATION ACT: PROCEDURAL REQUIREMENTS 73-79 (2025), <https://www.justice.gov/oip/page/file/1199421/dl?inline> [<https://perma.cc/3DW4-SY29>]; and *OIP Guidance: The “Reasonable Segregation” Obligation*, OFF. OF INFO. POL'Y, DEP'T OF JUST. (Jan. 1, 1993), <https://www.justice.gov/archives/oip/blog/foia-update-oip-guidance-reasonable-segregation-obligation> [<https://perma.cc/765C-CQYN>].

³¹ 28 U.S.C. § 995(e).

³² See 5 U.S.C. § 552(a)(5) (“Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.”). See also *id.* at § 552(a)(2) (requiring that federal agencies publish “final opinions” and “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register”).

4. Release decision-making materials developed for both public and nonpublic meetings to the greatest extent possible

The Commission considers numerous sources of information when evaluating potential changes to the Sentencing Guidelines, including data briefings, data supplements, presentations by internal and external experts, comments submitted by the public, and ex parte communications. To the greatest extent possible, the Commission should disclose (1) the existence of these materials or communications, (2) their dates, (3) their contents, and (4) the identities of who created, presented, and/or participated in them. This obligation should extend to materials developed for use in both public and nonpublic meetings. Although certain redactions or confidentiality measures may be needed to protect sensitive information and to encourage frank conversation among federal judges and the Commission, it is essential for the public to understand what pieces of information—and whose voices—played a role in the Commission’s decisions.

We encourage the Commission to formalize its policies regarding what decision-making materials it makes available to the public rather than rely on ad hoc decisions about whether to approve materials for public release. Clear expectations will benefit all parties involved. Stakeholders who communicate with the Commission will know in advance whether their materials and communications will be available to the public, and the public will feel more confident that the Commission is presenting an accurate picture of the information it considered.

5. Improve data collection and reporting

The Commission currently compiles and releases substantial data about the workings of the federal criminal system.³³ These disclosures are invaluable to researchers who study the federal criminal courts, as well as to advocates who litigate within the criminal justice system. The Commission should continue to disclose this data, and it should work to ensure that it is maximally useful to researchers and members of the public. To this end, the Commission should seek input from the researchers and advocates who rely most heavily on the Commission’s data to determine whether there are high-impact, low-effort ways to improve the Commission’s data—for example, by reporting sentencing information by judge³⁴ or by compiling information about a criminal defendant’s charges in addition to the information about their sentence.³⁵

³³ See, e.g., *Interactive Data Analyzer*, U.S. SENT’G COMM’N, <https://ida.ussc.gov/analytics/saw.dll?Dashboard> [<https://perma.cc/D7US-JHSV>].

³⁴ See Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 717 (2008) (“[T]ransparency in sentencing data—in particular, data on the identity of sentencing judges—could be useful in identifying sources of judicial sentencing disparity that would inform the types of reform necessary to improve consistency.”).

³⁵ See Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 394 (2010) (combining Administrative Office of the U.S. Courts charging data with U.S. Sentencing Commission sentencing data to “overcome[] [the] limitations of each” dataset alone).

Thank you for your time and attention to these matters.

Jennifer A. Borg
Visiting Clinical Lecturer
Media Freedom &
Information Access Clinic
Yale Law School

Alan K. Chen
Distinguished University Professor &
Thompson G. Marsh Law Alumni
Professor
University of Denver Sturm College of
Law

Jane E. Kirtley
Silha Professor of Media Ethics and
Law *Emerita*
University of Minnesota

Christina Koningisor
Harry & Lillian Hastings Research
Chair and Professor of Law
University of California School of
Law, San Francisco

Margaret B. Kwoka
Frank R. Strong Chair in Law
The Ohio State University Moritz
College of Law

John Langford
Clinical Associate Professor of Law
Yale Law School

Christina Lee
Visiting Clinical Lecturer in Law
Media Freedom &
Information Access Clinic
Yale Law School

Gregg P. Leslie
Professor of Practice
Executive Director, First Amendment
Clinic
Arizona State University Sandra Day
O'Connor College of Law

Stacy Livingston
Visiting Clinical Lecturer in Law
Media Freedom &
Information Access Clinic
Yale Law School

David A. Schulz
Co-Director
Media Freedom &
Information Access Clinic
Yale Law School