

Senate Majority Leader Chuck Schumer  
322 Hart Senate Office Building  
Washington, DC 20510

Senate Minority Leader Mitch McConnell  
317 Russell Senate Office Building  
Washington, DC 20510

CC: Senate Judiciary Committee Chair Dick Durbin and Ranking Member Lindsay Graham; Senate Judiciary Subcommittee on Criminal Justice and Counterterrorism Chair Cory Booker and Ranking Member Tom Cotton

**RE: Ensuring that the U.S. Sentencing Commission Remains Fully Staffed**

September 10, 2024

Dear Senate Majority Leader Schumer, Senate Minority Leader McConnell, Chairman Durbin, Ranking Member Graham, Chairman Booker, and Ranking Member Cotton:

On behalf of the Federal Public and Community Defenders and a coalition of civil rights, civil liberties, and criminal legal reform organizations, we write to urge the U.S. Senate to quickly confirm commissioners to the U.S. Sentencing Commission. Time is of the essence because, absent action by the Senate, the terms of two voting members will expire on October 31, 2024—less than two months from now.

It is imperative that the Commission maintain a full slate of voting commissioners. As you know, the Commission plays a critical role in the federal criminal legal system. It promulgates the advisory U.S. Sentencing Guidelines, which are the starting point and anchor for every criminal sentence handed down by a federal district judge and which exert enormous influence on the amount of time the approximately 60,000-to-70,000 people convicted of federal crimes each year must spend behind bars.<sup>1</sup> It promulgates policy statements, which, among other things, are critical to ensuring full and appropriate implementation of the First Step Act.<sup>2</sup> And it sets the agenda for research into the pattern and practice of federal sentencing, providing real-time data to Congress about necessary guidelines reforms and the impact of federal sentencing on rehabilitation, recidivism, and public safety.<sup>3</sup> The Commission's work is particularly critical to the fair and equitable

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<sup>1</sup> See *Peugh v. United States*, 569 U.S. 530, 542–43 (2013) (“Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges[.]”); see also Mark W. Bennett, *Confronting Cognitive ‘Anchoring Effect’ and ‘Blind Spot’ Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. of Crim. L. & Criminology 489 (2014) (explaining how—even though it is but one factor among many that a judge is supposed to consider in fashioning a sentence—the guideline range exercises an often disproportionate impact on judges’ sentencing decisions).

<sup>2</sup> See 18 U.S.C. § 3582(c)(1)(A) (sentence reductions based on extraordinary and compelling reasons allowed only if “consistent with applicable policy statements issued by the Sentencing Commission”).

<sup>3</sup> See, e.g., U.S. Sent’g Comm’n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* 4–5 (2024) (noting empirical flaws in the methamphetamine guideline), <https://bit.ly/3Z8X75n>; U.S. Sent’g Comm’n, *Revisiting Status Points* 3 (2022) (finding that “[people] who receive status points”—aggravated guidelines ranges based on being on some form of criminal supervision at the time of a federal offense—“were rearrested at similar rates to those without status points who had the same criminal history score”), <https://bit.ly/3RX13lf>; U.S. Sent’g Comm’n,

administration of the federal criminal legal system in light of the high rate of cases resolved by plea in the federal system.<sup>4</sup>

The Commission’s ability to do its job will be severely compromised if it loses two voting members in October. The sheer volume of work confronting the Commission right now means that it needs all-hands-on-deck to fulfill its responsibilities to the judiciary, to Congress, and to the people—overwhelmingly people of color<sup>5</sup>—who face loss of liberty in federal courts each year.<sup>6</sup>

More fundamentally, empty seats on the Commission undermine the legitimacy of both the Commission and the federal criminal system. The Commission’s work impacts not just the individual sentences federal judges mete out, but also the overall composition of the federal prison population. Because of this, it is crucial that voting commissioners reflect a range of experiences with, and perspectives on, the federal criminal system. Recognizing the importance of this diversity to the Commission’s work, Congress put in place statutory safeguards to ensure that, in U.S. Sentencing Commission Chair Carlton Reeves’s words, “when you speak to the Commission, you will be heard”—no matter who you are or what position you occupy in the federal criminal system.<sup>7</sup> When the number of voting commissioners dwindles, the Commission loses the diversity of viewpoints and perspectives that is essential to ensuring that federal sentencing “reflect[s], to the greatest extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.”<sup>8</sup> The more seats are empty on the Commission, the more we risk making Chair Reeves’s promise empty as well.

Recent U.S. Sentencing Commission history makes it especially critical to prioritize maintaining a full slate of voting commissioners right now. For more than three years—

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*Recidivism of Federal Firearms Offenders Released in 2010* 30 (2021) (noting that people with shortest prison sentences had lowest rearrest rates), <https://bit.ly/3ZZpGiQ>.

<sup>4</sup> See U.S. Sent’g Comm’n, *2023 Annual Report* 16 (97.2% of all cases resolved by guilty plea in FY 2023), <https://bit.ly/3yYmBYk>.

<sup>5</sup> *Id.*

<sup>6</sup> To illustrate the volume of work confronting the Commission: in response to its request for public comment on proposed priorities for the 2024–2025 amendment cycle, the Commission received over 1,200 pages of public comments from policymakers, judges, defense counsel, prosecutors and advocates for justice-impacted individuals. These comments collectively make the case for broad-based, systematic reforms to and simplifications of the U.S. Sentencing Guidelines. See U.S. Sent’g Comm’n, *Public Comment on Proposed Priorities for the 2024–2025 Amendment Cycle* (2024), <https://bit.ly/4dGqO1M>.

<sup>7</sup> See 28 U.S.C. § 991(a) (requiring the President to consult with a full range of actors in the criminal legal system before appointing voting members of the Commission); *id.* (requiring bipartisan representation among Commission members); *id.* (allowing more than just judges to serve as voting commissioners); see also U.S. Sent’g Comm’n, *Remarks by U.S. Sent’g Comm’n Chair Carlton W. Reeves* (Aug. 8, 2024), <https://bit.ly/3T9T1pD>.

<sup>8</sup> 28 U.S.C. § 991(b)(1)(C).

from January 2019 until August 2022—the Commission lacked a voting quorum.<sup>9</sup> This meant that for three years the Sentencing Guidelines remained frozen in place, with the Commission unable to update them in response to new federal criminal statutes, new procedural reforms, and new data on federal sentencing. Meanwhile, massive changes were wrought to the federal criminal system. The bipartisan First Step Act was passed. Numerous circuit splits over the proper interpretation of the guidelines arose, meaning that the length of a person’s sentence began to turn—not on their personal conduct and character—but on which circuit they happened to be charged in.<sup>10</sup> Congress enacted new substantive criminal laws and penalties.<sup>11</sup> And evidence of numerous ways in which the guidelines are broken continued to mount.<sup>12</sup> Without a quorum, the Commission was unable to address these issues and provide implementation guidance for new sentencing laws.

The Commission needs to be at full strength to respond to the backlog of issues created by the three years it went without a voting quorum. And the Senate simply must not run the risk that the Commission winds up without a voting quorum again. Under the current shape of federal sentencing law, a disabled Commission translates into arbitrary sentences, increased dysfunction and chaos in the courts, and—increasingly—an erosion in the legitimacy of both the Commission and the federal sentencing system it superintends. These consequences—and their effect on people’s liberty and the government’s grave responsibility to ensure fairness in the criminal system—simply cannot be allowed.

We urge the Senate to ensure that no voting seat on the U.S. Sentencing Commission goes empty.

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<sup>9</sup> See U.S. Sent’g Comm’n, News Release, *Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners* (Aug. 5, 2022), <https://bit.ly/3YYwKik>.

<sup>10</sup> See U.S. Sent’g Comm’n, *Notice of Final 2022–2023 Priorities* (2022) (noting resolution of circuit conflicts as priority), <https://bit.ly/3Xp5yYZ>.

<sup>11</sup> See U.S. Sent’g Comm’n, *Amendments to the Sentencing Guidelines* 14–18 (Apr. 27, 2023) (summarizing numerous criminal laws enacted while Commission lacked quorum), <https://bit.ly/3AGTxVH>.

<sup>12</sup> See e.g., Letter from Federal Public & Community Defenders to Hon. Carlton W. Reeves, Chair of U.S. Sent’g Comm’n, re: Proposed Priorities for the 2024–2025 Amendment Cycle (May 15, 2024) (identifying numerous flaws in the U.S. Sentencing Guidelines, including its treatment of methamphetamine, its treatment of economic loss calculations, its overreliance on strict-liability enhancements, and criminal history rules that create unjustified racial disparities in sentencing), <https://bit.ly/472v0GR>; Letter from Federal Public & Community Defenders to Hon. Carlton W. Reeves re: Proposed Priorities for the 2023–2024 Amendment Cycle (May 24, 2023) (identifying numerous additional guidelines and structural reforms necessary to improving fairness and equity of federal sentencing), <https://bit.ly/3XILt5v>.

Sincerely,

American Civil Liberties Union

Due Process Institute

Federal Public & Community Defenders

The Leadership Conference on Civil and Human Rights

National Association of Criminal Defense Lawyers (NACDL)

R Street Institute

The Sentencing Project

Vera Institute of Justice