UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

ANDREW S. HANEN
U.S. DISTRICT JUDGE

600 E. HARRISON STREET, #301
BROWNSVILLE, TEXAS 78520-7114
TEL: (956) 548-2591
FAX: (956) 548-2612

March 9, 2016

U.S. Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: *The Proposed 2016 Immigration Guideline Amendments*

Dear Sir/Madam:

I have been asked by the Chief Judge Ricardo H. Hinojosa of the Southern District of Texas to address, on behalf of the border judges in the Southern District of Texas, the currently proposed Amendments to the Guidelines with respect to cases falling under Title 8. According to the statistics I have been provided, the Southern District of Texas continues to lead the nation in the number of § 1324 and § 1326 cases. According to those same sources, the undersigned has personally handled more than 3,500 § 1326 cases. Most of my colleagues here on the South Texas border have similar caseloads. Consequently, it is clear that the subject matter of the Amendments is extremely important to the judges in this District and that, as their representative, I have more than a passing familiarity with the subject.

While there are many reasons one might suggest a change in the applicable Guidelines, the goals of avoiding the necessity of using the categorical approach and the simplification of the interpretation of the Guidelines are certainly meritorious. Further, the revision of the Guidelines to allow consideration of all criminal conduct after the first deportation is an improvement that will allow a judge (and the probation department) to consider all conduct relevant to an individual. This will be well-received.

While the proposed methodology may increase speed and efficiency, we question whether the proposed Amendments are a cure or whether it establishes a system that sacrifices justice in the name of expediency. Our concern is that the goal of jettisoning the categorical approach—and accomplishing whatever cost savings that would accompany that in terms of reduced court and court personnel time—is not worth the corresponding problems the Amendments as proposed would create. These Amendments will not lessen the Commission's worry about courts departing from the Guidelines because they will all but mandate that courts depart upwards in every case with a serious underlying criminal history. Further, the Amendments may undermine the very purpose of the Sentencing Commission and the Guidelines, themselves, as they will institutionalize sentencing disparities. More importantly, these Amendments may also undermine the ability of courts to protect the public from future crimes of a defendant. Whatever benefits that might result from the proposed changes will more than be outweighed by the harm that may be inflicted. These Amendments will achieve a level of ease and speed, but they do so at a cost.

A. Absent Departures, The Proposed Amendments Restrict A Judge From Considering the Nature of Underlying Conviction. If Adopted, The Guidelines Would Not Be Following The Statutory Distinctions Created By Congress. Further, They May Hinder Judicial Compliance with 18 U.S.C. § 3553(a) and They Effectively Delegate Sentence Decisions to the Courts Involved in the Underlying Criminal Convictions

1. The Amendments Ignore The Distinctions That Congress Instituted

When it enacted Section 1326, Congress set out a progressive penalty scheme that differentiated between the penalties faced by those who had merely been deported and then illegally reentered (two years maximum imprisonment), those who were deported after being convicted of a felony or three or more misdemeanors involving drugs, crimes against the person or both and then illegally reentered (ten years maximum imprisonment) and those who were deported subsequent to a conviction for an aggravated felony and then illegally reentered (twenty years maximum imprisonment). The proposed Amendments completely blur (or ignore) the Congressional mandate to treat those defendants with felony convictions different from those with aggravated felonies in their past. Under the current proposal, if any underlying felony conviction gets more than a two year sentence regardless of whether they are aggravated or not, they are all treated the same. This is not what Congress intended. Furthermore, we have not seen any indication from Congress that it wants anyone to lower the penalties that aliens who have committed violent or aggravated felonies face when they return illegally.

2. These Amendments May Hinder Judicial Compliance With 18 U.S.C. § 3553(a).

These proposed Amendments ignore two statutory factors that judges are required to weigh. First, 18 U.S.C. § 3553(a) instructs judges that they should formulate sentences that protect the public from future crimes of the defendant. These Amendments will hinder that goal. That same statute requires judges to consider the history and characteristics of a defendant and the nature and circumstances of the offense. This is another way of saying that judges should impose a sentence that fits the crime and fits the defendant. These Guidelines proposals do not aid compliance with this mandate.

These Amendments in the name of efficiency and speed totally discard any analysis of the underlying crime. While under the categorical approach courts are prevented from considering the underlying facts, they can at least consider the nature of the underlying offense. The proposed Amendments replace the nature of the crime with the length of sentence given by the judge in the underlying case.

Under the proposed Amendments, once the base offense level is identified, all sentencing factors are keyed to another court's sentencing decision. In the effort to avoid the categorical approach, the Commission's proposals effectively remove any analysis from the bailiwick of the district court judge and tie all pertinent sentencing factors (absent departures) to the decisions already made by the state or federal court judge who earlier sentenced the individual for the underlying crime. Admittedly, there is an element of this under the present sentencing system, but in the name of simplicity, the Amendments will transfer the role of federal judges from an individual exercising judicial insight and discretion into an individual occupying the role of a bookkeeper that can only look at the underlying sentence and then add up the points.

B. The Proposed Amendments Will Create Vast Disparities in Sentencing and if a Judge Stays Within the Guidelines He or She Will Not Be Able to Correct These Differences

The Amendments assume that the sentence imposed for an underlying offense equates to the seriousness of the crime. This is a flawed understanding of how state courts (at least those in this District) sentence individuals, especially illegal aliens. The Amendments wrongly assume that the greater the sentence imposed the more serious the underlying crime must have been. This is not necessarily true.

First of all, there are many sentencing variables from state to state and even intrastate. For example, a conviction for possession with intent to distribute a small amount of cocaine in Dallas would many times get at least the two year prison contemplated by the Amendments' highest enhancement category. In Brownsville, where drugs are most frequently measured in kilograms,

such a crime would almost certainly get probation. That being the case under the Amendments, the alien with the Dallas conviction would be enhanced the maximum amount while the alien convicted in South Texas would get no enhancement—for the exact same crime. These disparities exist from state to state as well. In this Court's experience in drug related cases, the disparity in sentencing gets greater and greater as one moves away from the border areas and bigger cities where courts are more likely to see drug cases. The Amendments are building in sentencing disparity and it will result in at least a two-tier system immigration—one set of penalties for those whose underlying convictions are from "law and order" jurisdictions and another for those whose convictions originate in more defendant friendly jurisdictions. The severity of the sentence may very well be location-dependent, and the federal court, if it follows the Amendments, will necessarily reinforce these disparities when it imposes a § 1326 sentence.

While it may not be universally true, the new proposals also ignore the realities as to how state courts (in South Texas and in many other venues) sentence illegal aliens with respect to the kind of sentence that is imposed. It is standard practice for state courts in South Texas to give illegal aliens probation or suspended sentences even for the most serious of crimes. These criminals are given suspended or probated sentences and then they are immediately turned over to the federal authorities where historically they are either prosecuted for illegal reentry, jailed and deported, or merely deported. The rationale behind this practice is well known. First, the defendants are illegal aliens and many state courts consider them to be the federal government's problem since it was the federal government's job to keep them out of the country in the first place. More importantly, many border jurisdictions include some of the poorest counties in the United States. That is definitely true here in the Southern District of Texas. State authorities give suspended or deferred sentences and turn hardened criminals over to the federal government so that they are jailed at the expense of the federal government. By excluding those with suspended, deferred or probated sentences, the Amendments are turning § 1326 cases involving the most serious underlying crimes into time-served cases.

Regardless of whether one agrees or disagrees with the rationale of state court sentencing in certain border jurisdictions, the fact of the matter is that this is the way it works in the real world. The proposed Amendments have the built in assumptions that illegal aliens are all sentenced similarly and this is a faulty assumption.

C. The Proposed Amendments Lower Penalties for the Most Dangerous Criminals While They Raise Penalties for Those Who Are the Least Dangerous

The proposed Amendments lower the guideline penalties for many defendants who have proven by their past conduct to be the most dangerous.

They would have the effect of cutting in half the penalties for the most severe criminals such as murderers and sexual predators.

The following examples from cases currently pending in the Brownsville Division illustrate the problem with the proposals:

Example One: Predicate Offense: Murder (No Criminal History Points Under Chapter 4)

PROPOSED GUIDELINES	**CURRENT GUIDELINES**
Base Offense Level: 10	Base Offense Level: 8
SOC: (b)(1) 0	SOC: (b)(1)(A) +12
SOC: (b)(2) 0	
Adjusted Offense Level: 10	Adjusted Offense Level: 20
Acceptance Adjusted Offense Level: -2	Acceptance Adjusted Offense Level: -3
Total Offense Level: 8	Total Offense Level: 17
Criminal History Category: I	Criminal History Category: I
Range: 0–6 months	Range: 24–30 months

In the case involving a convicted murderer, the guideline range under the Amendments is cut by at least 75%.

Example Two: Predicate Offense: Aggravated Sexual Assault of a Child (Probated Sentence)

PROPOSED GUIDELINES	**CURRENT GUIDELINES**
Base Offense Level: 14	Base Offense Level: 8
SOC: (b)(1) 0	SOC: (b)(1)(A) +16
SOC: (b)(2) 0	
Adjusted Offense Level: 14	Adjusted Offense Level: 24
Acceptance Adjusted Offense Level: -2	Acceptance Adjusted Offense Level: -3
Total Offense Level: 12	Total Offense Level: 21
Criminal History Category: IV	Criminal History Category: IV
Range: 21–27 months	Range: 57–71 months

A person convicted of an aggravated sexual assault of a child has his guideline range reduced by over 60% by the Amendments.

Example Three: Predicate Offense: Indecency with a Child by Contact (Three Year Imprisonment Term)

PROPOSED GUIDELINES	**CURRENT GUIDELINES**
Base Offense Level: 10	Base Offense Level: 8
SOC: (b)(1) +8	SOC: (b)(1)(A) +16
SOC: (b)(2) 0	
Adjusted Offense Level: 18	Adjusted Offense Level: 24
Acceptance Adjusted Offense Level: -3	Acceptance Adjusted Offense Level: -3
Total Offense Level: 15	Total Offense Level: 21
Criminal History Category: II	Criminal History Category: II
Range: 21–27 months	Range: 41–51 months

A person convicted of indecency with a child has his guideline range cut in half by the Amendments.

Example Four: Predicate Offense: Burglary of a Habitation: Three Different Convictions (Probated Sentences)

PROPOSED GL	**CURRENT GL**
Base Offense Level: 14	Base Offense Level: 8
SOC: (b)(1) 0	SOC: (b)(1)(A) +16
SOC: (b)(2) 0	
Adjusted Offense Level: 14	Adjusted Offense Level: 24
Acceptance Adjusted Offense Level: -2	Acceptance Adjusted Offense Level: -3
Total Offense Level: 12	Total Offense Level: 21
Criminal History Category: VI	Criminal History Category: VI
Range: 30–37 months	Range: 77–96 months

A person, who has demonstrated on multiple occasions that he is committed to a life of crime (in addition to repeatedly returning to the country illegally), has his guideline range reduced by approximately four to six years.

As one can see, the proposed changes do not enhance a Court's ability to protect the public from future crimes of the defendant nor do they adequately take into account the history and characteristics of the defendant.

D. The Proposals Will Increase Guideline Departures Not Reduce Them

These changes will have another effect. It seems in the Amendment background material provided by the Commission, that it was concerned by the number of judges that were departing from the current Guidelines in the most serious cases. The Commission pegged that percentage for a case dealing with the 16-level enhancement at 37.8% in fiscal year 2014. The apparent conclusions reached by the Commission were: (1) that there must be something inherently wrong with the Guideline or judges would not depart this frequently; and (2) that a change in the Guidelines would stop departures.

There are two things wrong with this conclusion. First, the departures do not necessarily imply fault with the Guideline. Those departures may be the result of judges using their discretion on a case-by-case basis, and it is not surprising that this happens most frequently when the suggested

penalties are at the highest level. A frequently seen, easily understandable example is when the underlying conviction is for an offense under 8 U.S.C. § 1324. The current 16-level enhancement to the 8 point base offense level applies whether the defendant was a major cartel figure guilty of transporting hundreds of illegal aliens or whether the defendant was guilty of merely picking up a fellow countryman who was hitchhiking. A judge might well be justified in distinguishing between these two scenarios. It does not mean the Guideline is flawed; it means the judge tailored the penalty to fit the defendant. This Court could provide many more factual scenarios where judges may be likely to depart, but again these are done in the exercise of discretion—not because the Guideline is necessarily faulty.

Moreover, the new Amendments will not cure the departure issue. Given the examples set out above, many courts, including this one, may be forced to frequently depart upwards if this Commission insists on lowering the penalties for illegal aliens who have committed heinous crimes. A Guideline that forces judges to upwardly depart is not an improvement. Further, the documentation involved in that process will be as much or more time consuming (and consequently expensive) as is currently the case. It will eat up both probation and court time.

Also, the proposals increase the base offense level (and consequently the penalties) on repeat immigration offenders. This, in and of itself, is not problematic. Most judges believe in some form of graduated sentencing and already do this. You may see a time served sentence for an initial § 1325 or § 1326 case, but the next one will garner a harsher penalty. One need not revise the Guidelines to accomplish this. Further, virtually every judge in this District, and I am sure all along the border, reviews a defendant's criminal history in detail. A previously deported illegal alien is obviously committing a crime by reentering illegally, but there is a qualitative difference between one who has merely broken the law by entering illegally and one who commits additional crimes while here. Judges already take this into account. A change to the base offense level is not needed to accomplish this. This increase in the base offense level will lead to downward departures as well.

E. The Failure of the Guidelines To Take Into Account The Nature of the Underlying Offense Will Lead to Ridiculous Results

The final problem with tying all federal sentences to the length an underlying state court's jail sentence is that the Amendments (absent departures) prevent a federal court judge from examining the true nature of the underlying criminal history.[1] A comparison of the two following scenarios illustrates the problem. The following example compares a real life defendant whose case is pending in this Court, and who is a convicted murderer, with a hypothetical individual whose only prior crime is a conviction under § 1326 for which the defendant got time served. The proposed

[1] It is conceded that the categorical approach also limits the Court's ability to examine the facts of an underlying conviction, but it at least allows judges to examine the qualitative nature of an individual's criminal history in determining the guideline level.

Amendments are being used for both individuals and the comparison assumes no criminal history points are assessed because those are the facts in the pending murder case.

Defendant I (With Only One Hypothetical Prior Felony Immigration Conviction)	**Defendant II (With a Real Murder Conviction)**
Base Offense Level: 12	Base Offense Level: 10
SOC: (b)(1) 0	SOC: (b)(1) 0
SOC: (b)(2) 0	SOC: (b)(2) 0
Adjusted Offense Level: 12	Adjusted Offense Level: 10
Acceptance Adjustment Level: -2	Acceptance Adjustment Level: -2
Total Offense Level: 10	Total Offense Level: 8
Criminal History Category: I	Criminal History Category: I
Range: 6–12 months	Range: 0–6 months

The guideline range for the individual who only has one non-violent immigration conviction in his history is 6–12 months. The guideline range for the convicted murderer is 0–6 months. This is the consequence of lowering the penalties on violent criminals while raising the penalties for repeated, non-violent immigration violators. It is also the consequence of using only actual jail sentences. It is not suggested that recidivism in the immigration context should not be a factor, but it does suggest that the penalties for two immigration offenses should not be more severe than that for an illegal alien who is a convicted murderer.

F. Conclusion

The judges of the Southern District of Texas are not necessarily enamored with the categorical approach mandated by the Supreme Court under the current guideline system, but the proposed cure may be worse than the disease.

This does not mean, however, that there are not positive aspects to the proposal. The best aspect of the proposal which should be incorporated into whatever Amendments are passed, is the ability to use all criminal activity when considering enhancements, including that which occurs after the first deportation (as found in § 2L1.2(b)(2) of the proposed Amendments). This aspect could be incorporated into the current Guidelines and would result in the Guidelines capturing a much more complete picture of a defendant. This is certainly a positive aspect; however, what the

Commission gives with this change it then takes away by not including all convictions in the calculations including those that resulted in deferred, suspended, probated sentences or which did not garner criminal history points under Chapter 4. These need to be counted in some fashion.

Overall, the judges in the Southern District of Texas appreciate the thought and effort that has been put into the proposed Amendments, but we cannot wholeheartedly agree with those involving § 1326 offenses. We deal with these offenses more often than any other District in the United States and we see both the benefits and the pitfalls in the current proposals. If adopted, these Amendments will lower the penalties for illegal aliens with serious criminal offenses in their background. It will create huge sentencing disparities. It will force judges to depart upwards on an ever-increasing basis for those with serious criminal histories and downwards in cases solely involving immigration offenses.

Finally, these proposals will not help the judges fulfill their mission and statutory duties. In cases involving serious underlying offenses, the Amendments will force judges to choose between following the Guidelines or the law. One can either follow the Guidelines or one can comply with 18 U.S.C. § 3553(a) and with the intent underlying the distinctions made by Congress in § 1326. It does not make sense to put the judiciary into this kind of bind. Most importantly, the Guidelines will actually hinder a judge's ability to protect the public from future crimes of a defendant.

G. Suggested Changes Should The Commission Decide to Move Forward Using These Amendments

Even if the commission insists on moving forward with these Guidelines, they should consider the following changes:

1. All judicial sentences should be counted regardless of whether the sentence imposed is jail time, probated, suspended or deferred. Further, serious crimes that result in no criminal history points should also be factored in the equation. These changes, in and of themselves, would cure many of the worst scenarios cited above.

2. The penalties for violent criminals that formerly would have received a 16 level enhancement need to be raised. There is no justification for lowering sentences on convicted murderers and those that sexually abuse children.

3. There is no reason to exempt those convicted of burglary of a habitation. This is a crime fraught with danger and many times leads to another more serious crime.

4. As a housekeeping suggestion, the Commission might want to rethink labeling sub-parts "b1" and "b2." This is just asking for problems when two of the statutory offenses you are dealing with are § 1326(b)(1) and § 1326(b)(2). This is a recipe for confusion. It would be fine if the corresponding sections actually matched up, but the statutory numbered section has little to the similarly numbered Guideline Section. The Commission will be creating an ambiguity it could avoid by labeling it (b)(I) or (b)(ii) or by labeling them "b" and "c".

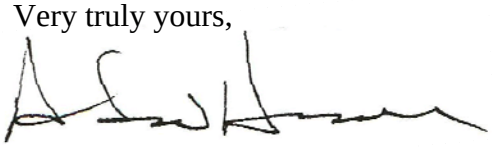
5. With respect to the proposed Amendments under 8 U.S.C. § 1324, Option 1 is the most practical and we would favor it. If the Commission opts for Option 2, the inclusion of an increased Base Offense Level for those who are involved in alien smuggling as part of an ongoing commercial organization is a welcome addition. However, the *mens rea* requirement contained in proposed Application Note 1 must contain the bracketed "reason to believe" language or it will render the amendment worthless.

6. The addition of a "*mens rea*" requirement ("knew or should have known) with respect to transporting minors is a needless complication. It will either render the entire provision meaningless or it will result in a mini-trial at sentencing. There is no reason to make this change. As a matter of course, human smugglers take their victims/customers as they come, and they should have to live with those decisions.

7. The proposed Amendments should include a much higher enhancement for sexual abuse of an alien than the four levels suggested. The aliens affected by this conduct are completely at the mercy of their smugglers/captors. They are for all practical purposes in the same position as a kidnapping victim. Many times they are compelled by actual force or by threats of harm either to their children or family members. The enhancement should at least parallel the enhancement for a permanent or life threatening injury (6 levels).

Thank you for allowing us this opportunity to express our views. Thank you for trying to make the Guidelines more efficient and easier to use. While we may not agree with the ultimate result of all of these proposals, we do appreciate the attempt to help the border judges that struggle daily with these cases.

Very truly yours,



Andrew S. Hanen
United States District Judge