

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON PROPOSED AMENDMENTS
TO THE FEDERAL SENTENCING GUIDELINES

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WEDNESDAY, MARCH 16, 2016

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The Commission met in the Thurgood Marshall Judiciary Building, One Columbus Circle, N.E., Washington, D.C., at 8:30 a.m., Patti B. Saris, Chair, presiding.

PRESENT

- PATTI B. SARIS, Chair
- CHARLES R. BREYER, Vice Chair
- RACHEL E. BARKOW, Commissioner
- DABNEY L. FRIEDRICH, Commissioner
- WILLIAM H. PRYOR, JR., Commissioner
- MICHELLE MORALES, Ex-Officio Commissioner
- J. PATRICIA WILSON SMOOT, Ex-Officio
Commissioner

PANEL I: IMMIGRATION VIEW FROM THE BENCH

- HONORABLE RANER C. COLLINS, Chief United States
District Judge, United States District
Court, District of Arizona
- HONORABLE ANDREW S. HANEN, United States
District Judge, United States District
Court, Southern District of Texas
- HONORABLE PHILIP R. MARTINEZ, United States
District Judge, United States District
Court, Western District of Texas
- HONORABLE BARRY TED MOSKOWITZ, Chief United
States District Judge, United States
District Court, Southern District of
California

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PANEL II: IMMIGRATION: VIEW FROM THE FIELD

RICHARD C. BOHLKEN, Chair, Probation Officers
Advisory Group
RICHARD L. DURBIN, JR., United States Attorney,
Western District of Texas, U.S. Department
of Texas, U.S. Department of Justice
KNUT S. JOHNSON, Ninth Circuit Representative,
Practitioners Advisory Group
MARJORIE A. MEYERS, Federal Public Defender,
Southern District of Texas

PANEL III: IMMIGRATION: ACADEMIC AND EXPERT
PERSPECTIVE

VICTOR M. MANJARREZ, JR., Project Director,
Center for Law and Human Behavior,
University of Texas at El Paso
JENNIFER PODKUL, Senior Program Officer, Migrant
Rights and Justice Program, Women's
Refugee Commission
CHRIS RICKERD, Policy Counsel, American Civil
Liberties Union, Washington Legislative
Office
WENDY YOUNG, President, Kids in Need of Defense

PANEL IV: ANIMAL FIGHTING: PRACTITIONER AND
PUBLIC GROUPS

JENNIFER CHIN, Vice President of Legal Advocacy,
American Society for the Prevention of
Cruelty to Animals
CHRIS SCHINDLER, Director of Animal Crimes,
Animal Cruelty, Rescue and Response
Department, The Humane Society of the
United States
JEAN WILLIAMS, Deputy Assistant Attorney
General, Environment and Natural Resources
Division, U.S. Department of Justice

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PANEL V: CHILD PORNOGRAPHY CIRCUIT CONFLICTS AND
MISCELLANEOUS AMENDMENTS: ADVOCACY AND ADVISORY
GROUPS

RICHARD C. BOHLKEN, Chair, Probation Officers
Advisory Group

NEIL FULTON, Federal Public Defender, Districts
of North Dakota and South Dakota

ALEXANDRA GELBER, Deputy Chief, Child
Exploitation and Obscenity Section,
Criminal Division, U.S. Department of
Justice

MARY G. LEARY, Member, Victims Advisory Group

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1 P-R-O-C-E-E-D-I-N-G-S

2 8:35 a.m.

3 CHAIR SARIS: Good morning to everyone.
4 It's a little late, but we're all excited because
5 I should just sort of break out of my written
6 remarks to say that first of all, welcome to
7 everyone. Thank you for coming this great
8 distance.

9 But, also we got our nomination
10 yesterday for a new Commissioner's spot. Judge
11 Reeves was nominated by the White House. So,
12 that's a very exciting new news for us that was
13 announced.

14 But, today we're here to focus our
15 discussion on the proposed Immigration Amendment.
16 And what we're going to be doing is starting with
17 immigration and then moving to animal fighting
18 and child pornography this afternoon.

19 All of the proposed amendments on our
20 agenda today have garnished a great deal of
21 interest and public comment. I spent the weekend

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1 reading them.

2 It was extremely interesting. Very
3 robust debate. And a lot of time went into
4 making the remarks. So, thank you very much.

5 Looking ahead, we will hold another
6 public meeting on April 15. At that time we'll
7 vote on the pending proposed amendments during
8 the cycle.

9 The full list of the proposed
10 amendments is posted on our website as well as in
11 the Federal Register. As a reminder though,
12 although our hearing is being held today, the
13 public comment period remains open until March 21
14 so that additional comments will be taken until
15 that time.

16 We hoped to hear not only from today's
17 witnesses, but I know this is our new -- and I
18 feel so tech savvy. There are lots of people who
19 are now coming into us live streaming. So, this
20 is being broadcast by live stream today.

21 And so, but first I want to introduce

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1 my colleagues on the Commission, who are all just
2 abuzz here about our news. The first is Judge
3 Charles Breyer who serves as the Vice Chair of
4 the Commission. He is a Senior District Judge
5 for the Northern District of California, and
6 joined the Commission in 2013.

7 Dabney Friedrich to left has served on
8 the Commission since 2006. Prior to her
9 appointment to the Commission she served as
10 Associate Counsel at the White House. Is counsel
11 to Chairman Orrin Hatch of the United States
12 Senate Judiciary Committee. And as an Assistant
13 United States Attorney first for the Southern
14 District of California and then for the Eastern
15 District of Virginia.

16 To her left is Judge William Pryor who
17 joined the Commission in 2013. Judge Pryor is a
18 United States Circuit Court Judge for the 11th
19 Circuit Court of Appeals and a former Attorney
20 General for the State of Alabama.

21 And Rachel Barkow is second here from

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1 my right, joined the Commission in 2013. She is
2 a Segal Professor of Regulatory Law and Policy at
3 the New York University School of Law. And
4 serves as the Faculty Director of the Center on
5 the Administration of Criminal Law in the Law
6 School -- at the Law School.

7 And Commissioner Michelle Morales
8 serves as the Designated Ex Officio member of the
9 Commission representing the Department of
10 Justice. Commissioner Morales is the Acting
11 Director of the Office of Policy and Legislation
12 in the Criminal Division of the Department.

13 I appreciate that all of you are here
14 today for this important discussion. To begin
15 we have a very substantive discussion planned
16 around a multi-part amendment on immigration.

17 This immigration amendment could
18 potentially be very significant because illegal
19 reentry comprises almost one quarter of the
20 Federal case load. And most of those cases are
21 concentrated along the southwest border.

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1 Which is why we are so pleased today
2 to have four judges from those districts here
3 today. You're the ones most affected.

4 If adopted, the proposed amendment
5 would make comprehensive changes to the illegal
6 reentry guideline. It would eliminate the
7 categorical approach, which is so vexing to many,
8 based on guideline enhancements for prior
9 criminal convictions on the length of the
10 sentence imposed.

11 And build in new factors that may be
12 relevant to the culpability and dangerousness of
13 the defendant. Such as whether the defendant has
14 multiple prior illegal entry convictions. And
15 whether the defendant has been convicted of
16 additional felony offenses after reentering the
17 U.S. Or whether he has led an otherwise law
18 abiding life.

19 Also in the area of immigration, the
20 Commission published a proposed amendment that
21 would increase penalties for alien smuggling

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1 offenses. The Commission proposed these changes
2 in part in response to concerns raised by the
3 Department of Justice following the widely
4 publicized surge in unaccompanied minors that was
5 seen around the border last year.

6 As you can see, the range of these
7 immigration amendments is potentially quite
8 significant. The issues we are considering
9 today, we all realize are complex and must be
10 examined in the context of both the data and the
11 potential impact on implementation.

12 And for that reason, the Commission
13 has been informed by a multi-year study of the
14 guidelines applicable to immigration offenses.
15 Today's hearing will allow us to hear the views
16 of many distinguished witnesses, beginning with
17 those right here today, on whether and how the
18 Commission should amend Section 2L1.1 and 2L1.2.

19 So, this -- I've read all the
20 comments. This promises to be a very lively
21 discussion today on the merits of the proposal.

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1 So, our first panel represents the
2 views of the bench. And we're fortunate to have
3 Judges from four of the five border districts
4 joining us here today. So, let me introduce
5 them.

6 Chief Judge Barry Ted Moskowitz is the
7 Chief Judge of the United States District Court
8 for the Southern District of California. Prior
9 to being elevated to Chief Judge on January 23,
10 2012, he has served as the United States District
11 Judge for that District since 1995.

12 I've served on Committees with Judge
13 Moskowitz. I'm thrilled that you've been able
14 to make it here today.

15 Chief Judge Raner Collins is the Chief
16 Judge for the District of Arizona. Before being
17 elevated to Chief Judge on September 3, 2013,
18 Judge Collins has served as United States
19 District Judge for the District of Arizona since
20 1998.

21 Judge Philip Martinez, whom I know

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1 well, has served as United States District Judge
2 for the Western District of Texas since February
3 12, 2002. Previously he was a Judge on the 327th
4 Judicial District in Texas. I was amazed when I
5 saw how many districts you had, from 1991 to 2002.
6 And on the County Court at Law Number One for El
7 Paso County, Texas from 1991 to 1994.

8 And Judge Andrew Hanen, who's really
9 helped the Commission many times giving us
10 comments, has served as a United States District
11 Judge for the Southern District of Texas since
12 May 10, 2002. Prior to taking the Federal bench,
13 Judge Hanen was in the private practice in a
14 Houston-based firm, Andrews Kurth from 1979 to
15 2002.

16 So, thank you all for joining us this
17 morning. We've all received your remarks. So,
18 why don't we start with Judge Moskowitz.

19 JUDGE MOSKOWITZ: Can I defer?

20 CHAIR SARIS: Yes, you may. So, if
21 you want us to go to Judge Collins, that's fine.

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1 JUDGE COLLINS: Can I defer too?

2 (Laughter)

3 CHAIR SARIS: Actually, this hearing
4 is moving very quickly.

5 (Laughter)

6 JUDGE COLLINS: Good morning. I
7 will -- I'll go ahead and make a couple of
8 comments.

9 CHAIR SARIS: We have read
10 everything. So you can -- you don't have to --
11 okay, go ahead.

12 JUDGE COLLINS: All right. My
13 biggest concern then as you've read what I had to
14 say, is that we may be trading something that we
15 have now for something else.

16 I certainly don't like the categorical
17 approach. I don't like the Taylor analysis. I
18 think it's very difficult to do it. It can be
19 very time consuming.

20 But, I'm not sure that changing it the
21 way the Commission wants to change it is actually

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1 going to bring about the results that you want to
2 have brought about. One thing that you can do
3 now when you see a guy with a 16 level enhancement
4 and his crime may have taken -- happened 20, 30
5 years ago at some point, you can do something
6 about that still. You can vary, you can depart.
7 There are things you can do.

8 The other thing that concerns me is
9 that State Court sentences and even District
10 Court sentences sometimes don't necessarily
11 reflect the true measure of what an underlying
12 crime was.

13 Sometimes a State Court Judge will
14 give a guy time-served sentence without the
15 person being turned over the Feds. Sometimes a
16 Federal Judge will do the exact same thing.

17 So, looking at just the sentence as
18 someone guiding the past doesn't necessarily cure
19 or take care of the problem in my opinion. I
20 certainly want to see the categorical approach
21 done away with, and a modified approach and so

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1 forth.

2 But I'm not sure if this is the way
3 that you're going to do it.

4 CHAIR SARIS: Can I just on a
5 technical note, are you -- do you think -- I want
6 to make sure your voice is being -- all being
7 caught for this.

8 Is this -- because it's --

9 JUDGE COLLINS: I'm very soft spoken.

10 CHAIR SARIS: That's fine. I'm just
11 not sure. All right, go ahead. It's -- do you
12 want to add anything else? Or --

13 JUDGE COLLINS: I would also say,
14 we'll just the worrying more about when someone
15 was actually deported, what the documents are to
16 support the deportation and things such as that.

17 CHAIR SARIS: Thank you.

18 JUDGE MARTINEZ: Chairman Saris, good
19 morning and good morning Commissioners. I'm here
20 first on behalf of Chief Judge Orlando Garcia,
21 who was unable to be here.

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1 And he asked that I certainly preface
2 my remarks by indicating that we're neither
3 advocating for nor advocating against a change in
4 the revisions. But we're hopefully here to
5 provide some feedback about what the challenges
6 may continue to be and certainly, you know what
7 the challenges have been.

8 The group of Western District Texas
9 submitted written testimony. I won't say it's
10 reflective of every individual Judge's views.
11 But, it is a consensus based upon the responses
12 that were received from a number of those Judges.

13 I do think that generally there is
14 something that is appealing about looking to an
15 objective factor. The categorical approach is a
16 lot of work. It takes a lot of time. It takes
17 a lot of resources.

18 So, that's true not only for Judges.
19 It's also true for probation officers,
20 prosecutors, defenders. And certainly one can
21 look at the body of case law that is out there

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1 and come away with an impression that there
2 continues to exist some degree of disparity.

3 I have to say, and I'll go on my
4 written remarks, I'm not going to read those to
5 you. But, I think we're not going to eliminate
6 disparity in this area even if we move to a new
7 framework.

8 The new framework that you've offered
9 I think does some things very, very well. It
10 asks us certainly to take into consideration the
11 totality of the conduct of the offender both
12 prior to deportation as well as after
13 deportation.

14 I think that's a plus. I think that
15 allows us to certainly recognize who is being
16 sentenced. It's not surprising to me that the
17 greatest number of departures or variances occur
18 when the largest enhancements are applied.

19 Recognizing what we're invited to
20 consider in assessing a sentence certainly allows
21 us to take into consideration issues relating to

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1 fairness. As well as certainly applying the
2 guidelines and making that mathematical
3 computation.

4 I do think that the other benefit to
5 the existing system is that we will be able to do
6 the mathematic calisthenics to get to the
7 guidelines. I don't necessarily favor adding
8 prior deportations to the base offense level.

9 Because the base offense level for me
10 has always been something that you could indicate
11 was with respect to the crime of conviction. And
12 I think Judges, even though we don't analyze the
13 issue in the new current framework that's being
14 proposed, we always take into account the number
15 of prior deportations, the number of returns.

16 And certainly we're mindful of both
17 charged and uncharged conduct. And so, I do
18 think an effort is made in that regard.

19 I do have a concern in raising the
20 base offense level to 10. That in and of itself
21 it doesn't seem to make a lot of sense.

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1 I do think some of the most violent
2 offenders, some of those that would give us all
3 some pause, will probably result in more lenient
4 sentences. I think although we can certainly
5 depart based upon the nature of the conviction.

6 And at the bottom end, some of those
7 that probably don't merit as long a sentence,
8 will probably see higher sentences under the new
9 framework. I had requested one of my divisions
10 actually do a sampling test.

11 And the Austin Division did a sampling
12 test considering current cases. I don't know
13 that it's in any way scientific. I think that
14 perhaps more study ought to be done.

15 I wasn't comfortable with the
16 conclusions that it reached. That it will result
17 overall in higher prison sentences. I'm not sure
18 that's ac -- it's accurate for the sample that
19 was done.

20 I don't think it's going to
21 necessarily be accurate across the board. And

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1 so certainly I think I would like to look at that
2 a little further.

3 I will say that notwithstanding the
4 attraction of having an objective standard to use
5 as a basis for determining prior convictions and
6 what enhancements should be warranted, I do think
7 that many of the comments that Judge Hanen
8 includes in his written remarks are appropriate.
9 And should be taken into consideration.

10 I do think in many ways we're going to
11 be challenged to determine what the nature is of
12 those prior convictions, and certainly post-
13 convictions. But overall, we appreciate the
14 opportunity to provide information to this
15 Commission.

16 We -- one of the questions that we
17 each had was the motive for the change. We
18 understand the cry that you heard in terms of the
19 resources required to determine the enhancements.

20 But, if the goal was to reduce the
21 prison population, or if the goal was to reduce

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1 the resources, I guess I end up where Judge Hanen
2 ended up. And that is, are we really deterring
3 the repeat offenders? Are we really
4 incapacitating those most violent offenders?

5 And we didn't know if the means
6 achieves the ends. Because we weren't sure of
7 what the ends were.

8 We think there will be departures. We
9 think there will be variances still. There is
10 always going to be a concern about disparity.

11 I will say for myself, and this is a
12 personal comment, relying on 12 months and 24
13 months is problematic. Because I am a Judge that
14 will typically sentence someone to 12 months and
15 a day.

16 And that will play differently than
17 someone who gives a 364-day sentence. And so,
18 you know, simply changing some of the dates might
19 address that issue.

20 But, overall, the judges were in favor
21 of it, just given the objective standard. It was

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1 easier for us.

2 CHAIR SARIS: All right, thank you.
3 Judge Hanen?

4 JUDGE HANEN: Chairman Saris, thank
5 you for letting us speak. I'm here obviously on
6 behalf of the Southern District of Texas.

7 And I think overall to sum it up,
8 we're against the proposal. Because we think it
9 sacrifices justice in the name of speed and
10 efficiency.

11 I don't think any Judge that you are
12 going to ask is going to get up and really support
13 the categorical approach. I mean, it takes time,
14 it takes effort.

15 But what this proposal does, is it
16 lowers the penalty on some of the most violent
17 criminals. And it raises the penalty on those
18 that haven't proven that they were violent.

19 Like Judge Martinez said, I mean, we
20 understand the motive in so far as it makes things
21 easier for Judges. But, what we don't understand

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1 is why you think two things with regard to
2 departures.

3 Why you think the number of departures
4 now indicates the guideline is bad. And
5 secondly, why you think the change is going to
6 prevent the number of departures.

7 Quite frankly, I think if you change
8 it the way you're talking about, departures are
9 going to go way up. Because the guideline just
10 won't work.

11 It doesn't take into account how most
12 courts, not just on the border, but most State
13 courts throughout, sentence illegal aliens. I
14 mean, you can be convicted of the most heinous
15 crime and get a suspended sentence or a probated
16 sentence.

17 Because they know what's going to
18 happen is you're immediately turned over to the
19 Feds and theoretically deported and theoretically
20 not to return again. And so, that's the way that
21 most jurisdictions, at least in our experience,

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1 that's the way the underlying crimes are
2 sentenced.

3 The second reason for departures and
4 the one I didn't mention this in my written
5 submission, but I think it's important at least
6 in our area, is we see what's going on in Mexico.
7 And the cartel wars that are happening, you know,
8 literally, you know, a mile from our courthouse.

9 And why people are coming back. And
10 that leads to departures. It's not the guideline
11 that's bad. It's the circumstances.

12 And Judges have to be able to look at
13 that and say, you know, this guy knew he was
14 coming back in the country illegally. He knew
15 it was wrong. But look, he's got objective proof
16 that the cartels just murdered three members of
17 his family.

18 And you know, we've seen police
19 reports where that -- they can show us that he
20 had, you know, he feared for his life. Now
21 that's a situation where we might depart.

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1 And so, you know, we're kind of the
2 boots on the ground on the border and we see these
3 different situations. I mentioned one in my
4 written presentation about, you know, was this
5 guy a human trafficker or did he just stop and
6 give somebody a ride?

7 All right, he got -- he gets a 16-
8 point enhancement either way because of the 1324
9 conviction. But, that's a situation where we'd
10 take the facts into consideration.

11 And what really worries us about the
12 proposal is, you know, we're not in love with the
13 category approach because it doesn't let us
14 consider the underlying facts. This proposal not
15 only doesn't let us look at the facts, it doesn't
16 let us look at the nature of the crime.

17 It only says you can only look at the
18 sentence imposed. And so, we're very concerned
19 about this. And we think it quite frankly is
20 contrary to the dictates of the Statute, 1326.

21 And it's definitely contrary to the

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1 spirit of the Statute. Which differentiates
2 between a (b) (1) offense and a (b) (2) offense.

3 And I will add just for your 1324
4 changes that we think some of those are good. We
5 think the increase level for when there's a
6 sexual assault, we think it ought to be increased
7 more quite frankly.

8 And we think the proposals with regard
9 to whether they're working for a commercial
10 organization, we of course call the cartel, that
11 that's a good change. Although we were worried
12 if you put a mens rea in there, that they have to
13 actually know.

14 Now reason to believe, we liked. But
15 if you say they have to know, what we're going to
16 have is a bunch of mini trials. And there's no
17 way that that is going to work given the number
18 of our cases.

19 But, we appreciate the chance to be
20 able to weigh in on this. But our overall
21 conclusion is, you know, the cure is worse than

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1 the illness.

2 CHAIRMAN SARIS: Thank you.

3 VICE CHAIR BREYER: Well yes, I have
4 a question. Since -- especially about your
5 example of the person who comes over who's a
6 victim obviously of a drug cartel or the murders
7 that occur and so forth.

8 And you say, and that's been my
9 experience in looking at some of these, that
10 indeed a Judge will depart because of the
11 individual's circumstances surrounding that
12 particular individual.

13 Is it your view that if this change
14 comes about you still would -- you would not be
15 able to depart?

16 JUDGE HANEN: No. I think Judges
17 would depart in that situation.

18 VICE CHAIR BREYER: Well, I mean, it's
19 not going to change. I mean, I'm just trying to
20 figure out, you know, for all the complaints we
21 get about the categorical approach, and everybody

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1 here is saying gee, you know, it's -- that
2 categorical approach it's extraordinarily
3 difficult.

4 That it's basically not working for a
5 lot of reasons. We see examples of it not
6 working. So, we're proposing that we get rid of
7 that.

8 And I'm trying to figure out okay, if
9 we got rid of that, would it also make it more
10 difficult for you? Or somehow impede your
11 ability to depart in that particular case in
12 which somebody has come over as a result of
13 violence in Mexico?

14 JUDGE HANEN: No. My point is no, it
15 won't impede our ability to depart. It's not
16 going to lower departures, it's going to raise
17 it.

18 You're going to see a lot more people
19 departing upwards. Almost -- you know, I can't
20 remember the last time I ever departed upwards.
21 But I gave you four scenarios that were sitting

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1 on our desk in the Brownsville division in my
2 written submission. And we will depart upwards
3 in all those cases.

4 So, if the guideline, the current
5 guideline is bad because of a large percentage of
6 departures, then the proposal you're going to
7 make is going to be real bad. Because people are
8 going to be pardoned right and left.

9 COMMISSIONER FRIEDRICH: Judge Hanen,
10 I agree with you completely that departures are
11 going up under this proposal. Upward departures
12 probably will go up.

13 And when I look at the Southern
14 District of Texas and I look at your data for the
15 plus-16 level increase under the current
16 guideline, your District's departure rate is over
17 56 percent at a plus-16 right now currently.

18 So, I'm not so sure that the overall
19 departure rate, while upward departures will
20 certainly go up, I agree with you, you overall
21 departure rate, it's over 56 percent at a level

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1 16. To me that's a high enough number that does
2 in fact suggest that there's a problem with our
3 existing guideline.

4 You, unlike the other Districts, don't
5 have the fast track to speak of. So, that's
6 playing a role. But, the bottom line --

7 JUDGE HANEN: We do have a fast track.

8 COMMISSIONER FRIEDRICH: Well, very
9 minimal. I mean, I'm looking at this data here
10 that shows fast track -- complete fast track for
11 all 1326s is less than one percent. And this is
12 data for fiscal year 2014.

13 So, maybe that's changed in 2015.
14 But, the bottom line is we've got a guideline
15 right now at a level 16 that has a large
16 percentage of departures in every District
17 including those with fast track. An
18 extraordinarily large number.

19 I don't think the Commission intends
20 to remove any of your abilities to depart for the
21 nature of the offense or the facts of the case.

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1 JUDGE HANEN: Um-hum. You're missing
2 my point though. What you're doing though is
3 you're -- it's not that you're taking away the
4 ability to depart. I'm not sure quite frankly
5 that the Commission has the ability to take away
6 these rights.

7 COMMISSIONER FRIEDRICH: Right.

8 JUDGE HANEN: But, you're replacing
9 it with a system that for a lot of reasons is
10 worse. And it's not going to cure the
11 departures.

12 COMMISSIONER FRIEDRICH: Well would -
13 - and I -- any system, because of the nature of
14 this offense that relies on priors that for the
15 most part come out of the State systems with
16 bearing statutes, with bearing documents that are
17 available.

18 There's going to be disparity no
19 matter what approach we take. There's disparity
20 under the existing categorical approach.

21 So, part of it is the nature of the

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1 offense itself that makes this a guideline that
2 we can never craft a perfect guideline. It's one
3 of all --

4 JUDGE HANEN: But, you're not going
5 to -- you're taking away our ability to look at
6 the nature of these.

7 COMMISSIONER FRIEDRICH: No. We're
8 not. We're not.

9 JUDGE HANEN: All we're -- yes, you
10 are. All we're looking at is how long they got
11 in jail.

12 COMMISSIONER FRIEDRICH: No, no, no.
13 That's where you start. And if we need to invite
14 a departure that makes perfectly clear to you all
15 that once you do the guideline calculation, if
16 you've got the murderer who got probation as a
17 prior, we would in fact expect you to look at the
18 fact and depart up.

19 JUDGE HANEN: Okay.

20 COMMISSIONER FRIEDRICH: I mean,
21 that's --

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1 JUDGE HANEN: And I understand it.
2 But I'm just telling you, I mean, if you think
3 this is going to cure departures, it's not.

4 COMMISSIONER FRIEDRICH: No, we
5 don't. We don't. We just --

6 CHAIR SARIS: Can I just -- no, go
7 ahead.

8 COMMISSIONER PRYOR: You know, so it
9 can't be the -- that a high departure rate doesn't
10 evidence a problem with the guideline. Which is
11 what I understood your letter to say.

12 Your letter suggests, well that's just
13 -- Judges can vary from that. Well, if that were
14 -- if that's not a problem, then we don't have a
15 problem with the career offender guideline. We
16 don't have a problem with the child porn
17 guideline.

18 Surely, high variance rates is
19 evidence that we have a problem with the
20 guideline. You would concede that wouldn't you?

21 JUDGE HANEN: No. I don't concede

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1 that.

2 COMMISSIONER PRYOR: Well, wait a
3 minute. That's hard to have a conversation with
4 someone who doesn't concede that.

5 (Laughter)

6 JUDGE HANEN: Well, wait a minute
7 Judge, it's hard to have a conversation with
8 someone who says you have to agree with me.

9 COMMISSIONER PRYOR: No, but if we're
10 to -- if our task is to develop a guideline, it
11 really works as a guideline. It helps Judges in
12 the amount of cases.

13 And we're told oh, forget the fact
14 that in more than half the cases that you're
15 looking at here, we vary. That's just built into
16 the system.

17 Well then, how are we to do our jobs?

18 CHAIR SARIS: Can I -- can -- oh,
19 Judge Moskowitz, go ahead.

20 JUDGE MOSKOWITZ: I had a few
21 comments. There in our District is generally in

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1 favor of the amendment. And I find with certain
2 modifications as I mentioned in my written
3 submission.

4 The biggest problem is with the
5 categorical approach. First, trying to figure
6 out the circuit does sometimes changes their view
7 on what is a crime of violence.

8 The Descamps case threw a curve into
9 the issue that makes it more difficult. And your
10 proposal has merit.

11 The other problem with 2L1.2(b) is
12 that it groups various plus-16 disparate
13 offenders. An illegal alien who drives a car
14 with his fellow illegal in it for the purpose of
15 deferring more important thing is, or a part of
16 his smuggling would be when he comes back, he
17 gets a plus-16 the same as the rapist, or a murder
18 or a violent robber. That just makes no sense.

19 And we're departing because we
20 disagree with the guideline. Also, a small drug
21 dealer is punished the same as a rapist, some are

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1 less than a murder. I don't think anybody here
2 thinks that's fair.

3 Your proposal assumes that the
4 sentencing Judge imposes a sentence commensurate
5 with the seriousness of the offense. And that I
6 think is a fair assumption. Now too, I agree
7 that the 12 month and a day point is very well
8 taken. The only problem is that I didn't think
9 of it myself.

10 (Laughter)

11 JUDGE MOSKOWITZ: And by deferring I
12 can support that. The other problem is that the
13 two-year sentence and now I've tried too many
14 people, but disparate offenses equally.

15 I think you need to break that apart
16 in half. And further, maybe lower the age and
17 have more for a five year and above. And the
18 most for ten years and above.

19 And that I think would make it more
20 clear as to the punishment. I think the idea of
21 having a look at it before they're deported and

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1 what they do after is a wise proposal because the
2 whole idea of this is what I call community self-
3 defense.

4 That we want to defend ourselves from
5 people that should be here and come back and harm
6 the community. And the way you broke it up, I
7 think it does that.

8 The -- make sure I cover. The other
9 thing that I think makes it a wise proposal is
10 that it takes into account more as it will be, a
11 category of -- and I'll talk first about the three
12 categories of defendants we see in San Diego.

13 One are people who come back to work.
14 And they need to be obviously deterred, but not
15 to the same as the next category, people who come
16 back to commit crimes.

17 And then there's the third category
18 that we see so often. The kid who was brought
19 here illegally by his parents as a teenager.
20 Grew up here, his whole family's here.

21 And now he gets involved with a gang,

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1 does drugs now, and he's deported. And when he
2 gets to Mexico, he looks around and says I don't
3 speak Spanish well. I have no family, and he
4 turns around and comes back right away.

5 We have done nothing to date other
6 than departures or variances for general
7 mitigation to cover that situation. And then
8 there's the category of people who come back
9 after a while because their family members have
10 health issues or died, for humanitarian reasons.

11 If they had a prior plus-16 they would
12 be hammered. If they have behaved themselves
13 after deportation, the plus-8 max, I think
14 ameliorates the situation somewhat.

15 But I encourage the Commission to take
16 and too again the people who come back because
17 their family are here, or for humanitarian
18 reasons. They in no doubt should be punished and
19 deterred, but not to the same extent as the other
20 categories.

21 Just a few more points.

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1 CHAIR SARIS: Excuse me. You think
2 we should take the cultural assimilation
3 departure and build it into the guidelines? Is
4 that what you're --

5 JUDGE MOSKOWITZ: I think so.

6 CHAIR SARIS: Okay.

7 JUDGE MOSKOWITZ: And the problem
8 with that is it assumes to require them to be
9 here a longer period of time. So, someone
10 brought here when they were two has a better
11 chance than someone who came when they were 14
12 and dropped out of school.

13 CHAIR SARIS: Can I just ask, one of
14 the things we've struggled with are the people
15 who keep coming back. And as you say, they fall
16 into different buckets.

17 People come back to commit crimes.
18 People come back to work. People come back for
19 their families. What is the -- if you were to
20 say that someone who keeps coming back at some
21 point needs further deterrence, what would that

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1 point be?

2 Is it three returns -- because some of
3 these people that just, I mean, they're just poor
4 and they're coming back to work. But some people
5 are just not getting the message.

6 Even in Boston we have these cases.
7 And they keep, you know, their fourth time, it's
8 their fifth time, and they keep coming.

9 At what point, maybe none, you would
10 say none, do you feel as if there's an additional
11 need for deterrence?

12 JUDGE MOSKOWITZ: Well, I like and
13 this was one of my two last points. I like that
14 the proposed guideline take the prior illegal
15 entry offenses into account.

16 You can do it by base offense level as
17 opposed to a very characteristic as in 2L1.1, but
18 it's a good idea. The way a deportation is a
19 government directive to stay out of the United
20 States.

21 Someone who violates it should be

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1 punished. But the punishment must fit the crime.
2 And so, perhaps even the first time a sentence to
3 act as a warning is necessary.

4 Otherwise the perception is catch and
5 release. That you catch them, you release them.
6 The word gets out there are not problems.
7 Nothing will happen to them.

8 VICE CHAIR BREYER: But Judge
9 Moskowitz, I recall that it was actually 15 years
10 ago I came down and sat in your District in order
11 to learn something about this particular problem.

12 And what struck me as remarkable is I
13 would get a sheet from the U.S. Attorney of how
14 many "voluntary," I don't know if they're called
15 voluntary returns or whatever the euphemism is,
16 to take care of a situation where somebody
17 crosses over. And then is turned around by the,
18 you know, border police or other law enforcement
19 and sent back.

20 And the number, the staggering -- not
21 the number of people who cross over, that's

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1 another issue. The number of voluntary returns.

2 And I was told by the U.S. Attorney
3 then that you don't even prosecute. That is
4 bringing to a Judge the case unless that person
5 has been returned. And I think the number was
6 over 20 or over 30. I mean, it was a staggering
7 number.

8 So I go back to Judge Saris' question.
9 And maybe there's no answer that any of us can
10 give. Which is what is that penalty that would
11 serve as a deterrent?

12 A deterrent without being draconian.
13 I mean, obviously to lock up people for life. As
14 being a deterrent to somebody coming back, who is
15 coming back because of cultural assimilation,
16 coming back because of family, coming back for a
17 job.

18 But not, not the group who is coming
19 back to commit crimes in addition to coming back.
20 Is there some number? Is there something we
21 ought to look at to make that determination?

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1 JUDGE COLLINS: I don't think there's
2 a magic number, because everyone's reason for
3 coming back is different. Whether you talk about
4 necessity, you talk about trying to take care of
5 a family and things such as that.

6 People calculate it's worth the risk
7 to them to come back and try to get a job rather
8 than stay in Mexico and not have a job. And not
9 be able to support their family.

10 So, there's just no magic number
11 you're going to be able to create anyway.

12 JUDGE HANEN: We've had people that
13 I've sentenced that basically tell me, I'm coming
14 right back.

15 VICE CHAIR BREYER: Yes, I've had that
16 too. I've had that too.

17 COMMISSIONER BARKOW: Can I ask just
18 for clarification though, is it commonplace then
19 for Judges to take into account the motive that
20 somebody has for coming back?

21 JUDGE HANEN: Yes.

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1 COMMISSIONER BARKOW: Irrespective of
2 whether you have it in a guideline?

3 JUDGE HANEN: Yes.

4 COMMISSIONER BARKOW: That that's
5 just kind of universal?

6 JUDGE HANEN: Yes.

7 COMMISSIONER BARKOW: Do you think
8 it's something that we should think about putting
9 into the guidelines and talk about potential
10 buckets of reasons? Or is it better to just kind
11 of leave a base number and have there some wriggle
12 room for that?

13 JUDGE HANEN: I think we all do it
14 anyway. I mean, I think we all graduate
15 sentences upward, you know, with an increase in
16 --

17 JUDGE MARTINEZ: I don't see how you
18 would have a guideline with a comprehensive way
19 of knowing what the motive is. I mean, I think
20 that's the reason you have human beings that are
21 conducting the sentencing hearings and

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1 recognizing and trying to gauge the sincerity.

2 But, I will say, just as a sentencing
3 Judge, if you come back and you have prior
4 convictions for illegal reentry, I'm generally of
5 the opinion that you shouldn't serve less time
6 then you did the last time.

7 Unless there's just been some huge
8 period of time during which there's been no prior
9 convictions or prior scorable conviction, it's no
10 longer scorable.

11 So, I think we're all mindful of the
12 need to deter. But, like every Judge here, I'm
13 sure we have those offenders who will say life in
14 a Federal prison is better than life in Mexico.

15 And when they say that, I mean, all we
16 have is the statutory max. And yet you see very
17 few sentences that ever approach the statutory
18 maximum.

19 JUDGE COLLINS: Right. One of the
20 problems is that all 16-level enhancements are
21 looked at as the same. And they're not the same.

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1 That's a big problem.

2 What you can do to eliminate that
3 would be very helpful. Because the guy who gives
4 someone a ride and gets a transportation offense,
5 gets a 16-level enhancement.

6 The guy who is actually smuggling
7 people across gets a 16-level enhancement. The
8 guy who robs somebody gets a 16-level
9 enhancement. They're all different people.
10 They're doing different types of things.

11 And that enhancement treats them the
12 same at the beginning of the calculation. And
13 that's something you need to take a look at more
14 than anything else I think.

15 CHAIR SARIS: Can I say, given the
16 number of departures from the 16, that's one big
17 thing we looked at. We looked at the Southern
18 District, and it's something like -- of
19 California, it's within range of the -- on the
20 plus-16 it's 5.2 percent.

21 I mean, it's just that the -- but, if

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1 you were to go down to -- a lot of those are fast
2 tracked. But those are -- 85 percent are,
3 apparently no one's get -- very few people are
4 getting it.

5 So, I'm trying to figure out, if you
6 think that some of the 16s are too harsh, I mean,
7 that's where people are going, where the
8 stakeholders are going. But, -- and we're trying
9 to think well, who's more culpable?

10 And one of our thoughts was well, the
11 people who keep coming back multiple times.
12 People -- certainly people who commit crimes when
13 they come back.

14 So, we're trying to build in -- listen
15 to the feedback from the Judges and from the U.S.
16 Attorney's office as they're prosecuting them at
17 plus-16. You know, shifting the culpability from
18 the plus-16 to people who maybe come back
19 multiple times and maybe for bad reasons, people
20 who get convicted.

21 And the question is whether in general

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1 what you're seeing is that you're saying, Judge
2 Hanen, that's not worth a dime to you. That in
3 general you don't want us to be working with this
4 guideline.

5 Is that what you were saying?

6 JUDGE HANEN: Well no, no. I think
7 there are -- I actually think there are ways you
8 could fix the guideline that you proposed.

9 CHAIR SARIS: So it's just the
10 categorical picture you're really most worried
11 about?

12 JUDGE HANEN: Well, I'm not -- believe
13 me, you're not going to find any Judge in the
14 Southern District who loves a categorical
15 approach.

16 But there may be ways to fix what
17 you've done. For instance, you say okay, if
18 you've served two years, or if you've committed
19 murder, robbery, rape, sexual abuse of a child,
20 regardless of how long you've served.

21 Something like that where you pick up

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1 these really bad people and heinous criminals.

2 VICE CHAIR BREYER: I was intrigued
3 by -- because I've heard it before, Judge
4 Hinojosa pointed this out. Was that in Texas
5 there has been the experience that State Court
6 Judges, exactly the example you cited.

7 State Court Judges will look at a
8 defendant who has committed a particularly
9 heinous crime and say, okay, I know what's going
10 to happen to you. The State of Texas is not
11 going to have to pay for your confinement. We're
12 sending you over to the Federal government and
13 you're going to be deported after you serve a
14 substantial sentence.

15 And I was trying to figure out,
16 because that's not actually what happens in
17 California in my experience. And maybe Judge
18 Moskowitz has a different one.

19 But my experience has actually been
20 that the State Courts do quote, whatever --
21 however you want to say, "appropriately" punish

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1 or not, do take that into account. And that is
2 the seriousness of the crime.

3 But, is this common? Or is it --

4 JUDGE HANEN: Well, it's not only
5 common, I had originally written a letter that
6 said, basically down here this is how they
7 sentence. And Judge Kazen who's, you know,
8 probably our most senior Judge on the Board,
9 called me up and he said, Andy, you need to fix
10 this. They do this everywhere.

11 And that's been my experience too. I
12 mean, it's a common way of sentencing. That's
13 why we're worried about you key it off of criminal
14 history points, or you key it off the length of
15 sentence, that's what bothers us.

16 COMMISSIONER BARKOW: But Judge
17 Hanen, if we did that correction that you have in
18 mind, where if you could use years as one
19 threshold, which might work better in other
20 Districts, but to account for this particular
21 problem, if we did have a list.

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1 I guess so the list could be named
2 offenses without a residual clause. Without
3 getting back into --

4 JUDGE HANEN: I don't think we want
5 to bring Johnson into this.

6 (Laughter)

7 COMMISSIONER BARKOW: Yes. Well, I
8 don't either. And so, I guess if you were to
9 construct that list, where would you take the
10 list from? Or how would you define those things?

11 Well, because the other alternative
12 would be -- I guess it wouldn't fix your problem
13 if we had five years, 10 years, 24 months.
14 Because you're saying they're not getting any at
15 all.

16 JUDGE HANEN: They're not getting the
17 time. That is the problem. Well, I would, you
18 know, I guess it would have to be -- you'd have
19 to get input from most people.

20 But, obviously I would include murder,
21 kidnaping, rape, sexual abuse of a child,

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1 robbery, and probably --

2 VICE CHAIR BREYER: But don't you do
3 that now? In other words, don't you use --

4 JUDGE HANEN: Well, but you're
5 getting rid of it.

6 VICE CHAIR BREYER: Well no. I'm not
7 talking about -- I'm not talking about the
8 categorical approach. I'm saying when you
9 sentence now, and you see that somebody got a
10 particularly light or inappropriate sentence for
11 the criminal act for which he was convicted by
12 the State Court, don't you look at that?

13 And if you see that he was shipped
14 over immediately, take that into account in that
15 departure?

16 JUDGE HANEN: Oh, absolutely. And
17 that brings us back to the discussion I was having
18 with Ms. Friedrich and Judge Pryor. And that is,
19 I mean, they're looking at us saying it's the --
20 you're departing X number of percent, therefore
21 the guidelines must be bad.

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1 The new guideline's going to be just
2 as bad if we do that -- if we do what you're
3 suggesting Judge Breyer.

4 VICE CHAIR BREYER: Well you just said
5 that. I'm just -- no, actually I'm not
6 suggesting, I mean, yes, I was intrigued by the
7 suggestions. And I think the public hearing is
8 very, very helpful to clarify my thinking.

9 But, I'm trying to figure out in my
10 mind whether the practice that is followed on
11 the, you know, boots on the ground, are you taking
12 these things into account anyway?

13 And if what you're saying is yes, we
14 take it into account because if we see that
15 inappropriately light sentence in the State Court
16 or no sentence at all, of course we take that
17 into account. We do it by way of the departure.

18 And that's what I think you do. But,
19 if you don't do it that way, you should let me
20 know.

21 JUDGE COLLINS: I don't do it that

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1 way. I don't make the assumption that a Judge
2 in another jurisdiction gave someone a particular
3 light sentence just because he thought they were
4 going to be deported.

5 VICE CHAIR BREYER: Well, in Texas
6 they seem to.

7 COMMISSIONER PRYOR: And if I could
8 respond. Given the current guideline, you're
9 just not considering the sentence at all?

10 JUDGE COLLINS: Well, what I may do
11 is, he's got a 46 to 57 month range. I may not
12 cut him any slack for those 46 months. That's
13 all I'll take into account.

14 I'm not going to upward depart because
15 a Judge in another State didn't give him enough
16 time upward depart. I will say that.

17 COMMISSIONER PRYOR: Judge Hanen, you
18 gave us four -- was it four or five big cases --

19 JUDGE HANEN: That's why I had to give
20 it some thought. That's why I didn't want to be
21 put on the spot. I could come up with --

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1 COMMISSIONER PRYOR: How many did you
2 -- what was your sample size? How many did --
3 were you all looking -- I mean, you have a lot of
4 cases.

5 JUDGE HANEN: Oh, those were not
6 cherry picked. They were not cherry picked at
7 all.

8 COMMISSIONER PRYOR: Well, how do I
9 know that?

10 JUDGE HANEN: Well, you have to take
11 my word for it I guess.

12 (Laughter)

13 COMMISSIONER PRYOR: Well, what was
14 it at the --

15 JUDGE HANEN: But, I mean, three of
16 those people had -- the defendants' files were
17 sitting on my desk. The murder case was sitting
18 on my desk.

19 CHAIR SARIS: What sentence did that
20 murder person get?

21 JUDGE HANEN: He got probation.

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1 CHAIR SARIS: But how can a case, a
2 murder case -- that just doesn't --

3 COMMISSIONER MORALES: I'm really
4 curious about that. Can you describe that case
5 a little bit more for us?

6 JUDGE HANEN: Just a -- because they
7 -- they're not -- they're getting rid of the
8 person.

9 VICE CHAIR BREYER: Well so, then
10 maybe that's a logical consequence of this whole
11 guideline system in terms of immigration. Is
12 that now State Court Judges believe that it's
13 going to be a Federal problem, and let them deal
14 with the whole thing themselves. And get rid of
15 "the bad people."

16 JUDGE HANEN: I mean, I'm amazed at
17 some of the probated or suspended sentences. And
18 it may have been a suspended sentence. I can't
19 actually remember. But --

20 CHAIR SARIS: But I've never seen
21 anything like that.

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1 JUDGE HANEN: Now, he may -- it may
2 have fallen the other way. He may have been the
3 one -- one of them was one who just got no
4 criminal history points. So, he fell into that
5 category.

6 CHAIR SARIS: Because I just -- I just
7 --

8 JUDGE HANEN: He may have been -- it
9 may have been the murder. But I had, what, a
10 sexual abuse of a minor and some other examples
11 in there that -- where they got no time.

12 CHAIR SARIS: Can I say I get it.
13 That Texas has more than anybody else. But I've
14 never seen anything like these scenarios in
15 Massachusetts, where someone commits one of these
16 serious crimes and gets no time because they're
17 going to be deported.

18 I just -- I've just never seen it.
19 So, I'm wondering how -- whether it's just unique
20 to Texas?

21 COMMISSIONER PRYOR: Well, that's the

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1 border.

2 CHAIR SARIS: Yes.

3 COMMISSIONER PRYOR: Well, what about
4 when they --

5 CHAIR SARIS: Well, wait, wait.

6 JUDGE MOSKOWITZ: You know, I've
7 never seen this. And if the State does that,
8 they're being foolish because after the Federal
9 sentence, they will likely be back.

10 And if they're committing murder,
11 they're going to kill someone else.

12 CHAIR SARIS: Go ahead.

13 COMMISSIONER FRIEDRICH: Judge Hanen,
14 one thing I want to correct. I said that there
15 was no fast track to speak of. But, it's
16 actually 4.5 for all 1326, 4.5 percent.

17 But, with respect to level 12
18 increases and 16, it's zero according to our
19 data.

20 JUDGE HANEN: We don't have any fast
21 track for anything above and eight.

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1 COMMISSIONER FRIEDRICH: Okay. So
2 that departure figure is a level 16, over 56
3 percent. But, my question is for Judge
4 Moskowitz, Judge Collins and Judge Martinez,
5 you've raised some great points about the
6 threshold.

7 And you raise them at the low end.
8 And maybe the Commission needs to look at a safety
9 valve for the true offender with no criminal
10 history who's going to bump from an eight to a
11 ten.

12 As we looked at our data, 77 percent
13 of those offenders who were at the lowest end
14 now, 77 percent will still remain in zero to six.
15 So, this is a small percentage. But, maybe the
16 Commission does need to look at a safety valve
17 carve out for that low end.

18 At the high end, you make -- at the
19 high end you make some great points about these
20 maybe five year sentence, ten year. And you're
21 year and a day point is a valid one.

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1 So, assuming the Commission takes in
2 some of your comments, or all of them, and deals
3 with these threshold issues, my question is, if
4 we make these adjustments, would you prefer that
5 system? Recognizing it's not perfect and there
6 will be a need for departures.

7 And maybe we need to enhance our
8 departure language to make clear, you should look
9 at the nature of the underlying offense. You
10 should look at the facts. We do not want Judges
11 to stop doing that.

12 If we did all that, would you prefer
13 that amended guideline to the status quo that
14 requires a categorical approach?

15 JUDGE MOSKOWITZ: Yes. For two basic
16 reasons. One it's more objective. Two, it's
17 what the event before deportation for those who
18 come back and they prey upon the community again.

19 COMMISSIONER FRIEDRICH: Judge
20 Collins?

21 JUDGE COLLINS: I think I would prefer

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1 that better than the other proposal too. When I
2 first started back in 1998, there was something
3 called Application Note 5, which allowed a Judge
4 to take a onetime departure in a level 16 case
5 and give a guy a break.

6 That went away sometime in the early
7 2000s. So, it's been a long time. But,
8 something in that -- something that can allow you
9 to do that would be great.

10 CHAIR SARIS: So, if we have fixed it,
11 you'd be okay with it the way --

12 COMMISSIONER FRIEDRICH: And Judge
13 Martinez?

14 JUDGE MARTINEZ: The consensus in the
15 Western District of Texas is that this new
16 framework can be made to work. And getting away
17 from the categorical approach is a huge move in
18 the right direction. Notwithstanding the
19 concerns that Judge Hanen has pointed out.

20 I will say, it is a little bit
21 inconsistent to me that on the one hand, we're

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1 getting away from crimes of violence, aggravated
2 felony, and yet for the three misdemeanors, we're
3 still looking at --

4 COMMISSIONER FRIEDRICH: Well, that's
5 a Congressional directive.

6 JUDGE MARTINEZ: Oh, okay.

7 COMMISSIONER FRIEDRICH: So, we can't
8 eliminate that.

9 CHAIR SARIS: We might agree you on
10 that. But, we can't --

11 COMMISSIONER FRIEDRICH: It's a
12 Stature.

13 JUDGE MARTINEZ: Okay. Wait a minute
14 --

15 COMMISSIONER FRIEDRICH: But Judge
16 Hanen, for you, if we were to add this list of
17 offenses, would it change your view on whether
18 this is a plus?

19 JUDGE HANEN: Oh, I think it would
20 change a lot of our -- the Southern District
21 Judges. If we're going to start picking up some

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1 of these --

2 COMMISSIONER FRIEDRICH: Some of
3 these key murder, rapes --

4 JUDGE HANEN: This serious crime.

5 CHAIR SARIS: A crime of violence.

6 JUDGE HANEN: What you would call a
7 crime of violence, because we're back to that
8 compliant term.

9 COMMISSIONER FRIEDRICH: Right.

10 CHAIR SARIS: But, the most heinous.

11 JUDGE HANEN: But yes, if you started
12 picking up the most heinous crimes --

13 VICE CHAIR BREYER: Enumerated
14 offenses.

15 CHAIR SARIS: Right, a few select.

16 JUDGE HANEN: Exactly. Right.

17 COMMISSIONER MORALES: I have one.
18 And whether -- going back a little bit to the
19 sentences that were imposed in those that are
20 either probated or suspended, is that how they
21 usually are imposed?

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1 Is it, okay, you would have gotten ten
2 years, but I'm suspending it? Or is it, okay,
3 you committed murder, but you're getting nine
4 months?

5 I mean, is it -- so, that -- if it's
6 usually suspended, would just having language
7 that suspended sentences count as if imposed,
8 have an impact on your views as well? I mean,
9 would that -- do you think that would help a lot?
10 A little?

11 JUDGE HANEN: I think -- I mean, you
12 know, now we get to consider whether it's
13 suspended, deferred, probated. I mean, if we
14 were able to do that, I think that would cure the
15 problem.

16 VICE CHAIR BREYER: Are the sentences
17 in Texas out of State Court, are they imposition
18 of sentence suspended? Or are they State prison
19 suspended?

20 In other words, I sentence you to
21 State --

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1 JUDGE HANEN: It can be both ways,
2 right.

3 VICE CHAIR BREYER: It can be both
4 ways?

5 JUDGE HANEN: Yes.

6 VICE CHAIR BREYER: So, in one case
7 we have "no sentence," because it's imposition of
8 sentence suspended. I place you on probation for
9 six months or nine months, and goodbye, you're
10 going off to the Federal system.

11 JUDGE HANEN: Right.

12 VICE CHAIR BREYER: Versus, I impose
13 a State prison sentence which could be five to
14 life or whatever it is. And -- but I suspend it.
15 And so you have two different kinds of sentences.

16 JUDGE HANEN: Absolutely.

17 VICE CHAIR BREYER: One in which there
18 is no sentence. One in which there's a State
19 prison sentence. And yet they both can be
20 exactly the same crime.

21 CHAIR SARIS: And in the current

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1 guideline it says 13 month sentence imposed for
2 drug trafficking.

3 VICE CHAIR BREYER: Thirteen, yes.

4 CHAIR SARIS: It's 13 months. Did I
5 say years? It says condition for felony drug
6 trafficking offense for which the sentence
7 imposed was 13 months or increased by a 12 level.
8 Sorry, you all know that.

9 So, just in terms of the ease of
10 imposition, has that been easy to apply? In
11 other words, you go, you find the conviction. I
12 mean, we heard some concerns about documentation.
13 Or -- has that worked basically?

14 JUDGE COLLINS: Well, most of those
15 drug convictions are going to be Federal court
16 and you'll have the documentation of it. But
17 keep in --

18 CHAIR SARIS: Those happen in Federal
19 court.

20 JUDGE COLLINS: Keep in mind though
21 that most of those drug trafficking convictions

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1 are backpackers. They're not people selling
2 drugs on the street. They're not people making
3 huge drug deals. They're backpackers.

4 That's a lot of the people getting who
5 are getting a 16 level enhancement.

6 JUDGE MOSKOWITZ: In California it's
7 difficult to apply for the very reason that we're
8 here. The Ninth Circuit will find it not a drug
9 trafficking offense because it was
10 transportation/sale of a controlled substance.

11 They don't list the controlled
12 substance in California sanctioned substantive
13 that the Federal Act does not. So, that doesn't
14 count where here it would.

15 Just before I forget, if the
16 commentary included something like this, if most
17 of the defendant's family resides in the United
18 States, and the defendant returned to be with his
19 family the court may consider a departure.

20 If there was something open-ended like
21 that, I think it would be helpful for that. So,

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1 as a defendant wouldn't require, it's just
2 something in writing recognizing the departure
3 there.

4 And last, before I run into done. And
5 2L1.1, the smuggling guideline, I share Mr.
6 Johnson's view. He'll speak of it as to the
7 increase for if the defendant smuggled,
8 transported or harbored an unlawful alien as part
9 of an ongoing commercial organization.

10 It has to have five people by
11 definition. But, the pickup driver from the
12 homeless shelter goes down to the border free to
13 drive the aliens, but he gets sucked into this.
14 And we then have a big debated as to whether he's
15 minor or minimal just like the drug carriers.

16 I just don't think this is needed. If
17 the government wants to press this, they have a
18 mandatory minimum of three years or five to use
19 if they want to prosecute the case that way.

20 CHAIR SARIS: Thank you. Judge
21 Pryor?

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1 COMMISSIONER PRYOR: Judge Hanen, if
2 we had a few enumerated offenses, would you want
3 to look at the facts too as part of the
4 guidelines?

5 JUDGE HANEN: Well, so far we can't
6 look at them.

7 COMMISSIONER PRYOR: I know.

8 CHAIR SARIS: If that we could.

9 COMMISSIONER PRYOR: We could say
10 that that's -- yes.

11 JUDGE HANSEN: Well, I think
12 depending upon the enumerated offenses you pick,
13 I mean, I'm not sure you need to do that.

14 COMMISSIONER PRYOR: Okay.

15 JUDGE HANSEN: I mean, I think if you
16 -- the ones I named and probably just given some
17 more thought, you all would come up with some
18 that you'd want to include as well.

19 But, I think that would go a long way
20 to curing our problem with this. And I think
21 quite frankly, it goes a long way to matching

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1 what's in the actual Statute, 1326, where they
2 make a gradation between a felony and an
3 aggravated felony.

4 You know, I think you'll be a lot
5 closer to the Statute if you do that.

6 CHAIR SARIS: Thank you. And I just
7 -- we don't have that much -- I don't know if we
8 have any more questions -- that much more time.
9 But I know that Judge Moskowitz mentioned the
10 alien smuggling. I don't want to lose track of
11 that for the others.

12 Do the rest of you have views on
13 whether it needs to be adjusted the way we -- in
14 one of the two options we've suggested? Or is
15 it appropriate the way it is?

16 JUDGE COLLINS: I don't have any
17 feeling one way or the other about that one.

18 JUDGE MARTINEZ: I'd agree with Judge
19 Hanan.

20 CHAIR SARIS: That?

21 JUDGE MARTINEZ: The inclusion of

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1 those more serious and egregious situations that
2 merited a higher bump.

3 JUDGE HANEN: Like the sexual abuse
4 of a --

5 JUDGE MARTINEZ: Yes.

6 JUDGE HANEN: Of a customer or captive
7 --

8 CHAIR SARIS: Of a minor.

9 JUDGE HANEN: Whatever you want to
10 call it. These, you know, the people -- the
11 alien that's being transported.

12 JUDGE MARTINEZ: Right.

13 CHAIR SARIS: And do you think we
14 should change the definition of minor? In other
15 words, the way it is now is I think is under 16
16 and should it be consistent with the Alien Act of
17 16 to 18?

18 Or are we capturing too many -- I
19 understand in Mexico, I read some testimony that
20 in fact in Mexico it's 16 is the dividing line.
21 So, is that appropriate? Have you seen many

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1 cases where this matters?

2 JUDGE MARTINEZ: Not that many, no.

3 CHAIR SARIS: All right.

4 JUDGE HANEN: But, if you're going to
5 -- I don't think you should put a mens rea into
6 that. I think, you know, these people that
7 traffic in human beings, I mean, if you say well,
8 I didn't know it was a minor. I mean, we'll have
9 a mini trial in every case.

10 I mean, or I didn't --

11 COMMISSIONER PRYOR: Would reason to
12 believe be good enough?

13 JUDGE HANEN: Well, reason to believe
14 would be helpful. Because that way, you know,
15 at least if the minor's young enough. Of course
16 if it's a 16 or 17 year old as Judge Saris is
17 talking about, I mean, you know, we're never
18 going to -- you know, I thought he was 18.

19 VICE CHAIR BREYER: Don't we have that
20 problem all the time? I mean, we have that
21 problem with a lot of criminal cases.

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1 CHAIR SARIS: The Man Act.

2 COMMISSIONER PRYOR: Isn't the
3 circumstantial evidence in a lot of these cases
4 going to be --

5 JUDGE HANEN: Pretty good.

6 COMMISSIONER PRYOR: Pretty
7 overwhelming.

8 JUDGE HANEN: And pretty much the
9 minor enhancement comes automatically. If
10 there's a minor in the group --

11 COMMISSIONER PRYOR: Yes.

12 JUDGE HANEN: It gets assessed. And
13 you know, whether the person knew about it or
14 not.

15 CHAIR SARIS: So, the testimony from
16 the experts was compelling on this point. I
17 mean, I was just gripped with it over the weekend
18 actually, on what's actually happening.

19 That young people are being recruited
20 or forced to be smugglers coming across the
21 border. And it's getting more and more

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1 dangerous.

2 So that let's say you had a young
3 person and then somebody else in the stash house
4 rapes the kid. You would attribute that to the
5 smuggler?

6 And that's what you're hearing is
7 happening. These young people are being forced
8 to be the smugglers. They come across the border
9 with unaccompanied minors and then they're
10 getting raped and tortured and kidnaped in these
11 stash houses. That's what you're reading about.

12 And so, if you don't have a mens rea
13 do you attribute that rape to the smuggler?

14 JUDGE HANEN: Well, first of all, it's
15 the young person, the smuggler wouldn't be in
16 front of us.

17 CHAIR SARIS: Well, 18, 19, yes.

18 JUDGE HANEN: Okay. I mean, I
19 wouldn't. And I don't think our probation
20 department. I mean, we would -- it would be
21 applied to the person that ran the stash house

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1 that was involved in the rape or doing something
2 like that.

3 But, we wouldn't apply it to someone
4 that didn't have anything to do with it.

5 CHAIR SARIS: So, you need some mens
6 rea in there. You'd have to know that the person
7 was raped. And you'd have to -- right, you'd
8 have to have --

9 JUDGE HANEN: Yes, that's a different
10 situation. It's --

11 CHAIR SARIS: But you're just talking
12 about the minor --

13 JUDGE HANEN: What I'm talking about
14 is the minor. Because then we're going to get
15 an argument well, she was 12 years old, but she
16 looked 15 or you know, whatever.

17 We don't want to try those.

18 CHAIR SARIS: All right. Anybody
19 else that has any parting ideas? But yes, you're
20 just saying that's yours?

21 JUDGE HANEN: Can I make one very

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1 frivolous suggestion?

2 CHAIR SARIS? That's yours? Yes.

3 JUDGE HANEN: If you implement these,
4 can you renumber them so they're not (b)(1) and
5 (b)(2)? I mean, they don't match the Statute.

6 CHAIR SARIS: Yes. That's a great
7 point. Yes. Very confusing.

8 COMMISSIONER PRYOR: So Judge Hanen,
9 if we make the kinds of modifications that we've
10 discussed to this proposal, do you still think
11 the departures will go up?

12 JUDGE HANEN: I doubt it actually. I
13 think if you were to add an enumerated list that
14 said, you know, and regardless of what sentence
15 you got, if you are guilty of murder, rape, sexual
16 abuse of a child, those things, I don't think
17 you're going to see that.

18 Because those are the instances what
19 we were looking at that, you know, all of us --

20 COMMISSIONER PRYOR: The way you're
21 looking at them now?

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1 JUDGE HANEN: Yes. I think that's
2 actually --

3 COMMISSIONER BARKOW: But would they
4 go down though if they're -- right now they're
5 not really upward departures though. The reason
6 you're departing is to go down.

7 So, the question is whether we fix
8 that with the other reasons.

9 JUDGE HANEN: Well but at least for
10 my purpose, we're not going to replace it with a
11 different one. That's right.

12 COMMISSIONER BARKOW: With an upward
13 one.

14 JUDGE COLLINS: Let me just one --
15 sexual abuse of a child, be careful how you define
16 that also. Because sometimes you find out that
17 they're now married. They were 15 and 17 or 17
18 and 14 and now they're married.

19 JUDGE HANEN: But that's another
20 reason we depart down.

21 JUDGE COLLINS: So, a number of

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1 departures in those areas will go down.

2 JUDGE HANEN: And in those cases we
3 actually look at the facts.

4 JUDGE COLLINS: If it's brought to our
5 attention.

6 COMMISSIONER MORALES: That's good.
7 I have one. Judge Hanen, earlier you said that
8 you had a bunch of fix -- that you had a number
9 of fixes that you thought could help. And I
10 think we've already discussed the idea of having
11 this enumerated list of offenses, the idea of it,
12 incorporating suspended sentences and of course
13 renumbering.

14 Are there any others that you have in
15 the back of your head that we should know about?

16 JUDGE HANEN: Well, no. Those are
17 the main ones. I think if we capture the serious
18 crimes, and as far as a gradation of, you know,
19 just this is a second time or a third time you've
20 had a 1326, I mean, I think I don't have an
21 opinion one way or the other because I think

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1 Judges are doing that anyway.

2 I mean, every time I sentence somebody
3 for that, I tell them, you know, next time you
4 come back here's what you're looking at. You
5 know, I -- because I want them to know that the
6 penalties go up if nothing else because of
7 criminal history points.

8 COMMISSIONER MORALES: So would you
9 like to see that in sort of -- in writing?

10 JUDGE HANEN: It's fine with me. And
11 it's fine with the Judges there. But, we're okay
12 either way.

13 CHAIR SARIS: Thank you. I think --
14 are we all set? Thank you all very much for
15 making the trip.

16 And we'll just take -- we'll just do
17 a second for the swap. I learned my lesson last
18 time, no break.

19 Okay. So, now we hear the view from
20 the field. We begin with the Department of
21 Justice.

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1 Richard L. Durbin, Jr. has been the
2 United States Attorney for the Western District
3 of Texas since 2014. And prior to that he was
4 an Assistant United States Attorney since 1983.

5 Next is the Federal -- is the
6 representative of the Federal Public and
7 Community Defenders, Margie Meyers. Ms. Meyers
8 is the Federal Public Defender for the Southern
9 District of Texas, and the Chair of the Federal
10 Defenders Sentencing Guidelines Committee.

11 Knut Johnson is testifying on behalf
12 of the Practitioners Advisory Group on which he
13 serves as the 9th Circuit representative. He has
14 practiced in his own law firm in San Diego since
15 1996.

16 And finally, Richard Bohlken, no
17 stranger to this Commission, is the current Chair
18 of the Probation Officers Advisory Group. And
19 has been a member of the group since 2010. He
20 is also the Assistant Deputy Chief Probation
21 Officer in the District of New Mexico.

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1 So, thank you. And I would -- I
2 didn't -- you'll notice there's a little bit of
3 discrimination here. I didn't do this with the
4 Judges, but we still have our light system for
5 the members of the field.

6 So, we have these, I guess, everyone's
7 been told, sort of in the vicinity of five minutes
8 for oral statements. And then these lights go
9 off, I think.

10 So, it will go beginning with you Mr.
11 Durbin. Thank you.

12 MR. DURBIN: Thank you. And thank
13 you all for having me. As you said, I've been
14 the U.S. Attorney for about a year and a half
15 almost.

16 I've been an Assistant U.S. Attorney
17 in the Western District for a long time.

18 CHAIR SARIS: You need to -- this is
19 a tough room just because it's --

20 MR. DURBIN: Can you hear me?

21 CHAIR SARIS: You need to just speak

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1 up a little bit because we have people who are
2 listening in.

3 MR. DURBIN: I have -- we do a lot
4 immigration cases. And I'm here this morning
5 mostly to answer your questions.

6 But, let me say a couple of things.
7 I wrote out some. But, I'm in the middle of a
8 conversation and so I'm not going to do the
9 written part. I'm just going to tell you a
10 couple of things and then get it going.

11 On the guidelines pertaining to
12 smuggling, there wasn't a whole lot of discussion
13 of that, but I do want to mention a couple of
14 things. I mean, it's our belief that the
15 guidelines should be raised.

16 And that it should not be based on
17 specific proof of membership in an organization.
18 Our experience on the border is that everybody
19 almost who's involved in transporting people is
20 somehow connected to an organization.

21 The organizations don't all look like

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1 what we think drug organizations look like in
2 terms of a very, very carefully vertically
3 integrated organization.

4 But, there is a tremendous amount of
5 coordination that has to go on to move people
6 across the rivers or across the border, through
7 the checkpoints, or around checkpoints to stash
8 houses. And ultimately to get into the stream
9 to go farther north or east and west.

10 You have different kinds of people or
11 different kinds of jobs that are done. There are
12 those that cross them over the river. There are
13 those that guide them by foot.

14 There are those who pick them up and
15 drop them off. There are those who lead them
16 around checkpoints through the brush.

17 And there are those who run the stash
18 houses again. And who are then involved in the
19 money, collecting the money. And then shipping
20 the money or wire transferring the money to
21 funnel accounts and then ultimately back to

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1 Mexico.

2 And what we see is that we have groups
3 that are affiliated but they will use each other
4 based upon who's available. So that a particular
5 smuggler may be using this driver this week, but
6 if that driver's not available, they'll use
7 somebody else.

8 And they'll use somebody who might "be
9 part of another organization." But they're all
10 sort of -- it's a confederacy. They're all sort
11 of loosely affiliated with one another.

12 With respect to the juveniles, let me
13 say first of all, we see a number of juveniles.
14 Especially in the El Paso area.

15 In El Paso the river is basically a
16 concrete culvert that crosses into downtown El
17 Paso. They use juveniles to cross the river, to
18 break through the fence, and then to lead them to
19 a staging area.

20 They are not people -- the juveniles
21 are not the ones being smuggled. These are

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1 juveniles that are now part of the organization
2 that are smugglers themselves. That know where
3 to go.

4 And if you think about it, I mean,
5 it's hard to take somebody who's never been here
6 before who's part of the smuggled load and say
7 all right, you're now a guide. Where are they
8 going to guide them? They don't know where
9 they're going themselves.

10 And so, the stories that the kids
11 become the guides, the kids become the guides
12 because that's what they're doing. Because
13 that's what they're doing consistently.

14 We don't prosecute most juveniles.
15 We think that the smuggling organizations
16 understand that. But, we have made it a practice
17 that if we catch them multiple times with loads
18 of multiple people, then we will certify them
19 under the juvenile prosecution statute and we
20 will proceed against them.

21 We've done a couple dozen maybe over

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1 the last five or six years. But, the border
2 patrol has asked us not to completely ignore it.

3 That's basically what I have to say
4 about the alien smuggling. With respect to the
5 illegal reentry, a couple of points.

6 We're not crazy about the categorical
7 approach. I had a breakfast with Chief Judge
8 Stewart not too long ago in which he said the
9 U.S. Attorneys do a lousy job on the categorical
10 approach.

11 Which I thought was -- it hurt. And
12 I thought it was a little bit unfair. I don't
13 think it's all our doing.

14 Going to a sentence imposed is -- I
15 suspect it's going to be simpler. It's not that
16 there won't be issues. But I suspect it will be
17 overall simpler.

18 The problem with it in part is, is
19 what Judge Hanen was talking about. I think he
20 overstates the Texas sentencing practice. I
21 don't think every defendant who's an illegal

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1 alien gets a suspended or probated sentence.

2 But Texas sentencing is weird.
3 Juries impose sentences in cases. So, it's not
4 all Judge imposed sentences. And that's
5 something to take into consideration.

6 And the thought I would leave you with
7 is sort of whether you're using the categorical
8 approach or you're using a sentence imposed,
9 we're sort of like the occupants of Plato's cave.
10 What we're doing is we're looking at shadows to
11 try to infer the reality.

12 And I think what you heard from the
13 Judges, and I know that it would be what we would
14 advocate is something that allowed the courts and
15 the prosecutors to look at the underlying facts.
16 Formally look at the underlying facts.

17 The problem with categorical, and then
18 I'll stop, the problem with categorical is if the
19 Judge gets it wrong, it still goes up on appeal.
20 And so any departure from the wrong determination
21 for the categorical is still going to go to

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1 appeal.

2 And so the appeal as it were of the
3 imposed sentence model is, there's probably going
4 to be fewer mistakes. So, there won't be such
5 long drawn out appeals.

6 And if there are departures based upon
7 the underlying facts of the conviction, there
8 probably will be less litigation, less expense.
9 And it won't take so much time. Thank you.

10 CHAIR SARIS: Thank you.

11 MS. MEYERS: And I'm going to have to
12 talk fast. I've been doing this as long as Mr.
13 Durbin has.

14 And I should mention that I have
15 represented thousands of undocumented aliens from
16 the magistrate misdemeanor level where you've got
17 60 at a time, all the way to the Supreme Court.
18 So, I really have done a lot of this.

19 And I've also represented people in
20 Texas State court. I will join Mr. Durbin in
21 saying Texas is weird.

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1 I mean, I've had people --
2 undocumented aliens got seven years for a robbery
3 that was shoplifting with a push. So, for every
4 alien that you have who's getting a lower
5 sentence, they're getting higher sentences.

6 There was a study done in San Antonio
7 about retained versus appointed counsel. And
8 there was a showing that poor people got much
9 longer sentences.

10 So, I don't think you can assume that.
11 But, I think what that reveals is that sentence
12 imposed is a poor proxy for seriousness. And
13 that's what we're trying to deal with.

14 I understand the desire to get away
15 from categorical. You can't. It's in the
16 Statute. And in fact a number of years ago, we
17 proposed aggregated felony plus crime of violence
18 or drug trafficking as the highest level so that
19 you don't have to do this twice.

20 I will say that of course we welcome
21 the effort to reduce the sentences at the top.

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1 I think those departures do show it's too high.
2 And it's partly because it ranges from murder to
3 alien transporting.

4 On the other hand, the tradeoff where
5 you're talking about raising the sentences for
6 the lowest people, in all honesty, in my personal
7 opinion, is unconscionable. Your own data shows
8 that these people are getting at or below the
9 guidelines as well.

10 The idea that multiple reentry makes
11 them more culpable or more dangerous just doesn't
12 make any sense. Your own data shows that
13 overwhelmingly these people enter for three
14 reasons, family, finances and fear.

15 Some of them commit crimes when they
16 come back. But they are almost all coming
17 because they have family here. They have people
18 they are supporting.

19 And what is happening not just in
20 Mexico, but in Central America is so horrific
21 that that's why these people come. And you can

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1 raise the sentences all you want, they will come
2 back.

3 And they are being warehoused in
4 dangerous private prisons. And there is just no
5 basis to raise the sentence for those people
6 either because they come back, because they
7 haven't come back, or because they have
8 relatively minor sentences.

9 I note also that the U.S. Attorney
10 themselves takes that into consideration. When
11 they decide whether to prosecute they look at how
12 many deportations. It takes a certain number
13 apparently more in San Diego than in Laredo.

14 That's their incremental punishment.
15 You start with illegal reentry and you add up to
16 reentry. And as you heard from the Judges, all
17 of the Judges consider how many deportations
18 there were, whether they have prior convictions.

19 In spite of my clients' desires, they
20 never give less time than you got on the previous
21 reentry. So, there is simply no basis, the

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1 trade-off is just wrong.

2 As we document in our testimony, 24
3 months is simply too low. I know that Mr.
4 Johnson can talk more about California, but
5 again, in Texas, the category -- the felony
6 three, the lowest sentence if you don't get
7 probation is two years.

8 You are not reaching the really
9 serious offenses by going to two years. Using
10 sentence imposed but probated would be the same
11 mistake the immigration statute makes.

12 People get probation because they are
13 a less serious offenders. And to use the
14 sentence imposed but probated, will reach the
15 least serious offenders rather than the most
16 serious offenders.

17 So, also I think what we recognize or
18 as we've talked about, there continues to be too
19 much emphasis on prior convictions. Whether it's
20 the reason they came -- whether it was a long
21 time ago.

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1 And what this guideline starts to move
2 toward, and which we do recognize, what really
3 matters is this time when the defendant is here,
4 are they committing serious crimes against the
5 people of the United States? And that's what we
6 should look at.

7 This only partially looks at it. And
8 the problem once again is it's double counting.
9 When you look at it in felony possession, you
10 also agree that the sentence should run
11 concurrent.

12 Which brings me to the departure
13 issues. First of all, to take away the departure
14 for time spent in State custody increases the
15 double counting. And fails to take account what
16 actually happens.

17 There needs to be a departure for
18 sentences that count merely because the guy's
19 been here for ten years and being law abiding
20 other than the fact that he's here illegally.
21 And we've also proposed you might start from the

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1 date they're found.

2 In terms of the smuggling, obviously
3 we disagree with increasing the base offense
4 level. And the issues raised by the Department
5 of Justice are generally already identified.

6 For example, substantial risk results
7 in the base offense level of 18 already. Why
8 would you raise it for 16 for many people who are
9 driving to pay their fee, the hooks, we're not
10 getting, or the government is not getting the
11 people who are organizing this.

12 They're certainly not getting the
13 people who are abusing the aliens. That's
14 happening before they ever come. Thank you.

15 MR. JOHNSON: Good morning. And
16 thank you for letting me speak to you today. My
17 name is Knut Johnson. I'm a criminal defense
18 lawyer in San Diego. I started at the Federal
19 Defender office in 1988. I was there about seven
20 years.

21 And I too have represented in the --

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1 probably up to about a thousand people in these
2 sorts of cases starting before Judge Moskowitz
3 when he was a Magistrate in Magistrate's Court.
4 Where we used to console and pled, you know, up
5 to 20, 30, 40 people a day for coming in illegally
6 or driving people.

7 Since then, since leaving Federal
8 Defenders, I was with a fairly large firm for a
9 while, for a couple of years. And I convinced
10 them to let me get on the CJA Panel. And after
11 that two-year stint, I've been on the Panel for
12 many years. And I'm the Panel Representative in
13 the Southern District.

14 I feel like I'm very familiar with
15 these cases. And I want to give you just a sample
16 of a couple of clients I typically represent.

17 And there certainly are those people
18 that come into this country and commit very
19 serious crimes. And I don't think anyone's
20 disputing they should be punished.

21 But I can tell you about a woman I

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1 just sentenced two days ago who is -- who her
2 entire family was immigrated here legally. All
3 her brothers and sisters became U.S. citizens.

4 She didn't because INS ran out of Visa
5 numbers. And we have the letter from the INS
6 saying we've run out of Visa numbers and the
7 family just didn't have it together enough to
8 understand how to follow up with that.

9 And she fell through the cracks. She
10 is now exiled from the United States. And can't
11 come back.

12 I represented a man who'd served two
13 tours in Afghanistan as part of the United States
14 Marines. He had come here when he was two or
15 three. He has suffered traumatic brain injury
16 and post-traumatic stress disorder and he
17 committed a robbery when he came back to the
18 United States.

19 He too -- and there were no specified
20 departures for him. Certainly, you know, I would
21 hope that you would consider setting out that

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1 people who had -- and I put it in my paper, you
2 know, had ties to the United States, pay taxes or
3 maybe even served in the Armed Forces, would be
4 worthy of a departure downward in some
5 circumstances, people like him.

6 And I don't want to overstate it.
7 That you know, that there's -- everyone has these
8 wonderful compelling stories. But I have many,
9 many stories like that.

10 And it's for those reasons that -- and
11 the difficulties that you've heard about, the
12 categorical approach that I hope that if you go
13 away from that, if you go away from the plus-16
14 and you look at the sentence imposed, you'll
15 consider a -- the time actually served.

16 Because if you think a sentence is a
17 good proxy of how bad someone's conduct was, I
18 think it's really the time service. Because, you
19 know, I talked this through with one of our Judges
20 in our District, and his comment was people with
21 similar facts should get similar sentences.

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1 And the problem is someone sentenced
2 for a robbery in California where it's -- what
3 you heard from Ms. Meyers, which is what we call
4 an Estes robbery in California, where you -- like
5 you just snatch someone and you bump into someone
6 on the way out, that sentence maybe very
7 different from a sentence in Connecticut, but
8 they serve about the same amount of time.

9 And Judges will understand how much
10 good time credit and how much time the person's
11 actually going to serve for that offense. So, I
12 think that time actually served is a better
13 indicator then the sentence imposed.

14 Along that line you should understand
15 our position why the two years should be higher.
16 In California two years is the presumptive
17 midterm of a prison sentence. The lowest prison
18 sentence is 16 months, two years, three years.

19 To get higher than two years you have
20 -- under Cunningham versus California, the
21 Supreme Court said you have to prove the

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1 aggravating facts beyond a reasonable doubt. So,
2 at a two-year sentence that's your average prison
3 sentence.

4 And that also doesn't reflect the fact
5 that some people who receive a two-year prison
6 sentence in California might serve a very short
7 period of time in custody. Whereas others who
8 get -- would only be eligible for 15 percent good
9 time credit because the California legislature
10 has said they have a very serious offense, they
11 would get a -- they will serve much, much closer
12 to the two years.

13 I see we've gone yellow, so let me --
14 I'll read through the rest of this.

15 On the smuggling cases, I believe the
16 age should be 16. Stay at 16 rather than go up
17 to 18. And we would point out that many of our
18 migrants from Mexico are working at 17.

19 And if you've ever sat through a
20 calendar where you have a whole group of people
21 from Mexico pleading guilty, and they're

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1 immigrants, and the Judge will say, how far did
2 you get in school? Almost everyone says sixth
3 grade.

4 And that's because they're
5 emancipated and working after that. And that's
6 a very different group than those who are 13, or
7 14 when they're being smuggled.

8 And now I've gone red.

9 CHAIR SARIS: Okay. Thank you. Mr.
10 Bohlken?

11 MR. BOHLKEN: Thank you, Judge Saris
12 and Commissioners for the opportunity to be here
13 today. I was telling Richard, I just met
14 Richard, I enjoy coming out here every time I
15 come out here.

16 But this trip was especially exciting
17 for me because I feel very passionately about
18 this guideline or this proposed amendment. And
19 the POAG loves the amendment.

20 We received almost unanimous support
21 across the nation for the amendment. And it's

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1 not lost on us that it's a major and a significant
2 change.

3 The 2L1.2 guideline is used more than
4 any other guideline in the book except for maybe
5 2D1.1. And over the years we've heard a lot of
6 issues with the 2L1.2 guideline as it stands now,
7 whether it be the disparity argument, the
8 categorical approach, the plus-16 is too harsh,
9 recidivism isn't taken into account.

10 And we believe that in this amendment
11 all of that is taken into account. And I kind
12 of wanted to go into that a little bit.

13 In large part in our paper we talked
14 about the categorical approach being reduced or
15 significantly reduced. The only reason we said
16 not eliminated is because we do feel that the
17 categorical approach is going to come into effect
18 in (b) (1) (d) and (b) (2) (d), the three
19 misdemeanors or crimes against persons,
20 misdemeanors involving drugs.

21 That that language has to be in the

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1 guideline. And we know that. But other than
2 that, it would eliminate the need for the
3 categorical approach.

4 We appreciate the fact that the way
5 the proposed amendment is written right now, we
6 would only be needing to track down one court
7 document in most cases. That one court document
8 being the judgement, to find out what the
9 sentence imposed was.

10 And that reduces -- I've been before
11 you before where I've told you stories of how
12 difficult some of the court documents are to
13 obtain. And when we're trying to employ the
14 categorical approach.

15 POAG supports the proposed tier system
16 for the base offense level because we feel like
17 it addresses one of those factors that hasn't
18 been taken into account adequately before. And
19 that's recidivism.

20 And for that same reason we concur
21 with the amendment in that the base offense level

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1 when taking into account prior reentry
2 convictions, the applicable time frame, they
3 should be imposed without regard to the
4 applicable time frame.

5 We also support the specific offense
6 characteristic structure. We feel like the
7 demarcation date of the first deportation or
8 first removal is easy to calculate.

9 It generally comes in the discovery.
10 And it's a clear line of conduct before and
11 conduct after that date.

12 We concur and support the enhancements
13 under (b) (1) and under (b) (2). And even the
14 recommended (a) (6) four level enhancements.

15 We do -- we did also discuss some of
16 what was discussed on the previous panel about
17 sentences along the border and sentences in the
18 heartland of the country or in the northeast
19 being different from -- for immigration
20 defendants. Because along the border it's more
21 of a numbers thing.

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1 And they get them in and they get them
2 out quickly. And sometime the sentences along
3 the border aren't as significant as maybe a
4 similarly situated defendant that's in the
5 northeast or the Midwest.

6 But, that's -- that brings me back to
7 the way that the proposed amendment is written.
8 I think there's something in there for
9 immigration defendants across the country.

10 And that along the border what we see
11 is a lot of repeat recidivism type conduct.
12 Where they just come in, come in, come in, come
13 in. That's being addressed in the base offense
14 level.

15 Whereas the SOCs are talking about the
16 criminal history. And that is going to go down
17 a little bit we believe.

18 A couple of recommended improvements
19 that we mentioned in our writings was the
20 definition for the sentence imposed. We believe
21 that sentence imposed is a good calculation to

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1 judge the seriousness of a crime because we have
2 to come up with something.

3 There's arguments about whatever it is
4 we use. I would -- POAG would be opposed to
5 coming back with any type of list of predicated
6 offenses like burglaries, robberies, sex
7 offenses.

8 The reason being, the only predicate
9 offense on that list that I've seen that wasn't
10 -- didn't need a detailed analysis or categorical
11 approach is murder. The rest of them, you're
12 comparing generic model penal code definitions of
13 terms that are on the list.

14 And trying to find -- so you're
15 employing some sort of a categorical approach any
16 time there's a list. There is no perfect list.
17 So, we like there not being any list. And just
18 going with sentence imposed.

19 One of the recommendations that we
20 wanted to make to the sentence imposed is to
21 (b) (1) (c) and (b) (2) (c). We wanted there to be

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1 some sort of a clarification in the application
2 note, application note two that says that those
3 sentences would include sentences of probation,
4 sentences of fine, non-custodial sentences.

5 Because we do feel like we'd lose a
6 lot of those predicate offenses along the border
7 where someone's just turned around and they
8 suspend the whole sentence and send them back.

9 We also talked about the probation
10 terms and how they would be calculated, along
11 with predicate offenses in (b)(1) and (b)(2).
12 And we feel like there's already an application
13 note in place for the prior to the demarcation
14 line of 4A1.2(k).

15 And after the first deportation, we
16 feel like we can -- it should be cumulative. The
17 last thing, and I know I'm on red, is the single
18 sentences that could result where someone has a
19 reentry offense combined with maybe a backpacker
20 offense, a drug offense.

21 We laid out in our paper that we feel

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1 like we're getting two instructions in Chapter
2 One of how that could be parceled out. And we
3 would recommend that you use the previous reentry
4 for the base offense level.

5 Just in closing, we really like the
6 amendment. And feel like it addresses all of the
7 concerns that we've heard about and written about
8 over the past six years.

9 CHAIR SARIS: Thank you. Did you
10 want to jump in?

11 VICE CHAIR BREYER: Yes. Well, your
12 observation of course about listing specific
13 offenses, my guess is that you've been here at
14 Commission meetings for the last two, three years
15 where we have tried to put lists together. It's
16 a nightmare to put a list together.

17 But I'm intrigued whether there's --
18 there seems to be a real difference on, Ms.
19 Meyers, between your position and those of our
20 co-panelists here.

21 MS. MEYERS: I'm shocked.

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1 VICE CHAIR BREYER: Shocked. Well
2 yes, but I want to explore, I want to try to
3 figure it out with respect to sentence imposed
4 versus time served.

5 And you -- your reaction was, as I
6 understood it, maybe I misunderstood what you
7 said. Is that you don't want some system to look
8 at well, previous. We're talking about previous
9 sentences, sentence imposed.

10 That it's sort of a -- it's not a good
11 measure. And I'm trying to figure out, because
12 it's a measure of something. We're trying to
13 address past conduct.

14 And once you get past the position of
15 gee, we shouldn't -- we're doing double counting
16 or we shouldn't discourage that, which I think
17 are all sort of policy considerations we always
18 talk about.

19 But once you get past that, and let's
20 say you think, or the Commission thinks, look, we
21 have to do something here. We disagree with you.

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1 Okay. Then the question is well,
2 there are disagreements and disagreements.
3 Let's try to figure out what you're saying about
4 sentence imposed.

5 And I'm, in my mind, I'm trying to
6 figure out if we're not going to say all rape is
7 rape, and assault is assault, and murder is
8 murder, and dah, dah, dah. We're going to look
9 at what the State Court Judge did in the initial
10 sentencing of this defendant.

11 And found that this defendant ought to
12 be, you know, "three years, five years, sentence
13 imposed." I mean a sentence suspended or
14 imposition of sentence suspended.

15 We're trying to figure out what's a
16 good measure here for the purpose of determining
17 how dangerous that person is. And how serious
18 that underlying offense is.

19 And I don't know. I mean, I would
20 have thought that time served, as Mr. Johnson
21 points out, is a pretty good measure of it.

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1 But yet there's a lot of difference of
2 opinion. And I want to -- I want you to further
3 explore that. And of course, hear from the U.S.
4 Attorney again.

5 MR. DURBIN: Judge Breyer, the reason
6 I shake my head --

7 VICE CHAIR BREYER: Yes?

8 MR. DURBIN: Is that we've had the
9 experience in Texas of serious prison
10 overcrowding. And so you may -- somebody may be
11 sentenced to 30 years. And if the prisons have
12 to release people, they start releasing people.

13 And they may serve 18 months. And
14 there are sort of the traditional role -- the
15 traditional formulas. But the actual time that
16 they're in prison doesn't really reflect what
17 they've done.

18 It can reflect a whole lot of other
19 policy things that have nothing at all to do with
20 the prisoner. And may not even correlate to what
21 it is that he did.

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1 Now that's not to say don't consider
2 sentence imposed. And I didn't mean to suggest
3 that in my opening comments. You've got to have
4 something. And there's nothing that's perfect.

5 VICE CHAIR BREYER: But Ms. Meyers did
6 suggest that.

7 MS. MEYERS: Well, I suggest -- there
8 are three measures. Categorical, which we can
9 handle it. You're going to have to do it on the
10 Statute anyway, sentence imposed and time served.

11 I agree with my colleague that time
12 served is actually the fairest. Because it does
13 reflect State Judge's imposed sentences knowing
14 how much somebody's going to serve.

15 And I might add, in Texas that the
16 most serious offenses are what are called 3G
17 offenses. In which a defendant must serve at
18 least half of their sentence.

19 So in fact time served can be looked
20 at. I'm just saying if you're going to use
21 sentence imposed that two years is ridiculously

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1 low for the most serious.

2 And that what you should not do is
3 what Ms. Morales suggested, which is sentence in
4 -- 10 years probated for 10 years. Because a
5 State Judges views that as probation.

6 That's much less serious to the State
7 Judge then a five-year sentence.

8 VICE CHAIR BREYER: So -- okay, well
9 I think I understand your position.

10 CHAIR SARIS: Could I ask Mr. Durbin,
11 so would you -- this all started in some ways
12 because we kept seeing the departure rates for
13 16s, all right? And categorical parts as sort
14 of the two of those.

15 So, would you agree that that's
16 essentially plus-16 is not followed mostly on the
17 border states? If you look at the numbers and
18 your office's policy?

19 MR. DURBIN: I guess that is. I mean,
20 I looked at that. And I was puzzled by that.
21 And that may be right.

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1 But, I don't know how much of that is
2 a function of fast track.

3 COMMISSIONER FRIEDRICH: But we do
4 know. We've got it broken down. And it's still
5 over 30 percent.

6 MR. DURBIN: To what extent is it?
7 Because we didn't do fast track.

8 COMMISSIONER FRIEDRICH: The numbers
9 are stunning without it.

10 CHAIR SARIS: Even with a fast track.
11 I'm just saying people aren't getting the plus-
12 16. So, it's a sign to us, you know, red flag.
13 Not red light. Red flag you've got to look at.

14 And so, I mean, would the Department
15 of Justice agree that that's being broadly
16 perceived both by DOJ and by courts as too harsh?

17 MR. DURBIN: You know, I can't draw
18 that inference. I don't know that that's what's
19 going on.

20 What I think in part has gone on is
21 sort of because of the way fast track has worked,

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1 it's shifted the whole framework. And it's
2 shifted it all down. It shifted it down in 1326
3 and it shifted it down for the smuggling also.

4 And so, I look at it as kind of like
5 well, if we want to get back to what are the
6 appropriate sentences, because we have to do fast
7 track, then maybe the frame should be shifted
8 back up to where it ought to be. And that's what
9 this might do.

10 CHAIR SARIS: I just noticed you
11 didn't comment on the plus-16. I mean, that's -
12 - in my neck of the woods and in much of the
13 northeast and, you know, fast track isn't as much
14 a factor.

15 And people are looking at plus-16.
16 It's a harsh --

17 MR. DURBIN: Well, I think the way
18 you've got it structured though, and it makes
19 sense to us that you look at pre-deports and post-
20 deport criminals. And what we're looking for is
21 the most serious criminals.

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1 The ones that are the threat to us not
2 just because they keep coming back and forth.
3 But because they come here and they do bad things.

4 And the States don't always address it
5 for a number of financial reasons. They see it
6 as a Federal problem. And they don't think they
7 should pay for a Federal problem.

8 And that is a very common issue.

9 VICE CHAIR BREYER: But why is that?
10 That's what I don't understand. Because number
11 one I don't think we are here to report on the
12 State Court systems.

13 And I've become quite concerned that
14 the answer to the problem is the State's aren't
15 doing it right. I don't know whether they're
16 doing it right or not.

17 But our jurisdiction's very, very
18 limited. We are -- we're limited jurisdiction.
19 We're not the general jurisdiction court.

20 We get a small percentage of the
21 criminal cases, not the overwhelming number of

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1 cases. And we get as a general rule the far less
2 serious cases and the States deal with the more
3 serious cases.

4 That being the case, I think that we
5 have to take a look at what is an appropriate
6 measure for a sentence for somebody who has
7 committed a serious State crime. And I'm just
8 amazed when I hear Judge Hanen and so forth say
9 well, the State simply -- in Texas they simply
10 take the position it's a Federal problem.

11 And I think that's what you said.
12 It's sort of a Federal problem to deal with these
13 people who are very bad people, who have
14 committed all sorts of crimes, and they've come
15 back.

16 And they've come back and committed
17 crimes in the State system.

18 MR. DURBIN: But that's -- but if
19 you're going to use the measure, you have to know
20 what you're measuring. And all I'm telling you
21 is that that is the attitude of State officials

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1 in the State of Texas.

2 Is the border is a Federal problem.
3 They love to pound on us and say you haven't
4 controlled the border. And --

5 VICE CHAIR BREYER: I don't disagree
6 with that. The border is a Federal problem.
7 What I'm concerned about is bad people coming
8 across the border is actually in part a State
9 problem because there are these bad people that
10 keep coming back.

11 MR. DURBIN: Only because they're in
12 Texas. They don't come across in Massachusetts.
13 They don't come across in Illinois.

14 MS. MEYERS: Can I just address part
15 of that? Because I mean, part of this issue is
16 they come back and they commit new crimes.

17 And I'm in Houston, which is not the
18 border. But many of our clients, what ICE does
19 is it's like a whale in a bucket. They go to the
20 Texas Department of Corrections and they find
21 them serving State sentences.

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1 They are serving long State sentences
2 in many cases. Anywhere from three, five, ten
3 years. The Federal government waits until they
4 serve their sentence before they bring their
5 case.

6 Which is my double counting concern.
7 But it's not like the State isn't addressing this
8 problem where they are seriously bad actors.
9 They are putting them in prison for a long time.

10 I think the problem with the 16
11 levels, and I will say I've never -- I've rarely
12 seen a prosecutor say that the 16 level was too
13 high. But, I think it's what you heard the
14 Judges say, 16 levels ranges from statutory rape,
15 which you recognize under career offender.

16 Transporting a few people where the
17 defendant got eight months for the transporting
18 and is now looking at five years for reentering.
19 All the way up to murder and forcible rape.

20 And so I think the biggest problem,
21 the reason you see so many departures under the

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1 16 level is that it -- the range of conduct it
2 covers is just too broad.

3 MR. BOHLKEN: I wanted to talk about
4 the 16 level a little bit. We're not capturing
5 all the defendants that the plus-16 was meant to
6 capture now.

7 In fact, we have repeat reentry
8 offenders that -- and I was talking to Judge
9 Collins on the van on the way over here this
10 morning. We have -- there's offenders that come
11 through and get a real harsh sentence in 2005,
12 2006, that come back now because of the
13 categorical approach.

14 And they may have went from a 96 month
15 sentence down to an 18 month sentence because
16 they were a plus-16, now they're a plus-4. The
17 sentence in moving away from the plus-16, a 12
18 and going to a sentence imposed, we have to have
19 some sort of measurement.

20 Like Richard just said, there isn't a
21 perfect measurement that's going to be perfect

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1 across the board. But I think sentence imposed
2 is the best one to go to.

3 Because let's think about the
4 documents that we've relied on to apply some of
5 these enhancements. If we went to a structure
6 where we were using sentence imposed, we'd be
7 relying on documents received from Departments of
8 Corrections, some of which I've seen are still
9 handwritten.

10 Case managers in prisons calculating
11 good time figuring.

12 VICE CHAIR BREYER: You mean if we
13 went -- if you went to sudden --

14 MR. BOHLKEN: If we went to time
15 served. If we went to sentence served, the
16 documents that we'll be relying on would not be
17 reliable.

18 For a sentence imposed, that's a court
19 document.

20 MR. JOHNSON: So, if I could say
21 something to that. You know, I wouldn't defer

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1 to Mr. Bohlken about -- he's a probation officer,
2 I'm not.

3 But I've seen plenty of pre-sentence
4 reports that I can look at it and tell what
5 someone's served. And I have looked at the
6 Bureau of Justice statistics numbers on how long
7 someone serves in State court in general.

8 Now, it's not specific cases. But,
9 they can tell you on average if you're a sentence
10 of X years results in Y months.

11 So, those numbers are out there and
12 available. And so, you know, I think it's
13 certainly doable.

14 VICE CHAIR BREYER: I mean, I would
15 also just point that the one person in the room
16 who knows how long they served is the defendant.
17 And now whether that's reliable or not, I'm just
18 saying that where a defense lawyer wants to make
19 an issue of time served, and by the way, this
20 cuts against the time served argument.

21 Where a person wants to make an issue,

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1 and say look, I only -- I actually served eight
2 months or 10 months or 14 months, or whatever it
3 is. There could be -- where it's determined
4 under 6A1.3, you might have to have a hearing on
5 that.

6 But the better way I can understand
7 would be the imposition of sentence. Because
8 there you have a document. And the defendant
9 would be hard put to challenge that particular
10 document. Because it's whatever the Judge set
11 at the time he imposed the sentence.

12 So, I think that that's the different
13 way of approaching it.

14 MS. MEYERS: But probation is already
15 figuring out time served in the criminal history.
16 Because it says sentence imposed on such date,
17 released on such date, on parole.

18 I mean, they're figuring it out
19 already.

20 VICE CHAIR BREYER: Well, what are
21 they figuring it out from?

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1 MS. MEYERS: I guess you'd have to ask
2 probation. I assume from either the NCIC or the
3 parole documents.

4 MR. BOHLKEN: No, from the available
5 documents that we get. But my point is, is those
6 documents aren't nearly as reliable as a court
7 document that's received.

8 I mean, we do call or try to call
9 Departments of Corrections, State prisons, case
10 managers for the criminal history calculation
11 that she's talking about.

12 But like I said, to rely on that to
13 apply an SOC is a lot lesser standard I think
14 then a judgement.

15 VICE CHAIR BREYER: And also you may
16 have like the State of California reducing
17 sentences after the fact. And then that further
18 complicates it because the time served is far --
19 is less than the sentence imposed.

20 And so you get into sort of a
21 nightmare of changing laws, changing practices.

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1 Yet it's all supposed to be imposed, you know,
2 looking at whatever the past is.

3 COMMISSIONER BARKOW: Can I ask if we
4 had a -- so, we're trying to kind of target the
5 norm, knowing that this is -- there's no norm.
6 Because the jurisdictions are so variable.

7 And so, if we -- so whatever we do,
8 there's going to be disparity and it's going to
9 be an imperfect metric.

10 So, if we went with this one that
11 looked at sentence imposed, and we talked on the
12 prior panel about but having language in there
13 that if it turns out something's very serious,
14 that should also go up.

15 We could have a countervailing thing
16 in there that said, if the sentence imposed
17 overstates the seriousness of the conduct, that's
18 the basis for going down. Would that address the
19 concerns that some of you have raised about
20 sentence imposed being an imperfect metric the
21 other way?

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1 Because as I see our task, we are
2 supposed to find the best metric we can knowing
3 it's imperfect. And then let Judges work around
4 it when it doesn't apply in a given case.

5 And I don't think we have the right
6 data to know which one of these is the worst.
7 Like you've made a case why this one is bad. But
8 we have a whole ample record about why the
9 categorical approach is bad.

10 So, if we did this one and we had that,
11 what would that kind of departure or language
12 look like that tries to capture sentence imposed
13 not being the right kind of metric?

14 MS. MEYERS: Can I respond? Just a
15 couple of things. And the defenders have
16 proposed sentence imposed at various times.

17 So, part of the argument is what
18 number rather than to use sentence imposed. And
19 in fact in 2007 the Commission had nine
20 proposals. Sentence imposed, categorical, you
21 might go back and look at that.

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1 So, I think I believe in spite of its
2 problems, categorical is the best measure.
3 Because we care about the nature.

4 But, I think you could get to sentence
5 imposed. But the numbers that you're proposing
6 are too low.

7 The other thing that concerns me about
8 all of this departure language is that we have to
9 get the guidelines right. Because that is the
10 starting point.

11 And some Judges follow the guideline
12 lock step. And so if you rely on departures too
13 much, you are increasing -- I mean, I love
14 departures because most of them are going down.

15 COMMISSIONER FRIEDRICH: But we
16 clearly don't have it right now.

17 MS. MEYERS: No. And I agree. I
18 think it's broken. But when I hear well, we
19 could just put a departure in there.

20 COMMISSIONER FRIEDRICH: But that's
21 because you can never create the perfect

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1 guidelines, right?

2 MS. MEYERS: Absolutely. But, you
3 can't rely on that to fix a guideline that's
4 broken. And I am particularly concerned about
5 this idea of looking at the underlying facts.

6 Because the reason for the categorical
7 approach is not just that that's what the Statute
8 says. As the court recognized in Descamps, the
9 problem with underlying facts is figuring out
10 what those are and talk about mini trials where
11 the defendant has no ability to fight it.

12 Judges already do look at underlying
13 facts in the right case. But you can't -- I
14 mean, yes. So the answer is yes. You should
15 have a departure that goes up and down as you do.

16 But, you can't just rely on
17 departures. You have to try to find the best
18 measure of seriousness. Whether that's
19 categorical or sentence imposed or sentence
20 served.

21 COMMISSIONER BARKOW: If the numbers

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1 were higher, would you prefer sentence imposed to
2 categorical? Is your dispute just kind of --

3 MS. MEYERS: I don't -- I don't really
4 care. I'm fine under either one. And in fact
5 we propose both.

6 COMMISSIONER BARKOW: But sentencing
7 aiming the -- if it wasn't 24 months or four years
8 --

9 MS. MEYERS: It was -- I mean the
10 Commission previously proposed 48. And we've
11 heard 10 years. I love 10 years.

12 CHAIR SARIS: Do you have a -- the
13 statistics to back up a higher number of those?
14 Have you done your own?

15 You always do such good research.
16 Research as to why you'd have a higher break
17 point?

18 MS. MEYERS: In our -- well, first of
19 all, in our testimony we have some statistics
20 about, for example, DOJ reports on the average
21 State sentence.

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1 I know for example in Texas, you know,
2 most felony are five to 99. So, five is
3 significant. I understand California has a whole
4 different -- I mean, in California, Arizona and
5 Texas are probably your biggest producers.

6 But -- so, I don't -- we do have some
7 information in our testimony about what studies
8 have shown is the average State sentence.

9 MR. DURBIN: Professor Barkow, I like
10 your suggestion. That's exactly where I think
11 it should go. And they can go up and down.

12 The problem is, any measure you're
13 going to pick is going to -- when you get into
14 actually applying it to the messiness of the way
15 the criminal justice system works, you're going
16 to find cases where it doesn't work.

17 And yes, the -- it's difficult to
18 figure out sometimes what the facts are. But, I
19 mean, we heard four Judges here this morning.
20 And they're astute people.

21 They see a lot of cases. Especially

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1 on the southwest corridor, they see a ton of
2 cases.

3 And I think that they have developed
4 really good skills in figuring out okay, this is
5 a troublesome guy, this is not so troublesome.
6 I think I know what's going on at the State court
7 in this prior case.

8 And it may not be plainly written and
9 I don't think it's plainly writable in a
10 guideline. I mean, I was going to tell you at
11 one point that sort of this is a microcosm of
12 what the immigration problem is.

13 I mean --

14 COMMISSIONER BARKOW: We agree.

15 MR. DURBIN: It's hard to come up with
16 agreement across the board. And this is just one
17 aspect of it.

18 But, something that's easier to apply
19 makes a lot of sense. Even if it's not perfect.

20 MR. JOHNSON: And that's why I think
21 it should be time actually served. And I know

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1 there's a lot of resistance to this.

2 But, let me go back to that one more
3 time. And one of the concerns is that oh, those
4 sentences are sometimes reduced later because of
5 overcrowding or other reasons.

6 But, the seriousness of an offense is
7 reflected in a whole lot of things. One is the
8 minimum and maximum sentence that the legislature
9 decides a Judge can impose.

10 Then it's what the Judge imposes. But
11 the third part of it is if the legislature later
12 decides that we're going to start releasing
13 people, and that is a political judgement that
14 people are getting sentences that are too long.

15 And so, even though the sentence is
16 reduced and it's not what the Judge thought was.
17 But it's still just like seriousness as
18 established by both the legislature and the
19 Judge.

20 And so I think that is as good as
21 you're going to get. And I think that the time

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1 imposed varies so wildly across the country and
2 depends on so many different factors like good
3 time credit, you know, work release and all that.

4 And let's be realistic here too.
5 People who are not in this country legally are
6 not going to get early release programs that they
7 would get if they were U.S. citizens.

8 So, they're going to necessarily serve
9 more time. So, it is a little bit unfair to some
10 people who are not U.S. citizens to use that as
11 a factor.

12 But I think it is more accurate and
13 fairer than the time imposed.

14 CHAIR SARIS: Can I ask, so one big
15 piece of this we haven't focused on is maybe the
16 worst of the people who return or the people who
17 come back and commit serious crimes. Right?

18 We all agree, I think, with that. So,
19 have we got that right in terms of how we've
20 calibrated culpability when you return after
21 being removed? And do we have that calibration

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1 correct?

2 MR. BOHLKEN: I think so. With the
3 base offense level increased that generally they
4 come back repeatedly. So, they're going to get
5 an increase on the front end of the base offense
6 level.

7 But also, in the defendants I've seen
8 over the years, generally they have a serious
9 crime that led to their deportation. They're
10 going to get an enhancement under (b)(1).

11 And then if they come back to commit
12 more serious crimes, they're going to get (b)(2).
13 And so, you're going to get -- see significant
14 sentence for the worst of the worst.

15 And then even if the sentence imposed
16 isn't 24 months or greater, to your point I think
17 that there are departures built into this
18 guideline right now that can allow a court to
19 depart upward or downward depending on the
20 circumstances of the -- either prior to
21 deportation convictions or after deportation

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1 convictions.

2 I think they're already built into the
3 guideline.

4 MS. MEYERS: In terms, first of all, I
5 guess evident, I don't think repeat reentry means
6 that you're dangerous. And nor will you be
7 deterred after you got seven months and came
8 back. But in terms of the after, I do think, I
9 will agree that if you come back, particularly
10 now that you're banned and you're committing a
11 serious crime, you should get -- that should be
12 taken into account.

13 Again, I don't think 24 months does
14 it. That being said, I'm not sure that this
15 guideline, which also doesn't focus on when
16 you -- right now. I mean you may have come back
17 before, but now you got arrested at your home and
18 nothing happened. It needs to take into account
19 how much time you did do in state court which is,
20 for example, what you do in felony possession
21 cases where a firearm is used in commission of

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1 another offense and that person gets state time,
2 under 5G1.3 you reduce the sentence.

3 And my only concern is that you are
4 triple counting the bad behavior. It's not like
5 it's not included because it's in from the
6 history. If you're going to increase the offense
7 level because they committed a serious crime
8 while they were here illegally you need to also
9 take that into account on the back end, how much
10 time they've already served, because you're
11 supposed to figure out what is sufficient but no
12 greater than necessary.

13 CHAIR SARIS: I just don't -- Oh, go
14 ahead.

15 MS. MEYERS: No, please.

16 CHAIR SARIS: I was just saying on the
17 multiple returns I agree. Some people keep
18 coming back for really sad personal reasons. And
19 we've got the departure for cultural assimilation
20 and we have basic variance capability, you know,
21 family circumstances, that sort of thing. And

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1 you can vary it apart.

2 But some people, as I see in Boston,
3 they just keep coming back because they want to
4 work. I mean they're poor and they want to work.

5 MS. MEYERS: Right.

6 CHAIR SARIS: I mean it's incredibly
7 sad but they come back again and again and again.
8 Is there some point at which you would say they're
9 not getting the message and have to be bumped up?

10 MS. MEYERS: I don't, I think there are
11 many studies that show that increasing prison
12 sentences are not a deterrent. I think that the
13 statistic --

14 CHAIR SARIS: Not a general deterrent
15 but what about specific to the person?

16 MS. MEYERS: No, I think with the
17 deterrent, and this is again what the statistics
18 say, are certainty of getting caught. In fact,
19 immigration from Mexico has gone down and
20 Mexicans are leaving the United States for two
21 major reasons: likelihood of getting caught, and

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1 there are no jobs because you have to present
2 papers.

3 So I don't think that you're -- that
4 there is nothing that shows that it's a
5 deterrent. Plus, as you heard from the judges,
6 the second time you get more time, but the reality
7 is for many of these people being in prison in
8 the United States where their family can visit
9 them is a much better choice than being in
10 Honduras where the gangs are killing their
11 families.

12 MR. DURBIN: But at some point there's
13 got to be punishment. Deterrence isn't the whole
14 story.

15 MS. MEYERS: There is punishment.

16 MR. DURBIN: We don't deter murder with
17 life sentences. And we don't ask, well gee,
18 should we lower murder sentences because it's not
19 detering murders? And it's not just deterrence.

20 VICE CHAIR BREYER: It's not just
21 deterrence. What it is saying this person who

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1 committed these crimes we don't want in the
2 United States, period. We don't want in the
3 United States. And if you come, you're going to
4 get a more severe sentence than you would if you
5 didn't come. Maybe it doesn't deter them, but
6 there's an argument that it protects the people
7 in the United States from these people who --

8 MR. DURBIN: And it incapacitates them
9 for a hearing.

10 VICE CHAIR BREYER: Yes.

11 COMMISSIONER FRIEDRICH: And moreover,
12 Ms. Meyers, you said that -- this is hard to
13 understand -- but that someone who comes back
14 repeatedly, --

15 MS. MEYERS: Right.

16 COMMISSIONER FRIEDRICH: -- violates
17 multiple court orders, violates the statute
18 multiple times is not more culpable than the one
19 who comes one time after deportation. We've
20 heard all the judges say without question, every
21 one of them said we look at that and we depart.

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1 And you're telling us not to rely solely on
2 departures. We've been told this is something
3 judges looked at. Why should that not be
4 integrated into the guidelines?

5 MS. MEYERS: Because it is integrated
6 in the guidelines in the criminal history score.

7 COMMISSIONER FRIEDRICH: Not multiple
8 deportations. I mean we're using this --

9 MS. MEYERS: No, not -- well --

10 COMMISSIONER FRIEDRICH: We're using
11 this as a proxy because what we've learned is
12 multiple illegal reentry convictions basically
13 show six or seven times as many deportations. So
14 we don't want to create a complicated situation
15 for you all, challenging deportations and all
16 that. We say the conviction is a clear proxy
17 that shows greater culpability.

18 How can you say someone with one or
19 more illegal reentry convictions is not more
20 culpable than someone who has none?

21 MS. MEYERS: I think we've used

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1 culp -- if you view breaking a law as a culpable
2 event probably, yes?

3 (Laughter and simultaneous
4 conversation.)

5 MS. MEYERS: Because it is counted in
6 the criminal history to increase the offense
7 level. It's like they keep coming back when what
8 we know is they come back because conditions at
9 home are horrific, their family is here, and
10 they're working.

11 COMMISSIONER FRIEDRICH: And many
12 commit really terrible crimes. And that's where
13 the sentences are going to go up under this. Not
14 for, not for the people who are just coming back
15 here to see family and not committing a crime.
16 They're going to stay here to six months. And
17 we can create a safety valve to the extent we hit
18 some inadvertently.

19 But we want to talk about backlash,
20 we'll keep them at zero to six months. What
21 we're talking about are the people who come back

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1 and commit crimes.

2 VICE CHAIR BREYER: Could I get your
3 comments, could I get all of your comments on the
4 question of aging out of priors? Because this
5 is in the immigration study for sentences it's
6 actually one of the few cases that we don't age
7 out --

8 MS. MEYERS: Right.

9 VICE CHAIR BREYER: -- past. And so
10 you do get into whether it's several times and so
11 forth, it's a different, if it's a different
12 thing.

13 And I'm trying to figure out why we
14 don't age them out.

15 MR. DURBIN: You mean totally?

16 VICE CHAIR BREYER: Pardon?

17 MR. DURBIN: You mean totally?

18 VICE CHAIR BREYER: More than 10 years.
19 If it doesn't count as a criminal history count,
20 it's not criminal history points and so forth.

21 MR. DURBIN: But the proposed guideline

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1 does that.

2 VICE CHAIR BREYER: Okay, yeah. But I
3 mean do you have any views on that?

4 MS. MEYERS: It doesn't do it enough
5 because you're -- no, I mean it's 5 percent. The
6 problem is that the date of the offense --

7 VICE CHAIR BREYER: You don't have a
8 problem with that?

9 MR. DURBIN: Totally aging it out, yes.
10 Because what we're looking at for, especially
11 under the specific offense characteristics, we're
12 looking for the dangerousness of this person.
13 And that they happened to have committed their
14 first crime and gotten convicted for it more than
15 15 years ago doesn't make it irrelevant.

16 Now, the current guideline discounts
17 them. Well, you get 12 for this and 8 for that,
18 or 16 and 12 and so forth, which does make sense
19 if you want to place some value on the age of it
20 or some recognition of the age of it. But to
21 discount it completely, to not consider it I

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1 think overlooks a complete assessment of what
2 this individual's dangerousness is.

3 And, again, the District Courts can
4 look at it and say, okay, well, you've got one
5 old conviction. That's what you got. And that's
6 all you've got. And you've been back multiple
7 times.

8 VICE CHAIR BREYER: Deputy Ocean used
9 to use the example of somebody who committed a
10 statutory rape or some type of sexual offense and
11 then went back, was deported, went back to
12 Mexico. Lived 25 years in Mexico and then came
13 back into the United States a totally different
14 person, you know, I mean but illegally,
15 illegally. And said, you know, why should we
16 consider that 25-year-old sexual assault?

17 MR. DURBIN: I mean it should be in the
18 calculus. But that doesn't stop the judge from
19 saying, you know, you really are a different
20 person and so you fall outside of these
21 guidelines.

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1 COMMISSIONER FRIEDRICH: So in other
2 words you take the departures as departures were
3 intended to address the out of heart land case,
4 the case where the person has an unusual set of
5 circumstances.

6 MR. DURBIN: I think that's right, I
7 mean as I say, because what you're doing is you're
8 excluding -- I mean what if they've got multiple
9 convictions for various types of offenses that
10 are all more than 15 years old and they've come
11 back and they've committed another one. None of
12 those count but they're all relevant to figuring
13 out how dangerous is this person, how dangerous
14 does he continue to be?

15 CHAIR SARIS: Can I make sure that we
16 spend time on the other amendment which is the
17 alien smuggling, that amendment.

18 COMMISSIONER BARKOW: I have alien
19 smuggling.

20 CHAIR SARIS: Hot stuff. Go for it.

21 COMMISSIONER BARKOW: All right. This

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1 is actually for you, Mr. Durbin.

2 I was puzzled by the fact that the
3 death rate that you have in your footnote, that
4 they fell in 2015 by a lot. Do you have a sense
5 of what's going on in terms of the risk? It's
6 an odd posture for us to be saying this a super
7 dangerous thing right as it looks like it's
8 actually getting safer for some reason.

9 Or what do you make of that data?
10 This is in footnote 8 on page 4 of this amendment.

11 COMMISSIONER FRIEDRICH: And it also
12 shows that it peaked in 2005. Fifteen years ago
13 was the peak.

14 MR. DURBIN: Yes, I think it -- there's
15 a couple of things that are interesting.

16 If you look at, if you look at
17 apprehensions along the Southwest border for a
18 period of years you'll see that the apprehensions
19 were sky high in the early 2000s. And they go
20 on a curve that goes like this. And they're at
21 the bottom of the curve in probably about 2010,

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1 somewhere around there.

2 If you look at, if you look at the
3 Census Bureau's housing starts and housing sales
4 for those same years it has the same curve. And
5 so what, you've had fewer deaths I think because
6 you have fewer apprehensions because you have
7 fewer people that are coming across.

8 As somebody mentioned here earlier
9 today, the Mexicans that are crossing has gone
10 way down. The apprehensions of Mexicans has gone
11 way down. What has gone up is apprehensions of
12 others than Mexicans, a lot, most of those coming
13 from Central American countries.

14 And I think the figure is -- first of
15 all, one year I don't think is necessarily
16 representative. I think you've also got some
17 circumstances where the Border Patrol
18 specifically is very concerned about alien deaths
19 and they're on the lookout for it.

20 And so I think there's a number of
21 different factors that go into it. I don't think

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1 it's any single particular thing.

2 COMMISSIONER BARKOW: I guess it's just
3 if the numbers of people coming over are lower it
4 would suggest that you don't necessarily need to
5 change the sentencing regime to affect the
6 influx. Or I mean because we have a lot of
7 testimony it's just it won't be a deterrent
8 anyway. So if there's a strong enough pull for
9 people to come over for the factors, for example,
10 that Ms. Meyers mentioned, they're going to come
11 over anyway.

12 MR. DURBIN: Yeah, but that doesn't
13 make it right.

14 COMMISSIONER BARKOW: No, no, I
15 understand that. But I'm thinking about where
16 the numbers should be. You know, whether we
17 should move it from where it currently is. There
18 is this question of whether or not there is a
19 right record to do -- why would we do that now if
20 it doesn't look like we need to do it as a matter
21 of deterrent.

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1 And there's a question of whether or
2 not these folks are any more culpable than -- if
3 they're always been part of organizations before,
4 kind of worried that they're going to be, we're
5 going to sweep into a block of drivers and people.

6 And I guess what I related to that is
7 the fact that, you know, this is another area
8 where the government sponsors below range rates.
9 And, you know, if the within range rate is so
10 lofty, so in your district it's 51 percent and
11 the government-sponsored outside is 40 percent,
12 so if it's --

13 MR. DURBIN: Most of that's fast track.

14 COMMISSIONER BARKOW: Right. But if
15 you're really serious, I would assume you
16 wouldn't do fast track.

17 MR. DURBIN: No, we have no choice.
18 We're required to do fast track. It's a
19 directive from the Deputy Attorney General's
20 Office.

21 COMMISSIONER BARKOW: In smuggling

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1 cases?

2 MR. DURBIN: Well, we do it in those
3 because -- well, I'll tell you why we do it in
4 smuggling cases is in order to prove a smuggling
5 case what we do is we rely on the material
6 witnesses, those are the people doing smuggling.
7 Under a local court rule they can be held for
8 only 45 days and then they have to be released or
9 returned to their country of origin. And they
10 must be deposed within that time.

11 Although they're deposed, the
12 deposition isn't necessarily admissible. So in
13 order to establish the admissibility of the
14 deposition if we go to trial, we have to show
15 that we have taken steps to secure that person's
16 testimony. Well, if they've been sent back to
17 Mexico we have to go through a bunch of hoops to
18 contact the embassies, to give them the notice
19 and so forth. And the practicality -- and this
20 is why I say the frame shifts because we give
21 them something to get the cases done so we don't

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1 incur the expense of the depositions, so that we
2 don't incur the expense of a trial.

3 And so those peculiarities of alien
4 smuggling cases because the witnesses have these
5 particular characteristics about them have caused
6 us to use the fast track. And we don't do as
7 many depositions as we once did. And the
8 depositions aren't terribly simple because you've
9 got to have the alien, the alien's lawyer, the
10 defendants, the defendants' lawyers, the
11 prosecutor, the interpreter, the court reporter,
12 but there's no judge.

13 And the other thing that we find in
14 those is in that type of circumstance material
15 witnesses are easily intimidated by the presence
16 of the defendant. And so the depositions are
17 difficult to take.

18 CHAIR SARIS: But is that going to be
19 the same no matter what we do with the guidelines?

20 MR. DURBIN: It's always there. But
21 that doesn't mean you don't raise it up. It just

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1 means that now what the discount is, is the
2 discount's going to be higher.

3 COMMISSIONER FRIEDRICH: But basically
4 that's what you're asking us to do, is to factor
5 in your EDP discount so you have a high enough
6 sentence with the EDP program that you think is
7 high enough; right? That's basically what you're
8 saying?

9 MR. DURBIN: I think I'd agree to that.

10 COMMISSIONER FRIEDRICH: You looked at
11 EDP and it's over 28 percent in the Western
12 District of Texas, and it's 1.9 for illegal
13 reentry. And that's astounding to me if the
14 Department feels these are the most serious
15 cases.

16 And I did, I used to try these cases.
17 I get the mat wit problem. It's a big, big
18 problem.

19 CHAIR SARIS: The what problem?

20 COMMISSIONER FRIEDRICH: The mat wit,
21 material witness problem. It's a really big

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1 problem. And you don't necessarily know that
2 you're going to be able to get them back.

3 I did all of that. But basically --

4 MR. DURBIN: What's the 1.9 percent?

5 COMMISSIONER FRIEDRICH: Your EDP for
6 illegal reentry cases.

7 MR. DURBIN: Right.

8 COMMISSIONER FRIEDRICH: Is 1
9 point -- I need reading glasses -- I think it's
10 1.5.

11 MR. DURBIN: Most of them are 0 to 6.

12 CHAIR SARIS: Join the aging group.

13 COMMISSIONER FRIEDRICH: Right. I'm
14 in the aging group.

15 But the bottom line is, for
16 convenience to the government and, you know, I
17 did it, these are tough cases, and in my view
18 they are some of the worst cases. They are some
19 of the most horrific facts. And defendants
20 should go to jail for these offenses. But the
21 problem is it's not that so much has changed in

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1 the last ten years in the way that Commissioner
2 Barkow is suggesting, if anything the facts are
3 suggesting mitigation --

4 MR. DURBIN: I don't think a whole lot
5 of change in 33 years.

6 COMMISSIONER FRIEDRICH: I mean you
7 basically think the guideline's just too low.
8 And it's mainly too low because you're doing EDP
9 a lot and you need to get, you need to get the
10 sentence high enough so when you give them that
11 break you're still sending them to jail. Right?
12 And isn't that the --

13 MR. DURBIN: That's a fair statement.

14 COMMISSIONER FRIEDRICH: And your
15 district's doing EDP. Is the whole country doing
16 it consistently? Because what we find is one
17 district does it at 28 percent, and one does it
18 at 9. You know, Boston does it at 9. I mean,
19 until the Department has conformity across these
20 EDPs it's very hard to ask us to make policy based
21 on their EDP practices.

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1 MR. DURBIN: I understand. Most of
2 these smuggling cases I suspect are in the
3 Southwest border district.

4 COMMISSIONER FRIEDRICH: But even your
5 EDP rates when you look at these different
6 districts for alien smuggling, and they vary
7 district to district.

8 MR. DURBIN: They do.

9 CHAIR SARIS: Boston just started one.
10 It's so strange it's hardly ever used. I'm just
11 saying it's so different across the country.

12 VICE CHAIR BREYER: But I don't even
13 understand how on the border of Texas there can
14 be different EDP programs. I mean which I, I see
15 it before for the Justice Department. I mean
16 they are the ones who put these so the defense
17 takes to it.

18 COMMISSIONER FRIEDRICH: But they do
19 it, but they do it for ease of prosecution for
20 some cases, but they should be uniform on
21 all -- we're not, we're not going to be making

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1 policy based on varying EDP programs when it's
2 ranging from 35 percent to 28. How can you ask
3 us as a Commission to say, okay, you need to
4 factor in this 28 percent. And so, you know,
5 it's not --

6 MR. DURBIN: I'm not sure I'm asking.
7 You're asking why there are such things. And I'm
8 saying that's what the realities are.

9 VICE CHAIR BREYER: Yeah, but there's
10 an easy answer to that. The easy answer, I'm
11 sorry, I mean your department sets the policy for
12 EDP, not the Congress and not the Sentencing
13 Commission, you do it. So if you're saying, gee,
14 we have these odd results because of different
15 programs, I'd say, yeah, that's great. Right,
16 you certainly do. So when you go home at night
17 maybe you can do something about it.

18 I mean it's not our job to do it.
19 It's not our job to try to address differences in
20 EDP programs that are implemented by the Justice
21 Department. It's the Justice Department's job.

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1 MR. DURBIN: I know, but you all
2 proposed the increase to 16. What I'm telling
3 you is we support it. And we do support it. And
4 then you're asking me why we have the departures.
5 And I'm saying that this is the reason we have
6 the departures.

7 COMMISSIONER FRIEDRICH: But no, no.
8 But on the alien smuggling it's a particularly
9 tough one.

10 MR. DURBIN: That's what I'm saying
11 though is that your proposal recommends 16. We
12 agree with that. We think that's right.

13 Now, we may have problems with our
14 internal policies. And I'm explaining to you,
15 you asked me, well, why do you have this departure
16 rate? And that's the reason for it. But that
17 doesn't, that doesn't address the question: but
18 is 16 appropriate? And I think, yes, 16 is
19 appropriate because of all of the risks and
20 dangers that are involved in these crimes.
21 There's serious conduct.

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1 COMMISSIONER FRIEDRICH: Yeah. But my
2 point is this is not a new problem. And maybe
3 these penalties are just too low. But it's not
4 because anything in recent years has changed
5 suggesting that we need to increase the numbers
6 for that reason. And maybe EDP, EDP has changed.

7 MR. DURBIN: Maybe it's too low to
8 start with?

9 COMMISSIONER FRIEDRICH: Well, but
10 there wasn't, when I prosecuted there was not the
11 EDP program for alien smuggling.

12 VICE CHAIR BREYER: And we have to be
13 careful here about what now, in response to
14 whatever the programs were and the practices
15 were, the professional smuggler in Mexico is now
16 using kids, 18, 19 year olds, to bring people
17 over. And they're the people who are being
18 apprehended. And they're the people who are "the
19 smugglers." And they're the people that you're
20 asking to be given more serious sentencing.
21 Which I can understand, given the harm that's

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1 caused, it may justify. But are you really
2 reaching the people that you want to reach by the
3 penalties that you are imposing?

4 MR. DURBIN: Well, the investigative
5 challenges we're aware of, and we work on those.

6 Yes, I agree completely with you,
7 Judge Breyer, a lot of the problem is beyond our
8 border. It's extra-territorial. We are working
9 with HSI. We are working with the Mexicans to
10 try to figure out how to reach those people. We
11 haven't talked about the unaccompanied children
12 today.

13 CHAIR SARIS: Well, I was just going to
14 ask.

15 MR. DURBIN: I know the Department is
16 very concerned about that.

17 Our problem with those cases is we see
18 unaccompanied children in loads, but they come in
19 in little handfuls. What our problem with the
20 unaccompanied children right now is they, they
21 are led to the northern border of Mexico. They

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1 are told, Go across and turn yourself in to the
2 first blue or green uniform. Because then they
3 have, then they get in the administrative process
4 and they're not sent back immediately.

5 And we are struggling with how do we
6 reach those smuggling organizations? They're
7 beyond our reach. They're beyond our, some of
8 our investigative powers. We're working on those
9 to try to figure out how to get to those.

10 But that's a different problem than
11 what's the appropriate punishment for those who
12 are found here that are doing it? And that's
13 what my argument is that --

14 VICE CHAIR BREYER: I'm sorry. But
15 those people, like the 18 and 19 year olds?

16 MR. DURBIN: Well, I don't know that
17 they're all 18 and 19.

18 VICE CHAIR BREYER: Well, I don't know
19 whether they are or not.

20 MR. DURBIN: There are 18 and 19 year
21 olds but I -- that's not what our typical smuggler

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1 is.

2 VICE CHAIR BREYER: Well, I mean that's
3 not the person that is bringing the kids over or
4 the people over?

5 MR. DURBIN: Not always, no.

6 VICE CHAIR BREYER: Not always; all
7 right. But there's a big difference between
8 always and not our typical problem. I'm trying
9 to figure out --

10 You know, we could raise it, not 16.
11 There's a 24 level.

12 And my question is, what's the
13 correlation between the length of the sentence
14 and the likelihood that you're going to
15 have -- that it's going to serve as a deterrent
16 effect to 18 and 19 year olds smuggling people
17 over? What's the correlation and what's the
18 evidence of the correlation?

19 MR. DURBIN: I don't know that high
20 punishments deter anybody. After 33 years as a
21 prosecutor I am convinced that most people commit

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1 crimes because they have an opportunity and
2 because they think they're not going to get
3 caught. And that's what motivates people.

4 They don't sit down and say, let's
5 see, if I get caught I'm get 11 to 15, and how's
6 that going to work out? I just don't think
7 that's how it works. And so that what we have
8 to look at it from is the standpoint of where do
9 we draw the line for this kind of conduct and
10 where do we put the punishment?

11 Now, if it has some deterrent effect,
12 great. That's wonderful. But we spent time two
13 years ago trying to measure the deterrent effect
14 of prosecuting misdemeanor entry without
15 inspections. We do that in my district. We've
16 done it since 2005 or 2006. I probably shouldn't
17 say it, but I am not convinced that it has a
18 deterrent effect.

19 The Border Patrol thinks that it has,
20 has consequences. They think they have to have
21 consequence delivered in it. But we can't

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1 statistically show that it has a deterrent effect
2 on entries.

3 What we can show is that when there's
4 enhanced enforcement along one part of the
5 border, apprehensions go down, the aliens move to
6 someplace where there's not so much enforcement,
7 and that's where they cross. Now, what draws
8 them and what pushes them, those we don't have
9 control over. That is the question of
10 immigration policy, which is a fascinating
11 question, but we don't get to answer that
12 question.

13 I mean if we've got jobs here and
14 people that want to come for jobs from countries
15 where they don't have them, should we allow them
16 to come? That's above my pay grade. I don't get
17 to go there.

18 CHAIR SARIS: If we throw some
19 deterrents off the table, especially when people
20 are fleeing from countries where there's violence
21 and that sort of thing, so what is -- why is it

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1 significantly you need a bump-up on just
2 desserts, the penalty for alien smugglers? I
3 mean has it gotten, are the people worse than
4 they were before? If we're not talking
5 deterrence but just like what does this crime
6 deserve.

7 MR. DURBIN: Right.

8 CHAIR SARIS: What we're hearing, I
9 guess it's the next panel, is that a lot of these
10 people are themselves the smugglers, are
11 themselves children or just above being children,
12 and they're smuggling because they have to.

13 MR. DURBIN: That's not our experience.

14 CHAIR SARIS: Okay. So what's with
15 that?

16 MR. DURBIN: That's not our experience.
17 Our experience is that the people who are driving
18 the loads, the people who are running as coyotes,
19 they may sometimes recruit children. We're
20 finding dope traffickers doing the same thing,
21 they're using kids to bring dope loads across.

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1 But that's not the norm. That is done but that's
2 not the norm.

3 Most of these people they're adults.
4 They know what they're doing. It may not be the
5 only thing they do for their livelihood but
6 they're engaged in picking up people and moving
7 them from somewhere south of San Antonio up to a
8 stash house in San Antonio.

9 CHAIR SARIS: Do you have any evidence
10 that they're worse than they used to be? In
11 other words that the statistical evidence -- I
12 get your impression because you prosecute
13 cases --

14 MR. DURBIN: No.

15 CHAIR SARIS: -- that they're now all
16 linked to the drug cartels.

17 MR. DURBIN: They're not all linked.
18 I don't want to suggest that.

19 What we have is we have in some places
20 we know that there are cartels that control
21 passage across the border. They charge a fee for

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1 aliens to cross. So the alien smugglers are now
2 paying a fee to the seconds. They're paying \$500
3 a person for the privilege of using that crossing
4 zone or using that crossing area.

5 We are finding probably some others
6 that have moved into, since marijuana's been
7 legalized in some places, we are seeing some that
8 are using or that are branching out into it. But
9 that's not really what's going on. It's more
10 it's part of this affiliation, coordination
11 that --

12 CHAIR SARIS: So it's more of the same,
13 it's not a different brand of smuggler? They're
14 not suddenly now terrorists or narco, what do you
15 call it, cartel people?

16 MR. DURBIN: But it's a recog -- I
17 think what we have is a recognition that this is
18 really dangerous conduct. They load people into
19 the trunks of cars. They load people into cars
20 without seats. They load people into sealed
21 refrigerator trucks. And this can happen in any

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1 load. We don't catch every load that that occurs
2 in, but that risk is there every single time.

3 And what my argument to you is,
4 because of that inchoate risk, the offense level
5 should take that into consideration, in addition
6 to the adjustments when bad things happen. Bad
7 things don't always happen but the conduct is
8 very dangerous.

9 MS. MEYERS: There is a base offense
10 level of 18 if there is a substantial risk for
11 all of the things you're talking about and
12 nothing has changed. And the bad stuff that we
13 see is covered by other statutes: hostage taking,
14 sex trafficking, all of that. And I think, as
15 Commissioner Barkow says, nothing has changed
16 that justifies raising the offense level, the
17 base offense level.

18 MR. JOHNSON: And you're taking an
19 ordinary alien smuggling case and turning
20 it -- increasing the base offense level just
21 because it's almost every case, and I agree with

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1 Mr. Durbin on this, almost every case you can
2 argue would be tied to an ongoing criminal
3 organization. I mean just --

4 CHAIR SARIS: Go right ahead. And then
5 we're going to finish up, take a break and --

6 COMMISSIONER FRIEDRICH: So I think, I
7 may be wrong, but I think when I handled these
8 cases in San Diego years ago, I think the base
9 offense level was 9 or something, 11. It was
10 really low.

11 The Commission at some point raised
12 it. And I don't remember what that date was. I
13 think it's before I joined the Commission. But
14 what I would like to know is from the last time
15 the Commission raised the base offense level I'd
16 like to know what the EDP rates were for the
17 border districts then and compare it with now.
18 Because, again, my sense is the real driver here
19 is that you have made a choice to increase EDP
20 prosecutions, and there's all kinds of legitimate
21 reasons why you've done that, but that's the

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1 pull-down here on these sentences now. That's
2 the driver here.

3 And they are horrific crimes. And the
4 base offense level should be high. But I think
5 ten years ago when you weren't asking this, or
6 maybe you were asking this, but I think the big
7 change, and I could be wrong, but I'm interested
8 in the data was what were the EDP rates at the
9 time the Commission last increased the base
10 offense level? And let's compare those to what
11 it is now. And I think that's the data we should
12 have.

13 MR. DURBIN: I would ask you to also
14 consider there's another factor in there, and
15 that factor is prosecution threshold. And we
16 have changed our thresholds over the years. And
17 there was once upon a time that we would not take
18 a smuggling case unless there were at least six
19 people in the load. And finding that there were
20 less than six people in loads, we changed those
21 thresholds. And we changed them to basically if

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1 it's not family and we can prove the offense, we
2 will prosecute it.

3 VICE CHAIR BREYER: But you see that
4 that's exactly the sort of thing that sort of
5 sets me off which is for the Sentencing
6 Commission to set long-term policies and alter
7 them whenever the Department of Justice feels
8 we're going to change our priorities here, or
9 we're going to use a different set of criteria,
10 or we're going to expand it, we're going to lower
11 the EDP program.

12 Those are all, I say those are all
13 Executive Department decisions, as I can't as a
14 federal judge say that person should be
15 prosecuted and that person should not be
16 prosecuted. Because that's not my job under the
17 Constitution, I don't know that our job telling
18 judges how to sentence ought to be in response to
19 changing policies within the Justice Department,
20 which by the way, as you candidly admit, are not
21 uniform --

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1 MR. DURBIN: No, they aren't.

2 VICE CHAIR BREYER: -- across
3 districts.

4 MR. DURBIN: But I'm not -- What I'm
5 saying is the EDP rates may not be --

6 VICE CHAIR BREYER: Okay.

7 COMMISSIONER FRIEDRICH: But likewise,
8 you're now charging and convicting and having
9 people sentenced who before you weren't even
10 prosecuting; right? And so that's a double-edged
11 sword. It's you've increased penalties because
12 you've got people before you used to let go.

13 MR. DURBIN: Well, maybe we should have
14 been doing them before and we weren't.

15 COMMISSIONER FRIEDRICH: Right.
16 Right.

17 MR. DURBIN: And there was a resource
18 issue.

19 MR. JOHNSON: I think mandatory
20 minimums too because to take a charge and should
21 take care of that problem.

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1 CHAIR SARIS: Okay. So it's 5 past.
2 So we're going to make this -- very interesting
3 and helpful -- 11:05 to 11:20, 15 minute break,
4 and then we'll come back for our academic and
5 experts.

6 Let me just say, lunch will probably
7 be in the vicinity of 12:00 to 1:00 for those of
8 us pod streaming for your planning purposes. And
9 then we move on to animal fighting this
10 afternoon.

11 (Whereupon, at 11:05 a.m., the hearing
12 recessed, to reconvene at 11:24 a.m.)

13 PANEL III: IMMIGRATION:

14 ACADEMIC AND EXPERT PERSPECTIVE

15 CHAIR SARIS: It was hard to break away
16 from the presidential announcement but we're all
17 here right now. And I want to welcome you all.
18 As I mentioned, I've read everything you wrote
19 over the weekend. It was fascinating and
20 important. So let me introduce you.

21 The first witness on this panel is

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1 Jennifer Podkul who is the Senior Program Officer
2 for the Migrant Rights and Justice Program at the
3 Women's Refugee Commission. Prior to joining the
4 Women's Refugee Commission Ms. Podkul represented
5 immigrant children and immigrants at Immigration
6 and Family Court in Ayuda in Washington, D.C.,
7 and at Kids in Need of Defense.

8 Next is Victor Manjarrez -- Did I say
9 that right?

10 MR. MANJARREZ: Manjarrez.

11 CHAIR SARIS: Manjarrez. All right,
12 thank you.

13 -- the Project Director for the Center
14 of Law and Human Behavior at the University of
15 Texas at El Paso, who serves as the university's
16 subject matter expert in issues relating to
17 border security and the Homeland Security
18 enterprise.

19 Before joining the Center of Law and
20 Behavior he was the Associate Director for the
21 National Center for Border Security and

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1 Immigration at the university, and also served
2 the United States Border Patrol for more than 20
3 years.

4 Wendy Young I just met outside, serves
5 as President of Kids in Need of Defense, KIND,
6 where she has served for more than seven years.
7 Before joining KIND, Ms. Young served as Chief
8 Counsel on Immigration Policy for the Senate
9 Judiciary Subcommittee on Immigration, Border
10 Security, and Refugees for Senator Edward
11 Kennedy.

12 Finally, Chris Rickerd, okay, is a
13 Policy Counsel at the American Civil Liberty
14 Union's Washington Legislative Office who does
15 administrative and legislative advocacy on
16 border, immigration and voting issues.

17 So you may not have heard, but we have
18 this light system going off here. So I'm not a
19 strict enforcer, but at some point the hook
20 comes. Why don't we start with Ms. Podkul.

21 MS. PODKUL: Thank you.

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1 Women's Refugee Commission greatly
2 appreciates the opportunity to testify today.
3 The WRC is a non-profit research and advocacy
4 organization that works to improve the lives and
5 protect the rights of women and children
6 displaced by conflict and hardship.

7 Since 2012 there has been a large
8 increase in the number of Central American women
9 and children encountered at the border with
10 Mexico and the United States. The WRC has
11 focused on identifying the issues that affect
12 these migrants and working to improve the manner
13 in which they are treated at all parts of their
14 journey.

15 Through my conversations with
16 individuals at every step of their journey I have
17 had the opportunity to better understand the
18 individuals who take this enormous risk to travel
19 to the U.S. My testimony this morning, as well
20 as the written testimony I have submitted, is
21 based on my research and accumulated knowledge.

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1 The proposed changes to the alien
2 smuggling guidelines encourage significant
3 changes in migration patterns at the U.S.
4 southern border. The vast majority of the
5 unaccompanied minors and family units who have
6 arrived at the United States since 2012 are
7 fleeing violence in three Central American
8 countries: El Salvador, Guatemala, and Honduras.
9 Pressures from gang recruiters, rampant killings,
10 create a situation so hostile to children they
11 are unable to even go to school.

12 Law enforcement in certain regions of
13 these countries is either under the control of
14 gangs or so corrupt that they present a threat to
15 the minors' well-being equal to that posed by the
16 gangs. The recent violence in these three
17 countries are approaching unprecedented levels as
18 the region grapples with growing instability.
19 And the murder rates in the Northern Triangle are
20 currently among the highest in the world.

21 The mothers and children fleeing these

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1 circumstances are desperate. So are the parents
2 and other family members who are sending them.
3 In their desperation they turn to smuggling
4 organizations to make the journey to the United
5 States.

6 These smuggling organizations have
7 many components. They rely on coyotes who move
8 migrants on much of the journey from the Northern
9 Triangle to the U.S.-Mexico border. The coyotes
10 then hand the migrants over to foot guides who
11 are responsible for bringing the migrants through
12 the final step of their journey across the
13 border.

14 Migrants often report they don't pay
15 a coyote to show them the way north, they pay
16 them because they know who to pay off during the
17 journey. The foot guides used to cross the
18 U.S.-Mexico border often work for a larger
19 organization of smugglers. The people at the top
20 of these organizations rarely see the migrants
21 coming to the U.S.

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1 Smugglers often rely on children to be
2 their foot guides because a child can be quickly
3 and can be smuggling again. One such child I
4 interviewed told me after having been repeatedly
5 caught and released back into Mexico, "I can't
6 get out of the smuggling gang. It's too late."

7 The U.S. rarely prosecutes these
8 minors. However, in 2014 U.S. Customs and Border
9 Protection piloted the juvenile referral process
10 in the attempt to get these children out of the
11 smuggling ring. The U.S. CBP continues to refer
12 these children for criminal prosecution.

13 It is important to note that many of
14 these children who make it to the United States
15 have experienced violence sufficient to make them
16 eligible for a claim and to receive asylum under
17 both the U.N. Convention on Refugees and U.S.
18 law. I make this point because although we all
19 know there are smugglers out there capitalizing
20 on and taking advantage of the most vulnerable
21 people imaginable, they are also helping them

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1 access territorial protections.

2 So WRC is concerned that some of the
3 proposed amendments might have the unintended
4 effect of increasing the offense levels of family
5 members who assist or pay for an unaccompanied
6 minor to be smuggled into the U.S. Family
7 members sending for their loved ones have begun
8 to get caught up in the heated political debate
9 around immigration. Judges, politicians and
10 border agents often cite to their actions in
11 using smugglers to send for their children.

12 These family members are desperate,
13 and do the only thing they believe they can to
14 keep their children safe. As a mother, I know I
15 would do anything I needed to in order to ensure
16 that my girls were safe. No parent should be
17 punished for trying to protect their children.

18 Make no mistake, leaders of criminal
19 entities who abuse and mistreat women and
20 children escaping danger should pay for their
21 crimes. However, it is important to remember

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1 that those who are likely to be apprehended in
2 the United States are not the masterminds of
3 these organizations. They are the lowest hanging
4 fruit, and some of them may be victims
5 themselves.

6 The current lack of effective refugee
7 protection is forcing many to lose hope and
8 undertake dangerous journeys. The WRC believes
9 comprehensive immigration reform, a more
10 protective refugee processing system, and
11 increased security in the home countries is what
12 will eventually stop smugglers from preying upon
13 vulnerable children.

14 Thank you.

15 CHAIR SARIS: Thank you.

16 MR. MANJARREZ: Good morning and thank
17 you for the honor to present testimony regarding
18 the proposed amendments to revise the alien
19 smuggling guidelines. This is an important topic
20 for protection for those who are being smuggled.
21 I believe that the changed dynamics of alien

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1 smuggling dictates that the current justice
2 system takes a closer look at this crime.

3 As you stated, I retired as the Chief
4 Patrol Agent of the Tucson Sector Border Patrol,
5 so I come to you with a perspective of a Homeland
6 Security practitioner and someone that has
7 actually had the opportunity to conduct research
8 at the university regarding this topic and other
9 topics that are relevant to the Homeland Security
10 enterprise.

11 As you understand, the difference
12 between alien smuggling and human trafficking are
13 different, but unfortunately in the last several
14 years the differences between the two are getting
15 smaller and smaller. They both certainly include
16 exploitation and violence towards the people who
17 are being smuggled.

18 Early in my career as a Border Patrol
19 agent I saw smuggling as multiple mom and pop
20 operations, really with not much organizational
21 structure. That's clearly not the case now. Mom

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1 and pop operations are very few, if they exist at
2 all. They have been replaced by organizations
3 that are structured enterprises and have long
4 tentacles that reach far into Mexico, Central
5 America and the United States. It's clear that
6 human smuggling in the United States is much more
7 like organized crime, and the organizations have
8 become very specialized in their trade and the
9 territory that they operate in.

10 Now, I'm often asked about the
11 involvement of drug cartels with alien smugglers.
12 On this point there's really not much involvement
13 other than generally that they're guardians of
14 certain clauses where they dictate, whether it's
15 money or human smugglers or move people, and they
16 pay, and they will pay a fee. Now, this fee gets
17 passed on to individual smugglers. There's
18 nothing that happens on the border that's free.
19 There's always a cost. It's either a financial
20 cost or a cost to the body.

21 Now, unfortunately many times these

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1 locations dictated are areas that are dangerous
2 and very remote, which causes alien smuggling
3 fees to increase substantially. In the last few
4 years it's increased substantially from something
5 that was, I would say, very affordable, things
6 that were below \$1,000 that could be arranged to
7 pay on a Mexican national, Central American or
8 bodies that could be moved from \$1,900 up to
9 \$45,000 for some of the parties.

10 Now, smugglers have become more
11 violent towards the individuals being smuggled,
12 in most cases to extort additional funds. Often
13 the ones that are being smuggled are held against
14 their will till the smuggler receives their fee.
15 In fact, it resembles a kidnaping offense. In
16 addition, there is an unmistakable trend that
17 increasing sexual violence is being committed on
18 individuals being smuggled, both women and
19 children.

20 Now, the nature of alien smuggling or
21 the nature of smuggling aliens has changed

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1 significantly over the years. It's pretty
2 routine that most people arrested on the southern
3 border are 97.5 percent Mexican nationals, about
4 2 percent are from Central America. And that
5 last 2 percent being from the three countries,
6 either Honduras, El Salvador and Guatemala.

7 CHAIR SARIS: Make sure you keep your
8 voice up so they can hear on the phone.

9 MR. MANJARREZ: Yes, ma'am.

10 CHAIR SARIS: Thank you.

11 MR. MANJARREZ: This is no longer the
12 case.

13 For example, in the last three years
14 U.S. Customs and Border Protection reported that
15 44 percent of all those arrested on the southern
16 border of the United States were from Central
17 American countries. Whereas in 2014, there were
18 more non-Mexican nationals arrested than Mexican
19 nationals. And this hasn't occurred in several
20 decades. This simply wasn't the case back then.

21 In addition, the U.S. Department of

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1 Homeland Security is reporting large increases of
2 unaccompanied women and children, and the
3 smugglers have adjusted to now exploit weaknesses
4 in the systems, in the governmental systems in
5 how they handle these children. They quickly
6 understood there was no need to smuggle aliens in
7 confidential covert buildings. In many places
8 like Brownsville they would point to a Border
9 Patrol agent, cross successfully undetected, they
10 would drive up to a Border Patrol station and
11 tell them to ring the doorbell.

12 What that provided to a smuggler was
13 the opportunity to charge higher prices in order
14 to guarantee the safe passage.

15 The other question that I'm often
16 asked is, is there a nexus to alien smugglers and
17 terrorists? That's obviously a fear that occurs
18 in the U.S. and Mexico, often exploited by the
19 media. And I will tell you the patrols around
20 Tucson there was no way ever to support that.
21 There is no current limits to support that now.

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1 But I believe that the changes you have here is
2 a response, of course, to the efforts.

3 Thank you.

4 CHAIR SARIS: Thank you.

5 Ms. Young.

6 MS. YOUNG: Thank you.

7 I appreciate the opportunity to
8 testify on behalf of Kids in Need of Defense, or
9 KIND, and to share our views on the situation of
10 unaccompanied immigrant and refugee children
11 seeking protection in the United States and the
12 intersection with the growing and increasingly
13 problematic phenomenon of smuggling.

14 KIND was founded by the Microsoft
15 Corporation and UNHCR Special Envoy Angelina
16 Jolie in 2008 to ensure that unaccompanied
17 immigrant and refugee children are provided pro
18 bono legal representation in their immigration
19 proceedings. We are also increasingly doing work
20 in the Northern Triangle of Central America and
21 Mexico to address the root causes of child

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1 migration in the region and to assist children
2 who are returning home because they've been
3 deported or are voluntarily returning.

4 We have also implemented an assessment
5 on sexual and gender-based violence against
6 migrant children, particularly girls.

7 KIND has assisted more than 8,500
8 children and trained over 11,000 volunteer
9 attorneys in our seven years of operation. So
10 we're very familiar with the situation of these
11 very vulnerable children. More than 100,000
12 children have come alone from Central America in
13 the last two years, far outpacing previous years,
14 many escaping the pervasive and growing gang and
15 narco-trafficking-related violence in the region.

16 The crisis began in fall 2011 when the
17 number of children coming alone to the United
18 States started to increase significantly, and
19 peaked in 2014 when more than 68,000
20 unaccompanied children were apprehended at the
21 U.S. southern border, a nearly tenfold increase

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1 from the historical norm.

2 The numbers have been rising again in
3 comparison to the same time last year. Starting
4 in August 2015 we saw the numbers significantly
5 increase. They dropped a bit in January but
6 they're now increasing again, which tells us that
7 this crisis is not over.

8 Until recently, these children had
9 little or no way of gaining access to the U.S.
10 protection system from their home country or from
11 the region. As a result, many children who
12 feared for their lives or families who feared for
13 their children felt they had no choice but to
14 find a way for the child to come to the United
15 States.

16 In the case of children traveling
17 without a parent or legal guardian this has meant
18 resorting to smugglers who they are forced to
19 rely on to lead them hundreds or thousands of
20 miles to cross into the U.S. Desperate
21 situations cause people to do desperate things.

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1 Children have been specifically
2 targeted by the gangs and criminal rings that
3 terrorize large parts of the Northern Triangle.
4 The gangs attempt to forcibly recruit children,
5 especially those in their early teens, but
6 sometimes as young as kindergarten age. They are
7 also forced to become "girlfriends" of gang
8 members, which in reality are non-consensual
9 relationships that result in rape by one or more
10 gang members.

11 If children resist gang recruitment,
12 they and their families face kidnaping, murder
13 and rape. These governments that characterize
14 the region are unable to unwilling to patrol that
15 violence. As a result, according to the U.N.
16 Refugee Agency, at least 58 percent of children
17 arriving at the U.S. border have been forcibly
18 displaced and are potentially in need of
19 international protection.

20 Families do not take the decision to
21 send their child with a stranger to the U.S.

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1 lightly. They are often terrified for their
2 child but, as one mother put it, "I would rather
3 my child die on a journey to the United States
4 than die on my doorstep." A heartbreaking
5 calculation, but this is the reality for many
6 families in Central America.

7 KIND recently conducted an intake for
8 a 3-year-old whose family sent him to the U.S.
9 because his family was receiving threats from a
10 gang that they would kill the little boy. The
11 police refused to help.

12 Smugglers are taking advantage of
13 vulnerable families and children and facilitating
14 the travel to the U.S. Smuggling rings are
15 highly organized and closely associated with the
16 same criminal cartels that are generating the
17 violence in countries of origin. They prey upon
18 their victims and exploit them even further by
19 charging high fees to transport children as young
20 as 2 years old to the U.S. border.

21 Children referred to KIND have told us

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1 about smugglers who denied children the food they
2 were paid to provide, numerous instances of
3 sexual assault and rape of both boys and girls,
4 and other abuses. Smugglers have also at times
5 sold the children they agreed to transport to
6 local criminal elements who then hold the
7 children and demand ransom from their families to
8 release them.

9 As border controls in the U.S. have
10 tightened in recent years, smugglers have changed
11 the routes to more remote and more dangerous
12 passages that put the children they have been
13 charged with transporting at even greater risk.

14 KIND has been deeply concerned that
15 the U.S. has addressed this surge in child
16 migration using primarily a border enforcement
17 approach that fails to acknowledge the need to
18 protect vulnerable individuals from the violence
19 in their countries. KIND is also concerned that
20 the greater the law enforcement approach targets
21 migrants, the further underground they will go

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1 and the more vulnerable they will become.
2 Trafficking victims and those in situations in
3 which smuggling has turned into trafficking are
4 particularly at risk for KIND.

5 More effective than a focus on border
6 enforcement is to ensure that all children in
7 adversarial proceedings are afforded counsel.
8 Upon release from the law or custody,
9 approximately half of unaccompanied children
10 appear in Immigration Court without
11 representation, which is fundamentally unfair and
12 contradicts the U.S. principle of due process and
13 respect for the rule of law.

14 The answer to this crisis is to
15 address the root causes in sending regions and to
16 restore order to the migration so that people can
17 safely access protection in the United States.
18 We must prioritize a protection-oriented approach
19 to the child migration issue that upholds our
20 nation's commitment to the most vulnerable.
21 There are no easy answers, but if protection is

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1 our guiding light, we will better serve the
2 children who are coming to the U.S. to seek
3 safety. As children, they deserve nothing less.

4 Thank you.

5 CHAIR SARIS: Mr. Rickerd.

6 MR. RICKERD: Judge Saris, thank you
7 and your colleagues on behalf of the ACLU for
8 this opportunity to testify today.

9 The ACLU's top organizational
10 priority is currently de-incarceration. And my
11 testimony aims to connect reentry to this vital
12 effort. We also stand up for immigrant's rights
13 through special attention to family separation
14 and due process in deportation.

15 We commend the Sentencing Commission
16 for its important attention to reducing excessive
17 sentences under the current reentry guideline, a
18 need which judges' sentences now reflect and we
19 wholeheartedly support. I will, however,
20 highlight two concerns about the proposed
21 amendment from my written testimony.

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1 First, the Commission should reject
2 the proposal's premise that after reform the
3 average guideline minimum sentence must remain
4 the same. There is no zero-sum mandate requiring
5 sentences at the lowest end of the spectrum to
6 increase for persons without aggravating factors
7 in order to correct disproportionate sentences
8 driven by features of the current guideline's
9 16-level enhancements. The Commission data
10 presented alarmingly shows that for individuals
11 in the least serious category with no current
12 criminal conviction enhancements or upward
13 departures, the average guideline minimum
14 sentence increases from 1 to 6 months without
15 justification provided beyond mathematical
16 parity.

17 Second, we agree with the proposal's
18 focus on serious recent criminal convictions that
19 come after reentry. We recommend, however, that
20 the Commission de-emphasize the proposed
21 increases in sentence severity based on old

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1 convictions preceding the most recent date of
2 reentry, and not include a departure for prior
3 deportations, many of which lack due process.

4 The proposed amendments use of an
5 individual's first entry date, which can be
6 decades ago in a broken immigration system that
7 has sent anything but consistent messages to
8 reentrants, and has had no consistency district
9 to district about who is prosecuted for reentry,
10 to use an old date for counting convictions that
11 enhance a sentence is at odds with the correct
12 effort to focus on recency as best informing
13 society's interest in punishing reentries.

14 Our larger purpose is to urge the
15 Commission to consider this guideline in full
16 context. As part of its mandate, the Commission
17 is tasked with assessing how sentencing affects
18 the federal prison population. Since 2007
19 especially, reentry sentences have been a leading
20 driver of Bureau of Prisons' overcrowding, with
21 immigrants housed in substandard, privatized

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1 criminal alien requirement facilities that were
2 the subject of a 2014 ACLU report titled
3 "Warehoused and Forgotten."

4 There has been a massive increase in
5 total criminal immigration prosecutions from
6 under 10,000 in 1997 to 40,000 in 2007, and almost
7 100,000 in 2013. This includes a doubling of the
8 proportionate cases involving individuals with no
9 felony convictions.

10 Keeping average sentences steady
11 would fail to address the devastating impact
12 these convictions have had on individuals who do
13 not meet any national security or public safety
14 priorities. Judge Robert Brack in Las Cruces,
15 New Mexico, told the Wall Street Journal in 2013,
16 "Every day I see people who would never have been
17 considered as criminal defendants two years ago.
18 It's just a completely different profile."

19 That profile is borne out by the
20 Commission's statistics. Half of those
21 sentenced for illegal reentry had at least one

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1 child living in the United States. As a whole,
2 sentence reentrants have an average and median
3 age of 17 at the time of initial entry, while the
4 average offender age is 36. Many persons
5 sentenced under the guideline across the country
6 therefore have deep family and other ties to
7 which they returned.

8 The Department of Homeland Security's
9 Office of Inspector General issued a critical
10 report last year concluding that "Border Patrol
11 is not fully and accurately measuring border
12 prosecutions' effect on deterring aliens from
13 entering and reentering the country illegally."

14 A University of Arizona study tracking
15 1,200 people deported found that there is no
16 statistically significant reentry difference for
17 those who went through prosecution. The
18 Migration Policy Institute has noted that for
19 border crossers with strong family and/or
20 economic ties "even high-consequence enforcement
21 strategies, i.e. criminal prosecutions, may not

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1 deter them from making future attempts."

2 And I would add a citation to Mr.
3 Durbin who echoed that point in speaking about
4 the Western District of Texas.

5 Within this context, we strongly urge
6 the Commission not to feel bound by a see-saw
7 approach in reducing the injustice of excessive
8 enhancements by increasing base offense levels,
9 and also to revise the proposal to more
10 accurately reflect its animating principle of
11 focusing on serious recent convictions after
12 reentry, not outdated criminal and immigration
13 history.

14 Thank you again for inviting the ACLU.

15 CHAIR SARIS: Thank you. Any
16 questions?

17 I was going to start with all the
18 folks who understand this, if we're talking about
19 alien smuggling I understand how horrible it is
20 for the women and children. Has the nature of
21 the smugglers changed over time? In other words

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1 are they more violent? Are they nice guys who
2 are trying to help somebody over the border or
3 they really these horrible people who stick them
4 in stash houses and they get raped? I mean has
5 it changed so that we should increase that
6 penalty?

7 MR. MANJARREZ: Yes, ma'am, it has
8 increased and changed significantly over the last
9 ten years. For example, I remember a time in
10 Naco, Arizona, where there was nationals that
11 were arrested. And it was part of the interview
12 process and we asked them, "How did you, you know,
13 pick Arizona?"

14 "Because we saw it on T.V."

15 And it was like a tourist, it was a
16 gateway to the Southwest. The people were really
17 nice, they gave us -- they offered them a package
18 deal.

19 And that dynamic has changed.
20 There's nothing nice about the smugglers. And
21 the people that are smuggled will tell you that.

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1 Although they make a contractual agreement to be
2 smuggled, they fear these people. So the dynamic
3 has significantly changed and there's a genuine
4 fear.

5 COMMISSIONER BARKOW: But that shift
6 happened ten years ago would you say?

7 MR. MANJARREZ: No, I would say that
8 within the last ten years, ma'am.

9 COMMISSIONER BARKOW: Within the last
10 ten years.

11 MR. MANJARREZ: Yes, ma'am.

12 VICE CHAIR BREYER: But isn't there
13 then a way to address what I would call the
14 subsequent bad conduct from the conduct of simply
15 bringing the person over? In other words, if you
16 simply bring the person over -- bad
17 enough -- bring the person over, that's
18 punishment X.

19 If you in fact you sexually assault
20 them and you do all the things of the parade of
21 horrors, which I think happens, and that's what

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1 you're telling us, it happens, that's, that's a
2 separate harm, isn't it? I mean that's a harm
3 that can be addressed separately with a severe
4 penalty or an increased penalty.

5 The question I have is why are we
6 increasing the penalty for X when what we're
7 concerned about is Y, unless there is some
8 evidence showing that the people who commit X
9 understand that Y is going to occur and
10 facilitate it? I understand you won't have Y
11 without X, but that doesn't mean that there's a
12 causal relationship between the two that we ought
13 to address.

14 That was one point. The other thing
15 I wondered about is unaccompanied minor. And I
16 wanted to find out your experience in this, is
17 that as it's written now, we talk about
18 increasing the penalty for unaccompanied by a
19 minor's parents or grandparents. And you raised
20 the question, well, what about other members of
21 the family bringing the person over?

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1 First, is that -- does that occur?
2 And does that occur with such frequency that we
3 ought to address it?

4 And secondly, there is an argument
5 that that a person stands in a different
6 relationship from the type of person that we're
7 trying to address here when we talk about
8 unaccompanied.

9 So I don't know how you want to
10 respond to it.

11 MS. PODKUL: Well, a few facts. I
12 think the first thing is that the crimes that
13 we're talking about that are happening to the
14 migrants, particularly those who I've spoken
15 with, are often occurring in Mexico. They are
16 not necessarily occurring once the person has
17 crossed into the U.S.

18 And as Mr. Manjarrez has said, you
19 know, oftentimes, especially where there're
20 refugees' stories of rape, they're probably being
21 dropped off, dropped off and told, "Go find a

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1 Border Agent.” So there's no time for these
2 crimes to be happening here after the smuggling
3 has happened.

4 And the most egregious acts we've seen
5 are in Mexico. Mexico has set up a new office
6 to deal with crimes against migrants in Mexico.
7 It seems like that would be the appropriate place
8 and that's where the prosecution would happen.
9 And the people who are bringing them here and not
10 necessarily engaging in those behaviors in the
11 U.S. would not necessarily be subject to any of
12 these enhancements anyway, they would be
13 prosecuted but these incidents are not happening
14 in the U.S.

15 And then to your second point, I think
16 the confusion is, you know, immigration law has
17 a definition through the Homeland Security Act of
18 an unaccompanied child, which is just a little
19 different here. And so I think, you know, what
20 does that mean? I think we have to kind of unpack
21 what does that mean.

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1 What we are often seeing is that
2 children are traveling with family members who
3 aren't necessarily a parent or legal guardian.
4 We're seeing a lot of the grandparents who are
5 bringing the children because the parent may have
6 been here on temporary protected status for
7 years, so the parent is already here. A lot of
8 siblings are traveling together where one sibling
9 may be an adult and another one is a child. We're
10 seeing cousins and aunts and uncles traveling
11 together.

12 So "unaccompanied" is difficult to
13 describe in kind of the sense that we're thinking
14 of and under the Homeland Security definition --

15 VICE CHAIR BREYER: But that would be
16 cured, wouldn't it, if we simply said "family
17 member." "Unaccompanied by a family member."

18 MS. PODKUL: Uh-huh.

19 VICE CHAIR BREYER: Now, I know there
20 are non-family members who are like family
21 members. I understand that. But there's no end

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1 to it if you have a loose definition. And from
2 the due process point of view it's extremely
3 difficult, even from a judge's point of view, to
4 try to figure out, well, he's like my mother,
5 like my father, like my brother, like my sister.
6 There's no answer to that.

7 I mean, yes, there's some lengthy
8 hearing you could have that maybe will give you
9 an idea. But judges aren't any better at that
10 than anybody else. We're probably worse.

11 So, you know, why isn't your problem
12 addressed at least in part? Because grandparents
13 are already in there. But at least addressed by
14 saying no family member -- unaccompanied by a
15 family member. Doesn't that deal with it?

16 MS. PODKUL: Yes.

17 VICE CHAIR BREYER: I mean what do you
18 think? You've got to be curious. Are cousins,
19 older brothers, older sisters bringing people
20 over?

21 MR. MANJARREZ: They are accompanying

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1 them. And call it a distinction, are they
2 smuggling or are they simply accompanying across?
3 And what we've found in not only the research but
4 in my practical experience is, you know, they
5 will hire a guide. They will hire a guide, a
6 series of guides in fact that will take them
7 through interior of Mexico up to the border area,
8 kind of sold like a commodity to other smugglers
9 that will bring them across.

10 Now that dynamic is particularly
11 interesting in the South Texas area where the
12 flood of other Mexican nationals has been
13 occurring. And it's slightly different than
14 what's in Arizona right now and New Mexico where
15 they're actually crossing over, literally being
16 driven to a Border Patrol Station, pointed at the
17 door and they say, "Ring the doorbell on that."
18 And they may be family members on that with the
19 idea of, okay, we're all going to be placed
20 together; we're brothers and sisters, aunt and
21 uncles. So let's start with those definitions.

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1 CHAIR SARIS: But we're not going to
2 catch those people because they're staying on the
3 other side of the border. So the ones that are
4 coming over we're getting. So right now the base
5 offense level puts them at I think at 12 before
6 you take into account other things. Which
7 basic -- you know, 10 to 16 months if you don't
8 have other criminal history.

9 And we're proposing asking whether
10 it's time to move it to 21 to 27 months,
11 potentially dramatically increasing, doubling
12 the penalty.

13 So from what you're seeing, is the
14 smuggler who makes it across the border -- not
15 the Mexico person, you know, the person who's
16 doing these horrible things in Mexico -- who
17 comes across, does he merit a substantial
18 increase in the kind of penalties he's getting?

19 MR. MANJARREZ: Yes.

20 CHAIR SARIS: Because?

21 MR. MANJARREZ: Again, the act of

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1 smuggling in the past was a mom and pop. It was
2 relatively slight. There was a level of comfort
3 on that. Now it's so organized there's really a
4 disregard for the commodity they bring. The
5 commodity are people.

6 Now, the smuggling, the levels of
7 criminal activity in terms of smuggling that was
8 discussed in one of the previous panels is down,
9 and migrant deaths and things of that nature,
10 certainly down. But the violence is not.
11 There's violence that is occurring to the women,
12 particularly women and children.

13 VICE CHAIR BREYER: I understand that.
14 But I think that, as we said, will it deter?

15 But let me ask you this: do we have
16 any information on the age of these people who
17 are bringing the people over? That is, do we
18 know, are they 18, 19 year olds or are they older?
19 Do you have any idea, anecdotally or --

20 MR. MANJARREZ: They're typically
21 older. They're not minors. They're

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1 typically --

2 VICE CHAIR BREYER: Well, naturally.

3 MR. MANJARREZ: -- 18, 19, 20.

4 But again, what you have to remember,
5 in a smuggling cycle and there are smugglers that
6 have or guides have different portions of that
7 cycle. One's responsible for bringing them to a
8 certain point, who's handing it over to another
9 person and rather over to another point. And
10 that could happen all the way in the interior of
11 Mexico all the way to destinations in the
12 interior of the United States.

13 So typically the age is of an adult
14 age.

15 COMMISSIONER BARKOW: How many of those
16 people that are on that last leg, the folks that
17 are likely to get caught who stay on the other
18 side of the border, how many of those folks are
19 in some way victims themselves or caught up in
20 coercive kind of situations where they take on
21 this task? Do you have a sense of what kind of

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1 percentage we're looking at of those folks? Any
2 of you?

3 MS. PODKUL: Yeah. And I would like
4 to disagree with my colleague that it should be
5 increased for the people who are bringing over,
6 because it's my experience it's younger people,
7 and it is that these organizations specifically
8 are targeting minor children because a minor is
9 able to withdraw their application for admission
10 at the border. Which means if you're a Mexican
11 child and you're screened by Customs and Border
12 Protection, you're allowed to withdraw your
13 application and say, "Never mind, I'll turn
14 around and go home if we pretend this never
15 happened." I don't get put into removal
16 proceedings and I might not get prosecuted
17 because I'm a child.

18 So these smuggling organizations are
19 taking advantage of this and saying --

20 CHAIR SARIS: What about the adults?
21 Let's assume we're not dealing with the juveniles

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1 who rarely get prosecuted. Are the adults, is
2 the typical adult worse? And just what you're
3 seeing, are they, rather than the mom and pop?

4 MS. PODKUL: I guess my point is
5 they're specifically using children for that last
6 point because they're children. They're not
7 going to get prosecuted. And, you know, it's
8 easier to coerce and force a child to do that
9 work and to victimize the child and to pressure
10 them into doing this work.

11 And so the smuggling units, you know,
12 there's 100 other Mexican, you know, 16- and 17-
13 year-olds who are able to easily either convince
14 or coerce them to do this work. So it's no big
15 deal if that kid gets prosecuted, and no big deal
16 if I could end up in detention.

17 MS. YOUNG: And just to offer the
18 point, and I understand the jurisdiction of the
19 Commission, but some way to take a look at just
20 the person who's actually doing that final
21 physical sending the child to the border, that's

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1 a very narrow slice of what's happening. There's
2 really transnational organized criminal rings
3 behind all of this that are organizing it.

4 So if you really want to crack down on
5 the smuggling you really have to go after the
6 people that are organizing it. And the
7 connections to what's happening in the home
8 countries can't be ignored either.

9 So I think in many ways the solution
10 to this problem is really not to focus on that
11 one person who actually effects the final --

12 VICE CHAIR BREYER: That's the person
13 who is in trouble.

14 MS. YOUNG: I know. I understand your
15 frustration.

16 VICE CHAIR BREYER: I'm sure you're
17 right, I mean but that's not what we do -- what
18 we do is -- I'm not saying we won't, I hope we
19 don't, get too many of them -- but we have to
20 focus on that person who the judge has to
21 sentence. And the question is, who is that

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1 person he's sentencing?

2 And I take it a step further. If we
3 increase the sentence, is that either, one, to
4 deter this type of conduct, which I don't hear
5 anybody saying it is, or two, appropriately
6 punish the person who is actually doing it? And
7 what I'm concerned about is if people who are
8 either minors or 18, 19 year olds, really young
9 kids -- I know they make a choice -- but that are
10 being, as Commissioner Barkow points out, maybe
11 themselves are being forced to do this sort of
12 thing, are we accomplishing anything, anything
13 other than ratcheting up sentences? Which we can
14 do or not. Are we accomplishing anything?
15 That's what my question is.

16 MS. YOUNG: I guess I would say, sir,
17 if the goal is deterrence, to prevent this from
18 happening, I doubt that ratcheting up the
19 sentences will have much influence.

20 COMMISSIONER FRIEDRICH: That's not
21 the end of this. But that's addressing

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1 everything.

2 CHAIR SARIS: But if it's a worse
3 person than we used to have, do they merit more
4 punishment? What would you say?

5 MS. YOUNG: Yes. But I think you have
6 to go to looking at exactly what activities that
7 person is engaged in besides smuggling.

8 COMMISSIONER MORALES: But if they
9 enroll in an organization that has increased
10 risks so, so let's say that before a person may
11 have been the cousin of the mom and pop
12 organization that Mr. Manjarrez mentioned, but
13 now he's playing a crucial role in an
14 organization that is indeed putting these people
15 at risk and is resulting in increased harms and
16 rapes and all these things, isn't that what -- is
17 the fact that that person's playing that critical
18 role, doesn't that need to be accounted for in
19 some way?

20 MS. PODKUL: The reality is that the
21 people who are the foot guides have the last

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1 level, they don't have much affiliation beyond
2 the here's money, you know, take this group of
3 people this way, with the kind of the masterminds
4 of it, the, you know, is there any sort of
5 connection to the drug trade or the -- you know,
6 they're not in those conversations. They're the
7 conversation of, yes, here's X amount of dollars
8 to take these people. You're just taking them
9 right here, you know, and we'll see you again
10 next week.

11 COMMISSIONER BARKOW: Would they be
12 aware of the previous act -- I mean what's the
13 kind of general sense of knowledge that the
14 person at the last end of this cycle would have
15 of what takes place before?

16 Like do they have any awareness,
17 knowledge? Would it be more likely that they'd
18 know, yeah, well look, I'm part of this
19 organization and I know they do these things in
20 Mexico, or I know these other things are
21 happening with other folks? What would you say

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1 the kind of -- if you had to pick a prototypical
2 high percentage, the person that's on that last
3 leg, how much knowledge does that average person
4 have?

5 MR. MANJARREZ: It's pretty high. In
6 the . . . what I submitted to you as evidence is,
7 if you were to take a trip down to the Tohono
8 O'odham Nation in southwestern Arizona, you've
9 got mesquite bushes where they're bringing up the
10 alien groups, the smuggling up there, there are
11 these bushes that are quite honestly are
12 disgusting because they have women's underwear,
13 undergarments hanging on there as trophies on
14 that, and that's often on that. So that is
15 pretty predominant. To sit here and give you a
16 percentage -- it's average 50 percent, 60
17 percent-- I simply couldn't do that. But it's
18 often enough that it's very identifiable.

19 COMMISSIONER BARKOW: Would it be easy
20 to prove if it was a requirement that the
21 defendant had to have that knowledge? Do you

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1 think that would be something that would be
2 difficult for the government to bring in evidence
3 of?

4 MR. MANJARREZ: Yes, ma'am, it would be
5 very difficult. Just like if we look at the
6 elements of alien smuggling. You go, "Did you
7 smuggle or not?" You ask the material witness
8 on that. You know, sometimes there's the fear,
9 there's the whole idea. He goes, "Well, I guess
10 so." And what did you pay on that? So I think
11 it would be very difficult.

12 I would like to kind of backtrack on
13 one spot and make clear that I've heard a couple
14 times said that the last leg of smuggling to bring
15 them across the border. That is not the last leg
16 of smuggling across the border on that. That is
17 the guide bringing them to the ultimate
18 destination in the United States. Delivery of
19 that person to that destination is the last act
20 of smuggling on that. And that is not typically
21 a juvenile. That is an adult.

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1 COMMISSIONER FRIEDRICH: And is it fair
2 to say that that is then taking them from the
3 border to the stash house, not crossing the
4 border? It's a higher-level person in the
5 organization than the one who crosses the border
6 and takes the high risk?

7 MR. MANJARREZ: Yes.

8 COMMISSIONER FRIEDRICH: All right.
9 So, Mr. Manjarrez, you talked about the change in
10 the nature of the organization and how they're
11 more complex. I'm curious whether at the same
12 time these organizations have increased in
13 sophistication, has the number of aliens smuggled
14 changed?

15 And I ask because, as you know, we
16 have these significant enhancements based on the
17 number of aliens. So we started at 12. But you
18 do get the plus 3 if it's 6 to 24. So are you
19 seeing any reduction in the number of aliens that
20 are being moved by these organizations such that
21 that SOC, that plus 3, is applied less frequency?

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1 Are they becoming sophisticated in traveling with
2 one or two here and there such that you're not
3 able to get the enhancement for 6 to 24 aliens?

4 MR. MANJARREZ: Yes, ma'am. What's
5 amazing about the organizations is how quickly
6 they adjust. When you talk about --

7 VICE CHAIR BREYER: They apparently
8 read our guidelines.

9 MR. MANJARREZ: They do.

10 COMMISSIONER FRIEDRICH: But you do?
11 I mean is there data you can show that in these
12 organizations when the defendant's apprehended
13 they have fewer defendants -- fewer mat wits with
14 them than they used to? Is that -- is there data
15 to support that?

16 MR. MANJARREZ: That is something
17 actually HSI actually carries.

18 COMMISSIONER FRIEDRICH: Can you
19 provide that kind of data --

20 MR. MANJARREZ: Yes, ma'am.

21 COMMISSIONER FRIEDRICH: -- that

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1 shows us over time from the time we increased the
2 base offense levels till now how the number of
3 aliens has changed over time?

4 MR. MANJARREZ: Yes.

5 COMMISSIONER FRIEDRICH: Because if
6 the number of aliens has dropped, then this
7 guideline is not the same guideline, it's not
8 operating the same way it was in 2006.

9 MR. MANJARREZ: Absolutely. That is
10 pretty clear to state. So I will bring it.

11 CHAIR SARIS: Let me just ask Mr.
12 Rickerd, I don't want to ignore you because I
13 very much appreciate your comments about
14 over-incarceration. I just want to know whether
15 the ACLU has a particular point of view on this
16 alien smuggling operation, where you think it
17 should be going?

18 MR. RICKERD: We share Ms. Young's and
19 Ms. Podkul's concerns about the root causes of
20 the smuggling.

21 CHAIR SARIS: If you could speak up a

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1 little to catch the mike.

2 MR. RICKERD: We share Ms. Young and
3 Ms. Podkul's concerns about where the root causes
4 of the smuggling operations are taking place. We
5 also think that some of the mens rea issues here
6 are very pertinent in terms of proving up on some
7 of the knowledge.

8 We haven't submitted particular
9 comments on that but we will be happy to follow
10 up with the Commission.

11 CHAIR SARIS: Anything, anybody else?

12 (No response.)

13 CHAIR SARIS: Well thank you. We're
14 going to break for lunch and we'll be back here
15 in an hour to talk about animal fighting.

16 Thank you.

17 (Whereupon, the hearing recessed for
18 lunch at 12:05 p.m., the reconvene at 1:06 p.m.)

19 CHAIRPERSON SARIS: All right. We're
20 ready for the next panel on animal fighting. But
21 before I introduce the panel, I'd like to

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1 introduce Commissioner Patricia Smoot who has
2 joined us this afternoon.

3 Commissioner Smoot is the chair of the
4 United States Parole Commission and is the
5 ex-officio member of the Commission.
6 Commissioner Smoot has served on the Parole
7 Commission since 2010 and as chairman since 2015.

8 Welcome this afternoon.

9 COMMISSIONER SMOOT: Thank you.

10 CHAIRPERSON SARIS: So we're turning
11 our attention to the guidelines relating to
12 animal fighting. The Commission has received
13 extensive public comment on this topic from
14 members of Congress in the House and the Senate,
15 from judges, as well as from individuals across
16 the country urging the Commission to undertake a
17 review of the penalties for these offenses.

18 To date the Commission has already
19 received 36,000 pieces of public comment. I
20 think it is the case that that is the most comment
21 we've ever received on an amendment. So right

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1 now you are in our "Guinness Book of World
2 Records" --

3 (Laughter.)

4 CHAIRPERSON SARIS: -- for public
5 comment.

6 This is an issue obviously of great
7 importance to stakeholders.

8 The proposed amendment would increase
9 penalties for animal fighting, particularly those
10 cases demonstrating extraordinary cruelty, and
11 would also address the statutory amendments to
12 the Animal Welfare Act, which was enacted after
13 the original Animal Fighting Guideline Provisions
14 were promulgated in 2008. The proposed amendment
15 would also respond to new offenses relating to
16 attending an animal fighting venture that were
17 established by law.

18 I look forward to hearing from all our
19 witnesses. Let me begin by introducing them.

20 The first witness represents the
21 Department of Justice. Jean Williams was

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1 appointed Deputy Assistant Attorney General for
2 the Environmental and Natural Resources Division
3 of the U.S. Department of Justice in 2010.
4 Before her current appointment Ms. Williams
5 served for 27 years in the Wildlife and Marine
6 Resources Section as a trial attorney and as
7 Assistant Chief and later as Section Chief.

8 Next is Chris Schindler, who is the
9 Director of Animal Crimes for the Humane Society
10 of the United States and previously served as its
11 Senior Manager of Animal Fighting Investigations.
12 Prior to joining the Humane Society of the United
13 States, Mr. Schindler was the Senior Humane Law
14 Enforcement Officer and Field Advisor for the
15 Washington, D.C. Humane Society.

16 The final witness on the panel is
17 Jennifer Chin, who is the Vice President for
18 Legal Advocacy for the American Society for the
19 Prevention of Cruelty to Animals. Ms. Chin has
20 held that position since November 2013 and
21 previously served as its legal advocacy counsel.

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1 Now, just a few mechanics in case you
2 weren't here this morning. We have a light
3 system that goes off. Red light when it's time
4 to end the testimony. So I sort of give a gentle
5 reminder and then the hook.

6 (Laughter.)

7 CHAIRPERSON SARIS: But we're very
8 lively again, so if you don't finish everything
9 you want, I'm sure there will be a shot at getting
10 it in later on.

11 The second thing is we have people
12 being live streamed in, and while it's tempting
13 because we're in this little cozy room talking
14 one on one, we really have to keep our voices up
15 so that people can hear it in the whole room as
16 well as live streaming.

17 So why don't we begin with you, Ms.
18 Williams? Thank you.

19 MS. WILLIAMS: Thank you and good
20 afternoon.

21 I am the Deputy Assistant Attorney

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1 General of the Environment Division with
2 oversight responsibility for our Environmental
3 Crimes Section. Environmental Crimes prosecutes
4 both pollution and wildlife crimes. On the
5 wildlife side the section is responsible, along
6 with United States attorneys around the country,
7 for prosecuting illegal wildlife trafficking,
8 Endangered Species Act violations, migratory bird
9 crimes and related matters. Because of their
10 expertise in wildlife crimes, DOJ decided to
11 consolidate the authorities for animal protection
12 in this section.

13 I'm appearing before you today to
14 support guidelines revision for animal fighting
15 prohibitions. As outlined in our comment letter,
16 Congress has recognized the seriousness of these
17 offenses both in regard to the treatment of the
18 animals involved and in terms of the negative
19 impact on society resulting from the violent,
20 cruel nature of these crimes.

21 We at DOJ believe that an increase in

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1 the base offense level from 10 to 16 for these
2 offenses is appropriate in response to Congress'
3 enhancement of the maximum term for animal
4 fighting and the addition of two new animal
5 fighting offenses. It is now unlawful to attend
6 an animal fight or to cause a person under the
7 age of 16 to attend an animal fight.

8 This congressional action is in
9 response to society's heightened awareness of the
10 horrors of animal fighting and our recognition of
11 the growing problem we face. And because we do
12 believe that animal fighting activity is on the
13 increase, we have taken steps at DOJ to enhance
14 our enforcement program. Fellow prosecutors
15 around the country have begun to prioritize
16 animal fighting crimes for prosecution. Over 250
17 defendants have been charged with animal fighting
18 in the last 7 years.

19 In 2014 DOJ, through the leadership of
20 then-Associate Attorney General Tony West, formed
21 the Animal Cruelty Working Group. One of the

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1 recommendations of that group was to consolidate
2 authority for the animal protection statutes
3 within the Environmental Crimes Section. And as
4 I mentioned, this recommendation was implemented
5 by DOJ leadership through the 2014 revisions to
6 "The U.S. Attorneys' Manual," which assigned
7 these statutes to our Crimes Section.

8 Since then we have worked with
9 prosecutors and other investigating agencies to
10 enhance enforcement. At our annual
11 Environmental Crimes Seminar at DOJ's National
12 Advocacy Center, the session on prosecuting
13 animal protection crimes was greeted with great
14 interest by our prosecutor audience.

15 We have engaged with federal
16 investigating agencies to encourage referrals of
17 cases. For example, we provided training on
18 animal fighting crimes at USDA, at Department of
19 Agriculture's Professional Development
20 Conference in Pittsburgh presenting to over 100
21 employees and agents of the Inspector General's

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1 Office.

2 We have worked with DOJ's Asset
3 Forfeiture Section to make sure we fully utilize
4 applicable forfeiture tools. And we are also
5 looking at utilizing our state/federal
6 relationships to work with state investigative
7 partners.

8 We plan to move this new program
9 forward to increase the number and effectiveness
10 of federal prosecutions. Consistent with this
11 effort and congressional direction we believe
12 that an increase in the base offense level of
13 animal fighting prohibitions to Level 16 is
14 called for.

15 With regard to the Commission's
16 proposal and issues for comment as detailed in
17 our letter, we believe the Commission should
18 retain extraordinary cruelty language in the
19 application note as a basis for upward departure,
20 but not include exceptional scale. Other than
21 these matters we are not aware of other

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1 aggravating and mitigating circumstances
2 specific to animal fighting that warrant
3 inclusion in the guideline.

4 On extraordinary cruelty we support
5 the proposed revision of the application note
6 because the level of cruelty exhibited in these
7 cases is so fact-specific that we believe it is
8 more meaningful to leave the extraordinary
9 cruelty as an application note rather than
10 assigning an enhancement number. We think this
11 is best left to the discretion of the sentencing
12 trial judge in consideration of the note.

13 Regarding exceptional scale we ask the
14 Commission to address issues of scale by
15 specifying that the animal fighting offenses
16 which are focused on individual animals or
17 individual persons now do not group for purposes
18 of the multiple count rules in Section 3D. We
19 believe that this approach, rather than a new
20 enhancement or a new departure will better
21 address the measurable indicia or larger criminal

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1 operations allowing a sentencing judge to not
2 group multiple counts. Involving the individual
3 animals and individual offenses furthers the
4 congressional purpose underlying these statutes,
5 namely protecting all animals from inhumane
6 treatment.

7 Thank you for your interest in this
8 heinous crime and for your consideration of our
9 comments on the proposed revision.

10 CHAIRPERSON SARIS: Thank you.

11 MR. SCHINDLER: On behalf of the
12 Humane Society of the United States, the nation's
13 largest animal protection organization, I would
14 like to thank the United States Sentencing
15 Commission for holding this public hearing on
16 proposed amendments to the federal sentencing
17 guidelines and considering an amendment to the
18 animal fighting guideline. The Commission's
19 attention to this issue is welcomed by our
20 organization and I thank you for inviting me to
21 speak to you all today on the importance of

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1 updating guidelines for this cruel activity.

2 My name is Chris Schindler and I
3 oversee the Humane Society of the United States'
4 work on animal fighting. Over the course of my
5 18-year career, I've worked with law enforcement
6 on thousands of dogfighting and cockfighting
7 cases throughout the country providing key
8 intelligence, expert testimony and critical
9 investigative assistance. I've also worked on
10 shutting down some of the country's most
11 significant animal fighting operations and I have
12 unique knowledge on this criminal industry.

13 For more than 50 years the HSUS has
14 worked with federal law enforcement on
15 dogfighting and cockfighting cases. In 2013, for
16 example, the HSUS was part of a federal crackdown
17 on dogfighting that spanned across four states.
18 More than 300 dogs were seized and federal
19 charges were brought against 15 individuals.
20 HSUS has worked with federal and state law
21 enforcement on hundreds of animal fighting cases

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1 across the country including cases that involved
2 major animal fighting operations.

3 We are urging the Commission to
4 include three specific characteristics for
5 sentencing of animal fighting crimes. I'm going
6 to talk about those three recommendations and
7 give an example from my own experiences with
8 animal cases as to why we believe the Commission
9 should accept these characteristics.

10 An enhancement of two points when the
11 offender intentionally and cruelly kills an
12 animal or subjects the animal to severe animal
13 abuse. The worst animal fighters commit acts of
14 unimaginable cruelty and the animals suffer every
15 day of their lives. Over the many years of my
16 working against animal fighting, we have
17 recovered animals who have suffered immeasurable
18 and unnecessary pain and suffering. I believe
19 some photographs were shared with the Commission
20 just demonstrating some of the wounds and
21 injuries --

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1 CHAIRPERSON SARIS: Why don't you
2 just hold it up because --

3 MR. SCHINDLER: -- I'm sorry --

4 CHAIRPERSON SARIS: -- the cameras
5 can see them.

6 MR. SCHINDLER: -- demonstrating some
7 of the wounds and injuries that are sustained
8 from some of the most egregious actors in animal
9 fighting. And these are just a few instances of
10 these types of injuries that are sustained in
11 some cases.

12 A specific offense characteristic for
13 particular egregious acts of cruelty is necessary
14 because the cruelty of the fighting ring does not
15 necessarily encompass the extent of suffering
16 endured by animals used in animal fighting
17 ventures. The treatment before and after fights
18 often constitutes the worst brutality. For
19 example, dogfighters kill losing dogs in very
20 cruel ways. If the losing dog is perceived to
21 be a particular embarrassment or affect the

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1 reputation or status of the owner, they're
2 typically executed or tortured. We have known
3 dogs to be dowsed with chemicals, hung, burned
4 alive and even beaten to death, as with a case we
5 worked on last year where the dogs were brutally
6 beaten with a sledge hammer for not performing.
7 Dogs who are mauled in a fight may also be left
8 and abandoned to die from their extensive
9 injuries, which can oftentimes take hours or even
10 days.

11 Roosters used in cockfighting are cast
12 aside after a fight into large dead piles or
13 barrels. While some cockfighters ensure the
14 birds are deceased, others do not take the time
15 to ensure their suffering ends. On raids we have
16 assisted on with our team, we have found birds
17 still alive with devastating wounds, punctured
18 lungs and even intestines wrapped around their
19 legs while still fully conscious.

20 Violent animal cruelty is inexcusable
21 and it is important to allow for a two-point

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1 increase in cases of animal fighting that involve
2 serious animal abuse, an enhancement of two
3 points when the offender demonstrates an
4 exceptional degree of involvement in the business
5 of animal fighting.

6 Animal fighters who commit the most
7 violent acts of cruelty deserve elevated
8 sentences, especially who are actively involved
9 in perpetrating a crime, a criminal enterprise of
10 animal fighting. Those who engage in the
11 breeding, organizing, sponsoring, promoting or
12 animal fighting are most responsible for the
13 proliferation of the crime and they should be
14 held accountable. They not only cause harm to a
15 large number of animals; they also encourage the
16 high profits that draw people in the blood sport.

17 Creating a specific offense
18 characteristic for those that demonstrate an
19 exceptional degree of involvement in the business
20 of animal fighting would ensure higher sentences
21 for those most responsible. For example, in June

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1 of 2009, we assisted the USDA OIG in the raid of
2 a significant dogfighting operation in Michigan.
3 The defendants in this case were not only
4 breeding a popular bloodline of fighting dogs,
5 they were also hosting high-stakes fights and
6 publishing an internationally significant
7 dogfighting publication. Despite their high
8 level of involvement in an enormously significant
9 dogfighting operation, the defendants received
10 six months in jail with two years' probation.

11 In 2014, federal authorities raided
12 one of the largest cockfighting operation pits in
13 the country in Kentucky. That brought upwards
14 of 400 attendees to fight throughout the
15 cockfighting season with hundreds of thousands of
16 dollars changing hands. The pit operator, his
17 family and others who were significantly involved
18 received sentences ranging from 6 to 18 months.

19 And I also provided some pictures of
20 examples of what would be considered more
21 organized than a typical operation. We have a

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1 cockfighting pit with bleacher seating. This
2 particular location had concession stands, food
3 that was offered, as well as a day care area for
4 children that was in the back at the time of the
5 raid.

6 Another pit that also -- arena
7 seating. These are the more significant
8 operations that are causing the most amount of
9 damage to animals and perpetrating crime.

10 This was a dogfighting pit in Benton
11 County, Mississippi, where there was actually
12 seating on the second tier with several hundred
13 people in attendance.

14 Next, an enhancement of two points
15 when the offender possesses a dangerous weapon.
16 Through our experience in assisting federal law
17 enforcement agencies in animal fighting raids
18 weapons can be present. The presence of knives
19 and guns escalates the danger to law enforcement
20 and bystanders, especially when used in a
21 criminal enterprise. Animal fighters who

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1 possess dangerous weapons are a greater threat to
2 the community and the sentencing guidelines
3 should reflect that.

4 Am I up?

5 CHAIRPERSON SARIS: Yes, why don't
6 you just finish up?

7 MR. SCHINDLER: Okay.

8 CHAIRPERSON SARIS: That's fine.
9 Finish your thought.

10 MR. SCHINDLER: So in 2015, we
11 assisted with a raid in South Carolina with more
12 than 400 people in attendance. After the
13 property was secured, dozens of firearms were
14 found throughout the woods. In the Benton County
15 case that I discussed, showed the picture, the
16 defendants fired shots at officers upon making
17 entry.

18 The updated guidelines should count
19 for this risk to law enforcement, bystanders,
20 field staff and those who are participating in
21 the raids. We are pleased the Commission is

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1 proposing an increased baseline for animal
2 fighting crimes and we encourage you to adopt
3 these three specific offense characteristics
4 based on the examples I suggested today. Thank
5 you for inviting me to speak and for your
6 consideration.

7 CHAIRPERSON SARIS: Thank you, Mr.
8 Schindler.

9 Ms. Chin?

10 MS. CHIN: Good afternoon. My name
11 is Jennifer Chin. I am Vice President of the
12 Legal Advocacy Department at the American Society
13 for the Prevention of Cruelty to Animals, the
14 nation's oldest animal protection organization.
15 Among our many programs we provide a full menu of
16 support to law enforcement and prosecutors in
17 animal cruelty and animal fighting cases
18 nationwide including investigative, sheltering,
19 legal, forensic and veterinary services.

20 Prior to joining the ASPCA in 2012, I
21 served as an assistant United States attorney in

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1 the Appeals Division of the United States
2 Attorney's Office for the District of New Jersey
3 where approximately 70 percent of my caseload
4 involves some instant matters.

5 On behalf of the ASPCA and its 2.5
6 million supporters nationwide, I thank the
7 Sentencing Commission for considering an
8 amendment to the animal fighting guideline.
9 We're pleased to provide you with our testimony
10 today.

11 We applaud the Commission for
12 proposing to amend the guidelines to reflect
13 recent statutory changes to the federal animal
14 fighting statute, 7 USC Section 2156. We
15 encourage the Commission to adopt the higher of
16 the two proposed base offense levels, 10 rather
17 than 8, with the new felony adopted by Congress
18 in 2014 of bringing a child to an animal fight.

19 We also support the Commission's
20 proposal to raise the base offense level for the
21 crime of animal fighting to 16 rather than 14,

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1 which achieves greater consistency with the
2 increased statutory maximum enacted by Congress
3 in 2008. However, that change alone falls short
4 of Congress' intent to provide for longer
5 sentences of up to 60 months to punish the most
6 egregious animal fighting crimes and warrants the
7 inclusion of specific offense characteristics.

8 Specifically, we recommend that the
9 guideline should include the following three
10 specific offense characteristics:

11 First, the guideline should provide an
12 enhancement of two points when an animal is
13 intentionally killed by methods, including but
14 not limited to shooting, hanging, electrocution
15 or drowning, or when an animal suffers due to
16 lack of veterinary care for an injury sustained
17 during fighting or from neglect. All animal
18 fighting is cruel and violent, but some practices
19 are even more so, and those demand longer
20 sentences.

21 The cruelty of animal fighting is not

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1 confined solely to the fighting pit. Fighters
2 may escalate the level of cruelty by withholding
3 food and shelter or by failing to seek
4 professional medical attention for wounds.
5 Animals who no longer have value to their owners
6 may be executed by horrific methods. A specific
7 offense characteristic should provide for longer
8 sentences in these instances.

9 And I believe you have a handful of
10 photographs as well. The first three are from a
11 case: a multistate federal dogfighting case that
12 was prosecuted out of the Middle District of
13 Alabama. And you can see from these photos some
14 of the conditions that the dogs were in. These
15 were emaciated dogs that were without food or
16 water. The third photo is of a dog that's
17 tethered with two tires attached. So that dog
18 is forced to bear the weight of those tires if it
19 chooses to move around. And that's to serve the
20 purpose of training that animal for fighting.

21 This photo shows a bit of the scale of

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1 the operation of one of the sites in which a
2 search warrant was executed. This is a young
3 puppy that we refer to as Timmy. And you can see
4 that Timmy is a very young puppy with an
5 incredibly heavy and large chain around his neck
6 to which he's tethered.

7 And the last photo is a closeup of a
8 dog that illustrates some of the injuries/wounds
9 that these animals can sustain.

10 Secondly, the guideline should
11 provide an enhancement of two points when there
12 is a pattern of activity showing that the
13 defendant has had a substantial amount of
14 involvement in the business of animal fighting as
15 indicated by breeding animals, selling animals or
16 organizing, sponsoring or promoting animal
17 fights. Animal fighters who perpetuate this
18 criminal enterprise through these activities harm
19 large numbers of animals and make the blood sport
20 more profitable.

21 A specific offense characteristic for

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1 those who demonstrate a substantial degree of
2 involvement in animal fighting ventures would
3 ensure longer sentences for those who profit and
4 allow others to profit from inflicting
5 large-scale harm. Activities that constitute
6 organizing, sponsoring and promoting animal
7 fighting include financing the cost of the
8 fighting animals and training, securing and
9 financing the venue, putting up money for wagers,
10 obtaining security and soliciting participants
11 and spectators. Activities that indicate
12 involvement in the business of breeding and
13 selling include profiting from stud fees for the
14 sale of puppies, breeding dogs or birds from
15 fighting bloodlines.

16 Lastly, the guideline should provide
17 an enhancement of two points when a dangerous
18 weapon is present. Animal fighting is commonly
19 linked with other felonies, including drug and
20 human trafficking, child abuse, domestic violence
21 and money laundering. Often animal fighting

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1 operations are discovered while law enforcement
2 is investigating these other crimes. The
3 presence of firearms escalates the level of
4 danger to the communities in which these crimes
5 are perpetrated to law enforcement responding to
6 these offenses and to the public and private
7 animal welfare organizations that are often
8 called upon to assist law enforcement with animal
9 fighting investigations and seizures.

10 The heightened danger presented by
11 possession of weapons is not currently being
12 captured by other criminal charges because
13 offenders are rarely charged for illegal
14 possession of weapons at animal fights unless the
15 offender has a prior felony conviction, nor is
16 animal fighting generally treated as a crime of
17 violence or a drug trafficking crime that would
18 warrant a firearm charge.

19 CHAIRPERSON SARIS: You need to --

20 MS. CHIN: In many cases sentencing
21 likely has not accounted for the increased danger

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1 posed by weapons. Thank you very much for your
2 attention to this important matter and for the
3 opportunity to present our testimony.

4 CHAIRPERSON SARIS: All right. Thank
5 you.

6 VICE CHAIRMAN BREYER: I'd like to
7 first of all thank everybody here and just say
8 that you give a voice to the animals. They can't
9 speak, so it's really -- I'm grateful. I know
10 the whole Commission is grateful for your coming
11 here today.

12 I wanted to ask about the weapons,
13 because is it the Justice Department's view that
14 in the event a perpetrator violating the animal
15 fighting laws -- that that perpetrator has to
16 have a weapon on him or herself, or that at
17 the -- in the arena where spectators would have
18 a weapon? Are they charged -- is it your idea
19 for the enhancement if in fact somebody at the
20 arena has weapons or that the perpetrator him or
21 herself has to have a weapon?

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1 MS. WILLIAMS: Well, Your Honor, we
2 didn't affirmatively advocate for an enhancement
3 for a weapon. Our letter simply stated that if
4 the Commission was interested in putting in an
5 enhancement for guns that we would support that.

6 When we looked at what aggravating/
7 mitigating circumstances might be important here,
8 we were looking at things specific to animal
9 fighting. I guess I'd have to say we were more
10 focused on the actual perpetrators, but it is an
11 offense to attend. And so I think if there was
12 a gun present -- but the concern here is the
13 safety of officers, so I think it would be both.
14 But that wasn't our --

15 VICE CHAIRMAN BREYER: Well, my
16 concern is this: Is it -- in light of court
17 decisions, in light of the 2nd Amendment, a lot
18 of people -- not my choice, but other people will
19 be carrying weapons. They carry weapons. I
20 don't know whether there's a higher incidence of
21 carrying weapons with people who attend these

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1 events or not, but I wanted to make sure that if
2 we did put some enhancement, it would punish
3 those people who are carrying on the other
4 illegal activities and then increase the danger
5 of that activity by virtue of the fact that that
6 person has a weapon. And that maybe that's a
7 view you all share, or maybe it's not. I don't
8 know.

9 MS. WILLIAMS: Do you want to --

10 MS. CHIN: I mean, I think that would
11 be right, that there should be some nexus between
12 the possession of the weapon and the offense.

13 COMMISSIONER BARKOW: Doesn't there
14 have to be? I mean, as purposes of the 2nd
15 Amendment, if someone has a right to carry a
16 firearm, I don't see how we could possibly
17 enhance on that basis.

18 CHAIRPERSON SARIS: Can you let Judge
19 Pryor -- could we start there and then --

20 COMMISSIONER PRYOR: So, the whole
21 reason we proposed the amendment is we had

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1 complaints, among them Chief Judge Watkins from
2 the Middle District of Alabama, in the case that
3 you referenced earlier, about this guideline
4 being inadequate. And there's certainly a
5 concern on our part that it might not be severe
6 enough in a lot of cases.

7 On the other hand, we've had history
8 with guidelines that have a lot of special
9 offense characteristics that really do not
10 distinguish the worst offenders from other
11 offenders. They in fact are just special offense
12 characteristics that are going to apply in
13 basically all of the cases because they're all
14 perpetrated that way. Now, that's the experience
15 with a lot of the enhancements for the child
16 pornography guideline. We wouldn't want this
17 guideline to be like that. We would want it to
18 be severe enough to reflect the punishment that
19 is deserved in a lot of cases.

20 So my concern about your request for
21 these special offense characteristics is are

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1 these not going to be cases that are typical as
2 opposed to truly exceptional?

3 MS. CHIN: Right, and Chris may be
4 able to speak also to his firsthand experience
5 deploying on these cases with law enforcement,
6 but I think in thinking about crafting these
7 proposed special offense characteristics the idea
8 was that there are the sort of ordinary cases,
9 right? And these particular factors that we
10 tried to delineate with some specificity are the
11 ones that actually take that crime away from that
12 ordinary case and in fact make them far more
13 harmful.

14 COMMISSIONER PRYOR: How do we know
15 that? How do we know that that really though is
16 not the ordinary case? At some point use of a
17 computer becomes a special offense characteristic
18 with child pornography. And that's how it's
19 perpetrated, right, is with the use of a
20 computer. How do we know that the ones that
21 you've carved out really are distinguishing some

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1 that are not going to be most of the cases that
2 a federal judge will see: How do we know that?

3 MR. SCHINDLER: If I could speak for
4 a moment on that issue. So we participate -- I
5 mean, I've been overseeing our Animal Fighting
6 Division and I've worked in this field for 18
7 years and participated in a lot of investigations
8 and raids on these crimes. Not every -- you
9 know, the electrocution and drowning, I mean,
10 that is a very unique subset of individuals. And
11 unfortunately we do come across it, but it's not
12 on every case and it's not necessarily the
13 standard.

14 Certainly we feel when somebody takes
15 it upon themselves to not only commit the act of
16 animal fighting, which we agree, yes, that's the
17 standard. The dogs get injured. Those animals
18 are obviously maimed during that. But that's the
19 typical. Somebody who then takes it a step
20 further because they're embarrassed by their
21 dog's lack of winning and then electrocutes the

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1 dog in front of a crowd is a different subset of
2 individual. And that's not something that we
3 hear about at every fight or anything like that.
4 Those are --

5 COMMISSIONER PRYOR: What about -- I
6 mean, aren't the large-scale animal fighting
7 ventures going to be ones that don't -- I mean,
8 that those sponsors have weapons? Are they all
9 going to do that?

10 MR. SCHINDLER: It depends on the
11 location. Some of the large cockfighting pits
12 actually prohibit weapons and some of the more
13 significant cockfighting pits actually do not
14 allow weapons to come into the facility. So the
15 individuals who bring guns to those events
16 they're prohibited by their own counterparts in
17 cockfighting, but they may bring weapons. You
18 know, there was a couple of individuals that were
19 shot and killed at a cockfight in Texas a few
20 years ago because somebody went out to their car,
21 got their gun and came back and killed two

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1 individuals over a fight that happened there.
2 And so those are the type of people. There,
3 nobody had weapons and this individual went out
4 to his vehicle and came and killed two
5 individuals.

6 COMMISSIONER PRYOR: Yes, but there
7 are other ways to address that.

8 MR. SCHINDLER: Huh?

9 COMMISSIONER PRYOR: There are other
10 ways to address that --

11 (Simultaneous speaking.)

12 MR. SCHINDLER: Well, obviously there
13 was murder, but I mean I guess I'm saying that it
14 is not a standard.

15 COMMISSIONER PRYOR: Well, but what
16 I'm kind curious about that is if I were a
17 sponsor --

18 MR. SCHINDLER: Yes.

19 COMMISSIONER PRYOR: -- of one of
20 these kinds of events, trying to put myself in
21 that framework --

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1 MR. SCHINDLER: Of course.

2 COMMISSIONER PRYOR: -- I'd be
3 concerned about individuals and -- I mean, I've
4 lived in Louisiana and Alabama. Okay? And I
5 would be concerned that individual customers
6 might want -- might get angry and might go to
7 their car or truck and retrieve a weapon. Right?
8 I would think that all the sponsors would have
9 weapons.

10 MR. SCHINDLER: Yes, and that's very
11 likely. We do come across guns. I mean, there's
12 been some fights in progress, or dogfightings
13 that we haven't found guns, but then there are
14 others like South Carolina and some of these
15 other ones where there was an exorbitant
16 amount --

17 (Simultaneous speaking.)

18 COMMISSIONER PRYOR: Right. That
19 would be the typical. Right?

20 MS. WILLIAMS: And some -- you know,
21 I would say what's not typical is some of the

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1 pits that we've had informants in -- you know,
2 normally guns are concealed. A lot of times
3 people aren't having guns out, but there've been
4 several locations where there are actually people
5 with AKs and other weapons providing -- you know,
6 basically standing at the pit-side, which is a
7 little bit more unusual for somebody to -- for
8 them to actually be presenting a gun and saying
9 we're going to do something if something occurs
10 here.

11 COMMISSIONER BARKOW: Were
12 those -- do you know if those are open carry
13 states, too, where that's occurred?

14 MR. SCHINDLER: I don't know, is
15 Georgia open carry? Georgia, Alabama. I'm not
16 sure if those are open carry states or not.

17 COMMISSIONER PRYOR: Yes, you have to
18 have a permit to carry concealed, not to carry
19 open in Alabama.

20 COMMISSIONER BARKOW: Can I ask a
21 quick question about the grouping rule?

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1 CHAIRPERSON SARIS: Well, I was just
2 going to just -- I've got a whole --

3 COMMISSIONER BARKOW: Okay.

4 CHAIRPERSON SARIS: I'll get you.
5 I'll get you. I guess everyone's interested in
6 this topic. We're going to -- do you want to --

7 COMMISSIONER FRIEDRICH: Okay. Ms.
8 Williams, I too wanted to explore the grouping
9 rule argument you're making. I get -- I
10 understand a little better the argument you're
11 making with respect to individual animals being
12 harmed and treating them in the same way we might
13 treat individual assaults of different people.
14 The more difficult argument for me is that we
15 would treat individual children at the same event
16 as not being grouped when -- I'm just thinking of
17 an alien smuggling case when you have multiple
18 victims, multiple aliens being brought in. Those
19 group. In other situations if there's drug
20 dealing and minors are present, I don't think we
21 individually calculate the individual minor.

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1 So I'm just interested in you
2 exploring that more. To what extent would this
3 approach be consistent or inconsistent with the
4 way we've handled grouping in other parts of the
5 guidelines?

6 MS. WILLIAMS: I guess I'd have to say
7 not being completely familiar with those statutes
8 underlying the crimes, the other crimes you're
9 referring to, our view was just that this was a
10 reflection of this new crime that Congress has
11 created to make it a crime to bring a child and
12 to --

13 (Simultaneous speaking.)

14 COMMISSIONER FRIEDRICH: But it's a
15 crime to bring an alien.

16 MS. WILLIAMS: Right.

17 COMMISSIONER FRIEDRICH: So it's a
18 new crime. But I'm just wondering whether the
19 focus of the statute is on the animals or the
20 children? Does that play a -- should that be a
21 factor in the Commission's decision?

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1 MS. WILLIAMS: I think the -- clearly
2 the focus of these statutes are on the individual
3 animals, but I do think part of why, for instance,
4 you've had so many comments here is that there's
5 just a really swelling societal awareness of how
6 awful and violent and heinous these crimes are.
7 And to bring a child to something like that and
8 expose that child to that violence -- I
9 understand that groups of children would be
10 coming in and smuggled, but this is really
11 focused on the exposure to the child. And in
12 terms of scale and size and how many people attend
13 and how many are children, that was our thought
14 in suggesting the approach that we suggested to
15 multiple counts.

16 COMMISSIONER BARKOW: And you're
17 saying that though with respect to the individual
18 animals as well, right?

19 MS. WILLIAMS: Yes.

20 COMMISSIONER BARKOW: So if you had
21 a --

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1 MS. WILLIAMS: Yes.

2 COMMISSIONER BARKOW: I don't know
3 what the average number of -- at a cockfight what
4 the average number would be, but you'd say each
5 of those is a separate --

6 MS. WILLIAMS: And it just really
7 varies. I mean, a cockfight is between two
8 roosters, two birds. And it may be one event
9 with just that happening that evening. It may
10 be 10 in a row. But in our view --

11 CHAIRPERSON SARIS: Would you group
12 each bird separately of the one fight?

13 MS. WILLIAMS: You could. You could.

14 COMMISSIONER FRIEDRICH: What would
15 that mean, plus-2, plus-2, or how --

16 MS. WILLIAMS: Well, if you had an
17 enhancement. Our view was not to do --

18 COMMISSIONER FRIEDRICH: No, no, no.
19 I mean, with the grouping rule. So when they
20 don't --

21 (Simultaneous speaking.)

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1 MS. WILLIAMS: Oh.

2 COMMISSIONER FRIEDRICH: On the
3 levels in terms of the -- it's been awhile since
4 I've done this, but you've got --

5 (Simultaneous speaking.)

6 MS. WILLIAMS: Yes, it's a little
7 complicated.

8 COMMISSIONER FRIEDRICH: -- level and
9 if they don't group, then you're going to in
10 effect add units, which often is a question.

11 MS. WILLIAMS: You know --

12 COMMISSIONER FRIEDRICH: And of
13 course the rules are somewhat complex, but that's
14 why I think that would be --

15 MS. WILLIAMS: Very complex.

16 COMMISSIONER FRIEDRICH: But you all
17 have done this? You've run this in your
18 stereotypical case and you've done the
19 calculation with these rules and think that in
20 cases involving large number of animals and
21 children the sentence wouldn't get too severe?

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1 MS. WILLIAMS: I don't think so, but
2 I think in some ways we are also at DOJ grappling
3 with what is really a new initiative on our part
4 to pursue animal fighting crimes. I mean, that
5 was the whole reason that the authorities were
6 moved to our Environmental Crimes Section because
7 they were somewhat consistent with our work on
8 wildlife. And certainly we've dealt with the
9 grouping issues in the wildlife crimes where who
10 you -- what you charge in each crime and et
11 cetera.

12 And I think so much goes into what's
13 in an indictment and how the charges are made
14 that at the end of the day it might well be that
15 you wouldn't break them one by one, but we just
16 felt that for something like scale where you
17 could measure it and with the focus on the new
18 provisions of exposing a child to these
19 provisions that it would apply, that if we did
20 have some exception to the grouping that it
21 should apply to any of the individual --

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1 COMMISSIONER FRIEDRICH: And you
2 think a departure wouldn't address that
3 sufficiently?

4 MS. WILLIAMS: I think if we -- if the
5 Commission believes that it does not want to
6 proceed with specifying that, the scale would be
7 addressed by not grouping, then our preferred
8 alternative would be the upward departure for
9 exceptional scale.

10 CHAIRPERSON SARIS: Thank you.
11 Questions?

12 COMMISSIONER SMOOT: No, I'm still
13 sitting here grappling with the -- go ahead.

14 CHAIRPERSON SARIS: Rachel, did you
15 have your chance?

16 COMMISSIONER BARKOW: No. I mean, I
17 think you covered it. I guess would you want -- I
18 mean, the concern I have is similar to
19 Commissioner Friedrich's, which is in other
20 contexts where we have multiple victims, we don't
21 dispense with the grouping rules. Number of

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1 victims in a fraud case. I mean, there's lots
2 of other places where people are affected, but
3 there's still a sense that if you treated each
4 one specifically separately, very quickly things
5 would add up. And I just wanted to get a sense
6 of whether or not you thought through kind of
7 whether that would actually produce a punishment
8 that seems about right given the level of
9 activity or if it would go far beyond even what
10 the stat max is in some of these cases. That
11 would be my only concern.

12 CHAIRPERSON SARIS: Thank you.

13 COMMISSIONER MORALES: No, my
14 question was going from the typical case to the
15 typical defendant and I wanted to hear from both
16 Ms. Williams and from -- well, from all of you
17 really as to what your average
18 defendant -- typical defendant looks like. Is
19 it somebody that generally has a criminal
20 background or is it somebody that's sort of a
21 first offender? And is there some overlap

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1 between these activities and other kinds of
2 criminal activities? If you could just talk
3 about that for a minute.

4 MR. SCHINDLER: So for like a typical
5 offender, you know, unfortunately this crime
6 is -- there's somebody in every state. This is
7 a very widespread crime, especially organized
8 dogfighting, but not every offender is going to
9 be at the highest level of organization of
10 dogfighting. And so there are different tiers.

11 There are individuals who may just be
12 breeding dogs, right? And they're breeding and
13 they're selling dogs to other individuals for
14 fighting. They may not be involved to any higher
15 extent than that. That would be kind of a more
16 common event. Or they may match dogs -- or
17 sorry, fight dogs every once in awhile just to
18 keep their bloodline going because they need to
19 show and demonstrate their dogs can fight.

20 There's also individuals that are just
21 the participants. They may bring a dog to a

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1 fight every once in awhile to that pit. These
2 are like the common guys.

3 But then you have the ones that are at
4 the highest level that are what they call
5 "hooking matches." These are the guys who I
6 would call him and say, "I have a 32-pound
7 female," and then he would connect with other
8 people who have those dogs and he would
9 facilitate setting that match up. And without
10 that person -- I mean, that's a higher level
11 individual that is very unique. There's
12 not -- it's not like there's droves of these guys
13 that are out there that hook matches. And it
14 makes it possible for that to occur.

15 You also have the people who are
16 hosting these fights that don't always have to be
17 a dogfighter. Some of the individuals that are
18 providing a space to host the fight are not
19 actually fighting. Actually in that -- we also
20 participated in the case from the Middle District
21 of Alabama. One of the defendants was a

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1 restaurant and bar owner who was not a
2 dogfighter, but when it rained, they moved from
3 Donnie Anderson's property, who was the primary
4 defendant, to his bar so that they could fight
5 indoors. And without him being involved in that
6 operation they would not have a space to fight
7 the dogs.

8 And so, obviously those are what I
9 would consider the people who are more the
10 facilitators that are not -- there's thousands of
11 people involved in animal fighting. There's not
12 thousands of people who are providing and hosting
13 the space, that are making it possible to set the
14 matches up or the fights.

15 Same goes for cockfighting. And even
16 for cockfighting there's people who are illegally
17 distributing knives and gaffs. That's
18 not -- there's not somebody in every state who
19 sells those. Without those little knives they
20 strap onto the birds feet you wouldn't be able to
21 fight birds. And so in one case that we did

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1 we -- there was a distributor who was the U.S.
2 representative for a Mexican company, a company
3 from Mexico who was basically importing illegally
4 these knives and gaffs in Pringles containers and
5 selling them, distributing them throughout the
6 United States. We seized several thousand knives
7 from his house. And that would be another person
8 that would -- I -- he's not the guy that we raid
9 who has his little box, right, of knives. This
10 is an individual who actually fuels the industry.

11 And so, I mean, I don't know if that
12 answers how we separate them --

13 COMMISSIONER MORALES: There's a huge
14 range is what you're telling me. There's not
15 a --

16 (Simultaneous speaking.)

17 MR. SCHINDLER: There is.

18 COMMISSIONER MORALES: And which
19 ones -- Ms. Williams, so which ones do we
20 generally take --

21 MS. WILLIAMS: I think we see exactly

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1 the kind of different -- the different levels of
2 involvement that Chris was talking about, but
3 sometimes we do refer to this crime as the sort
4 of criminals, because it is often connected to
5 folks who are very involved in gambling or very
6 involved in the drug trade, very involved in the
7 gun trade. And certainly part of our initiative
8 at Justice is to really reach as much as possible
9 those kinds of offenders who are multiple
10 offenders.

11 COMMISSIONER SMOOT: Can I just ask
12 one question? I think this is what concerns me
13 about the whole weapon offense. So you talked
14 about a whole array of different types of folks
15 who would be involved in this kind of activity.
16 And when you're talking about the enhancement of
17 two points, who are you directing that towards?
18 I think that goes to some of the conversation we
19 talked about before, that there are people who
20 are able to carry weapons because it's their
21 right. Who are you targeting this -- the two

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1 point -- who would you be looking to charge that
2 additional two points for?

3 MS. CHIN: Well, I think it would be
4 those participants who have those weapons in
5 order to further the animal fighting enterprise.

6 COMMISSIONER SMOOT: Not to protect
7 those involved? Or is it the people who are
8 using the weapons to do something to the animals,
9 which would be then -- would be the nexus, or
10 protecting the enterprise? That would also be
11 the nexus?

12 MS. CHIN: I think it might be a bit
13 broader, as you just articulated.

14 CHAIRPERSON SARIS: Let me ask -- I
15 don't -- many of your really compelling examples
16 involve dogs. I don't know as much about
17 cockfighting. We don't do a lot of it --

18 MR. SCHINDLER: Yes.

19 CHAIRPERSON SARIS: -- in Boston, so
20 I just would like to understand it better.
21 Because we're potentially tripling this penalty.

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1 I mean, that's -- if you go from a 10 to a 16,
2 you could potentially go from a 6 to 12 to 21 to
3 27. So I'm trying to understand: who's the
4 typical cockfighter? The horrible stories were
5 about the dogs and the pictures. But who's
6 involved in that and is it the same level of
7 culpability as the people who do the dogs?

8 MR. SCHINDLER: So cockfighting is
9 actually one of those industries that I -- there
10 are probably more people involved in cockfighting
11 nationally than in any other illegal activity
12 with animals. Some of these large-scale pits
13 draw 400 to 500 people in a weekend that are
14 coming from all over the country. And so when
15 you -- like a cockfighting pit basically operates
16 with -- you know, with a dogfight there may be
17 only two matches or three, you know, two or three
18 or four fights in a night.

19 For a cockfight, which they call a
20 derby, it depends on how many entries. And so
21 they have a schedule that literally they put out.

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1 I mean, these individuals do not feel that it's
2 illegal. They feel that even with the federal
3 penalties -- they actually print a schedule that
4 they send out to all these people that they carry
5 in their wallet that tells you how much the entry
6 fee is, whether it's knife -- which is the little
7 curved -- they look like a knife, or a gaff, which
8 looks like an ice pick, which type of instrument
9 they're using. So it kind of specifies all of
10 these things, which is good --

11 CHAIRPERSON SARIS: Now do they
12 typically use those knives and gaffs, or is it
13 more typical --

14 MS. WILLIAMS: They --

15 CHAIRPERSON SARIS: -- just the two
16 birds going at each other?

17 MS. WILLIAMS: They strap them on
18 their legs. And so typically both birds --

19 CHAIRPERSON SARIS: Typically?

20 MS. WILLIAMS: -- die because of the
21 extent of the injuries. And it depends on the

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1 weapon. Like a gaff is like an ice pick. And
2 so if you think about how thin an ice pick is, it
3 takes much longer time for the birds to die. The
4 injuries, while they're significant,
5 they're -- it's more punctured lungs, things like
6 that. A knife or a -- a knife is -- they have
7 short knife and long knife. The short knife is
8 just a short knife about that long [indicating],
9 but they're razor sharp. There have actually
10 been cockfighters who have been killed in the pit
11 by their own birds. And the long knife is about
12 three inches long.

13 And so for those fights, if you raid
14 a decent sized pit where there's several hundred
15 people there, there could be more than 100 birds
16 there for that night. I mean, we've seized
17 several hundred. And while it doesn't look like
18 there could be that many, the fights go on
19 basically all -- sometimes they start at 10:00
20 a.m. and go all the way through the night. And
21 so the individuals that are involved range also.

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1 They run the gamut of all the different people.

2 COMMISSIONER MORALES: So that day
3 there will be like 200 -- you say they all die,
4 so over the course of that day 200 --

5 MR. SCHINDLER: I didn't want to bring
6 truly disturbing photos today --

7 COMMISSIONER MORALES: Thank you.

8 MR. SCHINDLER: -- so I wanted to
9 spare everyone. But the --

10 CHAIRPERSON SARIS: What do you think
11 these --

12 MR. SCHINDLER: I tried. I mean, not
13 that those aren't, but I tried to be aware. And
14 so normally a lot of these places, like a pit we
15 did in South Carolina, you could almost go by
16 smell to be able to find where their dead pit is.
17 And so they'll either dig a big pit where they'll
18 throw birds in --

19 CHAIRPERSON SARIS: So you would put
20 the level of culpability of dogs and cockfighting
21 as equivalent?

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1 MR. SCHINDLER: I would.

2 COMMISSIONER BARKOW: And, Ms.
3 Williams, you would not group those though? So
4 there could be -- that would be like 100 plus-2s?

5 MS. WILLIAMS: I think we are
6 having -- yes. Technically yes, we would -- our
7 view is that on any of these it would be the
8 better approach to not group. But again,
9 you're -- there are so many things that go into
10 how a prosecutor is going to cast an indictment
11 to be reasonable. I don't know that you'd see
12 an indictment of 100 counts involving 2 birds
13 each.

14 COMMISSIONER FRIEDRICH: The end
15 effect in that scenario would be to add plus-5 to
16 the offense level, right, where you max out at
17 plus-5? So you'd increase from a 16 to a 21.

18 MS. WILLIAMS: That's --

19 (Simultaneous speaking.)

20 COMMISSIONER FRIEDRICH: Yes, is
21 right? So you're talking about a maximum offense

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1 level of --

2 (Simultaneous speaking.)

3 MS. WILLIAMS: But you're not -- what
4 my colleague Mr. Eddy was just mentioning to me
5 is mostly you'll have one owner with two or three
6 birds, so it would be a very unusual situation in
7 one of these environments. You're running owners
8 through. It's not one owner of all 100 birds.

9 COMMISSIONER FRIEDRICH: But that's
10 a -- I mean, you wouldn't charge sort of
11 conspiracy and they're accountable for these
12 animals?

13 VICE CHAIRMAN BREYER: What about the
14 person who's running it?

15 COMMISSIONER FRIEDRICH: Yes.

16 VICE CHAIRMAN BREYER: I mean, the
17 person who's running it from 10:00 a.m. to
18 midnight has 100 fights.

19 COMMISSIONER FRIEDRICH: But under
20 that scenario, let's say they're accountable for
21 all, it adds plus-5, you max out under the

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1 grouping rules, I think. So I'm just asking do
2 you think in those egregious cases -- is what
3 you're seeking a level 21? Is that what you
4 think, which is pre-acceptance 37 to 46? Is that
5 what you all think is the appropriate sentence in
6 a mine-run case involving a lot of animals?

7 MS. WILLIAMS: Well, I'm counting
8 from 16. I'm hoping I'm counting from 16. And
9 some of the scenarios we were looking at when we
10 were devising our comments to you we were getting
11 to 21 or 22 for the offense level. Again, we
12 think that if this seems like not an appropriate
13 approach that an upward departure would give you
14 that flexibility with the sentencing judge and --

15 CHAIRPERSON SARIS: All right. Thank
16 you.

17 COMMISSIONER BARKOW: Can I ask one
18 last quick question?

19 CHAIRPERSON SARIS: One last one. We
20 have --

21 (Simultaneous speaking.)

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1 COMMISSIONER BARKOW: -- states on
2 this? I mean, so I guess it's a federal offense
3 because of the gambling and the interstate, but
4 in terms of the animal cruelty part of this, where
5 are the states on this? Do these cases ever
6 get -- I mean, is this federal because of the
7 scope of the gambling operation? This becomes
8 federal because of the level of cruelty? And do
9 you seek to get relief in state prosecutions for
10 these?

11 MS. CHIN: I think both of our
12 organizations work both with federal law
13 enforcement as well as state. I mean --

14 MR. SCHINDLER: They do --

15 (Simultaneous speaking.)

16 MS. CHIN: -- there are many, many
17 state cases. We assist with both on the blood
18 sports cases and with the --

19 (Simultaneous speaking.)

20 CHAIRPERSON SARIS: So the federal
21 nexus is the gambling? Is that how they get

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1 the --

2 (Simultaneous speaking.)

3 CHAIRPERSON SARIS: -- commercial?

4 It has to be --

5 (Simultaneous speaking.)

6 MR. SCHINDLER: I would say the scale.
7 We do a lot of intelligence gathering. We work
8 with a lot of different federal agencies and
9 state agencies. And for us when we reach out to
10 any of our federal contacts about a case, it would
11 really be the size and scope and the level
12 involved of the individuals. When we're talking
13 about like a huge cockfighting pit, that's not
14 what they're all like. Those are -- I was giving
15 examples of the most egregious ones. A lot of
16 cockfighting pits can be much smaller. Those
17 cases tend to be prosecuted on the state level.
18 But when you're talking about places like the pit
19 in Kentucky that was raided, I mean, that
20 was -- literally people were coming from all over
21 the country to go to that location.

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1 COMMISSIONER BARKOW: So does that
2 mean though that -- I guess it goes back to Judge
3 Pryor's question --

4 MR. SCHINDLER: Yes.

5 COMMISSIONER BARKOW: -- which is I'm
6 just wondering if the typical federal case is
7 actually one of fairly large scope as a matter of
8 what cases are likely to come into this. Are
9 they like -- is the typical one for us likely to
10 be a bigger --

11 MR. SCHINDLER: I think it depends
12 on --

13 MS. WILLIAMS: I think that's
14 generally fair.

15 MR. SCHINDLER: Yes.

16 MS. WILLIAMS: Certainly it's the
17 kind of investigation we're looking at now with
18 our initiative our authority.

19 COMMISSIONER BARKOW: Okay.

20 CHAIRPERSON SARIS: Thank you very
21 much. As I say, there's enormous interest in

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1 this across the country and we're taking it
2 really seriously. Thank you.

3 MS. WILLIAMS: Thank you very much.

4 MR. SCHINDLER: Thank you so much.

5 CHAIRPERSON SARIS: So if that wasn't
6 a serious enough panel, we're now moving onto
7 child pornography. So I thank you all for
8 coming, bearing with us through the day.

9 This proposed amendment addresses two
10 circuit conflicts and application issues that
11 have arisen when applying the child pornography
12 guidelines. As I'm sure many of you know, under
13 the Supreme Court's decision in *Braxton v. United*
14 *States*, the Commission has the responsibility for
15 resolving circuit conflicts. The Commission is
16 always interested in doing this.

17 Actually it can be very hard. There's
18 a reason why the circuits don't agree sometimes.
19 I think Commissioner Friedrich would agree that
20 sometimes the hardest issues we hit on are
21 conflicting interpretations of the guidelines,

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1 but it does lead to disparate calculations for
2 similarly-situated defendants. So we are
3 hearing testimony about two such issues.

4 The first involves the vulnerable
5 victim adjustment when the offense involves
6 minors who are unusually young and vulnerable
7 such as infants and toddlers. And the second
8 involves the application of the tiered
9 distribution enhancement.

10 On the latter issue the proposed
11 amendment seeks to achieve the appropriate
12 enhancement for offenses involving a peer-to-peer
13 file sharing program or network.

14 So thank you for coming. Our
15 witnesses are Alexandra Gelber, who is Deputy
16 Chief of the Child Exploitation and Obscenity
17 Section in the Criminal Division of the
18 Department of Justice. Ms. Gelber works with the
19 U.S. Attorney Offices around the country on the
20 investigation and prosecution of federal child
21 exploitation crimes involving cases of child

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1 pornography, sex trafficking of minors, sex
2 tourism, enticement and coercion of minors.

3 Neil Fulton has been the Federal
4 Public Defender for the Districts of North Dakota
5 and South Dakota since 2010. He previously
6 served as Chief of Staff to South Dakota Governor
7 Mike Rounds and was in private practice in
8 Pierre, South Dakota and was a law clerk for our
9 former chair, Diana Murphy. Were you her law
10 clerk when she was here?

11 MR. FULTON: Before.

12 CHAIRPERSON SARIS: Before? So and
13 the final witness is Mary -- well, no.

14 MR. BOHLKEN: You've already
15 introduced me before.

16 CHAIRPERSON SARIS: It jumps right
17 over.

18 (Laughter.)

19 CHAIRPERSON SARIS: So I'm looking up
20 and I'm seeing you, Mr. Bohlken, who was
21 introduced as part of the last panel, so thank

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1 you for coming back to us, the chair of POAG.

2 And our last and final witness on the
3 panel is Mary G. Leary, who is a professor of law
4 at the Catholic University of America in
5 Washington, D.C. You served as a member of our
6 Victims Advisory Group. Thank you very much for
7 your service. Among other things, Professor
8 Leary is a former Assistant U.S. Attorney for the
9 District of Columbia, former policy consultant
10 and Deputy Director, Office of Legal Counsel,
11 National Center for Missing and Exploited
12 Children, and the former Director of the National
13 Center for the Prosecution of Child Abuse.

14 You're probably sick of hearing me say
15 it, but of course. When the red light goes off, I'm
16 polite in the beginning, then I start getting
17 antsy and then I start saying "When." So please
18 keep an eye on that light. And keep your voice
19 up. I mean, I said that last time, but really
20 towards the end, voices dropped again and people
21 can't hear. There's a lot of background noise

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1 here, so please keep your voice up.

2 Ms. Gelber?

3 MS. GELBER: Good afternoon and thank
4 you for the opportunity to discuss the three
5 proposed changes to the child pornography
6 guidelines.

7 Let's start with where we agree. We
8 agree with the proposal to use the vulnerable
9 victim enhancement in cases involving infants and
10 toddlers. For 2G2.2, we agree in concept with
11 the knowing or mens rea element for distribution
12 and we agree in concept that the defendant should
13 know he was receiving a benefit for his
14 distribution.

15 Where we disagree is with respect to
16 the distribution enhancement in the production
17 guideline. There is no circuit split here.

18 For first generation distribution;
19 that is, the first instance when child
20 pornography is shared, the enhancement should not
21 be changed. It should apply broadly to those who

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1 distribute what they produce, even more broadly
2 than enhancements covering redistribution to
3 account for the unique and lifelong wound
4 inflicted on these victims.

5 For the rest, our concerns are not
6 with concept, but with execution. The Department
7 is especially concerned about the proposed change
8 in the language from "if the offense involved" to
9 "if the defendant." Over our objection, courts
10 could interpret this to mean that these
11 enhancements could no longer be based on
12 conspiratorial or group behavior-- conduct the
13 Commission's own report identifies as especially
14 severe.

15 Instead, courts may find that this
16 enhancement would only apply if the defendant
17 personally engaged in the distribution. This
18 would substantially restrict the scope of these
19 enhancements far beyond what is called for to
20 resolve the circuit splits and would lead to the
21 unintended consequence of reducing the guidelines

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1 for the worst offenders who seek and join online
2 groups to collectively share child pornography.

3 As for the plus-5 enhancement for
4 distribution for a thing of value, the
5 Commission's proposal would reverse settled
6 precedent. The "for a specific purpose" language
7 would invite litigation as to the application of
8 the enhancement when the defendant had multiple
9 motives for his distribution. The revision would
10 also set the bar so high that this enhancement
11 may not apply to online groups, which often have
12 implicit understandings about the need to share
13 in order to receive benefits.

14 To illustrate this point, consider the
15 following case against seven defendants currently
16 being prosecuted in the Southern District of
17 Indiana: Defendant Domminich Shaw sent an email
18 to 64 individuals, which stated, quote, "I'm
19 pruning out all the dead email addresses and
20 those I never hear from. I know some of you are
21 active and keen to share, and I already have some

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1 of your email addresses saved to keep, but I would
2 like anyone that would like to stay in contact/on
3 my mailing list to reply to this email with
4 something hardcore that I haven't sent you. This
5 part is important. This way I get rid of all the
6 people who are just hovering waiting for
7 something who I never hear from. And of course
8 the reason for the hardcore material is to rule
9 out any of you as cops," end quote.

10 As would be required under the
11 proposal, does this email set forth an agreed
12 person-to-person exchange? What agreements have
13 been made among the 64 recipients with each
14 other? What valuable consideration will anyone
15 receive? There are no explicit promises as to
16 what will happen once the others send the
17 hardcore material. The specific purpose of the
18 distribution according to the writer is to
19 establish identity, not to add to his collection.

20 The proposed revision is so demanding
21 that it is an open question as to whether the

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1 plus-5 enhancement would apply to this group of
2 defendants, who I should add regularly shared
3 child pornography via email and online. This
4 group preferred children age zero to three.
5 Shaw's screen name, Nepi, derives from
6 nepiohilia, or a sexual attraction to infants.
7 One member shared a picture of a sonogram
8 describing his plans to abuse the baby once it
9 was born.

10 The goal of any changes to the
11 guidelines cannot be simply to lower the average
12 guideline range. To be effective and meaningful
13 the guideline must have a proper gradient that
14 treats more serious conduct more seriously. The
15 design of these two proposals, however, could
16 create an inverse gradient so that less serious
17 offenders have a higher guideline range than more
18 serious offenders. This would happen if
19 conspiratorial or group conduct could not be
20 considered when determining if the enhancement
21 should apply.

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1 Further, and if I may just briefly
2 make two more points, it is absolutely critical
3 that at the end of this amendment process the
4 distribution enhancements work for all types of
5 child pornography cases, not just peer-to-peer or
6 P2P cases. Because the majority of the cases
7 today involve P2P technology, it is very easy to
8 only consider those fact patterns. But the
9 Commission should not craft these amendments to
10 suit a particular moment in time or a particular
11 technology.

12 We've already heard reference to the
13 plus-2 for use of computer, which in its day was
14 a useful enhancement. With one or two
15 technological developments, some of which are
16 already underway, the use of P2P networks to
17 circulate child pornography could effectively
18 end. The guideline must be placed to handle
19 whatever comes next.

20 Thank you. I look forward to
21 answering your questions.

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1 CHAIRPERSON SARIS: We're a hot
2 bench, so you'll be able to get time.

3 MR. FULTON: Well, Madam Chair and
4 members of the Commission, thank you for the
5 opportunity. And I think it's important as we
6 start today to look at these proposed amendments
7 to resolve circuit splits through the lens of the
8 experience of this guideline. And as the
9 Commission knows well, this is a guideline that
10 since you reported to Congress last in 2012 has
11 been recognized by many people as not working.

12 In 60 percent of the cases under 2G2.1
13 -- the production guideline -- judges are going
14 below the guidelines. In 66 percent of the cases
15 under 2G2.2 -- the trafficking, which would be
16 the receiving/distribution/possession guideline
17 -- judges are going below the guidelines. That's
18 without government motion. That's just judges
19 going below the guidelines. So the guideline as
20 it sits today isn't working, isn't being
21 accepted.

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1 So we would ask the Commission, as you
2 resolve the splits, to keep that in mind and look
3 at a resolution that simplifies operation of the
4 guidelines, that rather than expanding that
5 divergence between those few cases where the
6 guidelines are being accepted and the vast
7 majority where variances are being given, that it
8 work to bring those bands closer together and
9 down.

10 To talk briefly about the specific
11 proposals, the vulnerable victim enhancement we
12 believe would effectively become another almost
13 automatic enhancement like the computer, like the
14 image enhancement. Under the proposal, it would
15 essentially make age for children of a certain
16 age an automatic enhancement. Age is already
17 factored into the guidelines as an enhancement.
18 And if you look at most cases, the S&M and
19 violence enhancement applies to most instances
20 involving a sex act involving small children. So
21 age is built in a couple of times.

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1 And again, in 2010 the production
2 guideline, judges were going below on 45 percent
3 of the case. In 2014 they were going below in
4 60 percent of the cases, the guidelines being
5 less accepted, not more. In distribution in 2010
6 it was 55 and in 2014 it was 66 percent of the
7 cases where judges were going below. It's
8 getting less accepted, not more. And I think
9 perhaps most telling, in 2014, the number of
10 upward variances and departures was less than
11 three percent. So the experience on the ground
12 is not one that judges are finding the guideline
13 is inadequate to what they're doing. They're
14 finding it's vastly more than adequate.

15 I think, too, when you look at the
16 circuit splits, if you go to the 9th and the 5th
17 Circuit where these two issues come from and you
18 start to break it down at the district court
19 level, you find disparities that already
20 significantly exist in this problem. In the 9th
21 Circuit and the 5th Circuit both, more than 50

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1 percent of the district courts that had dealt
2 with this issue had never applied the vulnerable
3 victim enhancement. The range in the 9th Circuit
4 was 4.4 percent of the cases to 17.8 percent. In
5 the districts that had ever applied it, it was
6 4.9 to 12.7 in the 5th for those districts that
7 had applied it.

8 The point in throwing the numbers out
9 there is simply that this is a problem that is
10 relatively isolated and contained right now, and
11 our concern is that by adopting the proposal on
12 vulnerable victim it metastasizes across the
13 country and throughout the guidelines. We think
14 a better approach would be to stick with the
15 existing language and clarify that age is already
16 accounted for and that vulnerable victims
17 shouldn't pile on top of it.

18 To turn to 2G2.2 on the distribution,
19 I'd like to just briefly talk about that through
20 the lens of the example of a client of my office.
21 I'm going to refer to this individual as Greg.

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1 Greg was at the time we tried his case 20 years
2 old. He had never lived independently from his
3 parents, he had never dated, we learned in the
4 psychosexual evaluation that was ordered for
5 sentencing by the sentencing judge. He had
6 undergone special programming in school and he
7 eventually moved out of that and back into the
8 general school, but he never thrived.

9 He was tried for distribution, receipt
10 and possession. He was acquitted by the jury of
11 distribution and receipt and sentenced only for
12 the possession count. The fight at sentencing
13 came down to whether the 5-Level enhancement or
14 the 2-Level enhancement should apply for
15 peer-to-peer.

16 We had expert testimony in that
17 instance from a forensic computer expert who
18 looked at his download history. He found that
19 Greg had begun using a peer-to-peer network to
20 obtain porn, adult licit porn. Might not be
21 tasteful, but it's legal. From that point in

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1 doing a generalized search for the word "porn,"
2 he found child porn. There were five downloads
3 from FrostWire in a less-than-30-day period where
4 all of the images came onto his computer. Less
5 than one percent of them were child porn.

6 When he was asked by officers about
7 his download history, they said, "Well, isn't
8 there a torrent on your computer?" He said,
9 "What's a torrent?". He was not a sophisticated
10 user. This was a program that we can about more
11 that mandated sharing. He was not a knowing user
12 and he is an example of why it is necessary to
13 have knowledge as a component to distinguish
14 among those people who are purposely
15 distributing, who are more culpable distributors,
16 and the vast majority of folks who are
17 generalized peer-to-peer users. Thank you.

18 CHAIRPERSON SARIS: Thank you.

19 Mr. Bohlken?

20 MR. BOHLKEN: Thank you again,
21 Commission, for having me here today and giving

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1 me the opportunity to speak on this proposed
2 amendment. To take up where my co-panelist left
3 off, we kind of agreed with the knowingly -- and
4 I know I'm going backwards from the amendment,
5 but we agreed with the knowingly requirement
6 being added to the 2G2.1(b)(3) and the
7 2G2.2(b)(3), because we do think that some of the
8 programs that are out there today in the data
9 dumps and stuff like that -- programs are
10 automatically sharing. Whenever they send one
11 of those programs or receive, they're
12 automatically sharing. So we agreed with the
13 knowingly requirement being applied.

14 We also agreed with the proposed
15 change to the (b)(3)(b), which created a higher
16 standard for the SOC for distribution, for the
17 receipt, or expectation of receipt of something
18 of value not for pecuniary gain. We believe that
19 the investigators are generally discovering
20 evidence during their interviews or forensic
21 computer analysis when the defendants are

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1 engaging in some sort of quid pro quo exchanges
2 involving child pornography. And we think this
3 change will help with consistency across the
4 country in reducing the application of (b) (3) (b)
5 enhancements for the use of peer-to-peer file
6 sharing without creating the need for a bright-
7 line rule regarding file-sharing programs and
8 such.

9 On the application note for vulnerable
10 victim being included in all three of the child
11 porn guidelines, when we talked about this, it is
12 currently being applied differently across the
13 country. One circuit rep applies it frequently,
14 and she was in the 5th Circuit. She was aware
15 of it. The rest of the circuit reps very
16 infrequently have ever seen it applied.

17 But we did feel like the application
18 note would bring consistency across the board on
19 how that is applied. And it makes sense in the
20 2G2.1 and the 2G2.6 guidelines given the severity
21 of those offenses. And in the 2G2.1 guideline,

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1 the defendants generally have contact with their
2 victims, they know the age, relative age of the
3 victim, so they have firsthand knowledge.

4 The one addition that we were kind of
5 hung up was with regard to the 2.2, 2G2.2
6 guideline. And we discussed complications with
7 the application note being included there because
8 the defendants in that guideline don't always
9 typically have contact with the individuals that
10 are in the images.

11 Secondly, the possession. Defendants
12 often get large volumes of images in what are
13 called data dumps containing a wide variety of
14 images or videos for which they're accountable,
15 and they may not even have requested that age
16 group or even viewed the contents of all the
17 different images that are on that file.

18 And thirdly, there's cases where
19 evidence reflects that possession -- defendants
20 have actively sought the actual toddler or infant
21 on the images. And we believe those are the

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1 people that should be more targeted by
2 this -- using the Chapter 3 enhancement in
3 addition to the age enhancement within the
4 guideline.

5 We discussed the terms that were used
6 in the proposed -- the synopsis of the proposed
7 amendments. And instead of using the term
8 "extreme youth" or "small physical size," we
9 thought the more specific term that was used in
10 the synopsis of the proposed amendment -- that
11 being "infant" or "toddler," while still not
12 perfect, was a better use. Using those terms was
13 better than the "extreme youth" and "physical
14 size." Thank you.

15 CHAIRPERSON SARIS: Thank you.

16 MS. LEARY: Good afternoon, members
17 of the Commission. I'd like to thank you for
18 holding these hearings and for inviting the
19 Victims Advisory Group to share the perspective
20 of victims in what we refer to as "child sexual
21 abuse images," as this Commission knows is the

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1 preferred term and a number of courts are going
2 to that.

3 As to the first point involving
4 unusually young and vulnerable minors, we'll rest
5 on our written testimony as we agree with the
6 proposed changes in that because these children
7 are uniquely unable to defend themselves, report
8 the crime and to even to identify the crime.

9 Turning to the 2-Level distribution
10 enhancement, the Victims Advisory Group strongly
11 opposes the proposed amendment to the guidelines
12 and to insert the term "knowingly" in these
13 provisions. And I should note at this juncture
14 that our objection is to that language in
15 (b) (3) (f) of both 2G2.1 and 2G2.2. In the extent
16 that our written testimony reflected just 2G2.2,
17 I want to be clear that it's to both.

18 We have two main reasons: One is the
19 reality of the peer-to-peer network file sharing
20 as a massive distribution mechanism that requires
21 affirmative participation by offenders. And

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1 two, the proposed amendment also fails to reflect
2 the resulting compounded harm to a victim when
3 peer-to-peer networks are used in the circulation
4 of these images.

5 For purposes of time perhaps it would
6 be just best to refer back to the Commission's
7 own statements in 2012 in their report where it
8 says quite directly that the very existence and
9 purpose of peer-to-peer networks is to share
10 digital content. These offenders choose this way
11 to distribute these images as opposed to other
12 ways of doing so. As a result, victims are more
13 extremely hurt. As a result, these are traded
14 on a massive platform and their images are
15 injected into an electronic stream where they
16 will exist in perpetuity.

17 That attraction of the peer-to-peer
18 networks for offenders is that it offers the best
19 of both worlds: the ability to be a part of a
20 community not only that they can exchange their
21 images, but that they can receive affirmance for

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1 their criminal activities or proclivities. But
2 secondly, they can obtain a large number, a large
3 amount of child abuse images through a
4 centralized system which gives them anonymity and
5 decreased risk. But personal distribution
6 should not be confused with the lack of knowing
7 distribution. And just because it's impersonal
8 does not mean that it is any less damaging to the
9 victims or that it is any less harmful.

10 A second reason to follow the lead of
11 a number of these circuits is that victims'
12 images -- the victims are more severely hurt when
13 they are shared in this peer-to-peer context.
14 The choice to share via peer-to-peer as opposed
15 to some other method is a choice to support a
16 marketplace that demands the production of more
17 images, thus increasing the risk of
18 victimization, and it's the choice to be a part
19 of a community that affirms this value system.

20 This amendment really turns the
21 system -- I would suggest, our sentencing system

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1 on its head. If adopted as proposed, if a
2 defendant were to hand one photograph to the
3 person next to them and say, hey, look at that,
4 it would seemingly apply beneath this knowing
5 standard. However, if a defendant seeks out and
6 joins a large child pornography community for the
7 very purpose of obtaining and sharing massive
8 amounts of child pornography and risking that the
9 victimization will continue for eternity for
10 these victims, that defendant wouldn't
11 necessarily get the enhancement.

12 With regard to the 5-Level
13 distribution enhancement, the Victims Advisory
14 Group also strongly opposes that proposed change.
15 The amendment is far too narrow and it changes
16 the meaning of the guideline and fails to account
17 for the additional harm to the victims as well.
18 The reality is that in the wake of the Internet,
19 the barter system is responsible for much of the
20 trade of child abuse images and is often done
21 with people unknown to the defendant as part of

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1 a larger system. Thus, there is rarely the
2 specific agreement with the terms laid out to the
3 level of detail and the language -- that the
4 language seems to require.

5 Secondly, the proposed amendment
6 requires that the item of value the defendant
7 expects to come from that person, thus it would
8 arguably not apply in an instance where an
9 offender produces images to an individual in
10 order to gain access to a group of child
11 pornography traders because they're not
12 necessarily getting the quid pro quo from that
13 individual with whom they distributed the image.

14 Secondly, when a victim's image is
15 used to obtain other images, the victim suffers
16 additional harm that should be accounted for at
17 sentencing.

18 It's actually a bad -- it's terrible
19 to be a victim of child sex abuse crimes, of
20 course. It's terrible to have that memorialized
21 in eternity. It's terrible and compounding to

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1 have that distributed throughout the world. But
2 it is even -- it is compounded even more when
3 those images are used as currency. And as the
4 District of Massachusetts noted, this is another
5 layer of exploitation felt by the victim because
6 it gives her, quote, "the indelible knowledge
7 that not only will her images be reviewed in
8 perpetuity, but that they will be utilized as
9 currency to further victimize other children."

10 I see my time is expired, so I welcome
11 your questions. Thank you very much.

12 CHAIRPERSON SARIS: Thank you.

13 I was just going to start off with
14 asking the Department of Justice -- see, I've
15 been doing -- I've been a judge for a long time
16 and I get a lot of these cases. And I've never
17 seen it charged as a conspiracy. It's usually
18 an individual distribution or receipt count, so
19 I'm trying to understand your concern that you've
20 articulated that somehow the amendment would
21 interfere with your conspiracy prosecutions.

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1 MS. GELBER: I can't speak to what you
2 may have seen in terms of the prosecutions that
3 are brought in your district, but in my office
4 it's very common for us to bring large conspiracy
5 cases. We most frequently indict these under the
6 child exploitation enterprise statute and we
7 always have several of these cases going at any
8 given time.

9 For example, there was a case
10 you -- on, no, no, it was Nebraska, not the
11 Dakotas. I'm sorry. There was a case --

12 CHAIRPERSON SARIS: No, it's --
13 (Simultaneous speaking.)

14 MR. FULTON: I know it wasn't, because
15 we've never seen a conspiracy.

16 MS. GELBER: It was called -- there
17 was a case prosecuted in the District of
18 Nebraska. There were 28 defendants. Twenty
19 were ultimately identified enough for arrest.
20 Nineteen of them have been convicted. The case
21 I referred to in the Southern District of

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1 Indiana, which is also a conspiracy case against
2 the seven defendants --

3 CHAIRPERSON SARIS: How many would
4 you say there are a year?

5 MS. GELBER: I think we could check
6 that data and get back to you.

7 CHAIRPERSON SARIS: Less than 12?

8 MS. GELBER: I wouldn't want to answer
9 off the top of my head.

10 CHAIRPERSON SARIS: So the question
11 is in the typical case would our -- I understand
12 some -- I'm not -- well, let me just say in your
13 case, in the conspiracy case how does the
14 amendment hurt you? Because you have to have
15 shared intent, right, to be convicted?

16 MS. GELBER: Our concern is that if
17 you change the specific offense characteristic
18 from "if the offense involved" to "if the
19 defendant" that would impact our ability to bring
20 in evidence under relevant conduct under the
21 jointly undertaking criminal enterprise theory.

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1 That's our concern, that if you have 20 or
2 30 -- there was a case in the Western District of
3 Louisiana involving 70 defendants where -- that
4 were all part of a group, that it would focus
5 exclusively on what the individual defendant did
6 and not his role in the larger community.

7 COMMISSIONER BARKOW: I have the same
8 question about this. I don't see how it -- I
9 mean, that's not my intent or how I'm personally
10 just, me speaking for myself, thinking that
11 was -- was this would not change anything related
12 to conspiracy law. It would just change the
13 definition for a particular offender. And then
14 if anyone else was in conspiracy to help achieve
15 that result, they would still be held responsible
16 like they always are under our relevant conduct
17 and jointly undertaken rules.

18 And so I guess I just -- I wasn't sure
19 why you thought the wording change would have
20 that effect just because the particular target
21 crime speaks about what kind of mens rea or

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1 whatnot a defendant needed. That wouldn't change
2 anything about conspiracy mens rea or conspiracy
3 requirements.

4 MS. GELBER: Well, this may be
5 impolitic, and forgive me if it is, but then I
6 don't understand the point of changing it from
7 "if the offense involved" to "if the defendant."
8 I assume by proposing that change that it's meant
9 to change something.

10 COMMISSIONER BARKOW: Well, in a case
11 where there was an individual being prosecuted
12 who's not part of a conspiracy you'd have to show
13 that that person had knowledge, but you wouldn't
14 change if there was someone else who wanted to
15 also further that crime by taking part in the
16 activity. I mean, that was my understanding, and
17 maybe I'm misunderstanding what -- how the
18 circuit splits developed in these cases, but in
19 an individual prosecution wouldn't it change the
20 law in those cases?

21 MS. GELBER: I don't follow your

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1 question. I'm sorry. I got lost in it.

2 COMMISSIONER BARKOW: Well, you were
3 saying it's a meaningless -- what we've done here
4 is meaningless.

5 MS. GELBER: No, no, no. I --

6 (Simultaneous speaking.)

7 MS. GELBER: So, let me be clear. I'm
8 just talking about the change of the focus from
9 the offense to the defendant.

10 COMMISSIONER BARKOW: Right, so this
11 is in 2G2.1.

12 MS. GELBER: This is for all of the --

13 COMMISSIONER BARKOW: For all of
14 them?

15 MS. GELBER: Yes.

16 COMMISSIONER BARKOW: So wouldn't it
17 be changing -- or clarifying, I guess is maybe
18 the better way to put it, in jurisdictions that
19 were confused about what it requires, that you'd
20 have to show you had a defendant who knowingly
21 distributed. And let's say that the only person

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1 being charged was that defendant. From now on
2 it would put the burden on the government to show
3 that the defendant knew, for example --

4 MS. GELBER: Right.

5 COMMISSIONER BARKOW: -- this was a
6 program that distributed. So that would be the
7 change.

8 MS. GELBER: Okay.

9 COMMISSIONER BARKOW: But it wouldn't
10 change anything that had to do with whether or
11 not there was a conspiracy around that particular
12 defendant engaging. So let's say this defendant
13 said -- and three of his friends, they say we'd
14 love to help you. We know we're going to
15 distribute this.

16 MS. GELBER: Right.

17 COMMISSIONER BARKOW: How can we help
18 you? It wouldn't change anything about that
19 scenario.

20 MS. GELBER: I think it wouldn't
21 intend to make that change, but as we say in our

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1 comments, we fear that it is -- it makes it
2 vulnerable to such an interpretation. That's why
3 we agree that the distribution enhancements
4 should be changed to incorporate a mens rea
5 element. We propose doing that by adding it to
6 the definition of distribution in the application
7 notes so it's clear that anyone -- that any
8 distribution has to be done knowingly. And we
9 propose that as an alternative because then it
10 doesn't create this question as to whether the
11 scope of conduct has changed. So our
12 counterproposal we think achieves the goal of
13 the -- and it resolves the circuit split without
14 introducing this potential vulnerability.

15 COMMISSIONER PRYOR: But those
16 jurisdictions weren't necessarily confused.

17 COMMISSIONER BARKOW: Right. Right.
18 They were --

19 COMMISSIONER PRYOR: They were
20 just --

21 COMMISSIONER BARKOW: -- following --

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1

2 COMMISSIONER PRYOR: -- reading the
3 plain text --

4 COMMISSIONER BARKOW: Yes. Exactly.

5 COMMISSIONER PRYOR: -- of the
6 guidelines.

7 COMMISSIONER BARKOW: Correct. To
8 clarify what the -- yes.

9 COMMISSIONER PRYOR: I think that
10 someone from one of those jurisdictions might
11 even support the clarification.

12 MS. GELBER: Well, I mean, if you look
13 at the cases where the -- that found a strict
14 liability application, they said, well, the
15 guideline doesn't say it's required. So I mean,
16 that -- so if you add it in, it takes care of it.

17 COMMISSIONER FRIEDRICH: So you agree
18 there should be a mens rea. You're just worried
19 that courts are going to improperly apply this
20 guideline if we draft it the way we've proposed?

21 MS. GELBER: I don't --

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1 (Simultaneous speaking.)

2 COMMISSIONER FRIEDRICH: -- your
3 approach better, but substantively you're on the
4 same page?

5 MS. GELBER: Yes, as I said, we agree
6 in concept, but not in execution. We think our
7 proposal -- and we actually offer two. One is
8 to add it to the definition of distribution in
9 the application note. And the other is to add
10 "knowing" or "reckless" to the introductory
11 language to the specific offense characteristic,
12 that this accomplishes the goal without
13 introducing the litigation vulnerability that
14 we've identified.

15 CHAIRPERSON SARIS: I like the
16 proposal, or at least to think about the proposal
17 adding "reckless." I was wondering if anyone
18 else wanted to comment on that. Yes?

19 MR. FULTON: I certainly would, Madam
20 Chairman. I mean, I think it becomes very
21 important to some degree to get down in the weeds

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1 on this because when we talk about how child porn
2 is moving right now and how it is being obtained,
3 I mean, we say peer-to-peer as though that is one
4 monolithic thing. And it's 74 percent of the
5 receipt cases. It's 85 percent of the
6 distribution cases. It is how child porn is
7 moving, period.

8 But within that realm, I mean, there
9 are very different levels of users. There are
10 peer-to-peer networks that are moderated, that
11 are user-protected where you have to obtain
12 admission, where you purposely seek it out, you
13 ask to be let in and the keeper of the club lets
14 you in.

15 There are also P2P networks like
16 FrostWire, LimeWire -- and Ares that we talked
17 about that was used in my client's case -- where
18 there is no they to let you in. It is an
19 open-source program out there that has again
20 licit uses. There are totally licit music files
21 on there, there are video files on there that are

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1 licit, there are licit adult porn files that are
2 on there. And there's also child porn.

3 There are people who go onto those
4 peer-to-peer networks and search terms like
5 "pre-teen hardcore." They are looking for a very
6 specific thing. There are also people who go on
7 there and search porn. I would analogize it to
8 the very homespun example if I walk into the
9 grocery store and say I want a high fiber muesli
10 to my grocer, or I say I want cereal. I'm casting
11 a very different net.

12 And our point on this is if you don't
13 interject knowingly in mens rea in this, this net
14 just sweeps up everyone because Greg, as an
15 example again, searched the term "porn" and he
16 got 167,000 files. And that is not an isolated
17 example. I think --

18 CHAIRPERSON SARIS: So you're saying
19 that would be the difference between "knowing"
20 and "reckless." He didn't know he was going to
21 get the child porn. So if we had "knowing," you

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1 wouldn't be attributed to it. You said
2 "reckless." You should have known that if you
3 put in "porn," you were going to pick up the
4 kiddie porn. Is that --

5 MR. FULTON: What I think I'm saying,
6 Madam Chairman, is that to draw a meaningful
7 distinction among the levels of culpability on
8 this front you should really think about three
9 groups of people. The people who are doing what
10 I think of as a 5-Level enhancement, the old first
11 year contracts, bargained for exchange. I offer
12 you porn or ask for porn. I give you some
13 valuable consideration back. And that's five
14 levels.

15 The 2-Level people who are knowingly
16 pushing porn out into the world either because
17 they've produced an image and shove it out or
18 because they knowingly enter a peer-to-peer to
19 share -- which again, remember, you have to know
20 how the peer-to-peer network works. If you use
21 FrostWire like our client did, there is a nine

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1 window -- not just clicks, nine windows you have
2 to go through to disable that program's
3 shared -- when you set it up, it sets up a shared
4 file and automatically downloads the image into
5 the shared file. Some programs automatically
6 upload including partial images, meaning you can
7 be distributing child porn before you have a
8 complete child porn file or know you do.

9 And then there are the people like
10 Greg who I would say are unsophisticated users
11 who ultimately do move child porn back out
12 distributing because of how the program works,
13 but they're not intending to. And our concern
14 with "reckless" is you still sweep those people
15 up.

16 So we think you should have three
17 bands of culpability: the people who
18 are -- bargain for exchange, the people who are
19 knowingly pushing it and the people who are
20 getting swept up into that because of how that
21 system works. How you smith that language rests

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1 with you, but I think that's where the bands lie.

2 CHAIRPERSON SARIS: The first time
3 ever I heard about the situation where some
4 people are bargaining for faster speeds -- it's
5 whether that should be considered something for
6 value. In other words, you agree for the
7 distribution and exchange for a faster download.
8 Is that it?

9 So how frequent is that? Is that a
10 serious concern for us to think about and how we
11 word this?

12 MS. GELBER: Well, I think it's a
13 little bit difficult to assess how frequent it is
14 because there's a circuit split. So we don't
15 know in the circuits whether it -- where they
16 don't require specific evidence of knowledge,
17 it's hard to capture how many cases -- this
18 evidence isn't presented in those circuits
19 because it's not necessary to do so.

20 What I would say with respect to
21 faster download speeds, we would urge the

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1 Commission not to reverse the settled precedent
2 in this area. And it's very easy to think, oh,
3 you know, faster downloads speeds, like why
4 should we account for that, but I think it's
5 important to finish the sentence. It's faster
6 download speeds in order to obtain more child
7 pornography more quickly. Faster download
8 speeds is a tool of the crime that augments the
9 extent to which that crime is committed. It's
10 like buying more ammunition.

11 So it's not just some sort of like
12 ancillary benefit, like my computer is going to
13 run faster. It is intimately connected to the
14 very commission of the crime. And that's why
15 it's entirely appropriate to leave the settled
16 precedent in place, that in cases where there's
17 evidence that the defendant knew that by
18 distributing he would receive that benefit.

19 VICE CHAIRMAN BREYER: But I
20 wonder -- I was intrigued by your remark about
21 making sure that we -- whatever we do we take

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1 into account that technology can change. And you
2 cited as an example the enhancement, as I
3 understood your testimony, for use of a computer,
4 which is the two-point enhancement.

5 So is it your -- is it the Justice
6 Department's position that we ought to do
7 something about that?

8 MS. GELBER: Well, yes. I mean, the
9 Department is on -- you mean with respect to use
10 of computer?

11 VICE CHAIRMAN BREYER: Right.

12 MS. GELBER: Yes.

13 VICE CHAIRMAN BREYER: Since it's
14 clearly the heartland of cases.

15 MS. GELBER: Yes, the Department is
16 on record on that. Following the Commission's
17 report in 2012, the Department issued a letter,
18 a written response to it and in that outlines a
19 number of changes that we recommend to the
20 guidelines in one of them. Even though the
21 Commission did account for the fact that that

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1 would apply all the time by lowering the base
2 offense level, it's just -- it's kind of like a
3 human appendix and it's -- there are more
4 meaningful --

5 VICE CHAIRMAN BREYER: Of course I
6 would refer example. I just saw that there's
7 proposal for Google in San Francisco to install
8 the highest speed free --

9 MS. GELBER: Yes.

10 VICE CHAIRMAN BREYER: -- Internet
11 connections and put in a whole new fiber and so
12 forth and give it to everybody in the city. So
13 I just have to wonder when we start marrying
14 criminal enhancements to changes of technology
15 whether we're just going to walk ourselves into
16 another situation of where it's -- in a year, two
17 years, it's going to be totally inappropriate.

18 MS. GELBER: I absolutely agree. I
19 absolutely agree with that, as I said in my
20 opening statement. So that is a big concern. If
21 you start talking about -- and that's, frankly,

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1 one of the reasons why we respectfully disagree
2 with the suggestion to include a bright line rule
3 that courts cannot consider the use of a
4 peer-to-peer program in deciding whether these
5 enhancements should apply.

6 Peer-to-peer programs, you know,
7 there are many different kinds. They have many
8 different features. They're changing every day.
9 It is a piece of evidence and the courts should
10 be left to assign whatever value and make any
11 interpretation from that evidence that they deem
12 appropriate.

13 But making a statement about the
14 evidentiary value of peer-to-peer programs when
15 you don't know what they're going to look like
16 tomorrow I think could be quite a mistake.

17 CHAIRPERSON SARIS: Ms. Leary?

18 MS. LEARY: Thank you. Just a
19 reference to the analogy about buying the cereal
20 or whatever, I think a better analogy might be to
21 look at the distributor. And as the court did

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1 in United States v. Shaffer talked about the
2 self-serve gas station. And there we say just
3 because the distributor doesn't know the exact
4 person or doesn't know the exact transaction
5 doesn't mean any less they're not distributing
6 gasoline.

7 And this is really a time framing
8 issue with regard to peer-to-peer. If we focus
9 on that very moment and getting down into the
10 weeds, there may be issues about that specific
11 transaction, but if we open up the time framing,
12 at some point these offenders decide: I want to
13 get my child pornography and I therefore am going
14 to download this and I'm going to go through these
15 nine things or not. But when we open up that
16 time frame, then we see this is a series of
17 affirmative decisions on the part of these
18 offenders. And while we would prefer not
19 reckless or knowing, reckless is certainly better
20 than knowing, because knowing is really
21 artificial.

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1 CHAIRPERSON SARIS: Go ahead.

2 MR. FULTON: May I just briefly, Madam
3 Chairman? That's not right. I mean, if you look
4 at how the peer-to-peer are working, you have to
5 opt out in many of these instances, many of the
6 programs. If you've opted out when you reboot
7 or start the computer, they change your
8 preferences back to the sharing mode. You see
9 that by looking at the fact in our comments. Ivy
10 League institutions full of reasonably smart
11 folks are, in their IT protocols, telling people
12 about this risk of P2P programs because you don't
13 know it. So to say that people are consciously
14 choosing just because they use a P2P is not right.
15 There are people --

16 (Simultaneous speaking.)

17 MS. GELBER: That's not what I said.

18 MS. LEARY: And we can get into a
19 factual dispute. I would defer to this
20 Commission's 2012 report which discusses a
21 different approach. Thank you.

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1 COMMISSIONER BARKOW: Can I ask one
2 quick -- we want to develop a language of the
3 extra-vulnerable victims, so you had suggested,
4 Mr. Bohlken, that we might be better off saying
5 "infant" and "toddler." And I was just curious
6 if the rest of the panelists had a view on the
7 phrasing of that particular provision. Right now
8 I don't know how -- we phrase it as if the minor's
9 extreme youth and small physical size made the
10 minor an especially vulnerable compared to most
11 minors under the age of 12. And the defendant
12 knew or should have known this applied. And the
13 question is would that be better stated as
14 "infants and toddlers."

15 MS. LEARY: The position of the
16 Victims Advisory Group, and we agree with what
17 Mr. Bohlken very wisely said, none of these is
18 perfect. I think we would certainly agree with
19 that. But from our perspective I think the
20 proposed language would be a little bit superior.
21 And the question is this: Is this a relevant

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1 consideration for a trial . . . for a sentencing
2 judge to look at the seriousness of the offense
3 and just punishment/adequate deterrence? And I
4 think the broader language would more give the
5 sentencing court that flexibility to be able to
6 do it rather than getting into a debate about
7 what's an infant, what's a toddler?

8 CHAIRPERSON SARIS: I worry about it
9 a little bit though. If you say -- every
10 seven-year-old is little, I mean, on the scale of
11 things. So how little is little before you add
12 it? Whereas infant and toddler, I mean, it's
13 horrifying they're taking kids who can't really
14 talk or complain or protest. So infant and
15 toddler catches it.

16 We originally started off -- we've
17 gone back and forth on it, so we were sort of
18 thinking that we weren't sure what the right
19 wording was.

20 So what do you think?

21 MS. GELBER: I think I could make

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1 arguments that there is definitely something
2 appealing to infants and toddlers because it's
3 plain language, it's words that everyone
4 understands. My one concern with that is that
5 sometimes the images are of such close-up that
6 you -- all you really see are -- like for example
7 are hips and you have to make a relative
8 comparison of the size of the child relative to
9 the adult. So in that situation having something
10 like "extremely small size" would provide a
11 little bit more flexibility in those scenarios.

12 The one thing we would recommend with
13 respect to 3A1.1, just adding something that says
14 "except as otherwise provided in the guidelines"
15 so it's clear that the two -- in the application
16 note so that it's clear that everything should be
17 read together.

18 CHAIRPERSON SARIS: Thank you.

19 COMMISSIONER FRIEDRICH: So for the
20 three of you who support the infant/toddler
21 change, do you all agree that if the Commission's

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1 going to do it, it's got to do more than just
2 solve the circuit conflict, that we need to make
3 this correction in the production and the child
4 exploitation guidelines as well?

5 Mr. Bohlken, you say you have concerns
6 about it in the distribution because sometimes
7 these come en masse and you feel more comfortable
8 if the defendant actually knew that -- in that
9 bulk that they download -- actually knew about
10 the infant and toddler. Is that -- did I
11 understand you right?

12 MR. BOHLKEN: Yes, but for
13 consistency we did agree that the application
14 note should be in all three guidelines. But we
15 did have additional discussions in the 2G2.2
16 guideline because -- for some of the same reasons
17 Mr. Fulton was talking about, the different types
18 of offender.

19 CHAIRPERSON SARIS: We said that they
20 knew they were infants and toddlers in there.

21 COMMISSIONER FRIEDRICH: But not for

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1 production and exploitation?

2 MR. BOHLKEN: Right.

3 COMMISSIONER FRIEDRICH: You're
4 talking about for distribution?

5 MR. BOHLKEN: Right. Right.

6 COMMISSIONER FRIEDRICH: But my
7 question is if we're going to do this, and I'm
8 not sure we should, but if we're going to do this,
9 are we better not -- are we better off just
10 addressing this in 3A1.1? And I haven't thought
11 of all the possibilities, but the initial
12 Commission who created this guideline made pretty
13 clear that if you've got an age enhancement, you
14 shouldn't have the vulnerable victim enhancement.
15 Now maybe they didn't foresee that child
16 pornography offenses and child exploitation
17 offenses one day would involve infants and
18 toddlers, but there's a pretty clear policy
19 decision in 3A1.1. And I just throw out -- I
20 mean, is it time to revisit that? If we're going
21 to -- we're doing more than solve this circuit

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1 conflict to do this is a logical way -- do we
2 need to go so far as look at that across the
3 guidelines if we're really going to delve into
4 this?

5 MS. GELBER: Well, I think what we
6 would say is what matters to us most is outcome.
7 So we support the -- some sort of recognition in
8 the guidelines in cases where the defendant knows
9 or should have known it involves infant and
10 toddlers. It's important to keep in mind that
11 having a mens rea element here distinguishes this
12 from the other content enhancements. So the
13 prepubescent and S&M can be strict liability.
14 This one would not be. It would therefore not
15 apply in cases where there was a large data dump
16 unless there was some sort of evidence that the
17 defendant was aware of that specific image.

18 So we are more interested in outcome
19 on this one than in structure, so if it's an
20 additional plus-2 in the SOC so it doesn't invite
21 these questions about the policy of the

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1 vulnerable victim enhancement, we would defer to
2 you on that one as long as the concept is
3 reflected somewhere.

4 MR. BOHLKEN: One more point I wanted
5 to make about the application note being in all
6 three guidelines, we kind of looked at this and
7 talked about the computer enhancement and how
8 when that was first written in it wasn't
9 applicable in every single case and now it's
10 become -- it's applied in every single case. I
11 can remember the days when child porn defendants
12 actually got the stuff in the mail box. But
13 we've moved way past that. We believe that
14 this -- with this application note that it's
15 going to be applied in almost every case now. So
16 it's going to make the guideline ranges go even
17 higher. And the circuits that vary or depart as
18 a practice are going to continue to do that. And
19 the circuits --

20 VICE CHAIRMAN BREYER: There you're
21 going to have a wider non-compliance.

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1 MR. BOHLKEN: Exactly. I mean, there
2 could be -- you could maybe distinguish, because
3 I know some of the circuit split was the age,
4 taking the age alone doesn't necessarily identify
5 like super vulnerable victims, the toddlers or
6 something. I had thought that there could
7 also -- an alternative could be maybe do a 4-Level
8 increase for a toddler or an infant instead of
9 a -- just someone under the age of 12.

10 COMMISSIONER FRIEDRICH: Mr. Bohlken,
11 do you ever find courts avoid this issue by simply
12 saying I'm going to depart in this case?

13 MR. BOHLKEN: Yes.

14 COMMISSIONER FRIEDRICH: Based on the
15 infant/toddler? Have you seen that? Is that
16 happening, or is it always that they engage on
17 this particular guideline?

18 MR. BOHLKEN: I think from my personal
19 experience with this guideline that I -- the
20 trouble I think a lot of courts have is that the
21 guideline ranges have become way too high. And

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1 I also have seen firsthand that judges kind of
2 like to look at hands-on sex offenses and child
3 porn sex offenses and see which ones are being
4 punished more severely by the guideline.

5 COMMISSIONER FRIEDRICH: For example,
6 in a production case where it might have actually
7 involved a toddler or infant the defendant
8 interacted with, in your experience is that the
9 kind of case where a judge is going to depart
10 upwards despite the lack of application for
11 vulnerable victim enhancement?

12 MR. BOHLKEN: Currently?

13 COMMISSIONER FRIEDRICH: Yes.

14 MR. BOHLKEN: Currently I haven't
15 seen an upward departure or an upward variance in
16 a child porn case.

17 COMMISSIONER FRIEDRICH: No --

18 (Simultaneous speaking.)

19 MR. BOHLKEN: I would say they would
20 sentence within the guideline range.

21 COMMISSIONER FRIEDRICH: Or

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1 exploitation? I mean --

2 MR. BOHLKEN: I would say within
3 guideline range for something like that that has
4 an aggravated factor like there were several
5 toddlers or infants involved. I would say where
6 that's not a typical case where they go down or
7 very downward. It's a within-guideline range
8 sentence.

9 CHAIRPERSON SARIS: All right. So
10 anything else anybody has questions?

11 (No audible response.)

12 CHAIRPERSON SARIS: Thank you very
13 much. Very interesting and important area.
14 Thank you.

15 We're going to adjourn. That's it.

16 (Whereupon, the above-entitled matter
17 went off the record at 2:49 p.m.)

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