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UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING

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FEBRUARY 21, 2006

8

SAN ANTONIO, TEXAS

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15 COMMISSIONERS:

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16

William K. Sessions

John R. Steer

17

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Ruben Castillo

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1 (Proceedings began at 9:32 a.m.)

2 COMMISSIONER HINOJOSA: I would like to  
3 welcome everyone to this public hearing. It is one of  
4 those cases where the commission has actually decided to  
5 go to the areas that are affected the most by what we  
6 do.

7 I would like to start off by introducing  
8 the members of the commission. We have Commissioner  
9 Beryl Howell, who is in private practice in  
10 Washington D.C. and actually has a background of having  
11 worked in the U.S. Attorney's Office as well as having  
12 worked as chief counsel for Senator Lahey.

13 We have Vice Chair Ruben Castillo, who is  
14 a United States District Judge in Chicago and has been  
15 on the commission now for about six, seven years maybe.

16 And we have Vice Chair John Steer, who is  
17 on the -- has been with the commission practically since  
18 it started. Both came in with Judge Wilkins when the  
19 commission was first started almost 20 years ago and has  
20 held several positions there, including having been the  
21 general counsel of the commission and is now a full-time  
22 member of the commission.

23 Vice Chair William Sessions, who is a  
24 United States district judge in Vermont and has also  
25 been on the commission for about six or seven years.

1                   And then we have Commissioner Michael  
2 Horowitz, who is also in private practice in  
3 Washington D.C. and, prior to that, was with the  
4 Department of Justice.

5                   And we have ex officio member here,  
6 Commissioner Michael Elston, who is the Department of  
7 Justice representative on the Commission.

8                   On behalf of the Commission, I would like  
9 to thank everyone for your presence here, especially the  
10 judges of the Western District of Texas as well as my  
11 Chief Judge, Hayden Head, who is here present from the  
12 Southern District of Texas.

13                   I will say that it is interesting to note  
14 that the Southern District of Texas and the Western  
15 District of Texas have probably the largest number of  
16 cases with regards to this issue than any other  
17 district. As a matter of fact, it is interesting to  
18 note that the Southern District of Texas this past year  
19 has sentenced more -- the judges in that district have  
20 sentenced more people than the judges in any other  
21 circuit except the 9th circuit.

22                   And the same holds true with regards to  
23 the Western District of Texas. They have sentenced more  
24 people than most circuits. And so it is amazing that  
25 these individual districts have the type of dockets that

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1 they do have.

2 I especially want to thank Judge Ludlum,  
3 Briones, and Rodriguez for being here this morning for  
4 the Western District and giving us their presentations,  
5 and we appreciate it. As a matter of fact, this all  
6 partially came about, although, about the Commission  
7 itself had been talking about this for a while with  
8 regards to going down to the Courts that handle most of  
9 these cases. It has been an important aspect of what we  
10 have considered is vital to our carrying out our  
11 responsibilities.

12 It's no secret -- and, certainly, I have  
13 been a product of this -- that those of us who practice  
14 in this field from the standpoint of the case load that  
15 we handle have often being critical of the work with  
16 regards to how we handle some of these cases and what we  
17 have to go through in order to make these  
18 determinations. However, I will say that my perspective  
19 has changed now that I'm actually on the Commission.

20 But we look forward to a frank discussion  
21 with the judges, with the practitioners in this area,  
22 with the probation officers, with the circuit judges,  
23 because we know how much of a role it plays in what we  
24 do every single day.

25 We actually had a round table discussion

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1 when we had judges and probation officers and  
2 practitioners, including prosecutors, come to Washington  
3 and spend an entire day with our staff explaining what  
4 the thoughts are and what the views are and  
5 recommendations from people in the different parts of  
6 the country with regards to this particular field.

7                   At that point, when we made -- and for  
8 those of us who know Walter Smith, you can imagine what  
9 his reaction was. Basically, he told our staff  
10 director: Why don't y'all come down here where people  
11 are really doing the work and y'all can learn more about  
12 it. And here we are.

13                   So, again, I thank you for taking your  
14 time to make these presentations. We have put out for  
15 discussion some suggested changes with regards to the  
16 immigration guidelines. As many of you know, the  
17 Commission itself four or five years ago made some  
18 changes. Those were the product of some discussion and  
19 some input from people across the country with regards  
20 to, especially, the illegal entry cases. Transporting  
21 alien and illegal entry continue to be an important  
22 discussion in Congress, as we all know.

23                   We're actually very fortunate. We  
24 actually have someone here from Congressman Lamar  
25 Smith's office, who will be here with us all day long.

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1 And we appreciate their presence and their interest.  
2 Congress Smith has, for many years, a serious interest  
3 in immigration, and we appreciate their interest with  
4 regards to our work and the judge's work in this field.

5                   What we are looking for is input from  
6 everyone who will make statements to us today and  
7 possibly you making yourselves available for some  
8 questions and answers. We want this to be a frank  
9 discussion, no holds barred. If it means criticizing  
10 the Commission or the Circuit Courts or Congress or  
11 whatever you need to do or, if you have any other  
12 suggestions with regards to the suggested amendments or,  
13 even if they're not suggested as to what you think  
14 should be changed or considered here in this field, it  
15 would be very helpful.

16                   We also, if you would like to address any  
17 of the other suggested changes -- we are certainly  
18 working on firearms, steroids, and terrorism, among  
19 other subjects -- you-all are welcome to make any  
20 comments with regards to anything else that is on our  
21 priority's list that has been put up for public comment  
22 with regards to suggested changes. And we will start  
23 with our first panel. Is Joe Ed going to join you-all  
24 up here?

25                   Joe Ed actually brings experience from

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1 the two districts, having been with the Southern  
2 District and a long time with the United States  
3 Probation Office. But I will start with Judge Briones.  
4 And if you would each like to make some kind of brief  
5 remark at the start, an opening statement on your part,  
6 Judge Briones, we appreciate it very much.

7                   Judge David Briones is a United States  
8 District Judge in El Paso. Judge Alia Moses Ludlum is  
9 the United States District Judge in Del Rio. I think  
10 you're the first full-time judge there, right?

11                   HONORABLE LUDLUM: That's correct.

12                   COMMISSIONER HINOJOSA: And Judge Xavier  
13 Rodriguez is a United States District Judge in  
14 San Antonio. And Joe Ed Canales is actually the Chief  
15 United States Probation Officer for the Western District  
16 of Texas. Judge Briones?

17 JUDICIAL PERSPECTIVE FROM THE WESTERN DISTRICT OF TEXAS

18                   HONORABLE BRIONES: Hello, Judge  
19 Hinojosa. It is my pleasure to be here. Members of the  
20 Commission and my fellow judges and Joe Ed. I really  
21 don't have any prepared remarks because Xavier was going  
22 to speak for us. We're mostly interested in any  
23 questions you may have. We have all looked through the  
24 options, and we have -- I think you're going to hear  
25 some remarks from us about what we prefer. But I think,

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1 actually, some of them prefer some of them more than  
2 others and not necessarily just one. But we'll go in to  
3 each one of the proposals that you are looking at.

4 For the present time, Judge Rodriguez is  
5 going to speak for us

6 HONORABLE RODRIGUEZ: This will be the  
7 first time that a junior judge gets to speak before.

8 COMMISSIONER HINOJOSA: I try my best to  
9 call people by seniority here.

10 HONORABLE RODRIGUEZ: I think there's a  
11 reason the junior judge got put here. But, Judge  
12 Hinojosa, thank you. Members of the Commission, welcome  
13 to the Western District of Texas, San Antonio Division.  
14 On behalf of Chief Judge Walter Smith, I know he would  
15 have liked to have been here, but he extends his  
16 welcomes as well.

17 As the Commission's aware, since fiscal  
18 year 2000, more than 65 percent of all immigration cases  
19 sentenced come from five border districts: Arizona,  
20 California Southern, New Mexico, Texas Southern, and  
21 Texas Western. And the presence of David Briones here  
22 from Texas Western, most of our cases come from the El  
23 Paso Division.

24 And, in addition, in fiscal year 2004,  
25 these five border districts were responsible for 34

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1 percent of the total criminal felony case filings. For  
2 your information, during calendar year 2005, our  
3 district disposed of 2029 illegal reentry cases, 86  
4 improper entry cases, and 678 smuggling or transporting  
5 cases. Our district did not process any violations  
6 under 1327.

7                   But with that, rather than read prepared  
8 remarks, I think our time might be more productive, if  
9 you have any questions or you want us to tackle one by  
10 one the various proposed amendments. It's your  
11 pleasure, Mr. Chairman.

12                   COMMISSIONER HINOJOSA: Judge Ludlum, did  
13 you want to say something?

14                   HONORABLE LUDLUM: Actually, I was  
15 prepared to answer questions, and I have notes regarding  
16 the different areas, if anybody had any questions. My  
17 docket is half of the El Paso docket, but we mirror the  
18 El Paso docket. We have mostly immigration cases and  
19 cases in the Del Rio Division.

20                   We too have not seen 1327, and I don't  
21 anticipate seeing any of those mainly because of the  
22 mental state requirement of the smuggler having to know  
23 the status of the illegal alien.

24                   COMMISSIONER HINOJOSA: Well, I guess I  
25 would have some questions with regards to, first of all,

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1 your reaction to the changes that occurred about four or  
2 five years ago on illegal entry as well as the suggested  
3 changes here and then with regards to the transporting  
4 alien cases.

5                   At least from my standpoint, I seem to  
6 think that there is a change with regards to the type of  
7 cases that we're seeing and those types of violations of  
8 the law and whether any of these suggested changes take  
9 care of the changing type of defendant and/or type of  
10 way that the law is being violated in the transporting  
11 alien cases.

12                   HONORABLE LUDLUM: If I remember  
13 correctly, the changes that were made a few years ago to  
14 2L1.2, which had to do with the illegal reentry cases,  
15 was to try to stair step the enhancements so that people  
16 weren't lumped together in terms of the types of  
17 criminal background histories that they had.

18                   I was a magistrate judge at that time,  
19 but I would still here the differences in the different  
20 sentences. I don't know that the changes have had that  
21 effect in practical practice. I'm finding, in terms of  
22 the cases that I see, there are some people that end up  
23 with very high guideline ranges that may be in a very  
24 low criminal history category, whereas some with very  
25 high criminal history categories or criminal histories,

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1 but whose histories didn't count for whatever reason,  
2 end up in lower categories depending on varying factors.

3                   So I'm still seeing a disparity in the  
4 sentences, given the differences in backgrounds and the  
5 types of prior aggravated felonies and crimes of  
6 violence. What I have seen in my court is that the time  
7 spent on sentencings for 1326 has gone up dramatically  
8 just based on the definition of aggravated felony and  
9 definition of crime of violence.

10                   So any way that the guidelines can be  
11 simplified in those areas, while remaining equitable to  
12 the different type of defendants that we see and the  
13 type of backgrounds that they bring, would be most  
14 helpful.

15                   I can spend an hour or two hours debating  
16 what a crime of violence is now. It's incredible. And  
17 so we're spending a lot of time basically having legal  
18 arguments that may or may not have a practical effect on  
19 the outcome of the case.

20                   HONORABLE BRIONES: I agree with  
21 Judge Ludlum. Judge Rodriguez was not here when those  
22 changes were made a few years ago. I -- I look at them  
23 with favor. I think they were good changes. I think  
24 we're due to get some more changes, and I agree with  
25 Judge Ludlum.

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1                   Sometimes when we go in the categorical  
2 approach, I will get stacks like that of previous  
3 judgements, court records, and everything from  
4 probation. And it's a lot of work for them. It's a lot  
5 of work for the Court. I don't mind it. I was telling  
6 the judges this morning, sometimes when we get to the  
7 sentencing, the attorney who made all those objections  
8 will withdraw them in the sentencing because he got the  
9 stack of documents outlining the previous convictions  
10 that his defendant had.

11                   But anything you can do to get us away  
12 from that categorical approach I think will benefit the  
13 Court in many ways. I think it would benefit the Courts  
14 of Appeals, the Probation Department, the defense  
15 attorneys, and probably the prosecutors. You have  
16 outlined some options. Any one of those that takes us  
17 away from the categorical approach, I would favor.

18                   HONORABLE RODRIGUEZ: I can't speak to  
19 the history, but I can speak to what's taking place now  
20 or taking place. And what's taking place, from my  
21 perspective, as a brand new judge, only two and a half  
22 years on the bench, is frankly still confusion. And,  
23 evidently, I'm not alone.

24                   The Chair may recognize this case. We  
25 talked about how we need to get away from the

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1 categorical approach, and I agree with that, and help me  
2 step upon what is a crime of violence. But then we look  
3 to what the Fifth Circuit has done in providing guidance  
4 or lack of guidance to us, the Chair may recognize  
5 U.S. v. Vasquez-Torres, which comes out of his  
6 district.

7                   There the defendant was indicted and  
8 convicted under Texas Penal Code for intentionally,  
9 knowingly, recklessly, or negligently injuring a child.  
10 The indictment charged that he hit a child.  
11 Section 2L1.2 doesn't define as a crime of violence  
12 injury to a child; and the Fifth Circuit concluded, much  
13 to my surprise, that it's not a crime of violence. But  
14 if injury to a child is not a crime of violence, I'm not  
15 sure how we're supposed to interpret this section.

16                   So, frankly, from two perspectives, one  
17 is gathering documents as to what crime the defendant  
18 engaged in, how to fit that into 2L1.2 and then dealing  
19 with the conflicting case law in this area makes this  
20 job very confusing. But I think any of the options, one  
21 through three, would help tremendously.

22                   HONORABLE LUDLUM: And I was also going  
23 to mention, if I remember correctly, the categorical  
24 approach was brought in to say these categories of cases  
25 automatically are crimes of violence, that we didn't

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1 have to look beyond the category of the cases.

2 Well, the case law overlay into this area  
3 has made it to where it's no longer just a categorical  
4 approach as we -- as we used to think of it. It used to  
5 be in the homicide, it was under murder and that was  
6 it. It's a crime of violence. It's gotten much more  
7 complicated due to case law as well. So now we're  
8 spending as much time deciphering the categories and the  
9 type of cases that fall under the categories as we do  
10 under the use or threatened use of violence type of  
11 cases.

12 COMMISSIONER HOWELL: I mean, even if we  
13 took one of the options, one through three, for this, I  
14 mean, I think we're pretty -- we're not going to be able  
15 to get totally away from the categorical approach. And,  
16 also, the legal arguments that are over the -- you know,  
17 the statutory definition of crime of violence is also  
18 something that we're -- we in the Sentencing Commission  
19 can help. You know, we sort of struggle to address  
20 that, at the same time, understanding and appreciating  
21 the limitations of what we can do since, you know, the  
22 statute is the statute.

23 So do I take it that -- you know, I was  
24 very interested in what Judge Rodriguez said, that any  
25 of the options, one through three, were -- were ones

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1 which you thought would be an improvement.

2 HONORABLE RODRIGUEZ: It's an  
3 improvement. It's not a wholesale solution.

4 COMMISSIONER HOWELL: Not a wholesale  
5 solution. And I take it you're speaking for the whole  
6 judge panel?

7 HONORABLE RODRIGUEZ: On that particular  
8 point, yes.

9 COMMISSIONER HOWELL: Okay. All right.

10 HONORABLE RODRIGUEZ: I have to be  
11 careful, 'cause I think there is some disagreements  
12 among, not only the three of us, but others in our  
13 district.

14 COMMISSIONER HOWELL: Are there any  
15 improvements to Options 1 through 3 that we didn't think  
16 of that you might suggest?

17 HONORABLE RODRIGUEZ: Well -- and we  
18 talked about this briefly this morning. I agree that  
19 the approach on one through three, which took away a lot  
20 of the conflicting definitions and contradictory  
21 definitions is helpful. What makes the job difficult by  
22 my proposal here is perhaps we ought to just define  
23 crime of violence as opposed to specific -- my  
24 understanding of the objections, and the federal public  
25 defender was good enough to share their remarks with

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1 me -- their remarks with me a couple of days ago.

2                   The objections that I hear is that, well,  
3 if we use the approach under one through three,  
4 1101(A)43 is over-inclusive, that there are crimes in  
5 there that are not necessarily crimes of violence, such  
6 as tax issues. So it's over-inclusive. Then from the  
7 other end of the spectrum, well, there are other crimes  
8 not included within the definition, so we're missing  
9 out, such as injury to a child.

10                   Perhaps the solution could be that we  
11 just define crime of violence under the guideline, and  
12 the Commission reaches some decision as opposed to just  
13 picking out a particular statute that they think is  
14 all-inclusive and just itemizing offenses. And the  
15 problem I realize with that approach is there will be  
16 some offenses that will be missed, and then you rely on  
17 the judges there to exercise their discretion as to  
18 whether or not an offense was not included in the  
19 definition and we depart upwards based upon that  
20 inadvertent omission. I just toss that out without a  
21 lot of reflection on that point.

22                   COMMISSIONER HINOJOSA: How much do you  
23 think the problem here is related to -- I mean,  
24 obviously, 1101(A)43 is a congressional decision as to  
25 whether an aggravated felony is, and it may include what

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1 some of these theft fraud charges or whatever. But that  
2 is the congressional decision with regard to an  
3 aggravated felony.

4                   The Commission, to some extent, is tied  
5 into this crime of violence definition that's in the  
6 statute itself, which seems to be what has caused the  
7 most concern from the standpoint of 16(A) and 16(B) as  
8 far as the elements of the use of force or threatened  
9 use of force. That is not so much -- although it's  
10 mentioned by the Commission in the application notes,  
11 it's really strictly out of the statute itself.

12                   So the question is, at least in this  
13 circuit, it seems to be that this common-sense approach  
14 with regards to the enumerated offenses has made it  
15 easier to say common sense tells you this is an  
16 aggravated assault. Does that simplify things for us as  
17 judges, and is that something that the Commission should  
18 give serious consideration?

19                   You mentioned injury to a child, for  
20 example. Does your job become easier as far as being  
21 able to define a crime of violence when it's enumerated  
22 as opposed to relying on the statutory definition?

23                   HONORABLE RODRIGUEZ: Well, I guess the  
24 problem is then, on appeal, is my common sense  
25 necessarily affirmed? I guess I would like the comfort

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1 of having something enumerated.

2 COMMISSIONER CASTILLO: So what you are  
3 saying -- and let me just start out by commending all of  
4 you for being here. I know very much what your dockets  
5 are and what it costs you to be here day-wise. I  
6 commend my Chair for having these hearings. Let me also  
7 say, I would hope that this would be the start of a  
8 conversation as opposed to an end. I don't really see  
9 your panel as being 20 minutes to tell us. I would hope  
10 you'd feel free to just send us whatever you have. And  
11 this commission does take anything that you have,  
12 especially all of you who are hearing thousands of  
13 cases, we would take that very seriously.

14 But as I understand it, enumeration from  
15 us would be helpful; is that correct? And do you find  
16 the application notes -- for example, if we in the  
17 application notes adopted our Chair's common-sense  
18 approach, which has been adopted by the Fifth Circuit,  
19 and try to enumerate then what are the aggravated  
20 felonies, would that be helpful?

21 HONORABLE RODRIGUEZ: I'm not sure the  
22 common-sense approach has been adopted by the Fifth  
23 Circuit

24 COMMISSIONER CASTILLO: Well, what if we  
25 made it clear that we're adopting it for all the

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1 circuits? Would that be helpful?

2 HONORABLE RODRIGUEZ: That would be my  
3 personal preference, yes.

4 HONORABLE LUDLUM: One of the things that  
5 I'm finding in the categorical approach is that we're  
6 also now having -- we know which categories are crimes  
7 of violence. The question now becomes: Which state  
8 statutes fall within that category of crimes. And now  
9 we're finding a lot of litigation because 50 states have  
10 50 different ways of alleging aggravated sexual  
11 assault. The question is: Which ones are contemplated  
12 by the categorical approach on 2L1.2 and which ones are  
13 not?

14 So frankly for me, the categorical  
15 approach, which is intended to be the easy, common-sense  
16 approach application, is generating just as much  
17 litigation as the crime of violence section used to.  
18 Because now I'm have to -- I have a case where they  
19 bring in legislative intent from the State. They bring  
20 in statute. They bring in cases interpreting the State  
21 statute, whether it was intended to be a crime of  
22 violence or not. And so now I'm having just as long of  
23 a hearing on that whole aspect.

24 So, for me, the categorical approach may  
25 not help unless we make it clear in the guidelines or

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1 the commentaries that this is a common-sense approach,  
2 that it's just a title of class of cases, and that the  
3 judges are supposed to use their common sense, because,  
4 otherwise, we're getting into a lot of litigation as  
5 well in that, or at least they are in my court.

6 COMMISSIONER SESSIONS: Can I just change  
7 the topic a little bit? Ricardo mentioned that there  
8 may be a change in the kind of person you're seeing  
9 charged with offenses since the -- since when we passed  
10 these changes. I wondered if you see a change in the  
11 kind of defendant who is involved in either alien  
12 smuggling, transporting, or the illegal entry cases from  
13 just a few years ago? For instance is there more  
14 violence at this point? Are there more use of weapons?  
15 Any significant changes?

16 HONORABLE BRIONES: For illegal entrance,  
17 I have not detected any change. I've been there for 11  
18 and a half years and probably get the same kind of  
19 category of illegal aliens coming in as I did when I  
20 first started. That may not mean the same for  
21 Judge Ludlum in Del Rio.

22 As far as the 1324s, I don't really  
23 detect a great deal of change either. We don't usually  
24 get the big loads. Usually, ours are -- I think  
25 Judge Rodriguez may have some stats on that. But the

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1 majority of them are under 20 -- under 24.

2                   However, Judge Ludlum has a different  
3 kind of defendant over in Del Rio where they do have  
4 bigger loads, and she may even have different types of  
5 defendants than 1326s. But, quite frankly, since I've  
6 been there, I think I've seen just about the same thing  
7 as far as 1326s and about the same in 1324s.

8                   HONORABLE LUDLUM. With regard to the  
9 1324 cases, I'm not seeing more use of firearms, but I  
10 am seeing more of reckless endangerment. I see more  
11 aliens in trunks. I see more aliens in toolboxes, in  
12 bed of trucks covered with all sorts of items. The  
13 transporters now think that if they have the alien half  
14 in the trunk and half in the backseat, that somehow gets  
15 away from reckless endangerment.

16                   Of course, that last Fifth Circuit case  
17 that came out said that removing the seat of the back of  
18 a van and stacking them like cordwood was not reckless  
19 endangerment. That argument has been coming up a little  
20 bit more in terms of all these different areas.

21                   So I see more of the reckless  
22 endangerment in the types of vehicles, in types of where  
23 the aliens are kept, and seeing more bailouts, the  
24 drivers jumping out leaving the vehicles in drive and  
25 going down the road without a driver. I'm seeing more

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1 of that type of offense.

2 Now, the number of aliens, they're still  
3 going to under 25. I've only had one case that had over  
4 100, but everything else has been under 25. I'm seeing  
5 more professionals in the guides -- not in the drivers,  
6 but in the guides and in the ones that are running the  
7 organizations. They're still picking one of the aliens  
8 out of the group to be the driver.

9 COMMISSIONER CASTILLO: And is it your  
10 view that these professionals are aware of guideline  
11 changes?

12 HONORABLE LUDLUM: They're aware of all  
13 kinds of changes. They know what the border patrol is  
14 looking for in terms of the reasons for the stop and,  
15 you know, the for gain now. For some reason, that was a  
16 big issue when I first arrived at the district bench.  
17 For gain now has almost become a very minimal manner.  
18 Now it's reckless endangerment.

19 COMMISSIONER HINOJOSA: And do y'all see  
20 an increase in the number of transporting minors?

21 HONORABLE LUDLUM: We see all sorts.

22 COMMISSIONER HINOJOSA: And that being  
23 the case, with regards to injury and death resulting or  
24 transporting minors, do you think that's something that  
25 the Commission should consider as an enhancement or not?

1                   HONORABLE LUDLUM:  Should.  The one  
2  thing -- the option in terms of minors, the option that  
3  I would prefer would be the one that didn't have any  
4  categories depending on age.  That it would just say  
5  that any minor under the age of 17, 18, whatever our  
6  majority age is.  Otherwise, you're just creating  
7  another point of litigation, trying to figure out how  
8  that minor runs.

9                   HONORABLE RODRIGUEZ:  There's also the  
10 point of documentation.  We're getting a lot of cases of  
11 other than Mexican Nationals, and to procure that type  
12 of paperwork as to the age of the minor would be very  
13 difficult.  My personal preference would be that we just  
14 add that, under the age of 18, an enhancement applies  
15 there as opposed to a differentiation of ages.

16                   HONORABLE BRIONES:  I'm getting minors as  
17 guides.  They usually don't prosecute them under the  
18 first, second, or third offense.  Then the U.S.  
19 attorneys start -- started recently bringing them into  
20 court because they've done it so many times.  But my  
21 minors are coming in as guides, and one of them was  
22 responsible for the death of a heavy gentleman who tried  
23 to get in through a tunnel.  And, obviously, the guide  
24 could get through, but the man didn't.  And he -- he was  
25 prosecuted for the man's death.  Or they.  There were

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1 two of them, both minors.

2 HONORABLE LUDLUM: Frankly, the base  
3 offense level under 2L1.1 is just too low. You can make  
4 as many categories as you want in terms of the number of  
5 aliens. But until that base offense level changes --  
6 and I did all the calculations starting with 12 and to  
7 14 -- and they all come out under 18, which is the base  
8 offense level for reckless endangerment, which tends to  
9 apply in 99 percent of my cases.

10 If that doesn't change, we're not making  
11 any changes. In essence, the changes are not going to  
12 be meaningful in my division.

13 COMMISSIONER RODRIGUEZ: As to simple  
14 illegal reentry cases here in San Antonio, I don't think  
15 we've noticed any perceivable, more violent illegal  
16 reentries. But it was the consensus of the judges in  
17 our district, unanimous consent, that as to coyotes,  
18 smugglers, the base offense levels needs to be  
19 increased. That was without objection by all of us.

20 As to the illegal reentry cases, however,  
21 I think it was also the consensus that the base offense  
22 levels did not need to be increased on those offenses.

23 COMMISSIONER SESSIONS: And do you agree  
24 with that?

25 HONORABLE LUDLUM: I agree. I see a lot

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1 of 1326 cases where the defendant, from coming in  
2 illegally, maybe he had a bad criminal history of five  
3 years previously or whatever is facing 46 to 57 months.  
4 But the man charging him \$1,300 to come in and put him  
5 in a toolbox is facing 15 months. And I find that to be  
6 a big disparity in those types of sentences.

7 COMMISSIONER HOROWITZ: Picking up on  
8 that point, in 2001, when we looked at the illegal  
9 reentry guideline, in addition to simplifying one of the  
10 issues that was of concern was the lack of proportionate  
11 penalties for certain individuals. There was an effort  
12 to separate more reduced penalties for some and increase  
13 penalties for others.

14 On the question we talked about, base  
15 offense levels, more broadly, how would you each say  
16 that we are dealing with penalties with regard to those  
17 who are transporting and harboring, those who are  
18 illegally reentering? Are we treating them too  
19 harshly? To leniently? Are there particular categories  
20 of individuals we should be thinking about either  
21 increasing decreasing penalties on? What's your  
22 perception where we are after the 2001 changes?

23 HONORABLE LUDLUM: Well, as I was just  
24 saying, me personally -- and I don't know if I speak for  
25 the rest of the judges. Judge Rodriguez would have that

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1 information -- I think that when you compare just the  
2 two categories, 1326 is punished much more harshly than  
3 1324, even though those are the folks that are making a  
4 living off of treating the illegal aliens as just a  
5 commodity, as just a COD package, so to speak. We're  
6 going to get them from point A to point B, and sometimes  
7 they hold them in homes for ransom and things of that  
8 nature.

9                   The typical 1324 defendant, in my court,  
10 is facing somewhere between 15 and 21 months, where the  
11 typical 1326 defendant is facing somewhere between 30  
12 and 57 months.

13                   HONORABLE BRIONES: And, Judge Hinojosa,  
14 you were around when I came on. The smuggling  
15 guidelines were way lower then.

16                   COMMISSIONER HINOJOSA: In fact, there  
17 was an increase, but not to the -- you know, I see what  
18 you're saying because --

19                   HONORABLE BRIONES: They were way low.

20                   COMMISSIONER HINOJOSA: The were lower  
21 than what they are now.

22                   HONORABLE BRIONES: Right. And my  
23 perception when I first came on, which is still my  
24 perception, is the illegal entries are -- 1326s are  
25 treated so much harshly than those that are doing the

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1 smuggling. And even though the guidelines have gone up,  
2 I feel that they probably should be increased.

3                   And not necessarily due to some of the  
4 options where we have increase on the amounts because,  
5 remember, we hardly ever see those big amounts. I  
6 haven't had a case of over 100 or over 60, as  
7 Judge Ludlum has -- she had one. And you may get some  
8 more in South Texas where, obviously, some of the  
9 trucking deaths and so forth that have occurred. But it  
10 shouldn't necessarily be based on the amount. But I  
11 think they should be raised.

12                   COMMISSIONER RODRIGUEZ: I had a hard  
13 time determining this number and I'm not totally  
14 satisfied with the accuracy of it. But I think in our  
15 district, over 46 percent of smuggling cases involve  
16 five or fewer aliens. And that is indeed the case. And  
17 I think consideration ought to be given to increasing  
18 the amounts, even at those lower ends. I know that's  
19 not what's proposed at the moment, but that would seem  
20 appropriate.

21                   HONORABLE LUDLUM: I think in the Del Rio  
22 Division, the prosecutors don't even prosecute 1324s  
23 when you have fewer than six aliens because of that  
24 three-level bump. I think anything under six goes as a  
25 regular misdemeanor, aiding and abetting, or being an



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1 those that deserve to be in those higher categories and  
2 have the criminal history count can get the guideline  
3 punishment. But those that deserve it, we have some  
4 leeway to downwardly adjust those sentences.

5                   To me, the only thing about the 2L1.2  
6 that makes it incredibly complicated is trying to  
7 decipher the definitions. Beyond that, if I see one  
8 that's -- I see a lot defendants under 1326 with 70 to  
9 87 months.

10                   COMMISSIONER HINOJOSA: Judge, under  
11 those cases where you point out the five history --  
12 criminal history points or six, sometimes, criminal  
13 history points for one conviction, sometimes it's just a  
14 prior illegal entry felony conviction that gives you six  
15 points, do you ever use the guideline section for  
16 criminal history over-representation. And then also to  
17 the panel as a whole: In the Western District, what is  
18 the status of your early disposition programs, and do  
19 you find those helpful or not helpful with regards to  
20 moving your dockets and handling your cases?

21                   HONORABLE BRIONES: You know, we're kind  
22 of fragmented because we're so many divisions, and it  
23 doesn't apply to all of the divisions. The U.S.  
24 Attorney, for instance, in Del Rio has a fast-track  
25 program. In El Paso we don't have one at all, period.

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1 Not -- not one. And I think yours is just recent?

2 HONORABLE LUDLUM: Uh-huh.

3 HONORABLE BRIONES: You know, they may --  
4 they may put it in El Paso, but it's the U.S. Attorney's  
5 option. And he has not done it in El Paso, and I think  
6 they're looking at it. But I'm not -- I'm not sure  
7 about the other divisions either, except for Del Rio.  
8 Do they have one here?

9 COMMISSIONER RODRIGUEZ: Not in  
10 San Antonio.

11 HONORABLE LUDLUM: With regard to your  
12 question about -- yes, I do use that over-represented  
13 criminal history as a reason for bringing the sentences  
14 down. We do have a fast-track program. It's for one  
15 level off. And, actually, we have it for both 1324s and  
16 1326s.

17 COMMISSIONER HINOJOSA: One level?

18 HONORABLE LUDLUM: One level for 1324s  
19 and 1326s. For the 1326s, if they plead within 60 days  
20 of the date of arraignment and they enter into a written  
21 plea agreement and they waive their right to appeal,  
22 they get the one level lower than they have it under  
23 5(K)3.1.

24 I did see it quite a bit. I would say  
25 now that number has dropped mainly because the defense

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1 attorneys are worried about what the appellate courts  
2 are going to do in terms of definitions of crimes of  
3 violence and the aggravated felonies. So they're  
4 worried about giving up that right to appeal and then  
5 maybe their defendant has a right to appeal and have a  
6 lower sentence. So I'm not seeing it a lot now in the  
7 1326s.

8 In the 1324s it's done so that we can  
9 move the material witnesses out of custody. And that is  
10 if they actually release the material witnesses on or  
11 before the date of deposition. And if they do that,  
12 then they get another level off. So their low sentence  
13 goes down even lower.

14 COMMISSIONER HINOJOSA: And do you  
15 automatically do depositions for material witnesses?

16 HONORABLE LUDLUM: If the parties decide  
17 not to waive, then they do have the depositions. We  
18 have very few of them really, Judge.

19 HONORABLE BRIONES: In El Paso we do --  
20 we do it a lot. Most of them. It means we can hold a  
21 lot less material witnesses for a lot less time and  
22 release them and go back. And most of them in El Paso,  
23 they're not -- we don't have a fast track, but they are  
24 pleading -- the 1324s are pleading with information and,  
25 usually, right off the bat.

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1                   So I think the fact that we do have the  
2 depositions and they get to see what the testimony is  
3 going to be is helpful to get the matter resolved  
4 faster.

5                   COMMISSIONER HINOJOSA: And in the  
6 Western District, like in the Southern District of  
7 Texas, it's like two or three are held as material  
8 witnesses in each case?

9                   HONORABLE BRIONES: Yes. Usually, two in  
10 El Paso.

11                  COMMISSIONER HOROWITZ: Have you noticed  
12 any change in practice along the prosecution or defense,  
13 or has there been any change in terms of sentencing  
14 practices in the district following the Booker  
15 decision? Has that alleviated the problem at all or  
16 aggravated the problem?

17                  HONORABLE LUDDLUM: I've been receiving a  
18 lot of requests to absolutely follow guidelines, and  
19 they should be mandatory.

20                  COMMISSIONER HINOJOSA: A lot of  
21 requests?

22                  HONORABLE LUDDLUM: That be made  
23 mandatory. That's it.

24                  COMMISSIONER HOROWITZ: That's probably  
25 not from the defendants.

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1                   HONORABLE BRIONES: You know, there are  
2 some appeals that have gone up in my court. And, for  
3 some reason, the U.S. Attorney is agreeing to vacate the  
4 sentence and it's back down. I disagree with it because  
5 I have not given a different sentence. And, usually,  
6 the public defender will come in and say, it's coming  
7 back down. I don't want another sentence. Here's my  
8 motion. Just re-sentence him to what you did before.  
9 That's how it's turning out, really. I'm still getting  
10 them coming back.

11                   HONORABLE LUDLUM: I was telling the  
12 judges at breakfast this morning, the Fifth Circuit just  
13 sent one back to me saying that, under North Carolina's  
14 statute, drug trafficking did not include transporting  
15 more than 10 pounds of marijuana -- or kilos of  
16 marijuana. So I'm not real sure what drug trafficking  
17 means anymore. So we'll see what happens.

18                   COMMISSIONER HINOJOSA: And as we all  
19 know, California has a drug trafficking statute that  
20 this circuit has found maybe is not drug trafficking.

21                   HONORABLE BRIONES: It's transporting.

22                   HONORABLE LUDLUM: You can add  
23 North Carolina to that list now.

24                   COMMISSIONER SESSIONS: I think you  
25 mentioned the ransom situation, where people are being

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1 held incommunicado and then additional ransom being  
2 required. Is that -- is that a difficult problem?

3 HONORABLE RODRIGUEZ: It's one of two  
4 things. Either more money is being demanded; or, once  
5 they arrive at the safe house, the demand is made on the  
6 relatives or family members or friends for payment and  
7 they can't come up with the additional agreed upon rate,  
8 then they're held against their will for some period of  
9 time, until the agreed upon money is delivered.

10 With all due respect to the Federal  
11 Public Defender's Office, I had a case a couple of weeks  
12 ago, and they didn't make this argument but I basically  
13 made use of the word "COD." The problem I have with  
14 just requiring the ransom or kidnapping guidelines to  
15 apply in these kind of cases where it was the initial  
16 agreed upon rate is that these people are not  
17 commodities. They shouldn't be detained COD until  
18 payment is made.

19 So I frankly like the proposed options  
20 dealing with holding aliens for ransom. But they should  
21 not -- my take on that is that it shouldn't be just for  
22 any increases in the agreed upon rate. If they're held  
23 against their will, it would seem to also -- this  
24 argument would also foster the public policy behind  
25 this, that we're trying to dissuade this kind of

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1 activity, it ought to apply even if the agree-upon rate  
2 had not been paid and they're being held against their  
3 will.

4 COMMISSIONER SESSIONS: Do you all agree  
5 with that ransom? I'm really amazed that these folks  
6 apparently carry copies of the -- of the guidelines in  
7 their back pockets. That's the first time I've ever  
8 heard that in six years on the Commission.

9 COMMISSIONER HOROWITZ: At least someone  
10 does.

11 COMMISSIONER SESSIONS: Right. Do you  
12 think that would make a difference. Do you think that  
13 would be helpful?

14 HONORABLE LUDLUM: You're looking at me.  
15 And I'd say, in my area, I don't see that situation  
16 because in the Del Rio Division, the ones that we see  
17 are trying to move them past the checkpoints. So those  
18 are not the final staging areas for the aliens. Those  
19 are just transit points where they hold them temporarily  
20 until they move them out. So I don't see a lot of  
21 that. I'm sure Judge Rodriguez sees it in Houston and  
22 other places away from the border.

23 HONORABLE BRIONES: We see a lot of these  
24 cases where one of the aliens is -- obviously, the  
25 smugglers know what the guidelines are because they'll

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1 tell one of the aliens: You're -- we'll give you a  
2 discount if you drive. But if you're caught, you say  
3 you -- maybe they're not one of the aliens. Maybe  
4 they're, you know, the smugglers just told them, If  
5 you're caught, say you're one of the aliens also and you  
6 were just getting a discount for doing the driving.

7                   So yeah. The guidelines -- the smugglers  
8 are aware of them. They at least have some idea of what  
9 the guidelines are.

10                   HONORABLE RODRIGUEZ: But, evidently, not  
11 having much of a deterrent effect. The safe houses are  
12 appalling conditions. They're boarded-up windows and,  
13 oftentimes, very inhumane situations.

14                   COMMISSIONER HOROWITZ: Given the absence  
15 of a fast-track program, other than one-point reduction,  
16 which I -- it sounds like isn't having a significant  
17 impact.

18                   HONORABLE LUDLUM: It is for the 1324s  
19 only.

20                   COMMISSIONER HOROWITZ: How is the docket  
21 being managed and moving along in the absence of the  
22 fast-track program? One of the things we've heard in  
23 the Commission is the significance of the fast track  
24 helping the dockets in the border districts keep the  
25 cases moving. And without it, the fear is from the

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1 marshal's probation in the courts, that the process  
2 would get stopped and there would be a significant  
3 backlog.

4                   How is that -- in a district where a fast  
5 track isn't uniformly being used, how is the docket  
6 being managed?

7                   HONORABLE BRIONES: Well, we don't have  
8 it in El Paso. We move the docket. And, quite frankly,  
9 I'm not sure if -- I'm not sure what effect it would  
10 have. It depends -- they would have to give up more  
11 than one level, okay, for the public defender or the  
12 defense attorneys to go along with it in El Paso, if  
13 they're going to give up their right to appeal or some  
14 other right.

15                   Usually, the 1326, when they come before  
16 us, do not have a plea agreement. They plead to the  
17 indictment. It's only a one-count indictment, as  
18 compared to the drug cases where they generally plead to  
19 only one count. I'm not sure if it would have any  
20 effect in El Paso unless it was really some significant  
21 reduction to the guidelines.

22                   COMMISSIONER HOROWITZ: And the  
23 acceptance carat is enough to get people to plead the  
24 current acceptance.

25                   HONORABLE BRIONES: Well, it has been.

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1                   COMMISSIONER HINOJOSA: And, Judge, do  
2 you think part of that is because of the fact that, when  
3 it's an illegal entry case, I mean, it's going to be  
4 easy to prove? They probably have been deported or  
5 removed before, and you don't have the legal status to  
6 be here and you're not a citizen. And I guess in those  
7 type of cases, there's not much to try; is that correct?

8                   HONORABLE BRIONES: That's correct. But  
9 we still get them. Some defendants for some reason will  
10 refuse -- refuse to plead.

11                   COMMISSIONER HINOJOSA: And do you think  
12 fast tracking those cases would help?

13                   HONORABLE BRIONES: I'm not sure, quite  
14 frankly. Not having experienced it in El Paso and not  
15 having had it there because the U.S. Attorneys have not  
16 gotten around to it, or for whatever reason -- it may be  
17 even the defense attorneys who -- who may have an  
18 objection to not getting a significant reduction to the  
19 guideline level.

20                   Would I think it would help any? You  
21 know what? We move our docket pretty fast. We're  
22 fortunate. There are four of us now. There used to be  
23 only one for a while and then two. Now we're four. She  
24 may be able to answer you more on that because she's the  
25 only one in Del Rio with more cases than -- than each

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1 one of us has in El Paso.

2 COMMISSIONER HINOJOSA: Have any of you  
3 seen an increase in the number of illegal entry cases  
4 going to trial where the claim is derivative citizenship  
5 or you haven't been able to prove that I'm not a  
6 citizen? Obviously, it's the government's burden in a  
7 case like that, where one of the elements is that you're  
8 not a citizen and you don't have the legal right to be  
9 here. Have you had an increase in those type of trials?

10 HONORABLE BRIONES: When they come before  
11 me claiming derivative, I'll give them every opportunity  
12 to prove it. A public defender in El Paso has one  
13 particular person who is apparently an expert, and  
14 they'll get working on it. I give them two or three  
15 months before they come in and say either we did it or  
16 we didn't do it or we couldn't do it.

17 Once in a while I'll have a trial where  
18 the person claims to have been born in the  
19 United States. It's very difficult for them to prove  
20 it, but they still want to go to trial and try to prove  
21 it. And I have not had a not guilty yet in one of  
22 those.

23 COMMISSIONER STEER: I'd like to return  
24 to the issue of the smuggling of minors and the proposed  
25 enhancement that is being considered there. You made it



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1 Paso; but, in my division, the juveniles that are  
2 involved in crimes are from the border city. They just  
3 cross over, commit the crimes, and go back home. A lot  
4 of these minor children that are being brought in are  
5 being brought in from the interior of Mexico --  
6 Guatemala, from Nicaragua, from El Salvador.

7                   And, you know, are we going to start  
8 saying, well, because the border juveniles are a little  
9 more sophisticated, we're now going to impute that onto  
10 every 12-year-old that comes in that may not have that  
11 level of sophistication?

12                   HONORABLE RODRIGUEZ: I tend to agree.  
13 For as hard as their life has been in these countries  
14 and for as much as we think they have matured, I cannot  
15 believe that psychological or physical harm does not  
16 occur by bringing them in unaccompanied without their  
17 parents.

18                   COMMISSIONER HINOJOSA: Joe Ed, we've  
19 heard about the stacks of documents placed in our  
20 districts here because of these Circuit decisions. And  
21 so exactly what has that done to the probation offices  
22 with regard to the amount of work and the ability to get  
23 this information to the Courts?

24                   CHIEF CANALES: Your Honor, in this  
25 district, we prepare over 5,000 PSIs in one year. And

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1 with the majority being for illegal aliens or  
2 transporters, the burden of -- upon us to obtain those  
3 documents has been tremendous, especially when we have  
4 aliens who are arrested in this district but have  
5 criminal histories in other states, specifically like  
6 California and up north, where it's just very difficult  
7 to obtain the documents.

8                   Officers have to, first of all, recognize  
9 and make sure that the individual has that conviction.  
10 And in trying to obtain those documents, a lot of times  
11 the -- the districts in which they have those  
12 convictions, they'll send us the minimum amount, not  
13 realizing that our courts need a lot more documentation  
14 in order to prove the cases.

15                   And so it is a tremendous effort on our  
16 officers because, as one of the judges mentioned, I  
17 mean, we could have two- or three-inch thick files of  
18 just documentation because some of these aliens will  
19 have, you know, three, four, five, six arrests and the  
20 documentation is just unbelievable. So it is a burden  
21 on us with as many cases as we have to handle on a  
22 yearly basis.

23                   HONORABLE LUDLUM: One of you was asking  
24 about the docket and how it's affected the docket. In  
25 terms of the taking of pleas or going to trial, it has

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1 not affected the docket in terms of the guideline  
2 provisions. My cases plead out very quickly. What's  
3 taking a long time is between the pleas and sentences.  
4 Because of the request for documents, we sometimes have  
5 to ask California two or three times, send out court  
6 orders when they don't want to send the documentation  
7 from New York or some of the other areas. So I get a  
8 lot of requests for resettings on the sentencings. So  
9 the sentencings can take a long time to occur. So time  
10 between the plea and the sentencing is really -- it gets  
11 substantial now.

12 HONORABLE BRIONES: And the type of  
13 documents that we get sometimes, which probation, the  
14 only thing they can get sometimes are computer  
15 printouts. And, you know, we can't use those.  
16 Sometimes they're just the abstracts. The Fifth Circuit  
17 said we can't just use the abstract. So they have to go  
18 and get the actual -- even the PSI from the previous  
19 conviction, you have to get the actual judgement. You  
20 have to get the -- the charging instruments. They have  
21 to get something signed by the judge as far as a  
22 judgement before they -- it can be used.

23 I mean, it will -- they'll really try to  
24 get everything they can for us, and sometimes it's --  
25 it's a big stack.

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1                   COMMISSIONER STEER: Do you have a feel  
2 for, just your guesstimate, of the frequency of repeat  
3 offenders? I'm not talking about defendants who have  
4 come across the border repeatedly. But those who have  
5 been previously sentenced under the guideline for  
6 illegal reentry who are now coming back and being  
7 re-sentenced again under that guideline, or the  
8 smugglers under the smuggling guideline?

9                   HONORABLE LUDLUM: What was that? Do we  
10 see that a lot?

11                   COMMISSIONER STEER: Yeah. And is it  
12 happening more? Do you have a feel whether it's  
13 happening more?

14                   HONORABLE RODRIGUEZ: I'll relate to  
15 something that a defendant told me a couple of months  
16 ago. Normally at sentencing, I give admonishments about  
17 do not return to the United States illegally. And he  
18 was quite blunt and honest, but very respectful. He  
19 goes, Judge there's nothing for me back there. I will  
20 be coming back. And he was very respectful about it and  
21 was very genuinely heartfelt and honest, I thought. But  
22 I'm not sure that it's having the deterrent effect that  
23 anyone thinks.

24                   HONORABLE BRIONES: Not only that, but  
25 they're facing supervised release. Sometimes I do them

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1 both together, the sentence and the revocation, because  
2 they're extra and they usually run consecutive. And  
3 they know they're facing that when they come back  
4 because they're told. And then they come back during  
5 the supervised release period and face a revocation on  
6 top of a higher sentence that they got before. They'll  
7 do it.

8 HONORABLE RODRIGUEZ: Most of those that  
9 we see here have family members here. That attraction  
10 is too strong.

11 COMMISSIONER HINOJOSA: Judge Ludlum, you  
12 talk about for profit and gain, and how that's really  
13 not an issue anymore. And Judge Briones and I have been  
14 on the bench long enough that we remember when it used  
15 to be an enhancement. And then the Commission, I guess,  
16 made a decision that it was applying in so many -- such  
17 a high percentage of the cases, that it should be  
18 factored into the base offense level and then deducted  
19 in cases where it was.

20 One of these proposals -- and I think it  
21 really came as a suggestion from Judge Lake -- is that  
22 we do the inversion with regards to the illegal entry  
23 and we start off with the theory that everybody's got an  
24 aggravated felony in their background that is being  
25 prosecuted. And I believe it's about 80 percent of the

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1 cases that we do have as illegal entries have that  
2 enhancement attached to them.

3                   And so do you think that it would be a  
4 help when we take the majority of the cases and factor  
5 that in to the base offense level and, therefore, make  
6 this a deduction if you don't have an aggravated  
7 felony? Would that ease the burden of proof and the  
8 information that we have to get. I mean, obviously,  
9 it's not an enhancement, so the burden shifts. And  
10 since it's a majority of the cases, is that something we  
11 should consider? And then would that ease the burden of  
12 all these documents and as to how to get them and how  
13 much we rely on them?

14                   HONORABLE LUDLUM: And that's Option 5 in  
15 your proposal. It could work. My concern would be,  
16 though, in that instance, then you are throwing in such  
17 a large category of defendants. You're grouping them  
18 together. Then the question's going to be: What would  
19 be then the appropriate base offense level?

20                   And when you -- I took the three  
21 proposals that you had in there 16, 20, and 24, and  
22 started doing some calculations, deducting the different  
23 number of points, either four, six, or eight. And you  
24 ended then, if you start with base offense level 16, you  
25 end up with ranges of somewhere, once you get into

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1 acceptance of responsibility of six to ten, depending on  
2 their criminal history. That could be a very low  
3 number.

4 And then if you go to other end, the 24  
5 side, and you do the same calculations. You're running  
6 in the ranges of adjusted offense levels of 12 to 17.  
7 That might be too high for some classes of defendants.

8 So the question is going to be: How do  
9 you come up with the correct base offense level and then  
10 the adjustment, the number for the adjustment downward  
11 that would put it in an appropriate range. Yes, it's --  
12 it's a very good idea. I think it would take a lot of  
13 these issues out of the -- out of the courtroom in terms  
14 of bringing down the time. The question would be trying  
15 to then fine tune it for the appropriate defendants as  
16 they come before us.

17 COMMISSIONER CASTILLO: Are there any  
18 other changes we're contemplating that you find to be  
19 problematic or have some kind of needless litigation  
20 points?

21 HONORABLE BRIONES: Well, the 1327s. I  
22 checked in our district. There was one conviction in  
23 the last two years. Out of 11 and a half years I've  
24 been on the bench, I've never had one. So I'm not sure  
25 what changes are needed or how good it will do.

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1 Obviously, it's not a deterrent, at least not at this  
2 point. We may be getting some more of these cases,  
3 obviously, because of our times. But as of now, hardly  
4 any.

5 COMMISSIONER CASTILLO: Have y'all gotten  
6 frustrated that we have gone into this area too often,  
7 and it's only been so many years since the last changes  
8 and now we're back at it again and still might come back  
9 at it again? Is that problematic?

10 HONORABLE BRIONES: Not for me because I  
11 hardly ever see it. I don't have to deal with it. I  
12 haven't dealt with it in my career.

13 HONORABLE RODRIGUEZ: This is not  
14 problematic. But on the trafficking of documents, I  
15 don't think we've discussed that. I wasn't sure I  
16 understood the differentiation between U.S. passports  
17 and foreign passports. If we're at the receiving end,  
18 what difference does it make that an employer or others  
19 are being deceived on the document? I'm not sure I  
20 understand the distinction there. I think it ought to  
21 be the same.

22 COMMISSIONER HINOJOSA: And, Judge, some  
23 of these may be directed to Congress, some of these  
24 issues. The Commission operates on its own with regards  
25 to its own suggestions. But we get a lot of directives

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1 from Congress and legislation to consider adjustments  
2 with regards to certain crimes. So some of these,  
3 although we think they don't apply in too many cases,  
4 come directly from Congress as a directive to the  
5 Commission to consider a change.

6                   The passport issue actually, Judge  
7 Rodriguez, has been an issue that was originally raised  
8 actually from Secretary Colin Powell, the issue of the  
9 American passport being the gold standard. But we  
10 actually have to come back and realize that a passport  
11 is a passport. So, therefore, they all basically have  
12 the same effect.

13                   COMMISSIONER SESSIONS: We have received  
14 comments from some judges who encourage us not to do  
15 anything just because the guidelines have been  
16 implemented for so long, that we should be very  
17 reluctant to change anything. Do you have a feeling  
18 that that's appropriate?

19                   HONORABLE RODRIGUEZ: Well, with regard  
20 to the smuggling, the judges of this district we're  
21 pretty certain in their response to that, that those  
22 needed to be increased. So there was a desire from our  
23 judges to see a change there.

24                   HONORABLE BRIONES: And at least from us,  
25 I think we'd like to get away from the categorical

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1 approach, at least.

2 HONORABLE LUDLUM: I also have understood  
3 that you've received comments of applying the standards  
4 of 4(A)1.2 to how you -- that they should apply to the  
5 enhancement crimes.

6 I have a problem with that because I  
7 think 4(A)1.2 sometimes doesn't adequately reflect  
8 criminal histories of defendants. It even over-reflects  
9 and under-represents it. I've seen a lot of defendants  
10 with terrible criminal histories that end up in criminal  
11 history category one time limits. I think it would be  
12 very problematic if we tried to put that overlay on top  
13 of any enhancements under 2L1.2.

14 HONORABLE BRIONES: What would we do  
15 without departure?

16 HONORABLE LUDLUM: Thank God for  
17 departure. Maybe that's where a lot of work needs to go  
18 into.

19 COMMISSIONER HOWELL: Well, do you have  
20 any suggestions for departures? Federal public  
21 defenders had suggested -- and since I thought some  
22 constructive suggestions that we'd want to talk about  
23 more with them about areas we should consider in these  
24 guidelines. Are there specific suggestions that you  
25 have that we should think about?

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1 HONORABLE BRIONES: Well ...

2 HONORABLE LUDLUM: Maybe that's where we  
3 might want to consider departures in terms of the age of  
4 the prior conviction that was used for enhancement.  
5 Maybe that's -- we ought to look at it for possibly a  
6 departure instead of trying to make those calculations  
7 up front.

8 HONORABLE BRIONES: And then what is  
9 Congress going to approve as far as giving judges more  
10 departures? I don't foresee that they're going to be  
11 real lenient in approving something that calls for more  
12 departures.

13 COMMISSIONER CASTILLO: Sounds like  
14 you've been spending time with us in D.C.

15 COMMISSIONER SESSIONS: In other words,  
16 you think that perhaps having some application notes  
17 suggesting there should be a downward departure or  
18 encouraging a downward departure based upon the age of  
19 the convictions?

20 HONORABLE RODRIGUEZ: I'm not sure  
21 encouraging is the right word. It should be appropriate  
22 under certain circumstances.

23 COMMISSIONER STEER: How about building  
24 it in? And if it's going down one notch, one tier, if  
25 it's -- if the age of the prior conviction is such that

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1 it doesn't count for criminal history purposes, then you  
2 reduce the offense level by four levels or whatever.

3 HONORABLE LUDLUM: The question is going  
4 to be: Do you want to do that for the person who is the  
5 child molester or murderer just because the age of their  
6 conviction, that they somehow should get treated as a  
7 lesser aggravated felon or otherwise? I don't know that  
8 that would be appropriate. For me, I don't know if that  
9 would be the appropriate solution that I would want to  
10 see.

11 COMMISSIONER HINOJOSA: Does anybody have  
12 any other questions?

13 COMMISSIONER HOROWITZ: Just briefly, on  
14 the harboring issue, since there does seem to be some  
15 agreement that those guidelines are too low, in our  
16 proposal, we have the base level going up. We also  
17 have -- and we talked a little bit about this -- the  
18 chart for numbers going up. But it sounds like we're  
19 going up to levels that you're not seeing anyway that we  
20 really have to think about below six and what that  
21 means.

22 Otherwise, we have enhancements for  
23 national security that we're proposing for minors,  
24 increasing the offense levels for injury, death in  
25 particular. Any other enhancements that we should be

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1 thinking about in the harboring or any that apply with  
2 some frequency or that you're seeing with some frequency  
3 that we're not picking up in this guideline? Any other,  
4 or does that seem to cover the landscape of the types of  
5 crimes you are seeing there that concern you and perhaps  
6 we just need to figure out and focus on what values, the  
7 numbers we're assigning to each?

8 HONORABLE LUDLUM: I think the latter.

9 COMMISSIONER HOROWITZ: Okay. That's  
10 right.

11 COMMISSIONER HINOJOSA: We thank y'all  
12 very much. We realize how busy your schedule is. And I  
13 think we have found it very helpful. Thank you. For  
14 some of us, it has reinforced our viewpoints. For  
15 others, it was very educational.

16 DEFENSE PERSPECTIVES

17 COMMISSIONER HINOJOSA: I would ask the  
18 individuals who are testifying, if y'all would speak a  
19 little bit closer to the microphone. Apparently, it's  
20 harder to hear you-all in the back of the room, so  
21 please keep that in mind.

22 We have two individuals. One is not here  
23 yet. Carmen Hernandez, who is actually with the NACDL  
24 and is a private attorney in Washington D.C., got held  
25 up and had to spend the night in Atlanta. I will say we

0055

1 didn't plan it that way on purpose.

2 But we have two of the defenders:

3 Lucien Campbell, who is a federal defender for the  
4 Western District of Texas, and Marjorie Meyers, who is  
5 the defender for the Southern District of Texas.

6 Obviously, their work is cut out for them, and they have  
7 a difficult job with regards to -- their offices are  
8 very big and represent a large percentage of the  
9 individuals who are charged within immigration  
10 guidelines. And they both do an excellent job with  
11 regards to their work with the defender's offices.

12 And we'll go ahead and start with the  
13 Southern District of Texas. Marjorie, do you want to  
14 say something before we go into the questions?

15 MS. MEYERS: Certainly. And I do hope  
16 that you'll ask a lot of questions, and then I can read  
17 my scribbles as I was listening to the last panel. We  
18 kind of divided up our remarks. I'm going to focus on  
19 the 1324, the smuggling offenses, and Mr. Campbell is  
20 going to focus on illegal reentry. And I'm not being  
21 loud enough.

22 As we've indicated in our written  
23 comments, I think our biggest concern is the proposal to  
24 enhance the guidelines based on the smuggling of  
25 children. While I certainly understand the concern

1 about children and at the round table, the probation  
2 officer from Arizona specifically indicated the concern  
3 about very young children who kind of get lost in the  
4 system. But I think with respect to smuggling, as  
5 opposed to other offenses that involve children, that  
6 there really is not the same harm either to the children  
7 nor to society.

8                   First of all, I think as Commissioner  
9 Steer mentioned earlier, that there is a difference  
10 between 17- and 18-year-olds who are being assisted in  
11 entering illegally and 6-year-olds. That these older  
12 children or young adults or adolescents are coming on  
13 their own, traveling on their own from Central America,  
14 even South America, and generally coming here either to  
15 work or to rejoin their families.

16                   When we talk about problems of proof, I  
17 think that we will find it is very difficult to  
18 determine -- if it's hard to get a judgement out of  
19 California, it's even harder to get a birth certificate  
20 out of El Salvador to determine whether or not somebody  
21 is 17, 18, 16, or 15. And the real harm or the real  
22 danger, if there is one, are the very young children who  
23 cannot say who they are, cannot say where they're from,  
24 and may get lost in the system.

25                   Now, the flip side of that is on the

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1 ground, what we find is that those who smuggle children,  
2 really, usually, are not in the business of smuggling as  
3 opposed to the people that everyone is talking about.

4                   What so often happens is someone who is  
5 already here, either as a permanent resident or an  
6 undocumented alien comes to make a life for themselves  
7 and then sends for their children. And what happens is  
8 they may ask a friend, who has permanent residency or  
9 U.S. Citizenship, to cross that bridge with the child  
10 posing as the mother as a form of family reunification.  
11 And that's what we will find are higher sentences for  
12 the people who are not in the business and the people  
13 who are less involved.

14                   Similarly, where there is an  
15 organization -- and I have the Department of Justice in  
16 its pleadings saying that the way that children are  
17 smuggled is, number one, they are separated generally  
18 for ease of crossing, sometimes for their own safety, so  
19 they're not squished together with everybody else. But  
20 then what happens is the spouse or the girlfriend or the  
21 niece or the grandmother is the one who brings the child  
22 so it looks like a family. And, again, what you're  
23 going to see are higher sentences for those who are  
24 actually reunifying families.

25                   In terms of the numbers, I think the

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1 biggest concern -- and I want to echo what the judges  
2 have said -- I have rarely seen cases involving more  
3 than 100 aliens. And I think that where you see them --  
4 and there's really a distinction in my district probably  
5 between Houston, Corpus, and along the border. Along  
6 the border, most of what we see are transporting cases  
7 and some drop-house cases, and those are not going to  
8 involve the same numbers.

9                   But what you get are the harboring cases  
10 with potentially higher numbers either because three,  
11 four groups are brought to the house until they're  
12 delivered to their families or you have material  
13 witnesses saying that over five weeks, there were five  
14 loads. And then you have different probation officers,  
15 whether they'll call that 100 or 200 aliens.

16                   But, really, in terms of culpability, the  
17 guy guard the drop house to pay his fee is no more  
18 culpable than the guy driving the car to pay his fee,  
19 and that these numbers may artificially enhance the  
20 sentence.

21                   I think the further calibration,  
22 particularly in the post-Booker era, where the judge has  
23 flexibility, just makes the guidelines needlessly  
24 complex and there's no reason to have 3, 6, 9, 12, and  
25 differentiating between 5 and 15 versus 5 and 24. The

0059

1 individual judge certainly has the flexibility to  
2 determine, this is close to 24; this is close to 6. And  
3 for that reason, the guideline is appropriate or there's  
4 no reason to further calibrate it.

5 I heard a comment about whether or not  
6 the smugglers carry the guidelines in their pockets.  
7 Certainly, some smugglers are aware of the guidelines,  
8 just like they are in drug cases. They were very aware  
9 of Booker. They all thought that the time to cross was  
10 January 13th, 2005 because there was a new law in effect  
11 that meant they would no longer get lengthy sentences.

12 But it really does not impact their  
13 conduct. What impacts their conduct is this is a  
14 business. So when I hear that we might have a guideline  
15 that increases the guideline if aliens are kept in the  
16 house until they pay the agreed-upon fee, that conduct  
17 will not change because, certainly, nobody in the  
18 business is going to say, Oh, I might get another year  
19 in jail. I'm going to forgo 2,000, 5,000, \$10,00.

20 That conduct is driven by the nature of  
21 the business. That business has not really changed for  
22 as long as I've been doing this, and that is about 23  
23 years. And, that is, the alien on the other side of the  
24 border makes a deal to pay an agreed-upon amount, and  
25 they leave the drop house when they pay that amount.

0060

1                   And if there is more than that, if there  
2 are guns, if there is increased funds, if there is  
3 really extortion, we have a hostage-taking guideline, we  
4 have a hostage-taking statute that the department of  
5 justice uses when it's appropriate.

6                   To the extent that the Commission -- and  
7 I keep wanting to say "The Court" -- is thinking of  
8 increasing the base offense level because of the concern  
9 that the business people or those in the business are  
10 not getting high enough sentences, then I think the  
11 Commission needs to seriously look at downward  
12 adjustments, particularly in the area of -- if it isn't  
13 for profit.

14                   If it is for relatives, that instead of  
15 three levels off, the Commission might consider six  
16 levels off, for example, as they do in the felony  
17 possession guideline supporting reduction, so that we  
18 can continue to see appropriate sentences, sentences  
19 that are not greater than necessary for those who are  
20 bringing in relatives, friends, who are not involved in  
21 the business, or who are first-time offenders who need  
22 to understand that they shouldn't be doing this.

23                   And remember that most of these people  
24 are suffering a consequence not only of prison but of  
25 deportation. And if somebody is a permanent resident,

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1 permanent deportation, unless they can get back across  
2 the river.

3 MR. CAMPBELL: If I may proceed,  
4 Mr. Chairman and members of the commission. I  
5 appreciate this opportunity to talk with the Commission  
6 about sentencing and immigration cases. The defenders  
7 share the view of many observers in the system that this  
8 guideline, the reentry guideline produces sentences that  
9 are excessive in many cases.

10 I would think at a time when federal  
11 prison capacity is 40 percent over and the Commission is  
12 under directive to minimize the likelihood of  
13 over-capacity, that it would be a matter of concern to  
14 the Commission.

15 We believe we see things that are driving  
16 it in the current guideline and things that might drive  
17 it even higher and worsen the situation on the options  
18 that are under consideration. Foremost is the 16-level  
19 increase that I submit is frequently producing sentences  
20 greater than necessary to achieve the purposes of  
21 sentencing. It's a blunt tool that puts too many people  
22 at Level 24 too fast.

23 From the interim report, we know that  
24 about 40 percent of the cases under this guideline  
25 received the biggest increase more than any other

0062

1 category. And it's obvious that 16 levels has a very  
2 dramatic affect. As we explained in our written  
3 statement, it could take a Category 6, Offense Level 8  
4 from 24 months at the top to 125, a fivefold increase.  
5 You can take a Category 1, an even more dramatic  
6 increase, from a top of 6 to 63, a tenfold increase.

7                   And we note some comparisons to the felon  
8 in possession guideline. Looking at a baseline offense  
9 level of 14, it goes up only two level -- ten levels for  
10 two prior serious offenses and six for one prior serious  
11 offense and for conduct and offenses that, to us, seem  
12 more serious than reentry by -- by an alien after  
13 deportation.

14                   The other thing that's overdriving this  
15 guideline that we perceive is the reliance on aggravated  
16 felony. Some of the questions from the Commission have  
17 pointed out that, you know, since the Commission is  
18 stuck with it, it's still up to the Commission how to  
19 use it.

20                   Congress uses it for different  
21 purposes -- for cutoffs that have effect in the  
22 immigration civil side and to determine the statutory  
23 maximum. But that doesn't mean it's useful for  
24 calibrating final sentences at such time high levels in  
25 an expert guideline system.

1                   If 40 percent of the cases go up 16  
2 levels, that's a substantial increase. And the  
3 Commission has heard that a lot those come back down  
4 from fast track, but it's not all the 30-month  
5 reductions in serious cases on the West Coast or two to  
6 four levels. In many divisions and many districts, it's  
7 only one level and, in some divisions of this district,  
8 for example, as the Commission heard, no reduction at  
9 all.

10                   Using aggravated felony also overdrives  
11 drug convictions. To be countable, state drug  
12 convictions should be felony under both state and  
13 federal law and they should be trafficking offenses.

14                   But we're concerned about the  
15 Commission's proposals that would spread the overbreadth  
16 that comes from aggravated felon to the two highest  
17 groups without any reduction in the offense level.

18                   Looking at those options one at a time,  
19 Option 5 is the one of greatest concern to the federal  
20 defenders. It would presume that the highest offense  
21 level applied, unless the defendant established by a  
22 preponderance of the evidence, that he did not have a  
23 prior felony conviction. May I suggest that Option 5  
24 would be profoundly wrong. It would turn the blunt tool  
25 of the 16 levels into a bludgeon.

1                   And there's also conceptual and practical  
2 problems with that approach. Prior conviction is an  
3 enhancement, a classic enhancement. And the burden  
4 under this system is on the proponent of the enhancement  
5 to establish it. Starting at the highest level would  
6 not only place that burden at the right place -- not  
7 place it in the right place. It would place it on the  
8 party least able to carry that burden, especially when  
9 the burden is to prove a negative.

10                   An alternative example, called the  
11 inverted alternative, of guideline with multiple  
12 reductions based on the nature of the prior, I think  
13 that's equally undesirable, because here again, the  
14 burden is being placed upon on the wrong party and a  
15 party that's very ill-equipped to carry it out.

16                   Reentry defendants are foreign  
17 nationals. They largely do not read English. May not  
18 read any language. Overwhelmingly, they're indigent.  
19 The defense does not have access to NCIC, like the  
20 prosecution and probation have. They may be prosecuted  
21 for reentry far from the jurisdiction where the prior  
22 conviction was sustained and records and logs, this  
23 making it hard to obtain the necessary records,  
24 especially if they're under time constraints of the fast  
25 track plan. If proving the nature of the crime is

1 complicated, as the proposal says, then the least  
2 advisable option is to shift to the defendant the burden  
3 of uncomplicating it.

4                   Looking at Options 1, 2, and 3 as a  
5 group, the defenders don't see anything in that pattern  
6 of levels that should be adopted. It would bring in all  
7 Title 8 aggravated felonies in the top three groups  
8 without any decrease in the offense level. And this  
9 would drive the guidelines to high levels and the  
10 overbreadth and ambiguity that I've discussed.

11                   The Commission in these proposals  
12 recognizes that there needs to be some calibration of  
13 the seriousness of the prior offense and suggest that it  
14 can come from sentence length, breaking variously at two  
15 years, 13 months, 12 months, 60 days.

16                   I think it's well to think back to the  
17 time 20 years ago when the first Sentencing Commission  
18 was developing the inaugural set of guidelines. That  
19 Commission was mindful that regional differences and  
20 state sentence length could lead to disparity. In the  
21 design of Chapter 4 and the way the horizontal access  
22 works helps trap out that disparity or minimize it.  
23 They would come back in and state sentence lengths were  
24 used to drive the vertical access as well, especially by  
25 four-level leaps.

1           The remaining option, Option 4, is  
2 similar to the existing. It would add statutory  
3 aggravated felony definitions to the categories and  
4 would extend sentence length for the crimes of violence.

5           We think that's the least ill-advised,  
6 except we recommend certain exceptions or changes. And  
7 aggravated felony should be limited to a conviction for  
8 a felony offense, and the 16-level cutoff should be  
9 two -- two years, not 13 months. And a crime of  
10 violence should not be Section 16, which includes force  
11 against property. I think that's another example of the  
12 statutory definition ill-serving the needs of an expert  
13 sentencing system, which should be limited to force  
14 against the person.

15           I'd like to mention the defender's  
16 proposal for a 2L1.2 that I believe was exposed to staff  
17 at the round table last year. We believe it has some  
18 virtues of simplicity and will advance the purposes of  
19 sentencing. It's modeled on felon in possession, except  
20 it recognizes reentry after deport is less serious.  
21 It's graduated into six levels with smaller gaps. Many  
22 would produce lower sentence -- lower adjusted offense  
23 levels than the present guideline. It retains in a top  
24 offense level of 24, but reserves it for national  
25 security and terrorism and it would require conviction,

1 not just involving conduct.

2                   It would adopt familiar definitions of  
3 crime of violence and control substance offenses in  
4 4(B)1.2. It would also recognize a couple of  
5 departures. We think the Court would use guidance on  
6 return for family medical needs, which happens more than  
7 the Commission might imagine. And I recognize it's easy  
8 to say, but the burden is on the defendant to establish  
9 it to the Court's satisfaction when that can be  
10 established as a powerful mitigated factor.

11                   The other is cultural assimilation. We  
12 see cases where a defendant has spent his whole life  
13 since infancy in the United States and has broad family  
14 support here, has no family support in Mexico, may not  
15 even be fluent in Spanish, and is facing deportation to  
16 Mexico but only at the end of a long, long sentence.

17                   I think the -- perhaps the most important  
18 thing is that the defender's proposal would apply  
19 staleness cutoffs of 4(A)1.2 to offense level increases  
20 under the reentry guideline. We think it's anomalous  
21 that the staleness cutoff applies to career offenders,  
22 including repeat violent offenders but -- and to felons  
23 holding firearms, but not to reentry defendants.

24                   Many prior -- prior convictions are far  
25 too remote to be reliable sentencing factors, especially

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1 with an effect as pragmatic as the one that 16 levels  
2 has.

3 Many defendants accepted older aggravated  
4 felony convictions at a time when those convictions were  
5 not included in the definition of aggravated felony.  
6 The staleness factor I believe would advance the  
7 purposes of sentencing.

8 I appreciate the opportunity to present  
9 these remarks.

10 COMMISSIONER HINOJOSA: Questions?

11 COMMISSIONER CASTILLO: As to your  
12 proposal -- and I'm sympathetic toward it -- do you  
13 believe that what you have as a departure consideration,  
14 the nature of assimilation into the culture of the  
15 United States, that that sets up a very subjective  
16 determination that's going to vary from judge to judge  
17 as to whether or not there will be a departure?

18 MR. CAMPBELL: It is somewhat  
19 subjective. But it would be possible for the Commission  
20 to address objective factors in a application note that  
21 would guide discretion.

22 MS. MEYERS: The Commission could do  
23 something similar to what it did with aberrant behavior,  
24 looking at the case law, looking at the cases, and  
25 identifying the factors, excluding those who have become

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1 assimilated into the jail culture. And I think earlier,  
2 somebody asked about whether we see that our clients  
3 return and whether these lengthy sentences have a  
4 deterrent impact.

5                   For those who are assimilated, for those  
6 who have family, it has no deterrent impact at all from  
7 what I can tell. I had a client who served -- who was  
8 given 86 months in Chicago and didn't make it as far his  
9 time. He only made it to Houston within a month of  
10 having been deported because this is where everybody is.

11                   COMMISSIONER HINOJOSA: You know, you  
12 talked about shifting the burden of proof in the  
13 inversion, Option 5. And you heard the frustration of  
14 the judges earlier. And part of their frustration is  
15 because this is not relevant conduct, this is criminal  
16 history, that everyone in the courtroom knows existed,  
17 even the defendant. And most of the argument is, I  
18 didn't -- it's not that I didn't commit that. It's that  
19 you don't have these documents in your hand to show  
20 this. And so isn't that a little different than  
21 changing -- saying you're changing the burden of proof?

22                   Because the argument never is, I didn't  
23 commit that and I wasn't convicted of that. The  
24 argument is, you just don't have these documents. And a  
25 lot of times, these are documents that are in -- you

0070

1 know, most courts don't keep their documents that long.  
2 And so you did hear the frustration of the judges  
3 earlier of, we all know that it's happened and these are  
4 serious prior history crimes as opposed to relevant  
5 conduct, which we know the burden needs be on the  
6 government. But in these cases, when no one denies that  
7 the prior criminal history occurred or that these  
8 convictions are there, do you think that that is  
9 different from saying, well it's shifting the burden of  
10 proof.

11                   Because, as you heard, I mean, it's taken  
12 a lot of time to argue these cases as far as sentencing.  
13 The argument is never, I didn't commit the crime. It is  
14 always, you just don't have the documents.

15                   MR. CAMPBELL: Well, the burden is  
16 already on the government to establish criminal history  
17 for horizontal access of the sentencing table. So I  
18 think the burden properly stays there. It would really  
19 fall disproportionately on panel attorneys. Federal  
20 defenders have resources and they have the ability to  
21 pick up a phone and call the defender office in  
22 California and call upon resources there and  
23 investigators to run down prior convictions. But panel  
24 attorneys would not have those resources available, and  
25 it would be a significant burden to them.

1 MS. MEYERS: I also think that this  
2 guideline is not the only time the government has the  
3 problem. I think that what we know from Shepard and  
4 Taylor is, to the extent that the prior conviction  
5 increases punishment, it is still the government's  
6 burden. Now, they may just have to prove you had the  
7 prior conviction. But the categorical approach is  
8 required by the tension between Apprendi and  
9 Almendarez-Torres. And that placing that burden on the  
10 defense is -- has constitutional implications.

11 And that's true whether it's 924(E). In  
12 the State of Texas, for example, as you know, there is a  
13 recidivist statute. If the State of Texas cannot get  
14 the documents to prove the prior convictions, they  
15 cannot enhance. It means the defendant might get 25  
16 years instead of 99. But it's the fact that it's hard  
17 to prove doesn't mean that the burden should be on the  
18 defense.

19 I also think that, again, we have  
20 Booker. These are advisory. Often, we can't tell what  
21 happened. Injury to a child is a classic example where  
22 the reason injury to a child is categorically not a  
23 crime of violence is that it can be a crime of  
24 omission. Injury to a child can include the parent who  
25 left to go to wa-wa and the house burned down. And

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1 unless the State has chosen to narrow that document and  
2 they don't because their case load makes our case load  
3 look easy, then, categorically, that crime is not a  
4 crime of violence.

5                   But after Booker, although I may argue  
6 differently when I'm in court, I suspect that the Court  
7 can look at the facts and say, technically, this  
8 document doesn't show that. But the reality is that the  
9 defendant did such and such, and take that into  
10 consideration in fashioning an appropriate sentence.

11                   But to say that a defendant, as  
12 Mr. Campbell says, is looking at 57, 77, 90 months,  
13 unless they can get the documents out of California,  
14 places the burden on the person who is least able to  
15 meet that burden. And sometimes they don't really know  
16 what they were convicted of, whether it was a  
17 misdemeanor, whether it was a felony, what they pled to,  
18 whether they had a lawyer, whether the person in the  
19 black robe was a judge. Sometimes they really don't  
20 know that.

21                   COMMISSIONER HINOJOSA: Well, I guess the  
22 argument could be made that, pre-Booker, you could also  
23 depart upward in those kind of cases, where the facts of  
24 the underlying convictions were so bad that you could  
25 make the decision that you could depart. And you and I,

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1 Marjorie, have been in this for a long time. In fact,  
2 just about the same length of time, more or less.

3                   And you made the statement about people  
4 transporting their relatives and friends. That's not  
5 really true, that people really get prosecuted when it  
6 was a relative. That would be a pretty rare case, that  
7 we're going to have a prosecution because somebody is  
8 bringing their spouse -- or transporting their spouse.  
9 I mean, that is a very small number, if any number of  
10 cases that we have.

11                   Because, first of all, we have the six  
12 number to begin. You don't get federally prosecuted  
13 unless you've got six that you're transporting. And so  
14 it's a very rare number of cases where the prosecution  
15 is for relatives and/or friends as opposed to it being a  
16 business.

17                   MS. MEYERS: I think the problem is that  
18 it's probably rare in the Rio Grande Valley. It would  
19 not be rare in North Carolina. And that's the same  
20 disparity we get with fast track, that what goes on,  
21 where the prosecutor in McAllen has a rule that if you  
22 are caught bringing a child across the border and it's  
23 a -- and there's just one or two, they give us a  
24 misdemeanor in McAllen. They don't -- they do give us a  
25 misdemeanor in McAllen.



0075

1 used to them.

2 MS. MEYERS: And what I do hear from my  
3 people in McAllen, in fact, if they're not bringing  
4 relatives, what they are bringing friends, children.  
5 And you may not see them because they may not be  
6 prosecuted.

7 COMMISSIONER HINOJOSA: I would dare say  
8 that those people are getting prosecuted as felons.  
9 They may be friends in some cases, but they're getting  
10 paid for it.

11 MS. MEYERS: They may be. But this  
12 guideline would mean that they get two, three years for  
13 doing that, where the person driving six or ten of them,  
14 who really is in the business, is getting less time.  
15 Their conduct is not as culpable in the scheme of things  
16 than the person transporting, the person running the  
17 show.

18 What they are doing is helping out a  
19 friend. They may be paid gas. They may be paid some  
20 fee for taking the risk of crossing the border. But  
21 they are not in the same league with those who are  
22 running the show, running the drop houses, sending  
23 people to the trailers.

24 COMMISSIONER CASTILLO: Can I get your  
25 reaction both of you to the fast-track programs in

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1 general?

2 MS. MEYERS: I think fast track is a  
3 perversion of the system.

4 COMMISSIONER CASTILLO: I agree with you,  
5 but keep going.

6 MS. MEYERS: The defender community. I  
7 speak personally. I'll do the DOJ. I'm not speaking  
8 for the defender community. Because for those who have  
9 fast track in some divisions, it's great. In McAllen  
10 it's great, because they can have a fast track and they  
11 don't waive appeal. In Brownsville it is horrible  
12 because, yes, they have fast track, but they waive  
13 appeal and people get 16-level enhancements that they  
14 are stuck with. In Laredo, which is the busiest  
15 division in the Southern District of Texas, there is no  
16 fast track for illegal reentries.

17 It doesn't affect whether we enter a  
18 plea. It affects the sentence and anybody who is  
19 getting two levels off is happy to get two levels off.  
20 But as someone earlier said, in most cases, illegal  
21 reentry, the defendant knows going in whether they'll be  
22 convicted if they go to a jury trial. And so the three  
23 levels off makes a difference, the likelihood that the  
24 judge will not charge rent on the Courthouse or whatever  
25 it is.

1                   COMMISSIONER CASTILLO: So the whole  
2 justification for fast-track program, is busy districts  
3 by U.S.-Mexico Border, primarily. And, yet, we're  
4 finding out that El Paso and Laredo, the two busiest  
5 districts, do not have fast-track programs.

6                   MS. MEYERS: Now, I think fast track is  
7 useful, for example, in the 1324s where, for example,  
8 they stipulate and material witnesses can be released.  
9 There is a justification. There's a reason for doing  
10 that. There's a benefit to not having to house those  
11 people. But I don't think fast track is moving cases.

12                   COMMISSIONER HINOJOSA: And Laredo has  
13 fast track in drug cases?

14                   MS. MEYERS: That's correct. And I think  
15 they have them in 1324s, the material witness cases.

16                   COMMISSIONER SESSIONS: This is off the  
17 topic, but what do you think about the fast track in  
18 drug cases? Does it help? Is it a good thing, or is  
19 there no justification for that as well?

20                   MS. MEYERS: Yes, it helps, because most  
21 drug cases are triable. If you have drugs hidden in a  
22 gas tank, you can always argue that -- or you can always  
23 make the government prove you knew the drugs were  
24 there. It's harder in an illegal reentry case.

25                   And, also, the fast track in Laredo, drug

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1 cases in Laredo are prosecuted that are not prosecuted  
2 elsewhere in Texas because Webb County doesn't want to  
3 take the federal bridge cases. So they're getting lower  
4 sentences, but they're cases that wouldn't -- I would  
5 say small amounts. But if I tell you what's a small  
6 amount in Texas, then you will laugh.

7 COMMISSIONER SESSIONS: Right. That  
8 would be fair to say. I wonder if I could just ask you  
9 about the minors. We're assuming that there are cases  
10 in which minors are being transported, not by friends or  
11 not by relatives, but by organizations and they're  
12 relatively young. And you want to enhance penalties for  
13 that kind of harm that's done to minors.

14 You raise the question about proving a  
15 minor's age, and I wonder if -- assuming that you don't  
16 have to prove an age or you don't want to go up to 18.  
17 How do you -- how would you suggest we try to focus in  
18 upon that harm? I mean, some people talk about age six  
19 or below.

20 Well, are you suggesting that the lawyers  
21 would then insist the El Salvador birth certificate be  
22 obtained to show that the child was six or below, in  
23 which case are there other ways in which you could focus  
24 in upon that limited harm?

25 MS. MEYERS: I think -- number one, I'm

1 not convinced that, in most case, there is a greater  
2 harm. I'm not convinced there is a specific  
3 psychological trauma greater than the child remaining in  
4 El Salvador while the parents are here.

5                   Number two, there may be other ways,  
6 whether the child can communicate effectively. But I  
7 think it is -- it is hard without a birth certificate to  
8 determine whether someone is 15 or 18. Now, it may be  
9 hard to determine whether they're 6 or 10. But I think  
10 setting the numbers up around 16 or 17, many of our  
11 clients give different ages, depending on the  
12 circumstances. Some of them claim to be adults in the  
13 state system so that they can get probation and be  
14 deported, then come back and they're juveniles.

15                   I don't know what the answer is. But I  
16 think that there may be other factors you could look at,  
17 the child's ability to communicate on some of the  
18 factors.

19                   COMMISSIONER HOWELL: If I could just  
20 follow up on Bill's question. First of all, I wanted to  
21 thank both of you for your written testimony. It was  
22 enormously helpful, at least to me personally, what your  
23 positions were and your reaction in writing to the  
24 amendments. I know you all are really busy, and I just  
25 want to thank you. It was just enormously helpful.

0080

1                   And I do think on the minor -- on the  
2 minor children being smuggled, this is something that  
3 the Commission has heard about from other judges, not  
4 just the judges who were here this morning, with a  
5 proposal that -- and I'm talking about judge's roles  
6 from the District of Arizona's proposal -- where they  
7 wanted a little bit more of a nuance proposal than just,  
8 you know, all minors under 16.

9                   One of the things they suggested was  
10 focusing on the 6-year-olds and 12 and under. You know,  
11 sort of the prepubescent category of minor, so that it  
12 would be sort of almost apparent to people that they  
13 weren't debating whether somebody was 15, 16, or 17 and  
14 really requiring a birth certificate.

15                   Do you think that a proposal that would  
16 allow for an enhancement for, you know, the really young  
17 children, 5 or 6 and under, and then 12 and under, and  
18 then not deal with the adolescents, but leave that to  
19 judicial discretion an application of note to address  
20 what Judge Ludlum pointed out quite accurately, the  
21 difference between the sophisticated border adolescent  
22 versus, sort of, the less sophisticated one. Do you  
23 think that is something that would not be a litigation  
24 invitation, or that would be just as much of a  
25 litigation invitation for disputes over the age?

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1 MS. MEYERS: Well, anytime there's an  
2 enhancement, there's going to be a litigation  
3 invitation. But I do think it would be less so. I  
4 guess to me, more importantly, it more reflects the  
5 concern. I really think that 15- and 16-year-olds in  
6 this aspect, as opposed to child pornography or  
7 something, are in a very different level than a  
8 6-year-old in terms of concerns about what may or may  
9 not happen.

10 COMMISSIONER HOWELL: I mean, we've heard  
11 from these judges from Arizona, fairly horrendous  
12 stories about kids being drugged and fairly, you know,  
13 quite serious stories which has, as you see, prompted us  
14 to try and address this in an amendment.

15 MS. MEYERS: But you could address that,  
16 A, under vulnerable victim and, where they're  
17 horrendous, the Court can depart. You might consider  
18 something about drugs or abuse or, as opposed to across  
19 the board, if you bring a minor over.

20 COMMISSIONER HOWELL: Or, you know, a  
21 special enhancement for drugged children.

22 COMMISSIONER HINOJOSA: But you don't see  
23 that this is a policy reason. I mean, the argument so  
24 far from you has been today that they're just trying to  
25 come here and get together with their parents who are

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1 here illegally. So, therefore, we are somehow saying  
2 that, you know, the reason they're separated from the  
3 parents is because the parent has made that choice. And  
4 so, therefore, we are encouraging people, then, to go  
5 ahead and just continue violating the law.

6 MS. MEYERS: But we won't stop it.  
7 Parents who are here illegally will try to bring their  
8 children, whether the coyote gets 12 months or two  
9 years. That's not going to change. And I don't think  
10 it changes the coyote's culpability, which is the person  
11 going to prison.

12 COMMISSIONER HINOJOSA: Plus hasn't it  
13 been your experience that most of these do involve fake  
14 documents more so? They usually involve documents that  
15 are being used with regards to the person transporting  
16 them, how these are their children as opposed to  
17 somebody else and that this is presenting that kind of  
18 problem? There is an attempt to use fake birth  
19 certificates more and to link them to the person  
20 transporting them than there is in the ordinary case.

21 MS. MEYERS: Then create an enhancement  
22 for the use of fake documents to commit a felony. Don't  
23 make it across the board.

24 COMMISSIONER STEER: Ms. Meyers, I'd like  
25 to ask you about the alien table, the proposed changes

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1 and the comments that you made in your written  
2 testimony. You opposed finer gradations. And, frankly,  
3 I'm -- I'm interested in that issue, but I'm a little  
4 bit intrigued by your position as federal defenders.

5 I would have thought that finer  
6 gradations, which would enhance the fairness, at least  
7 for some defendants. Right now with the three-level  
8 gradation at the margin, you're talking about, you know  
9 about, a 40 percent increase, where one alien can make  
10 that difference, can result in that increase. Whereas,  
11 with two-level increments, the offense levels would  
12 overlap, and it would seem to me would be a fairer  
13 approach.

14 But when you don't -- you don't raise the  
15 issue over complexity for anything else, but you raise  
16 it here. Why is that? Why are you not interested in  
17 the fairness of such an approach?

18 MS. MEYERS: Because I don't see -- I  
19 think we would raise the issue of complexity elsewhere  
20 in terms of -- and I think the completion of 2(B)1.1 is  
21 unnecessary. But that's not what we're talking about  
22 today.

23 COMMISSIONER STEER: You didn't raise it  
24 as an issue. Mr. Campbell didn't raise it as an issue  
25 in his comments about which option he would prefer, you

0084

1 know, in the unlawful entry. It just seems  
2 inconsistent.

3 MS. MEYERS: Because what is complex in  
4 illegal reentry is figuring out what the law is. And  
5 what is complex is probation officers having to do that  
6 instead of the Department of Justice doing that. But we  
7 can't change the fact that there are at least 51  
8 jurisdictions that define different crimes differently  
9 and that have different sentencing patterns.

10 But changing the gradations assumes that  
11 there is a significant difference between smuggling six  
12 aliens and smuggling 11 that should be mandated, at  
13 least if the guidelines are presumptive and reasonable,  
14 from somebody in Washington versus leaving the judge on  
15 the ground, the authority. Yes, one alien changes the  
16 guideline level, but that's easily dealt with either by  
17 giving bottom of the guidelines instead of the top or  
18 deciding that, in this case, this guideline creates a  
19 sentence that is unnecessarily severe.

20 I just don't see any reason for adding  
21 gradations when they're advisory.

22 COMMISSIONER HINOJOSA: We have time for  
23 one more question, if there is another question.

24 COMMISSIONER SESSIONS: You've heard --  
25 you've heard comments from the judge from El Paso that,

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1 essentially, the lack of a fast track system does not  
2 impact them at all. Have you found that to be the case  
3 as well?

4 MR. CAMPBELL: Well, perversion or no, I  
5 think the fast track system can move cases that should  
6 be moved, but there has to be a meaningful benefit. And  
7 a benefit that we have in two divisions in this district  
8 is -- is stingy, one level. I don't think it moves as  
9 many cases as it could. And I think if a fast track  
10 with a more realistic benefit were adopted in El Paso,  
11 it would move more cases faster and cut down appeals.

12 COMMISSIONER SESSIONS: Judge was  
13 indicating there's no real -- no real docket problem,  
14 that they were moving rapidly. Do you see that as not  
15 the case?

16 MR. CAMPBELL: It's a very busy docket.  
17 It's hard for everybody involved to keep up with it.  
18 Certainly on our side, it is.

19 MS. MEYERS: And fast track doesn't  
20 change it. It only makes it easier for the Department  
21 of Justice. The probation and the defense still has to  
22 do the same analysis and same search for mitigation.

23 COMMISSIONER HINOJOSA: Well, thank y'all  
24 very much. We do realize how busy your schedules are  
25 and the number of cases you're responsible for. So we

1 appreciate your input and your willingness to come  
2 today. Thank y'all very much.

3 MS. MEYERS: Thank you.

4 MR. CAMPBELL: Thanks.

5 DEFENSE AND OTHER ADVOCATES

6 COMMISSIONER HINOJOSA: Our next panel is  
7 present, and Carmen Hernandez continues to be an empty  
8 chair here. But we do have Fredilyn Sison, who is an  
9 assistant federal defender in the Western District of  
10 North Carolina. I believe they'll bring a different  
11 perspective, not being a border court, to some of these  
12 issues.

13 And Lisa Brodyaga, who is an attorney in  
14 San Benito, Texas, who has an extensive immigration  
15 practice on the civil side and also handles criminal  
16 aspects in her practice. And so we look forward to  
17 hearing from both of you. And, Fredilyn, why don't you  
18 go first.

19 MR. SISON: Thank you, sir. I think I  
20 bring a different perspective to this panel and to the  
21 previous speakers in that I actually am an immigrant.  
22 When I say I'm an immigrant, I came to this country when  
23 I just turned eight with my family.

24 It was a little different. We came here  
25 legally. And I understand we're talking about illegal

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1 immigrants, but my experience could be anybody's.  
2 Before I was able to come in here, my mother came in  
3 here without us in order to establish residency. And I  
4 was with her for many years until she was able to bring  
5 us here. She brought my father in several years later  
6 and, finally, the children.

7                   And I can tell you what it was like to  
8 finally be with my parents, but treating them as if they  
9 were strangers because they truly were strangers. The  
10 first few weeks we were finally together, I was a little  
11 afraid because I didn't know these people. And the only  
12 person that was familiar to me was my sister.

13                   Couch this with not know the language,  
14 seeing snow for the first time, and being in a place  
15 that was utterly foreign to me. And so that was the  
16 emotional cost to -- to me and my family.

17                   But the bigger cost, and it's not one  
18 that I talk about, is what happened to another member of  
19 my family, which was my brother. We lost him because in  
20 the wait for us to get into the country illegally, he  
21 went into the hospital and he died. And there's not a  
22 day that goes by when I don't think what it would have  
23 been like having been able to come to this country  
24 together as a family and had had him in a United States  
25 hospital. I think it would be different, and my life

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1 would be different.

2                   And so my experience as an immigrant  
3 informs what I do as a defender, and I feel a lot of  
4 sympathy for the people who come here and,  
5 unfortunately, break the laws to be with members of  
6 their families.

7                   And that's what I want to bring today to  
8 this table. I don't think the guidelines provide enough  
9 information or guidance to the courts as to the families  
10 that are part of this big problem that we have.

11                   I'm lucky that I was able to work for  
12 four different jurisdictions. I started out in 1994 in  
13 Nebraska, which has a significant immigration problem.  
14 Went to Idaho, again significant immigration problem.  
15 But we dealt with it using -- they didn't call it a  
16 fast-track program then. But what we did was what was  
17 known as double 1325s, in which either if somebody with  
18 a low criminal history score would get one 1325, a  
19 misdemeanor; somebody with not so bad would get a  
20 double, but would be maxed out at 24; and somebody with  
21 a higher criminal history would have 24 plus six, which  
22 is the double 1325 and have them concurrent to each  
23 other.

24                   Then I moved to Nevada, which again had a  
25 significant problem with immigration. And in that

1 particular jurisdiction, there was no such thing as fast  
2 track. It wasn't something they wanted to consider and  
3 wouldn't consider.

4                   And, finally, I'm now with Western North  
5 Carolina, which we are getting illegal reentry cases,  
6 and the word is from the U.S. attorneys that we're going  
7 to get more because of the substantial amount of people  
8 that are coming into that area?

9                   Now, I want to talk about examples from  
10 my experience as a federal defender, because I don't  
11 think these are the kinds of cases that we think about.  
12 Specifically, we have cases in which somebody, let's say  
13 at age 18, comes into this country illegally and commits  
14 a crime. I have a specific case in mind where my client  
15 was involved in some sort of bar fight. He picks up a  
16 bottle in order to defend himself, and a whole number of  
17 them get charged with assault. Didn't do any time, but  
18 that's on his record and it's a crime of violence.

19                   Fast forward to when he's in his mid-40s,  
20 has a family, has gotten nothing more serious than  
21 several driving charges. And all of a sudden he's  
22 looking at a 16-level bump and there's nothing that will  
23 take him away from that. Even the much used cultural  
24 assimilation departure isn't available for him. And is  
25 that the kind of sentence that is fair for someone in

0090

1 this position?

2                   Another client I had came into this  
3 county illegally and has had a number of priors. The  
4 difference with him is that he got sick while he was in  
5 custody; and, fortunately, for him BOP decided to take  
6 him to a nearby medical facility where he was treated.  
7 Unfortunately, it was the kind of treatment that  
8 required more than one visit. And, actually, during the  
9 course of the year, he received numerous visits to this  
10 medical facility and he was deported, even though he was  
11 expected to keep continuing his rehabilitation.

12                   Well, not finding the same kind of  
13 medical care in Mexico, he decided to come back  
14 illegally and was caught. And, again, his sentence was  
15 bumped up substantially, and all he wanted to do was  
16 medical -- get medical care.

17                   The most common type of illegal reentry  
18 cases are those in which the person comes back because  
19 everybody in his family but him is either naturalized or  
20 born a U.S. citizen. And all he wants to do is make a  
21 living with his family and not get into any trouble but  
22 just have work, either as a landscaper or in a  
23 restaurant, which is typical of our cases. And this  
24 person is caught, not because he was doing anything else  
25 other than going to work and that's all.

1                   This is substantially different from the  
2 kinds of cases that I used to get in Nebraska where the  
3 only people they would pick up are those in prison who  
4 are in there for some sort of drug crime or a crime of  
5 violence, and then they were charged with 1326s. The  
6 cases that I'm getting now are people who are plucked  
7 off the street because they're recognized as not being  
8 able to speak or there's some sort of raid that goes on  
9 in a casino, and they're the ones that are looking at  
10 these lengthy sentences.

11                   Finally, the last client that I want to  
12 talk about is a client who actually came into this  
13 country legally with a permanent resident card. What  
14 ended up in his case is he got involved in drugs, and he  
15 was deported but he didn't go through a hearing. He  
16 actually didn't even get notice of a hearing, but was  
17 sent back.

18                   Now, nobody didn't tell him that he  
19 should give back his visa card. And when he came back  
20 to the United States, he came back using that visa card  
21 and actually came in after being inspected at the  
22 border. He went back to Mexico, came back actually  
23 twice in the space of about three years using the same  
24 card and was inspected at the border and let in.  
25 unfortunately he got stopped for a driving offense; and,

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1 all of a sudden, this came back to haunt him. And this  
2 is somebody that thought he -- he was doing something  
3 legally.

4                   What I'm asking this commission to do is  
5 to consider these family types of situations. I  
6 understand that we don't want to let people in here who  
7 can't come in here legally. But they're going to come.  
8 I mean, that's just a fact of life, whether or not  
9 they're going to come here to do low-paying job or to be  
10 with their families, they're going to come.

11                   And then we enhance their sentence by 16,  
12 or 12 or 8 levels because of something they've done in  
13 the past, I just don't think that's fair because it  
14 doesn't put a human face in this entire thing. What I  
15 would ask the Commission to do is maybe think of a  
16 non-guideline sentence in either the forms of the  
17 departure or variance and encourage the judges to do  
18 this in terms of an application note.

19                   Now, you may say, Well, why don't you as  
20 a defender make a downward departure motion? We do  
21 that. But let's face it, judges look at the guidelines  
22 and do exactly what the guidelines tell them to do. And  
23 if there's nothing in the application note or in the  
24 adjustments, they're not going to do it. And I think  
25 data bears this out. Most of the guidelines post-Booker



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1 to point out that I think have not really been fully  
2 considered yet. First of all, I would like to draw a  
3 different distinction between the undocumented and the  
4 undocumented. One of the problems that occurs in the  
5 immigration system is that if you're a lawful, permanent  
6 resident and trying to bring in your family, depending  
7 on what country you were from, you may have a wait of up  
8 to, say, 15 years. I think this was the reason that she  
9 had to wait so many years before she was able to come  
10 in.

11                   If you're trying to join your lawful,  
12 permanent resident husband or parent in the  
13 United States and are told you have to wait in Mexico or  
14 your home country, particularly if it's Mexico, for 8 to  
15 15 years, the answer to that is, What husband? What  
16 family? after that period of time. So it is completely  
17 understandable that, although they do so illegally, the  
18 documented family member is going to bring in the rest  
19 of the family and they are going to try to wait here.

20                   One of the problems that we're having  
21 after the 1996 legislation is if one of those persons  
22 who is waiting -- let's say the husband has properly  
23 petitioned for the family and they are all waiting their  
24 chance to -- to immigrate, suppose the mother's parent  
25 dies in Mexico and she is not able to get a permit to go

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1 back there and come in again so she goes back and comes  
2 back in illegally. Under the law, she is now  
3 permanently barred from ever becoming a lawful,  
4 permanent resident. She has become undocumented.

5                   This is not something that this  
6 commission can fix, but it is something that I think  
7 needs to be taken into consideration. There are a lot  
8 of these traps, particularly after Ira-Ira in 1996,  
9 where people do what they think are relatively innocent  
10 acts and they have horrendous immigration consequences.  
11 And they become permanently undocumented.

12                   We see it a lot with false claim to U.S.  
13 Citizenship. Children who have grown up in this  
14 country, gone to school here, but actually were born  
15 abroad, their parents, for whatever reason, have never  
16 gotten them legal. They go to Mexico with their buddies  
17 to have a beer and come back, say, I'm a U.S. Citizen.  
18 And low and behold, they get caught, and that person is  
19 now permanently barred. There is no waiver. That  
20 person can never become legal.

21                   By creating large numbers -- and there  
22 are a number of those traps. By creating large numbers  
23 of people who are otherwise good human beings, who have  
24 made mistakes, whose whole families are here, you are  
25 creating a permanently undocumented population.



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1 a drug trafficking offense, there is no second chance  
2 anymore. That person is going to come back. That  
3 person is going to be considered an aggravated felon.  
4 And I've heard a lot of talk here about considering the  
5 staleness of the underlying crime. But I would also  
6 like to suggest that you consider the gravity as  
7 measured, for example, by the sentence that the person  
8 was given for that offense.

9                   Because someone who was received deferred  
10 adjudication for possession of less than one gram of  
11 cocaine should not receive the same sentence as somebody  
12 who was the captain of the ship where there were 2000  
13 pounds of marijuana; and, therefore, has an aggravated  
14 felony. And that I think is something that could be  
15 done through the guidelines without having to go back to  
16 Congress.

17                   In terms of the false passports. I think  
18 there's another area where the Commission could also  
19 consider that, frequently, people need passports to get  
20 out of their countries. They are under repressive  
21 regimes. They have to get false passports to escape.  
22 They come here to apply for asylum.

23                   I do not think that we should  
24 categorically consider them to be of the same gravity as  
25 people who have gotten, say, false U.S. passports to

1 come in. If they get a false Iranian passport to get  
2 out of Iran or false North Korean passport to get out of  
3 North Korea, that should be taken into consideration,  
4 the reasons, whether it was obtained to get out of their  
5 country of origin or whether it was obtained to get into  
6 the United States.

7                   Finally, in terms of minors, I understand  
8 and I agree with Judge Hinojosa, that it is the rare  
9 case that the smuggler is a relative or is doing it as a  
10 favor for a friend, but it is not an unheard of case. I  
11 personally have had several cases where people have been  
12 prosecuted. One case where a husband and wife used the  
13 birth certificate of their child to bring in a nephew  
14 for medical treatment. That brings all the elements  
15 together that she was speaking of. Fortunately, that  
16 was back in the days when 212(c) relief still existed,  
17 and we were able to get them relief.

18                   But I now have a client who also is a  
19 permanent resident who brought in two minor children to  
20 take them to their parents in Chicago, or thereabouts,  
21 and this was in Laredo and she got caught. She was  
22 given a total of \$1,000 for all the airplanes and all  
23 the costs and any little bit that might have been left  
24 over for her. But she was basically doing it as -- her  
25 motivation was to help a friend and not for the gain

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1 involved, even though there was some money which changed  
2 hands.

3                   With respect to the question of people  
4 who have claims to U.S. Citizenship. That, I think you  
5 are going to see increasingly, if only because there is  
6 no other defense left for people in that situation. It  
7 used to be that a lawful, permanent resident who got his  
8 citizen -- his residence through a U.S. Citizen parent  
9 and got into some kind of trouble could request relief  
10 under Section 212(c) of the act. And even I, as a  
11 practitioner, rarely would go into the details to find  
12 out whether that person qualified for acquired  
13 citizenship or not because there's an easy way out. You  
14 get them 212(c) relief.

15                   Now that everything is an aggravated  
16 felony -- a bar fight with a one-year suspended  
17 sentence, possession of less than one gram of cocaine,  
18 everything almost is an aggravated felony -- and there  
19 is no longer relief for any of these people, of course  
20 we are digging much deeper and we are trying to use  
21 acquired citizenship far more often than we ever did in  
22 the past.

23                   And it is not something that is an easy  
24 case to prove one way or another. And, for their own  
25 reasons, immigration has tightened up extremely in terms

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1 of granting certificates of citizenship over the past  
2 couple of years. And cases that would have been very  
3 easily accepted previously because they were based on  
4 credible testimony of relatives and friends as to the  
5 time the parents spent in the United States are now  
6 being denied because they're demanding a document for  
7 each month of claimed presence that the -- that the  
8 parent has in the United States. So you are going to  
9 see more of those, and I suspect you're going to see a  
10 lot more of them in trial.

11                   And you're also going to see those people  
12 coming back because, as others have said, if you have  
13 family here and you have spent your whole life here,  
14 you're not likely to stay in Mexico.

15                   And I would ask also, in terms of the  
16 limitation on the forms of the programs that are  
17 available in the prison system to the undocumented, what  
18 is the purpose of not letting them participate in the  
19 drug programs? What is the purpose of not making these  
20 things available to them?

21                   Certainly, in most of these cases, you  
22 are going to see these people again. And, therefore, it  
23 would be in society's interest to help them rehabilitate  
24 themselves. And I ask whether we are, by increasing the  
25 sentences of such people, whether we're really

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1 protecting society or whether we are, as I think in a  
2 lot of cases with the increased sentences, we are simply  
3 protecting the prison industrial complex. Thank you.

4 COMMISSIONER HINOJOSA: I haven't heard  
5 that term in a long time. Carmen?

6 MS. HERNANDEZ: Good morning. My  
7 apologies. Bad weather follows me. I spent the night  
8 in Atlanta. Thank you for inviting me to testify. I  
9 want to tell you this is a much nicer venue than  
10 Washington D.C. Very pretty, in fact.

11 Where do I start? I think you'll expect  
12 the same thing from me as time's gone by, so you'll  
13 continue to get my unvarnished view of what is happening  
14 in the law, particularly now that I'm practicing  
15 full-time. Before I get to the bad news, let me  
16 congratulate you for hiring Judy Sheon as your executive  
17 director. She's terrific. I didn't think you'd be able  
18 to replace Tim with anyone as good. But  
19 congratulations.

20 COMMISSIONER HINOJOSA: Is that it for  
21 good news?

22 MS. HERNANDEZ: Yes. I'm sure the ones  
23 that came before me have already given the good news.  
24 But I agree with almost everything everyone has said  
25 here. And that's the reality.

1                   COMMISSIONER HINOJOSA: You didn't hear  
2 the judges.

3                   MS. HERNANDEZ: Oh, except for them. I  
4 recognize the Commission always struggles. I mean, I  
5 respect you. I know sometimes I may sound like I'm only  
6 pointing out the bad things you do, and then I never  
7 give you credit for the good things. But as I've  
8 mentioned in the past, you don't want me to give you  
9 credit because the moment I say you've done something  
10 well, surely, someone on the other side will say we must  
11 look at this again.

12                   I'll cut through the preliminaries. As  
13 an aside on the Booker, you should know that the rumors  
14 that the guidelines are dead are, you know, highly  
15 overstated. Unfortunately, the guidelines are  
16 continuing to be applied in the ways that defense  
17 attorneys think create problems and the way that at  
18 least five Justices of the Supreme Court have ruled were  
19 unconstitutional.

20                   Judges, for the most part, continue to  
21 use guideline sentencing exactly as they were before.  
22 In, you know, the rare case, in the cases that before  
23 they would have granted a departure, now they're  
24 deviated. Strangely enough, I thought they were going  
25 to grant more departures; but, instead, they're ignoring

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1 departure grounds and deviating, where they could have  
2 just as easily departed under the guidelines.

3                   Which is -- which is to say that -- and  
4 certainly, the courts of appeals are jumping over each  
5 other to assert that, you know, the guideline sentence  
6 is reasonable. In my opinion, frankly, the guideline  
7 sentence should be presumptively unconstitutional until  
8 the judge and the government gets to prove that, in  
9 fact, it complies with the Sixth Amendment requirements  
10 that you -- the Supreme Court said are required.

11                   The judges ought to at least -- the  
12 government ought to have to prove that the judges did in  
13 fact look at the factors, the guideline sentence.  
14 Otherwise, it should be presumptively unconstitutional.

15                   COMMISSIONER CASTILLO: Why do you think  
16 judges are skipping departures and going right to  
17 non-guideline sentence?

18                   MS. HERNANDEZ: You know, I don't -- I'm  
19 not quite sure. I thought they would -- I certainly,  
20 when I argue, I try to steer them because I thought they  
21 were trying to not appear as if these numbers have gone  
22 crazy. It may be partly that judges, when they're  
23 deviating from the guideline, feel more comfortable  
24 in -- in spelling it out as a function of sort of  
25 judicial discretion, a full-flesh judicial discretion,

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1 instead of sort of caveating their opinions through  
2 guidelines sentencing.

3 But it just -- that just -- it appears to  
4 me -- you know, and I know the guidelines fairly well,  
5 and I make the guideline arguments and the judges still  
6 appear to ignore that and go in the other direction.  
7 And, obviously, your numbers show the downward  
8 departures are less than they were before. So I'm not  
9 sure.

10 So the rumors that I'm hearing that the  
11 Department of Justice is going to Congress this year for  
12 sure, I'm not sure why they're doing that. And I just  
13 want to remind them that two of the justices have voted  
14 with them in Harris are gone.

15 Which is all to say that the guidelines  
16 are flawed -- we all know that -- in some respects.  
17 Everyone in this courtroom -- in this room knows it,  
18 Judge.

19 COMMISSIONER HINOJOSA: I just want it on  
20 the record that silence is not an admission at this  
21 time.

22 MS. HERNANDEZ: The over-reliance on  
23 quantity and loss as a measure of culpability, I think  
24 everyone has recognized that that is an issue that needs  
25 to be addressed, or that is a flaw in the guidelines, at

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1 least to a number of cases.

2                   And I continue to say -- and here's what  
3 I came to say: I think 5, 10, 15 years, 20 years, the  
4 kind of sentences that we've gotten used to, I think is  
5 morally corrupt in most cases that we sentence people  
6 to. There certainly is, I believe, a moral problem that  
7 we've gotten used to sentencing people for those periods  
8 of times.

9                   Five, 10, 15 years, a child grows. Any  
10 of us who have children knows that in five, ten years,  
11 these children are no longer children. They're adults.  
12 Parents die. Families dissipate. And in immigration  
13 cases, it is frankly an outrage. In my opinion,  
14 speaking as an immigrant, I happen to be one of the  
15 lucky ones. My parents came to the United States and  
16 brought me here fleeing a communist dictator, and they  
17 were granted a political asylum.

18                   COMMISSIONER HINOJOSA: Who is still  
19 there.

20                   MS. HERNANDEZ: Who is still there.  
21 Outlived many, many U.S. Presidents.

22                   But because of that, I know the view  
23 of -- people do not leave their home countries  
24 willingly. Every -- every person in the world has an  
25 attachment to the land that they were born, and they

1 leave because of the dire circumstances in their own  
2 home country, either financial or political or  
3 otherwise.

4                   So these people that are coming across  
5 the border to do our yard work, to take care of our  
6 children, to clean our offices, and we joked in  
7 Washington D.C. some months ago when Congress was  
8 considering passing Draconian -- further Draconian  
9 immigration statutes, that there would be hordes of  
10 little children running through upper Northwest and  
11 Chevy Chase because all the nannies would be gone. And,  
12 you know, our yards in the Washington D.C. Metropolitan  
13 area would no longer be nice and manicured. We do -- my  
14 family does our own yard work.

15                   But it's just -- I think there's a moral  
16 component to this. I know that you commissioners, I  
17 know you judges take this very seriously. And the  
18 Commission, it's a political hot potato, I recognize.  
19 But the Commission ought to -- ought to speak out on  
20 this.

21                   And I also think that I practice in the  
22 jurisdiction that has no fast track. In a world where  
23 the government is continuously telling us that the need  
24 for guideline sentencing and the need for limiting  
25 judicial discretion is about eliminating disparity, the

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1 fast-track programs are a farce.

2                   My client in Washington D.C. and in  
3 Maryland end up being comparable to the people who are  
4 being prosecuted in the border districts. If you get  
5 picked up in Washington D.C., even with only one reentry  
6 or even with no priors, you're getting numbers that are  
7 completely out of whack with what people in the border  
8 districts are getting. So in terms of disparity, it's  
9 just -- it make no sense whatsoever. And the government  
10 ought to --

11                   EX OFFICIO COMMISSIONER ELSTON: It's  
12 about time you look at me when you were criticizing the  
13 Department of Justice. You should feel free to look at  
14 me when you're directing those comments.

15                   COMMISSIONER HINOJOSA: I will say you  
16 are the only person who he's made a comment to this  
17 morning. So you've gotten your effect. But, you know,  
18 speaking of the moral aspect of things, let's leave  
19 illegal entry and go into transporting aliens.

20                   I mean, morally, those individuals who  
21 are charged with those crimes tend to be people who are  
22 just abusing individuals who are desperately wanting to  
23 come for a job. And they treat them like they're a  
24 commodity, like they're transporting cattle, like  
25 they're -- there's nothing appealing about them as to

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1 how they have treated these individuals, the amount of  
2 money they have made from them, the threats they have  
3 made on them.

4                   Are these penalties enough for those type  
5 of individuals on a moral basis as opposed to -- you  
6 know, it's not just illegal entry that we have here. We  
7 have transporters. In many cases, these are people who  
8 have abused individuals, many times, our fellow  
9 citizens, and have mistreated them, have charged them an  
10 outrageous amount of money based on the desperate need  
11 to come here and find a job.

12                   MS. HERNANDEZ: Well, I think it  
13 depends. Recently, there was an article in the paper  
14 about a Cuban-American who had gone to Cuba with a boat  
15 to take out some of his family. And low and behold, a  
16 child died on the way over. And so they  
17 cross-referenced him to the murder guideline. And I'm  
18 not sure if they cross-referenced him. But the judge  
19 was complaining that 78 months or 80-something months  
20 was not out enough and he sentenced him to a higher  
21 sentence.

22                   As a parent, I cannot fathom taking a  
23 child of mine on, you know, on a dinghy into the ocean.  
24 So the only thing I can figure is that the conditions  
25 must be so dire that you would take your own child and

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1 expose him to such danger that we have -- we have no  
2 conception of what is going -- or of why people are  
3 driven to come to the U.S.

4                   With respect to your question, Your  
5 Honor, you know, I think it's easy to paint everyone  
6 with the same broad brush. But, in my experience, in  
7 almost every case I've ever represented someone -- and I  
8 don't represent smugglers. I never have. It's not the  
9 type of case that I have represented people. But in  
10 almost every case, there is an explanation and there is  
11 some reason why people do what they do. So what --

12                   COMMISSIONER HINOJOSA: Sometimes it's  
13 greed and money.

14                   COMMISSIONER STEER: Yeah. Money.

15                   MS. HERNANDEZ: Rarely it's pure greed,  
16 except for those republicans involved in the big  
17 Enron -- no. Never mind.

18                   MS. BRODYAGA: If I could also just jump  
19 in on this issue, because I agree that the majority of  
20 smugglers fall in that category. But I am very  
21 concerned about painting again with too broad a brush.  
22 I recently or am still representing a gentleman, a  
23 permanent resident, who fell into financial distress and  
24 all that. He was a trucker and he allowed himself to be  
25 talked into taking a group of six Mexicans in his

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1 truck.

2                   What did he do? Well, one was a pregnant  
3 woman. So he said, Oh, no. I can't have her in the  
4 back. He put her in the cab and gave her his wife's  
5 documents. The others, he had them in the back, but he  
6 made sure all the windows were open so that they got  
7 plenty of air, et cetera. And, of course, the dogs  
8 picked up on them very easily at the checkpoint and he  
9 was caught because he was not being inhumane. And I  
10 think we need to leave the door open for the fact --

11                   COMMISSIONER HINOJOSA: But how much  
12 money was he making?

13                   MS. BRODYAGA: He was going to get  
14 \$2,000.

15                   COMMISSIONER HINOJOSA: Right. But he  
16 wasn't doing that just out of the kindness of his heart.

17                   MS. BRODYAGA: No, he was not.

18                   COMMISSIONER HINOJOSA: He was making  
19 money off of it.

20                   MS. BRODYAGA: That is true. He was  
21 trying to. Of course, he didn't get it. But he did it  
22 in a manner which he took care to be sure that he did  
23 not endanger the people. And that was the point I was  
24 trying to make. Yes, he made a grave mistake.

25                   Fortunately, and this is ironic, that

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1 transporting, although it is an aggravated felony, is  
2 not a crime involving moral turpitude and he was still  
3 eligible to adjust his status, again, through his wife.  
4 And he was willing to stick it out. He was given, I  
5 believe, an 11-month sentence and he spent another year  
6 and something in immigration detention while we went  
7 through the process and immigrated him again through his  
8 wife. So his story has a happy ending. And I assure  
9 you, he has learned his lesson. He never did it before,  
10 and he will never do it again.

11 But we need to be careful about the broad  
12 brushes, that because you see -- and I'm sure you do.  
13 And I've read about and I have seen a lot of these  
14 horrendous cases. And I would not represent these  
15 people either. But I --

16 MS. HERNANDEZ: I do, but I just haven't.

17 MS. BRODYAGA: I don't have time. But  
18 not everyone falls into that category. And I think we  
19 need to be careful that we don't paint ourselves into  
20 such a corner that we assume that everyone is not only  
21 making money off of it, but is willing to put the lives  
22 of the people they're transporting at risk.

23 COMMISSIONER SESSIONS: How do you make  
24 the distinction? I agree with you completely. On the  
25 northern border, it obviously is not nearly the

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1 difficult situation that it is on the Southern border.

2                   But, oftentimes, in our neck of the  
3 woods, somebody goes to a bar and persuades another  
4 person to take two or three people across the border in  
5 the woods, in the middle of the woods, and they get  
6 picked up on the other side and that's it. These are  
7 not professional smugglers; but, of course, it's still  
8 transporting. It's still smuggling.

9                   How do you make the distinction? How do  
10 you differentiate within the guidelines for smugglers  
11 who are creating a substantial risk? That's one of the  
12 ways we could do it. And, second, for this kind of  
13 profiteering; that is, management of some larger  
14 organization as opposed to some guy who, for \$100 --  
15 these people are getting paid a \$100 to take somebody  
16 across the border.

17                   MS. BRODYAGA: I think you just answered  
18 your own question. And it goes to the endangerment  
19 issue and perhaps to the -- to the profit and to the  
20 issue of whether the person has priors or not. And  
21 also, you know, the question of motivation. If the  
22 person has taken pains not to endanger the transportees,  
23 you know, that should be recognized. And a person who  
24 does endanger them, that should also be recognized.

25                   I think there are mechanisms currently

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1 available. This is not my specialty, so I can't really  
2 go into that in great detail. But I think the mechanism  
3 is already in place. And by raising the base level,  
4 what you are doing is you are punishing the innocent in  
5 order to get it -- or the less culpable in order to get  
6 at the guilty or the more culpable, when there are other  
7 mechanisms for doing that.

8 COMMISSIONER SESSIONS: Philosophically,  
9 that's the point I think that you're making. That is,  
10 to keep the base offense level low and then you focus in  
11 upon the aberrant acts, the real dangerous acts or the  
12 acts that you want to particularly punish by way of an  
13 enhancement.

14 MS. BRODYAGA: Exactly.

15 MS. HERNANDEZ: And also we need  
16 discretion. By definition, any travel across the  
17 southern border has a certain amount of risk just  
18 because of the weather. And I'm not sure that everyone  
19 who smuggles is consciously trying to put the people  
20 they're smuggling across at risk. It just happens. I  
21 mean, that's -- that's part of the -- of the nature of  
22 the crossing in that manner. So judicial discretion,  
23 what a novel idea.

24 MR. SISON: And then you have a model.  
25 And let's look at the drug crimes. I mean,

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1 specifically, to see whether or not somebody's a user  
2 versus a drug dealer, and why couldn't we consider that  
3 in the context of this. You look to see whether or not  
4 they've done it before, how big are the reaches. Have  
5 they been convicted of this particular crime and the  
6 kind of risk they're taking.

7                   It is a given that anytime you try to  
8 bring somebody into this country illegally, there's  
9 going to be a risk no matter what because you're trying  
10 to get away from, you know, border patrol agents or  
11 customs or whoever. So there's other things that you  
12 should take in place instead of saying, well, this  
13 person got \$1,000. He's probably profiteering.

14                   I mean, in many ways, people bringing  
15 other people over aren't making a lot of money and  
16 they're taking substantial risks. So I think there are  
17 other ways of doing it. And as I said, let's look at  
18 other models that are in place within the guidelines.  
19 Have they done it before? What are their priors? What  
20 kind of risks have they taken with this particular trip?

21                   MS. HERNANDEZ: With respect to  
22 aggravated felonies, I'm sure people have said it  
23 before, the notion of an aggravated felony was an  
24 immigration-based notion to determine who should be  
25 excluded or who should not be permitted. And it's been

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1 adopted into the -- into this federal sentencing in a  
2 manner in which, I'm sure everyone before me has already  
3 discussed, really corrupts the notion of graduated  
4 guideline sentencing.

5 I mean, a 16-level enhancement for an  
6 ag felony is just -- you know, that's what we do when we  
7 have a terrorist act or something like that. It's  
8 just -- it corrupts the guideline. And I want -- I want  
9 you to know that, in my neck of the woods now, they're  
10 charging ag felonies that are identity theft, which is a  
11 two-year mandatory minimum aggravated felony if anybody  
12 is arrested with a phony ID. Which almost by  
13 definition, if you're an illegal alien in the U.S. and  
14 you're working, you're going to get ahold of some  
15 illegal -- some, you know, false identification to  
16 enable you to earn money.

17 So that's what they're doing in  
18 Washington D.C. Everybody is getting charged with an  
19 ag felony with the identify theft two-year mandatory,  
20 whether they knew -- you know, they're buying these  
21 things on the black market. They don't know -- they're  
22 not using it for purposes of, you know, stealing  
23 someone's identify. They're using it for purposes -- I  
24 mean, that may be the end result in some ways. But  
25 they're using it for purposes of getting a phony ID so

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1 they can get a job, so they can, you know, make a living  
2 instead of dealing in drugs.

3                   So if you're going to -- you know, that  
4 person, all those people, they're not -- you're not  
5 charging -- you're not charging identify theft, I'm  
6 sure, at the border. So right off the bat, you've got a  
7 disparity with people -- I mean, these guys -- this may  
8 be the only time they've ever entered. I've gotten  
9 clients who entered and get turned around at the border  
10 50 times in like three months until they finally make it  
11 up north. And those people are being treated -- people  
12 up in non-fast track districts are getting treated much  
13 more harshly than people at the border.

14                   EX OFFICIO COMMISSIONER ELSTON: So are  
15 you in favor of fast tracks everywhere or opposed to  
16 fast tracks everywhere?

17                   MS. HERNANDEZ: No. I'm in favor. We've  
18 had this discussion at other hearings before. If it is  
19 appropriate to sentence a person in Arizona at 30 months  
20 or for 24 months for doing this act, then it ought to be  
21 equally appropriate to sentence that same person --  
22 person who does that same act in Washington D.C. at 24  
23 months.

24                   I understand it's -- if disparity is such  
25 an evil, it ought not to be so easily thrown aside just

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1 for purposes of expediency. I understand that the  
2 numbers coming across the border in Arizona are  
3 astronomical.

4 EX OFFICIO COMMISSIONER ELSTON: Well, is  
5 the argument. It's not simply a disparity. It's  
6 unwarranted disparity. And unwanted disparity, in part,  
7 is defined by how Congress defines it. Congress has  
8 authorized these fast-track programs. And there's a  
9 bigger disparity, and you've just pointed it out. When  
10 someone crosses the border 50 times and doesn't get  
11 prosecuted because there are so many people that are  
12 crossing the border that they can't possibly be  
13 prosecuted --

14 MS. HERNANDEZ: Yeah. But my client, who  
15 gets picked up after having crossed only once, and gets  
16 picked up in Maryland or Washington D.C. gets  
17 prosecuted.

18 EX OFFICIO COMMISSIONER ELSTON: And the  
19 fast tracks reduce that disparity rather than --

20 MS. HERNANDEZ: And they may even get  
21 prosecuted even though he doesn't have an ag felony on  
22 his background.

23 EX OFFICIO COMMISSIONER ELSTON: Without  
24 the fast-track program, though, people might have  
25 crossed the border 75 times before they get prosecuted.

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1 That's the argument. I'm not saying that that's  
2 accurate. But that is a form of disparity as well. I'd  
3 like to ask the other two panels for a second -- we're  
4 running short on time. I know you'd like to filibuster  
5 us 'til the end. I appreciate you coming here, and I  
6 have learned a lot from your testimony today. It's been  
7 very valuable. And I especially appreciate the passion  
8 that you present on these issues.

9                   We're engaged in an intense national  
10 debate about immigration and immigration policy. One of  
11 the things that I'm not sure what to do with is the  
12 sense that we should punish people less because they're  
13 just going to do it anyway. I've gotten that sense from  
14 a couple of things both of you have said. If they have  
15 family here, they're just going to keep coming back. If  
16 they need a job here, they're just going to keep coming  
17 back.

18                   From a sentencing -- prosecution  
19 sentencing standpoint, I'm not sure that it makes good  
20 sense for us to catch those people and punish them less,  
21 deport them, and then have them come back sooner,  
22 because we're prosecuting and punishing the same person  
23 over and over again. It sounds really more like a  
24 problem that needs to be addressed by immigration policy  
25 as opposed to sentencing because, typically, in the

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1 sentencing arena, we use -- we use the concept of likely  
2 to recidivate as an indicator of a higher sentence.

3                   And what I'm hearing you say is, the more  
4 likely a person is going to violate the immigration laws  
5 as to recidivate, we should punish them less. And  
6 that's not really the way we typically look at  
7 recidivism. I'm just wondering if you have an answer  
8 for that. Maybe you don't, but ...

9                   MR. SISON: Well, I agree with you.  
10 Unfortunately, the answers to the problems that we are  
11 presenting here can't be handled just by the  
12 Commission. It's something that Congress has to  
13 change. I wish that they would have some sort of  
14 exclusion so that the people who haven't committed  
15 crimes, who have prior aggravators can come back legally  
16 either on a permanent or some sort of limited visa.  
17 That would be the best solution. That takes the  
18 problems out of our hands and your hands.

19                   My problem with the people that do come  
20 back, and I'm not disagreeing with what we were saying,  
21 they will come back because the pull is. The emotion  
22 pull is here. They're not going to take their family  
23 back to Mexico or to the Philippines or wherever.

24                   But my concern is, we're using the very  
25 limited resources that we have for putting people that

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1 really should be in prison and prosecuting these  
2 particular people. If I had a choice between putting in  
3 prison somebody who is a national security threat, a  
4 terrorist, or somebody is going to commit dangerous  
5 crimes over and over in the United States versus  
6 somebody who keeps coming into this country because he  
7 wants to be with his wife and kids, I say lets put the  
8 former into prison.

9 I'm not saying that, you know, what  
10 you're doing is a waste of time. But I'm looking at it  
11 resources-wise. And perhaps there's something we can do  
12 within the Commission that, given that they are going to  
13 come back, and I'm not going to say they're not going to  
14 come back no matter what and Congress refuses to do  
15 something about that, well then let's look at our  
16 resources and see how we can best apportion these  
17 things. And I say put the people who should be behind  
18 bars behind bars and not these people.

19 MS. BRODYAGA: And if I could add to  
20 that, if you look at three elements that are supposed to  
21 go into sentencing. One is the question of deterrence,  
22 one is rehabilitation, and the third is protection of  
23 society. There may be others, but those are the three  
24 that come to mind.

25 A person who has been deported five times

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1 and comes back six because his wife and five kids are  
2 here, first of all, is not going to be deterred;  
3 secondly, he's not going to be rehabilitated; and,  
4 thirdly, he's not a danger to society.

5 I could go into, at length, my theory  
6 that a lot of the immigration laws are designed to  
7 create people like him as slave wages and that he will  
8 be back. They know he will be back, and they don't  
9 particularly care if he's caught or not.

10 When I was doing a class action back in  
11 the 1980s in the way they were treating some of the  
12 Central Americans, I got some discovery that made me  
13 realize -- it was one of the times that the lightbulbs  
14 went on. It made me realize that what immigration  
15 wanted was to have the people under deportation orders,  
16 but they had no interest at all in executing those  
17 orders. They were very happy to have him running around  
18 with these orders. They were terrified.

19 I once had a call from a Salvadoran in  
20 California whose sister was here in the Valley illegally  
21 and was working as a maid. And she was being raped on a  
22 daily basis by her employer, and he asked if we could do  
23 anything about it. We arranged for her to call us when  
24 her employer left the -- left the house to go pick her  
25 up. And we did. And she was on the corner, and we

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1 picked her up. And just as she got into our vehicle,  
2 the employer came around the corner and we took off and  
3 laid rubber.

4 Now, under the sentence -- I would be  
5 liable for prosecution for that, although we did put her  
6 in to the asylum process. But I realize --

7 EX OFFICIO COMMISSIONER ELSTON: We would  
8 probably decline to prosecute that case.

9 MS. BRODYAGA: I don't know. The  
10 immigration tried very hard all through the 1980s  
11 because of my work with the Central Americans.  
12 Fortunately, the U.S. Attorney in Houston wouldn't allow  
13 them to indict me because he said, She's just defending  
14 them. What's illegal about that?

15 But my point there is that she was more  
16 terrified of being deported to El Salvador than she was  
17 of being raped by her employer. And that -- that type  
18 of person has now largely disappeared because the  
19 situation in El Salvador isn't nearly so bad. And they  
20 are being replaced by former, lawful permanent residents  
21 who committed some minor aggravated felony, if you  
22 understand what I mean by that, and had been deported  
23 are now back again.

24 And these people now have a very similar  
25 fear of being caught by immigration and being deported

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1 again. So they will come back. And I don't believe  
2 immigration actually wants to keep them out. And I  
3 don't think that we are serving any of the ends of  
4 sentencing by locking them up and throwing away the key  
5 because they have been so -- they have persevered so in  
6 returning to their families.

7 COMMISSIONER HINOJOSA: We have time for  
8 one final question.

9 COMMISSIONER HOROWITZ: I wanted to bring  
10 it back to our proposal and see if any of the panelists  
11 have comments on any of our particular proposals,  
12 whether any particular option was better than another,  
13 whether we were off track in any respects, and ask about  
14 the recommendations we put forward.

15 MS. HERNANDEZ: Number one, I think --  
16 and I think Freddy was talking about this earlier -- the  
17 reentry particular guideline, without some reference to  
18 motive, why the person came, is flawed. All judges know  
19 they want -- when a judge is about to sentence someone,  
20 you want to know why this person did what he did. So if  
21 you don't have some indication of how that should play a  
22 part in imposing sentence, you've got a flawed  
23 guideline, in my opinion. So you ought to do  
24 something -- all these changes you're making without  
25 addressing that, you're ignoring a basic element of this

1 offense.

2                   And one thing I would say, the focus  
3 again on the term of sentence that was imposed, I prefer  
4 the one where you're looking at your two years as the  
5 number -- as the trigger number rather than, you know,  
6 there's been sentence inflation. Has there been  
7 inflation in anything else.

8                   And one of the judges at the immigration  
9 round table brought this up -- and I happen to have a  
10 client right now under these similar circumstances -- if  
11 a client cooperates, they may end up doing more time  
12 waiting for the cases to resolve themselves before they  
13 actually get sentences. And when they finally get  
14 sentenced, they get sentenced to time served. And so  
15 you've got a false measure if you're looking only at the  
16 amount of time they did when sentence was imposed.

17                   At least with respect to that particular  
18 consideration, you ought to add some sort of reduction  
19 in the terms of the sentence imposed for the prior if it  
20 had something to do with cooperation or the terms was  
21 related to something other than the severity of the  
22 crime.

23                   I wanted to say something about -- may I  
24 say one more thing? The recommendation -- and this is  
25 non-immigration, but I've been told through the

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1 grapevine that you might be interested in hearing this.  
2 The recommendation to eliminate the downward departure  
3 for lesser harms in gun cases is not a good one.

4 I mean, lesser harms has been in there  
5 since -- since I think the beginning of the guidelines.  
6 The cases where lesser harms downward departure has been  
7 granted -- and Judge Cassell granted one in a case  
8 where -- no liberal in a case where the defendant had  
9 owned a firearm before he committed a felony. When he  
10 got out of prison on the -- for the felony time, he took  
11 that firearm that he had owned before he was a felon,  
12 pawned it because he needed cash to live on, having just  
13 been released from prison.

14 Well, ATF goes to pawn shops and looks  
15 through who pawns firearms, and they noticed that this  
16 guy pawned, and he was a felon. So they charged him  
17 with a 922 felony possession. And Judge Cassell  
18 departed down in that case.

19 To eliminate that departure ground,  
20 frankly, I think you're inviting deviation from the  
21 guideline because, since the guidelines are advisory and  
22 you're putting in something that's irrational, in my  
23 humble opinion.

24 COMMISSIONER HOROWITZ: Can I interrupt  
25 you? I want to see if either of these panelists had

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1 anything else to add on my question in terms of comments  
2 about the guidelines.

3 MR. SISON: Well, the first four options,  
4 I think they'll come back to the same problem that  
5 judges panel talk about, which is the categorical  
6 approach. I mean, you were spending a lot of time on  
7 these immigration cases because it's not just documents  
8 that we're looking for. We're talking about the actual  
9 litigation. So as far as answering that concern, I  
10 don't think it's going to do it.

11 And then you look at Option 5, which, you  
12 know, takes that out of -- I guess my problem with it  
13 from a defender's standpoint is, one, the due process  
14 concerns that the previous panel discussed. But then at  
15 the same time, I look at them and, again, they're high  
16 and don't take into consideration some of other things.  
17 And maybe when I look at Option 5, maybe it's not  
18 complete. Maybe that's the starting point from which we  
19 need to look at.

20 And instead of looking at the base  
21 offenses at such a high range, which is my concern,  
22 maybe we should look at something else and look at it  
23 from that point of view so that we don't have the same  
24 problems we have. But it probably is a starting point.

25 MS. BRODYAGA: The only other thing I

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1 would add in that is to be sure that when you talk about  
2 sentences, anytime that you take a sentence into  
3 consideration, please take the actual sentence imposed  
4 and not the sentence that was dictated because you will  
5 find so frequently that the person, if they serve time,  
6 they may serve eight months. But if they get probation,  
7 they will get five years probated for five years.

8                   And if you do as immigration is now doing  
9 and consider the five-year sentence worse than the eight  
10 months, then I think you're also perpetuating a serious  
11 injustice.

12                   COMMISSIONER HINOJOSA: One last  
13 question. I guess on issue of motive and culture  
14 assimilation, in many of these cases, the criminal  
15 history is such that it's not a minor aggravated felony;  
16 it is a serious series of aggravated felonies that the  
17 individual has committed and has come back into this  
18 country -- and family members may be here, and he or she  
19 may have no connection or a small connection to another  
20 country. But you're running the risk of the public  
21 safety because the series of aggravated felonies  
22 including, many times, to members of their own families,  
23 are such that how do you make that distinction in  
24 cultural assimilation as opposed to a motive as opposed  
25 to someone, as you indicated, with a minor aggravated

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1 felony?

2 MS. BRODYAGA: Well, I think that's going  
3 to come out in your criminal history and that it's going  
4 to be accounted for there. I think that if you -- like  
5 I said, I'm not an expert on guidelines, so I can't  
6 throw out numbers. But if you have a very long sentence  
7 based on your criminal history and you get, you know,  
8 two points off because you've got your family here,  
9 that's not going to make a great deal of difference in  
10 the safety of the American people.

11 And if they have a series of very serious  
12 offenses that they have committed, I assume that they  
13 also will get a series of very serious sentences in the  
14 underlying offenses when they are committed. So this is  
15 really just frosting on the cake, if you will, in terms  
16 of protection because they were going to be doing -- you  
17 know, increasing amounts of time.

18 So I don't think that cultural  
19 assimilation should play a large role or family should  
20 play a large role where you do have a very serious  
21 criminal history. You know, if they get, you know, a  
22 few months off for that, so be it. I don't think that  
23 would hurt anything either.

24 COMMISSIONER HINOJOSA: Well, we thank  
25 y'all very much and appreciate your time, and your

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1 comments have been very helpful and very informative.

2 (Recess from 12:25 to 2:32 p.m.)

3 DEPARTMENT OF JUSTICE PERSPECTIVE

4 COMMISSIONER HINOJOSA: We'll go ahead  
5 and get started. Our next panelist is by himself, but  
6 he has the entire Department of Justice behind him,  
7 although he'll be speaking on his own maybe today. This  
8 Matthew Friedrich, who is Chief of Staff and principal  
9 Deputy Attorney General in the criminal division of the  
10 Department of Justice. His biggest claim to fame is  
11 that he is a former law clerk to that great American,  
12 Royal Ferguson.

13 MR. FRIEDRICH: I should start by saying  
14 I'm worried about any bar that Judge Ferguson may have  
15 set. And as a matter of judicial notice, what Judge  
16 Ferguson would say about his worst enemy on a bad day  
17 would get that person nominated for a Nobel Prize.

18 Chairman Hinojosa, Members of the  
19 Commission, good afternoon and thank you for calling  
20 these hearings. It is my privilege to appear before the  
21 Commission today to discuss the important issues  
22 surrounding immigration federal sentencing policy.

23 Let me begin with the simple observation  
24 from the perspective of the department that alien  
25 smuggling is a threat to our security on multiple

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1 levels. Most importantly, it is a threat to our  
2 national security because those who seek to enter the  
3 United States illegally will include and have included  
4 terrorists.

5                   Additionally, alien smuggling facilitates  
6 and spawns other forms of criminal activity. We have  
7 seen that alien smuggling is often tied to human  
8 trafficking, to organized crime, to corruption of border  
9 officials, and to the drug trade.

10                   It is important to note that not just  
11 U.S. Citizens are threatened. Alien smuggling is also a  
12 threat to those who are smuggled. Aline smuggling is  
13 not a victimless crime. People who are smuggled into  
14 the United States illegally, many of whom are simply  
15 seeking a better life, are subject to unsafe, sometimes  
16 horrific, and even deadly conditions during  
17 transportation into the United States.

18                   It is the Department's hope that  
19 amendments to federal sentencing policy in the area of  
20 immigration address and reflect these and other risks  
21 presented by alien smuggling to deter future such  
22 conduct.

23                   I have to say I was heartened by Judge  
24 Alia Ludlum's comments this morning about the knowledge  
25 that people who would consider engaging this kind of

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1 conduct -- or at least across the border in Del Rio --  
2 that they know what the guidelines say. And that's  
3 heartening to me as a prosecutor, and I believe it  
4 should be heartening to you as a Commissioner and  
5 humbling in a sense that what you do here will matter.  
6 It will matter how you resolve these various amendment  
7 proposals.

8                   It is important I think to put these  
9 proposals and this hearing in context. Our position  
10 regarding amendments to the guidelines is part of a  
11 comprehensive strategy addressing border security. As  
12 President Bush recently stated, "Keeping America  
13 competitive requires an immigration system that upholds  
14 our laws, reflects our values, and serves the interest  
15 of our economy. Our nation needs orderly and secured  
16 orders. To meet this goal, we must have stronger  
17 immigration enforcement and border protection. And we  
18 must have a rational, humane guest worker program that  
19 rejects amnesty, allows temporary jobs for people who  
20 seek them legally, and reduces smuggling and crime at  
21 the border."

22                   To achieve these goals, the  
23 administration, working with Congress, has been seeking  
24 ways to improve border security, discourage and prevent  
25 illegal entries. And hopefully, as a result, reduce the

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1 number of such cases brought before the courts.

2                   We're using new technologies to prevent  
3 fraud in the making and use of passports, to verify the  
4 identity of individuals attempting entry at our borders,  
5 and discourage anyone from entering except at authorized  
6 entry points. We've increased security, particularly  
7 here in the southwest, where we have and will continue  
8 to increase the number of federal agents who patrol the  
9 border.

10                   Just recently the President signed the  
11 Department of Homeland Security Appropriations Bill,  
12 which provides funding for an additional 1,000 border  
13 patrol agents. We've also expanded detention and  
14 removal capabilities to eliminate catch and release. We  
15 have greatly increased interior enforcement of our  
16 immigration laws, including increased work site  
17 enforcement. Increased funding will allow Immigrations  
18 and Customs Enforcement, or as it is now known, ICE, to  
19 add roughly 250 criminal investigators to better target  
20 human smuggling organizations. It will also allow ICE  
21 to add 400 new immigration enforcement agents.

22                   In addition, as the Commission's interim  
23 staff report indicates, we're working with Congress on a  
24 number of proposals to amend the civil and criminal  
25 provisions by the Immigration and Nationality Act, as

1 well as Chapter 75 of Title 18, which deals with  
2 passport and visa violations.

3           Of course, another important component of  
4 border strategy is prosecution. As your statistics  
5 reveal unequivocally, the number of immigration cases  
6 has steadily increased over the last decade, so that now  
7 immigration and related cases dominate the work of  
8 courts along the southwest border and account for about  
9 22 percent of the entire federal criminal docket. I  
10 anticipate that the trend will continue, if not  
11 accelerate, in the short to mid term.

12           I would also note that the department has  
13 seen a rise in the number of alien smuggling cases  
14 prosecuted. Between 2001 and 2005, the number of such  
15 prosecutions rose by about 62 percent.

16           To be effective in law enforcement, we  
17 not only have to assure that those who engage in alien  
18 smuggling are caught, but that they will receive  
19 appropriate and proportional punishment. With the  
20 staggering number of immigration cases now being  
21 prosecuted, we believe that the goals of this amendment  
22 cycle should include ensuring guidelines account for the  
23 risk factors and aggravating circumstances that have  
24 been increasingly associated with alien smuggling and  
25 passport fraud. By accounting for such risks and

1   aggravating circumstance, deterrence can be targeted  
2   where it is most needed.

3                   The Department believes that the options  
4   described in the January 25th proposed amendments  
5   sentencing guidelines go a long way towards achieving  
6   these goals, particularly in the area of alien smuggling  
7   and passport fraud.

8                   With that introduction, let me turn to  
9   the proposed amendments relevant to section 2L1.1.  
10   Under this section, the current base offense levels and  
11   specific offense characteristics result in sentences  
12   which heavily rely on the number of aliens transported.

13                   Under the existing 2L1.1, the base  
14   offense level for smuggling, transporting, or harboring  
15   an unlawful alien is 12, except in rare circumstances.  
16   That means that in almost all alien smuggling cases, the  
17   base offense level results in a sentence of just 10 to  
18   16 months.  And if the person pleads guilty and receives  
19   a two-level reduction for acceptance, the total offense  
20   level will be ten and the offender is subject only to a  
21   six- to 12-month sentence.  Such sentences do not take  
22   into account many of the risk factors or potential  
23   dangers posed by alien smuggling.

24                   Here let me address first a proposal for  
25   an adjusted base offense level for national security

1 issues within 2L1.1. The events of September 11, 2001  
2 and subsequent investigations have brought a new urgency  
3 to border issues and awareness of a potential threat to  
4 our nation's security from illegal immigration.

5           As Senator Dianne Feinstein aptly notes  
6 in her letter to the Commission regarding some of the  
7 proposed amendments that we discussed to, maintaining  
8 the integrity of our borders is paramount to national  
9 security. The Department supports the proposed  
10 amendment for national security concerns. As presently  
11 worded, the adjustment for base offense level applies  
12 not only to those smugglers who are convicted of a  
13 violation of 1327 involving an alien who was previously  
14 deported after conviction for an aggravated felony.

15           Option 1 appropriately provides a base  
16 offense level of 25 for smugglers who are convicted of  
17 1327, involving an alien whose entry into the  
18 United States is forbidden under immigration laws  
19 dealing with national security. Such enhancement would  
20 apply, for example, to alien smugglers who bring  
21 terrorists or those associated with terrorist  
22 organizations into the United States.

23           Option 2 similarly provides an  
24 enhancement for those who harbor or transport aliens  
25 whose entry into the United States is forbidden for

1 reasons of national security. The Department supports  
2 both of these options, and we do not see them as  
3 mutually exclusive.

4                   Importantly, neither option requires  
5 proof that the smuggler knew that the aliens they were  
6 smuggling was inadmissible for national security  
7 reasons. The amendments wisely impose a form of strict  
8 liability on alien smugglers in this regard. Such a  
9 standard provides incentive for smugglers, as one might  
10 say, to know your customer. That is, an incentive to  
11 identify and become familiar with the backgrounds of the  
12 people they are helping to move illegally into this  
13 country.

14                   An alternative standard in which  
15 knowledge was required would create precisely the wrong  
16 incentive of the one that exists now, the incentive for  
17 the smuggler to know as little as possible about the  
18 people he is smuggling.

19                   I would humbly offer two small changes to  
20 the amendments under 2L1.1. First, with regard the  
21 existing language providing an enhancement for base  
22 offense level under 2L1.1(a) with regard to offenders  
23 who smuggle aliens into this country whose entries are  
24 forbidden because they are aggravated felons or on  
25 national security grounds. We believe such people



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1 put in serious danger by being placed in freight trains  
2 traveling at high speeds, riding on boats or jet skis  
3 across frigid water while being exposed to extreme  
4 conditions, or being left in trucks or trailers for  
5 extended periods of time.

6 Both of these cases serve as a rebuttal  
7 to the idea that professional smuggling -- professional  
8 smuggling organizations do not smuggle minors. They do  
9 smuggle minors. It's not simply the fact that minors  
10 are smuggled by family members.

11 According to recent statistics, some  
12 15 percent of those smuggled are minors, 52 percent of  
13 which are under the age of 12. Particularly when  
14 unaccompanied by parents and under the age of 12,  
15 children who are smuggled in the country are placed at  
16 risk.

17 For those who question the necessity of  
18 sentencing enhancements for those who smuggle minors,  
19 I'll refer them to the letter sent to the Commission by  
20 Judge Cindy Jorgenson and John Roll of March 2004. This  
21 is a letter, I believe, that Ms. Howell was making  
22 reference to this morning.

23 The judges wrote to the Commission  
24 because they had noticed "an alarming increase in cases  
25 in which very young children are being smuggled into the

1 United States by strangers who have no connection to the  
2 children's parents." Their letter, which documents in  
3 the record four cases in the District of Arizona, all  
4 which occurred within one month's time, amply  
5 demonstrates why the smuggling of minors should be of  
6 concern to all.

7 All of these cases involved children all  
8 under the age of seven. In some cases, and there were  
9 more than one, involved infants of under one year or  
10 less. These children are smuggled into the  
11 United States by complete strangers, none of whom knew  
12 the identity of their parents. Most of the smugglers,  
13 when they're convicted, admitted that they were  
14 completely unaware of the identity of the party to whom  
15 they would deliver the children once across the border.  
16 In two of the four cases, the children -- some of the  
17 children appeared to have been drugged during  
18 transportation.

19 The risk that these children and others  
20 like them face are obvious and they are many. They are  
21 at risk of being kidnapped because, obviously, there's  
22 no due diligence done at either end of the transaction  
23 to ensure that persons who drop off and pick up the  
24 children have legal custody. They are at risk of sexual  
25 abuse because they are unaccompanied by parents and in

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1 the supervised hands of criminal elements. They are at  
2 risk of death or injury during transit. Surely, we can  
3 all agree that these risks are ones which the guidelines  
4 must deter.

5                   Accordingly the Department supports the  
6 proposed modification to the guidelines to reflect the  
7 children who are smuggled are placed at risk and that  
8 smugglers that count unaccompanied minors among their  
9 clients must be punished more severely.

10                   With regard to the amendments regarding  
11 bodily injury and death and holding for ransom, the  
12 Department supports these amendments as well as sensible  
13 adjustments to the guidelines which reflect, again,  
14 individual offense characteristics which are often  
15 present in alien smuggling cases and which are not  
16 adequately addressed under current law.

17                   Particularly, it is just to apply an  
18 enhancement where death resulted from alien smuggling  
19 regardless of whether the death was caused under  
20 traditional notions of homicide or involuntary  
21 manslaughter. Smugglers who place aliens in inherently  
22 dangerous conditions, such as overheated trailers or  
23 railway cars, should not be excused from the death  
24 enhancement or death results simply because they can  
25 claim such deaths were, quote, an accident.

1                   Finally, the Department supports the  
2 amendments to the table within 2L1.1 for number of  
3 aliens smuggled. While infrequent, the Department has  
4 seen cases in which the number of aliens smuggled  
5 literally goes off the charts, as it currently exists,  
6 and expanding the scope of the table is a prudent  
7 measure that will guide judges in sentencing cases  
8 involving very large numbers of smuggled persons. I  
9 urge you to adopt all the proposed amendments to 2L1.1.

10                   As the penalties increase based on  
11 controverting risk factors, prosecution and deterrents  
12 of such conduct should likewise increase.

13                   Just as we are generally supportive of  
14 the proposed changes to the smuggling guidelines, we  
15 also believe that recommended changes to the guidelines  
16 pertaining to passport fraud would be beneficial but  
17 perhaps could be expanded even further.

18                   And I have some comments there, but I  
19 want to hold them just to make sure we have time for  
20 questions.

21                   Finally, we have some concerns with  
22 regard to various proposals regarding 2L1.2. As you  
23 known, Johnny Sutton, the U.S. Attorney for the Western  
24 District of Texas, will testify before you in San Diego  
25 this spring and will address more specifically many of

1 the issues we have involving illegal entry. And just as  
2 the public defenders did, Johnny and I are going to  
3 break it up where I'm covering alien smuggling and  
4 Johnny will be talking about illegal entry. I think  
5 he'll certainly have a better perspective than I do  
6 about what the issues are in South and West Texas.

7 I can tell you generally that we believe  
8 that the guidelines for unlawful entry could be modified  
9 even further than what is now proposed in order to  
10 simplify their application. No one would disagree that  
11 an inordinate amount of time is spent identifying,  
12 documenting, and researching prior convictions to see  
13 whether they fit numerous definitions, including  
14 aggravated felony, that apply different levels of each  
15 prosecution.

16 We favor moving towards the system in  
17 which the length of sentences are the guiding factor.  
18 Defendants who think that their sentences in the  
19 underlying case were unduly harsh can move for downward  
20 departures and rely on reports or other records in  
21 support of their request.

22 We submit that such a system would be  
23 fair and would help unclog the system by reducing, if  
24 not eliminating, much of the analysis required in Taylor  
25 and in determining whether an offense is an aggravated

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1 felony

2 That concludes my prepared remarks for  
3 today. I thank you for this opportunity.

4 COMMISSIONER HINOJOSA: Thank you,  
5 Matthew.

6 COMMISSIONER CASTILLO: Let's start out  
7 not with a question so much as a request. I would  
8 request that you have Mr. Sutton address, when he comes  
9 to testify before us in San Diego, the specific proposal  
10 that the federal defenders had made with regard to  
11 2L1.2. And if you don't have that request, let us know.

12 MR. FRIEDRICH: I'd be happy to do that.

13 COMMISSIONER CASTILLO: Thank you.

14 COMMISSIONER HOWELL: Can I just start?  
15 And where you left off, which is I guess our Option 5  
16 for 2L1.1, where we start off by having a fairly large  
17 sentence and then -- or offense level and then shift the  
18 burden to a particular defendant to show that they  
19 didn't have, you know, I guess prior criminal history  
20 that would warrant. I think, therefore, we have to  
21 argue to the judge that they should be entitled to a  
22 downward departure of certain levels

23 You know, we talked today about  
24 constitutional issues, due process issues with that  
25 shifting of the burden, and the practical issues faced

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1 by people who are here in the country, you know, and  
2 having heard the complaints from, you know, federal  
3 judges and, you know, probation officers about the  
4 difficulty of being able to get documentation about  
5 prior record. The situation of a defendant, certainly  
6 without as much power to compel production of documents  
7 from overworked state systems or local systems.

8                   So there are constitutional issues,  
9 practical issues. You know, do you not -- do you not  
10 see any problem -- do you not share the problem that has  
11 been -- that we've heard about today with that kind of  
12 proposal?

13                   MR. FRIEDRICH: I certainly understood  
14 the legal point that the public defender was raising  
15 from the standpoint of, if conviction is the  
16 enhancement, certainly under Apprendi and other laws,  
17 you would need to have the government proving those  
18 elements.

19                   I think it remains to be seen if you  
20 could shift it toward the system in which the sentence  
21 were to trigger how those same rules would apply. I  
22 also appreciated Judge Hinojosa's point earlier that, in  
23 terms of where you end up at the end of the day, for  
24 many of these defendants, the argument is not, I was not  
25 convicted, but -- I was convicted, but there were some

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1 extenuating circumstances or some other reasons in  
2 support of a departure.

3 COMMISSIONER HOWELL: Well, my other  
4 question is: In the national security context where --  
5 when you talk on Page 6 of your testimony about, you  
6 know, providing -- our option about providing a base  
7 level of 25 for smuggling, you know, an alien who had,  
8 you know, prior -- prior national security related  
9 violations. Have there actually been cases where -- you  
10 know, we've talked about this. But have there actually  
11 been cases where there have been alien smuggling of an  
12 alien, you know, with terrorism related connections?

13 MR. FRIEDRICH: There have been. There's  
14 a recent case --

15 COMMISSIONER HOWELL: And what's happen  
16 with those? The judges upwardly departed? What's  
17 happened with the cases of alien smugglers who brought  
18 in terrorists?

19 MR. FRIEDRICH: One case in which I  
20 can -- which I know was a case, there was a case that  
21 was indicted either late last fall or earlier this year  
22 involving some suspected FARC terrorists who were  
23 smuggled into this country by an alien smuggling  
24 organization. Obviously, they have not been sentenced  
25 yet, so I can't answer your question how that played out

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1 at sentencing.

2 But unless this is -- unless an  
3 enhancement like this is adopted, I wouldn't have  
4 expected those issues to play out with immigration  
5 offenses. They may have charged other offenses, but I  
6 don't think you would have seen a precedent that would  
7 tell you how an enhancement like this would play out  
8 here because it's obviously not a part of the law right  
9 now.

10 COMMISSIONER HINOJOSA: Matt, my question  
11 is: Is there any discussion at the Department of  
12 Justice with regards to what appears clear to those of  
13 us on the bench on the border and in other places, that  
14 the immigration enforcement policies vary within  
15 divisions, sometimes within districts, depending  
16 sometimes on which border patrol sector controls the  
17 division. And certain type of cases will be prosecuted  
18 in certain parts of the border or certain parts of  
19 certain districts which are not on the border as opposed  
20 to other. Whether that -- there's been discussion  
21 within the Department of having to streamline this  
22 and/or develop one policy so that we have a clear  
23 message as to what's being enforced as opposed to,  
24 sometimes within 100 miles of each other, we are  
25 enforcing the law in different ways because of the way

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1 we're prosecuting them.

2                   And I understand that we'll always have  
3 prosecutorial discretion. I never understand the  
4 argument that this places too much power on the  
5 prosecutor. Well, that's the way our system is set up.  
6 I mean, the prosecutor decides. But as far as  
7 uniformity and equal treatment and equal message, is  
8 there any kind of discussion of trying to put this  
9 together throughout the country as opposed to  
10 helter-skelter almost with regards to how we proceed?

11                   MR. FRIEDRICH: I think the answer is,  
12 yes, there's certainly that discussion in terms of  
13 there's always a lot of different agencies at work. In  
14 any one given border, there's marshals, judges,  
15 prosecutors, defenders, you know, ICE, border patrol.  
16 And making sure -- sometimes, you know, in one district,  
17 there will be an abundance of one resource and a  
18 shortage of another; and that may lead to,  
19 unfortunately, a different approach in one district  
20 versus a different approach in another.

21                   I think, certainly, I agree with you that  
22 uniformity should be the goal and I think there are  
23 definitely discussions every day about how that  
24 enforcement policy should be coordinated. I can't bring  
25 you a message that there is an absolute sense that we're

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1 moving towards uniformity in every district.

2                   Sometimes a U.S. Attorney will go out and  
3 announce they're starting a new program and will trumpet  
4 the fact that it's new, that it's different from what's  
5 out there. People like to experiment to see what works  
6 as well. I hope that answers your question  
7 sufficiently.

8                   COMMISSIONER CASTILLO: I can understand  
9 that, because it's difficult for the Department of  
10 Justice to control all the U.S. Attorneys. There's one  
11 area that you certainly control by statute, and that's  
12 the fast-track programs. I'm troubled by the testimony  
13 we've heard this morning, that a district like El Paso  
14 does not have a fast-track program, whereas other  
15 districts do, including some that are a long way from  
16 the U.S.-Mexico Border. And also testimony that a  
17 district like Laredo does not have an immigration  
18 fast-track program.

19                   It seems to be a clear lack of  
20 uniformity, and the situation where what was the driving  
21 point to justify the fast-track program doesn't really  
22 exist. Any comments on that?

23                   MR. FRIEDRICH: I think what I can tell  
24 you is that the fast -- the districts in which  
25 fast-track programs are authorized, obviously, Congress

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1 has made a determination that this is essentially a tool  
2 that the Department should have.

3 COMMISSIONER CASTILLO: Right. And  
4 they've given you control over it.

5 MR. FRIEDRICH: Yes. That was going to  
6 be my next point. How that is implemented and where is  
7 obviously left to the Department's discretion. I can  
8 tell you that how those districts are authorized, where,  
9 when, and for what reasons that that process is  
10 currently, as we speak, under review by the Department.  
11 That's something that they are -- that they are looking  
12 at.

13 Many question, well, here's a busy border  
14 district that doesn't have fast-track program and here's  
15 a non-border state way away that has one. Sometimes the  
16 border districts say, We don't want one or can we have  
17 one? Sometimes the people that don't have it want it.  
18 So I think those are all things that should be  
19 considered as part of the next agenda. Those are  
20 entirely legitimate -- entirely legitimate concerns.

21 COMMISSIONER STEER: I had a couple of  
22 questions about the alien smuggling proposal. First,  
23 will you address the smuggling of minors issue as to  
24 whether or not the Department seeks or would support any  
25 differentiation based on the age of the minor? Should

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1 there be a greater enhancement, for example, for very  
2 young minors?

3 MR. FRIEDRICH: I like what I heard  
4 Ms. Howell saying earlier in terms of a tier approach  
5 that is broken down by age. However you break it, but  
6 under the age of seven, under the age of 12, under the  
7 age of 16. Of course, as far as the number of points,  
8 the younger the child being, the higher number of  
9 points. I can see a system like that working well, and  
10 I think that would be appropriate.

11 COMMISSIONER STEER: Secondly --

12 MR. FRIEDRICH: I'm sorry, sir. If I  
13 may?

14 COMMISSIONER STEER: Go ahead.

15 MR. FRIEDRICH: Somebody asked on the  
16 issue if you're going to have an enhancement for minors,  
17 is that something we ought to leave as a general matter  
18 to the vulnerable victim enhancement and deal with it  
19 that way. And in preparing my testimony, I tried to  
20 look to see were there actual cases in which that had  
21 been done. I only found one case. It's an unreported  
22 case. I know you can't cite unreported case in court.  
23 I hope it's okay to cite it before the Commission.

24 The United States v. Cock. It's a Fifth  
25 Circuit case that was decided about two months ago

1 where, in looking at this very issue, the Court said,  
2 "Because an alien's illegal status is a prerequisite to  
3 the crime of alien smuggling, it indeed would have been  
4 error for the district court to find unusual  
5 vulnerability based on that status."

6                   To me, as a prosecutor, that would give  
7 me pause before arguing a vulnerable victim is the place  
8 where we should put this concern. The position of the  
9 Department is, when we look at the risks that I went  
10 through earlier -- unaccompanied kids in the hands of  
11 criminals at risk of kidnapping, sexual abuse, being  
12 drugged during transportation -- I think that's enough  
13 risk that we can say, categorically, that is the type of  
14 thing we should try to deter without trying to put it in  
15 the basket of vulnerable victim.

16                   COMMISSIONER STEER: To follow up on your  
17 point about the proposed enhancement for the criminal  
18 status of the smuggled alien. I think I understood your  
19 testimony to say, the proposed enhancement should be  
20 broadened so that if the smuggled alien had previously  
21 been convicted of an aggravated felony, there should be  
22 an enhancement for that.

23                   In the first place, that makes sense, but  
24 I wonder about the practicality of that. Is the  
25 Department in a position to find out the criminal status

1 of the smuggled aliens, you know, sufficiently often so  
2 that we could expect it, if you had an enhancement like  
3 that, it would be a wide, even-handed fashion.

4 MR. FRIEDRICH: I think it's certainly  
5 going to be a challenge to identify, you know, if a  
6 smuggler is caught with a load of people he is  
7 smuggling, you know, assessing the status -- the exact  
8 status of all those people, whether for, you know,  
9 felony status or for whether they fit within, you know,  
10 any of the terrorism provisions that we're asking for,  
11 certainly, that's going to be a challenge.

12 And I don't have a very good answer for  
13 you as to how that could be uniformly applied in every  
14 case. I think if the enhancements were there -- and  
15 that's a big step from 13 to 25 in terms of the base  
16 offense level. I mean, that provides a real incentive  
17 for border officer to attempt to make that  
18 identification. So I'm hopeful that, with that  
19 incentive, we'll see more attempts to identify exactly  
20 who is being smuggled. And I think that's a good thing.

21 COMMISSIONER HINOJOSA: Do you think that  
22 would, therefore, increase the problem with the  
23 categorical approach even one step further, because then  
24 we would have to worry about the aggravated felony  
25 itself or the person being transported?

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1                   MR. FRIEDRICH: I think that -- I think  
2 it would -- I think you would certainly have that  
3 problem. I think that's right. But, you know, in terms  
4 of where our resources are best spent, I guess I would  
5 look at it that way. If these determinations are being  
6 made as a matter of course in many, many illegal reentry  
7 cases, why don't we make them towards the people for  
8 whom we really want to make a difference, towards the  
9 smugglers themselves? I think it would be worth the  
10 effort.

11                   COMMISSIONER HINOJOSA: One more  
12 question.

13                   COMMISSIONER HOROWITZ: On the minor  
14 point, picking up the question John had, what concerns  
15 me -- I agree with you, an increase for minors. What  
16 concerns me about our Option 2, which has the tiered  
17 approach or the beginnings of the tiered approach, what  
18 I think some of the judges perhaps this morning  
19 mentioned, which is the difficulties of proving the age  
20 of the minor, number one; and, number two, the increased  
21 likelihood that you will cause the minor to become part  
22 of the judicial process because a defendant who wants to  
23 challenge that enhancement might seek to make the minor  
24 a witness at a hearing or take a deposition. And that  
25 causes me great concern.

1                   I think it's less likely if we have a  
2 flat 18 age cutoff than if we do a six years or  
3 10-year-old or 12-year-old or 14, whatever the  
4 gradations are. And how do you -- how do you go forward  
5 with that enhancement, ensuring it will have some  
6 uniform application if this problem arises, those two  
7 issues arise?

8                   MR. FRIEDRICH: I can certainly accept  
9 that point. I think that, you know, in terms of, first  
10 of all, recognizing the age, I think if -- certainly, if  
11 they are lines that were drawn, you know, a 13- or  
12 14-year old might not be as readily distinguishable from  
13 an adult as a child who is less than 12. And maybe that  
14 would -- maybe there would be sort of less problems in  
15 those -- in those types of determinations.

16                   But, to me, the fact that a child could  
17 potentially become a witness, I certainly think that's  
18 not a -- that's not a good thing. But I think that is  
19 worth -- to me would be worth the risk of deterring the  
20 smuggling of children. I accept that that's a risk, but  
21 I think it's one that is worthwhile.

22                   In terms of identifying age, it's not  
23 that it would -- certainly there would be, you know,  
24 disputes about the age of a child, if you had a tiered  
25 approach. I don't think -- you know, even in the

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1 absence of a birth certificate, there are ways that age  
2 can be proved. It's hardly a simple process, but we run  
3 into this all the time in the area of, sadly, child  
4 pornography where the defense the defendant will make is  
5 this kid is not under the age of 18.

6                   And I have personally put a pediatrician  
7 on the stand to look at photos and say, based on the  
8 child's physiological characteristics, it is my expert  
9 medical opinion the child is of a young age or an age  
10 younger than 18.

11                   I feel like I haven't answered all of  
12 your questions.

13                   COMMISSIONER HOROWITZ: We appreciate at  
14 least an initial response.

15                   COMMISSIONER HINOJOSA: Matt, thank you  
16 very much. We're looking forward to Johnny's discussion  
17 of 2L1.2.

18                   MR. FRIEDRICH: I'll be sure to give him  
19 his homework assignment. Thank you.

20                   COMMISSIONER HINOJOSA: Thank you.

21                   APPELLATE PERSPECTIVE

22                   COMMISSIONER HINOJOSA: Next we have our  
23 panel with the chief judge of the Fifth Circuit. Judge  
24 Edith Jones has recently become the chief judge of the  
25 best circuit in the country. She is well-known for her

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1 intelligence and her candor; and, because of that, we  
2 look forward to hearing from her this afternoon. I'm  
3 sure we'll benefit from her comments.

4 HONORABLE JONES: Good afternoon, members  
5 of the Commission. I do not have programmed remarks.  
6 I'm here after I -- when I found out about this hearing  
7 being convened, I did two things. I sent an E-mail to  
8 the members of my court and asked them if any of them  
9 would like to also come along and testify. Lamentably,  
10 they could not. We've just been having our own court  
11 retreat here in San Antonio, and they all wanted to get  
12 back to their offices, but I did bring some comments  
13 that they had.

14 And the second thing I did was send  
15 E-mails to Judge Hinojosa and to Judge Kazen and said,  
16 What do you think about this, these guidelines? And in  
17 particular, all I'm going to address you about is the  
18 2L1.2 guideline for basically the crime of violence  
19 problem that has bedeviled our court and, in turn, the  
20 district courts.

21 And I'm not sure I can put my hands on  
22 Judge Kazen's E-mail back to me. But, basically, it was  
23 one paragraph of exploding frustration that said what I  
24 gather you've already heard here today, that the crime  
25 of violence definition and the categories of enhancement

1 under 2L1.2 impose undue complications in sentencing  
2 cases which, normally, in the run-of-the-mill federal  
3 sentencing in which our district courts in Southern and  
4 Western Districts of Texas are more than expert, just  
5 are not the highest sentences that they impose. But the  
6 judges have to go through inordinate legal hoops to  
7 impose any kind of sentence.

8                   Number two, that the way our court has  
9 treated these -- and I think we're required to -- we  
10 review miscalculations in the guidelines as a matter of  
11 plain error so that, quite often, the district judges  
12 issue sentences under this guideline and they don't even  
13 know that they have run afoul of the interpretation of  
14 the guideline because, for whatever reason, it is not  
15 raised until appeal, putting our court also in the  
16 unenviable position of occasionally having to try to  
17 issue a limited remand or reverse the district court,  
18 who really didn't know what was coming to him. That's a  
19 source of frustration for the district courts.

20                   And then of course you've already heard  
21 about the inherent complexity of trying to apply the  
22 crime of violence and the aggravated felony definitions  
23 to a myriad of thousands and thousands of state laws.  
24 We've had to review convictions under Georgia child  
25 abuse statutes, under California sexual, under numerous

1 California statutes for drugs and child endangerment  
2 statutes and sexual abuse statutes, Florida statutes,  
3 Illinois statues, Idaho statutes, Nebraska statutes.

4                   And to have to do all these in the  
5 context of deciding between, you know, 87 months and 108  
6 months, it really is asking an awful lot of a sentencing  
7 procedure that ought to be reasonably clear-cut and easy  
8 to apply.

9                   So I would like, in the time that I have,  
10 just to describe what I think are some of the problems  
11 that we have and then answer questions that you might  
12 have. I may not have to take up the entire time.

13                   Our court didn't really encounter  
14 problems about the crime of violence enhancement until  
15 the last three or four years, when we started having a  
16 very serious effort from the Justice Department to crack  
17 down on illegal reentrance. And you put this against  
18 the perspective -- of course, at least it's our  
19 understanding that DOJ doesn't even prosecute many  
20 illegal reentrance unless they do have a felony criminal  
21 record or unless they have been caught coming over the  
22 border illegally, I've heard seven, I've heard ten times  
23 before. So prosecutorial discretion, as we understand  
24 it, and DOJ can correct me, is already being exercised  
25 in connection with the selection of which offenders of



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1 cases on crime of violence. We have had cases that have  
2 very counterintuitive results on the crime of violence.  
3 For instance, we had -- one of my favorites is a case  
4 that was denominated retaliation against the police  
5 officer. Texas has a criminal statute that has many  
6 levels of penalties from zero to ten years or something  
7 for retaliation against a public official, and this  
8 particular offender had shot at a policeman.

9                   But because he was convicted of  
10 retaliation under the categorical approach that we  
11 thought had to be used for these crime of violence  
12 definitions, the retaliation statute could be convicted  
13 by sending a threatening letter to a public official;  
14 and, therefore, that person warranted either only a  
15 four-level or no enhancement at all. But, in fact, he  
16 had shot at a police officer.

17                   Another one of our fairly ignominious  
18 cases involved an offender who drove his car at the car  
19 in which his ex wife and children were driving. So his  
20 intent was to run them down. He was however convicted  
21 of an assault. And because of that, again, under the  
22 categorical approach, he received at most I think a  
23 four-level enhancement. But there was no doubt that he  
24 was trying to do serious violence to his wife and  
25 children.

1                   We have had enormous troubles construing  
2 sexual abuse convictions because those are written in  
3 many different ways across the country. And, again, one  
4 of our more ignominious ones involves an offender who  
5 had been in California and picked up a 13-year-old girl  
6 on the street in San Francisco, drove her away in his  
7 car, raped her, brought her back, and dumped her on the  
8 street. But for whatever reason in California, he had  
9 pled out to some sexual battery crime, which was  
10 technically a felony, but he had a very low like  
11 one-year or less prison sentence. But that was plainly  
12 what he had done because he pled guilty. But because of  
13 the categorical approach, we couldn't -- we had to  
14 vacate a 16-level enhancement.

15                   There are another number of child  
16 endangerment cases that we've had. Because many states  
17 have, sort of, a combination child endangerment statutes  
18 that can range from leaving your child next to the  
19 swimming pool, to leaving a child in a car at the mall  
20 when it's 100 degrees heat, to dropping your child in a  
21 pot of boiling water.

22                   And they're all felony offenses, but the  
23 punishment ranges are very, very wide, depending on the  
24 state of mind. Because of the categorical approach, we  
25 have generally had to say those are not crimes of

1 violence when they plainly were.

2                   Now, I will say that, because of this, my  
3 personal concern, not speaking from my court at this  
4 point, is that, plainly, something is wrong with the  
5 system and I do not think the public will understand  
6 when offenders who have repeatedly come illegally into  
7 the United States and done these particular types of  
8 dangerous crimes are legally, quote, not guilty of  
9 enhancement for crimes of violence. It's something that  
10 doesn't make sense to the average person.

11                   I will say too that I think one way in  
12 which the Commission could try to correct that  
13 particular mistake is by describing some of the terms a  
14 little more generically. I do not believe that the  
15 Commission, once you look through the way in which the  
16 statutes operate, has to tie the definition of what  
17 crimes deserve enhancement to the definition of crime of  
18 violence in 1101(a)43. In other words, that sets a  
19 standard, but it doesn't set a maximum or minimum, much  
20 less, a range or desirable set of ranges within which  
21 enhancements should be given.

22                   So, therefore, the Commission, for  
23 instance, changed the sexual abuse category recently to  
24 clearly encompass statutory rape. That's a very recent  
25 change. That solved several cases that we had on appeal

1 because it recognized that, I think, with wholesome  
2 concern for federalism, that, you know, if statutory  
3 rape is rape, according to the laws of the states  
4 even -- because of the youthful age of the victim, that  
5 is therefore a crime of sexual violence and ought to be  
6 recognized as such for enhancement purposes.

7                   So one suggestion I would have, just  
8 speaking for myself, is that it is possible to address  
9 these particular kinds of crimes with regard to  
10 children, with regard to sexual violence, with regard to  
11 violence against police officers -- law enforcement  
12 officers in a generic sort of way that avoids the  
13 categorical approach.

14                   In other words, more like the -- like the  
15 approach that the Commission has used with drug  
16 trafficking offenses, which is any offense related to or  
17 involving, you know, sexual abuse or the abuse of a  
18 minor or whatever. So that's one possibility.

19                   I have not closely studied the five  
20 proposals the Commission has before it. I do not feel  
21 that I am equipped to decide among your proposals that  
22 deal with the amounts of punishment as the gauge -- you  
23 know, whether felony two years or one year or whatever  
24 as being the trigger for a particular enhancement. I  
25 think that's for your expertise, not ours.

1                   As a court, I will observe that in  
2 several of these cases, the levels that you have spoken  
3 about would not in fact capture the kinds of crimes that  
4 I'm talking about, because for whatever reason related  
5 to local plea bargain characteristics, these offenders  
6 who had done these things pleaded to probated sentences  
7 rarely over a year in length.

8                   But they all pleaded guilty, and that  
9 brings up another subject that I have. Because of the  
10 categorical approach and because of the Supreme Court at  
11 one point in Shepard said that you can look at the plea  
12 colloquy and conviction documents and so on with the  
13 interest of not conducting many trials on resentencing.

14                   I understand all those concerns. But it  
15 occurs to me that a district judge ought to be able to  
16 make an inquiry of the defendant in these cases. Well,  
17 it says here that you pled in California to sexual  
18 assault and the convicting papers from California,  
19 whatever they are, say that you abducted this  
20 13-year-old girl and that you raped her and that you  
21 dumped her back on the street. Is that not true?

22                   The defendant, it seems to me, does not  
23 have a Fifth Amendment self-incrimination privilege.  
24 He's already pled guilty to that other crime and  
25 presumably paid the price, paid his penalty, and he

1 ought to be able to answer that question. That ought to  
2 be able to establish proof. Now, I'm sure my friends at  
3 the public defender's office don't like that idea.

4                   COMMISSIONER HINOJOSA: I've heard them  
5 howling.

6                   HONORABLE JONES: I'm sure they'll howl  
7 to me later. But, you know, it seems to me that that  
8 would be a way to cut through all the difficulty in  
9 order to get to more of a real offense enhancement  
10 possibility here. So that's my other suggestion.

11                   Let me go through a few of the comments  
12 that my -- that my colleagues on the Fifth Circuit had.  
13 Because, again, when we were winding up our retreat  
14 today, I asked them if they had any comments or  
15 concerns.

16                   And let me just say, there is total  
17 exasperation on our court with the crime of violence  
18 enhancement as it now is and was the categorical  
19 approach now has to be applied. We have just been  
20 jumping through hoops. It's -- maybe it's a problem of  
21 our own creation.

22                   But by trying to apply a categorical  
23 approach and yet also occasionally trying to say, well,  
24 under what circumstances can we bring in extrinsic  
25 documents? How can we use extrinsic documents? When

1 does a multilayered crime allow itself -- we have a term  
2 for it. What is it? Trying to deconstruct a guilty  
3 plea that could have been two -- well, the Commission  
4 would have defined as a crime of violence in a  
5 bifurcated or trifurcated statutory scheme. We can  
6 deconstruct the parts of that statute.

7                   We have had, as I said, two or three on  
8 bonds. Cases like this are coming up on almost -- I  
9 don't want to exaggerate, but I would say on about close  
10 to 50 percent of our oral argument panel dockets. And  
11 still proportionally, illegal reentry crimes may be, at  
12 most, 20 to 25 percent of our docket. And I would say  
13 from the standpoint of expending judge time, they are  
14 double that in terms of the problems they impose on us.  
15 And I can't even imagine the -- what the district courts  
16 have to go through. So you really do need to do  
17 something about this and help us out.

18                   But let me state briefly the comments of  
19 some of my colleagues. Two of them, all but four of  
20 them, were in the room today when I asked this. Only  
21 two of them believed that the categorical approach was  
22 totally satisfactory. That's two out of 16 -- 14 who  
23 were present.

24                   Many of them were hoping that the  
25 Commission would give wider flexibility to the district



1 well, no -- a number of the judges were of the opinion  
2 that all of these definitions of crime of violence  
3 should be consistent throughout the guidelines. Because  
4 as you -- as you know, right now there's one definition  
5 of drug trafficking offense for purposes of 2L1.2 1. and  
6 there's another definition of drug trafficking offense  
7 for -- I think it's the firearm type of offenses. And  
8 we recently had a published opinion that had to deal  
9 with the -- the difference in wording and the difference  
10 when the changes were made.

11                   And every time the Commission tweaks one  
12 part of a definition of this sort and doesn't tweak the  
13 entire guideline scheme, then everybody can argue  
14 whether it's on the prosecution or defense or it's --  
15 those of us on the courts trying to interpret, well, the  
16 Commission changed drug trafficking here, but they  
17 didn't change drug trafficking there. So are we to --  
18 to interpret something? And then the guideline, to even  
19 be more helpful, may say, for purposes of this  
20 guideline, the definition of drug trafficking is A B C.  
21 But in another guideline, it says the definition of drug  
22 trafficking is D E F.

23                   Well, do they really mean that you  
24 interpret drug trafficking as if it's an entirely  
25 separate category theoretically and apply to the

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1 statutes. And if so, why? Why should a scheme that's  
2 supposed to be ascertainable to all of the parties  
3 involved in the criminal justice process have to lend  
4 itself to such variety?

5 I mean, that to me -- and you talk about  
6 the Justice Department being inconsistent in its  
7 approach, the guidelines ought to have consistency for  
8 whatever purposes in terminology across the entire  
9 scheme. So those are my modest comments.

10 COMMISSIONER HINOJOSA: Judge, part of  
11 the situation with the categorical approach is that that  
12 is case law. And I guess the other part is, the  
13 definition of crime of violence, the guideline in the  
14 application note has basically taken 16(A) and said that  
15 it's an offense that has an element of use, attempted  
16 use, or threatened use of physical force to a person or  
17 property of another. And our circuit has taken the  
18 position that if you can do this -- and by omission,  
19 therefore, it doesn't count.

20 16(B) has been left out of that. And one  
21 of the reasons is because 16(B) involves potential risk  
22 against property. What would be your personal reaction  
23 to including in the crime of violence any other offense  
24 that is a felony. And that by its nature, involves the  
25 potential risk of physical force against a person --

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1 against a person that may be used in the course of  
2 committing the offense and leave out the property as  
3 opposed to that, by its nature, involves physical force  
4 and may be used against the person? That that might  
5 cover -- do you think the circuit would still react that  
6 that is -- that some of these crimes are not by its  
7 nature, crimes that might involve the use of force  
8 against a person?

9 HONORABLE JONES: So if you said the  
10 crime -- you're taking out the words, "by its nature"?

11 COMMISSIONER HINOJOSA: No. I would  
12 leave "by its nature." Leave the 16(A) in there and  
13 then -- and 16(A) is not limited to felonies. 16(B)  
14 is. And leave 16(B) as it is and say -- and any other  
15 offense that is a felony and that, by its nature,  
16 involves a substantial risk of physical force maybe --  
17 against a person, maybe, used in the course of  
18 committing an offense. And leave out property.

19 HONORABLE JONES: Well, I don't object to  
20 leaving out property as a policy matter. But with  
21 regard to -- we -- I think the first case in which we  
22 got involved in this was a 16(B) case with Judge Garwood  
23 and a DWI, wasn't it? I think that's right.

24 And I guess you can -- of course, you can  
25 reasonable people can debate whether felony DWI ought to

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1 be considered a crime of violence. I personally thought  
2 that it should because, in Texas, again, you can't --  
3 you're not -- you can't be prosecuted for a felony level  
4 driving under the influence unless it's three times.  
5 And anyone who has children who are teenage drivers  
6 knows about the risk of drunk drivers.

7                   But that -- yeah. Reasonable people can  
8 differ about that particular offense. But if it is a  
9 crime that has a substantial or risk, the violence --  
10 the physical --

11                   COMMISSIONER HINOJOSA: It's a felony and  
12 the substantial risk of violence may be used against a  
13 person.

14                   HONORABLE JONES: I think that will  
15 probably capture a lot of the types of crimes that I'm  
16 talking about. I'd have to go back and look at the  
17 precise facts. But with regard to my concerns with  
18 sexual abuse, abuse of children, law enforcement  
19 officers, and whatever.

20                   COMMISSIONER HINOJOSA: I guess, really,  
21 for example, sexual abuse of a minor, that's an  
22 enumerated offense. The Circuit seems to have taken a  
23 position that if it smells like sexual abuse of a minor,  
24 it is.

25                   HONORABLE JONES: Well, except where we

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1 didn't. We did except where we didn't. And where we  
2 didn't was in Grossi-Cantu. And I forget what the abuse  
3 was in that. We had another one where a person -- where  
4 a fellow had been -- I think he pled out to abuse of his  
5 wife. But the way he abused his wife was throwing his  
6 kid into his wife's chest. And so he pled out to  
7 something that was a very low-level felony. But,  
8 obviously, had committed this, you know.

9                   But, again, that was -- that would seem  
10 to be covered by the definition that you're suggesting.

11                   COMMISSIONER HINOJOSA: Does anybody  
12 have --

13                   HONORABLE JONES: I could look at 16(B)  
14 and write you a response about that.

15                   COMMISSIONER HINOJOSA: And, Judge, I  
16 have to say, we appreciate the amount of time that  
17 you've taken because Judy and I know how much time your  
18 office has devoted to this, your staff and yourself.  
19 And it obviously shows that you are concerned about a  
20 problem that district judges in this Circuit and across  
21 the county face just about every day in the courtroom.

22                   HONORABLE JONES: I think I'm  
23 anticipating that they're going to face it a lot more,  
24 since this is a -- seems to be a growing priority in  
25 government. And while I may not speak for my court in

1 regard to the four types of offenses that I think  
2 need -- need to be considered very carefully, I do speak  
3 for my court in saying that this has been a very big  
4 problem for us as well as for the district courts.

5 COMMISSIONER HINOJOSA: And I guess it  
6 would be difficult to say the courts are going away from  
7 the categorical approach on their own. That doesn't  
8 appear to be happening.

9 HONORABLE JONES: Well, our court  
10 certainly has shown no interest in doing that. I think  
11 it will take the Commission's action. And, you know,  
12 I'm not sure that it is -- I can understand why Taylor  
13 was decided the way it was.

14 It seems to me that the purpose of  
15 sentencing is different from the purpose of articulating  
16 the definition of a federal crime. The purpose of  
17 sentencing is to adjust, you know, retribution and  
18 deterrence and rehabilitation and so on rather than the  
19 definition of guilt. And for that purpose, one does not  
20 have to use -- and neither the statute nor anything that  
21 I can see in principle in a guideline sentencing scheme  
22 has to adopt a categorical approach.

23 So what you say is more of a descriptive  
24 approach. And I think the idea of allowing or having an  
25 application note allows the district judge to use some

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1 common sense or allow the district judge to ask a couple  
2 of questions of a defendant. You know, this offense  
3 says that you ran your car into your kids when your wife  
4 was driving it; is that correct? If he pled guilty, he  
5 has to answer that. So it seems to me that would avoid  
6 the mini-trial problem that we see other ...

7 COMMISSIONER HINOJOSA: Did you talk to  
8 Judge Ed before you said this?

9 HONORABLE JONES: No, sir.

10 COMMISSIONER HINOJOSA: He mentioned this  
11 at lunch.

12 COMMISSIONER SESSIONS: Not from the  
13 perspective of us adding an application note to this  
14 effect, but perhaps raising --

15 HONORABLE JONES: Great minds run in the  
16 same circles.

17 COMMISSIONER SESSIONS: And I'm sure  
18 he'll put that fact on his resume right now.

19 COMMISSIONER HINOJOSA: Does anybody have  
20 any other questions of Judge Jones?

21 (No response)

22 COMMISSIONER HINOJOSA: Thank you very  
23 much, Judge.

24 HONORABLE JONES: Thank you.

25 JUDICIAL PERSPECTIVE FROM THE SOUTHERN DISTRICT OF TEXAS

1                   COMMISSIONER HINOJOSA: Our next panel  
2 consists of the Chief Judge of the Southern District of  
3 Texas, Judge Hayde Head. And I have a confession to  
4 make. Judge Head and I have been on the bench for a  
5 long time, and we actually did sentencing before the  
6 guidelines. And I will say that he is an older version  
7 of the orange and white guidelines because, many a time,  
8 he and I would compare what we should be doing in  
9 certain kinds of cases with defendants of certain kinds  
10 of backgrounds in order to try to make sure that we  
11 didn't have disparity in at least our area in South  
12 Texas. And so I consider him my original orange and  
13 white manual.

14                   And Becky Burks, who is the Chief U.S.  
15 Probation Officer for the Southern District of Texas.  
16 And she supervises one of the best divisions in the  
17 country in McAllen.

18                   MS. BURKS: Thank you, Judge.

19                   COMMISSIONER HINOJOSA: Judge Head.

20                   HONORABLE HEAD: Thank you, Your Honor.  
21 You have already introduced Becky. And I would like to  
22 expand on her services and on the services of the  
23 numbers of officers that she supervises in Houston and  
24 Galveston and Brownsville and Laredo and McAllen and  
25 Corpus Christi and Victoria. They are many. Her

1 district is quite diverse in terms of geography, in  
2 terms of economics, in terms of populations, rural and  
3 urban.

4 Her department does a very fine job.  
5 And, frankly, they all do. This scheme could not work  
6 without the competence of the probation officers that --  
7 that work with us, work with the defense attorneys, work  
8 with the prosecution. And so I think they deserve  
9 special recognition in all of this.

10 As a matter of fact, I don't think they  
11 ought to be called probation officers. They like  
12 probation officers. But since probation is sort of an,  
13 at this point, a legal fiction in our lives, I think it  
14 probably ought to be something closer to criminal  
15 justice officer, which I think encompasses both their  
16 supervision responsibilities and their presentence  
17 responsibilities and sentencing responsibilities. So  
18 Becky, thank you, and thank you for coming.

19 Rather than speak to the other judges on  
20 the Court who I felt would be commenting on their own --  
21 and, frankly, I wish George Kazen was here. He's not  
22 been filling well. He's been very busy. I think if  
23 Judge Kazen had been here, he'd been very helpful to all  
24 of us. He's a bright, experienced judge, and I wish he  
25 were here.

1                   But Becky got together several  
2 representatives of each of the officers -- and they sat  
3 down as technicians as opposed, perhaps, to judges, and  
4 that's how they view themselves -- and addressed each  
5 one of the proposals. Their proposals pretty much  
6 mirror what you've seen today. And she's prepared some  
7 testimony, and she agreed that she would just sort of go  
8 over it. And I -- if you'd like to hear from her and  
9 what the probation officers in an extremely busy  
10 district might think about what you've proposed, she's  
11 free to say her piece.

12                   COMMISSIONER HINOJOSA: Becky, you might  
13 tell us how many probation officers you have in your  
14 district.

15                   MS. BURKS: Well, our total staff is over  
16 300. I would say about 225 are probation officers. We  
17 did -- I just looked at the first quarter 2006 stats  
18 yesterday. We did 6,489 PSIs for the 12 months ending  
19 December 30th, 2005.

20                   COMMISSIONER HINOJOSA: I know I haven't,  
21 but I feel like I've read every single one of them.

22                   MS. BURKS: I'm sure you did. I'm sure  
23 you did. I first want to thank Judge Hinojosa and the  
24 members of the Commission for the invitation to come and  
25 comment on the proposed amendments to the immigration

1 guidelines. As you know, and as Judge Head has  
2 referenced, probation officers are statutorily charged  
3 with the responsibility of completing that presentence  
4 investigation for the sentencing court, which involves  
5 investigating the facts and analyzing the application of  
6 the sentencing guidelines to those facts.

7 Our comments here today will reflect the  
8 perspective of those technicians. Our principal focus  
9 is the proposed amendments to 2L1.1 and 2L1.2.

10 In regards to 2L1.1, as it pertains to  
11 national security, the Commission proposes revising  
12 2L1.1 to increase punishment for those defendants who  
13 assist certain aliens who pose a heightened risk to the  
14 safety of the United States.

15 Option 1 involves creating a new base  
16 offense level of 25 for a defendant who's convicted  
17 under 8 USC 1327, involving an alien who is inadmissible  
18 on security or related grounds determined by  
19 8 USC 11283.

20 As indicated in the Commission's staff  
21 report, it's sometimes difficult for the court and  
22 probation officers to determine why -- to determine  
23 whether any alien smuggled on the part of the  
24 transporter is inadmissible. And it's for that reason  
25 that probation officers like Option 1, because under

1 Option 1, the government would be required to meet the  
2 statutory conviction to have the documentation, to have  
3 anticipated the need to prove that up. And that makes a  
4 probation officer's job easier.

5 Option 2, providing that specific offense  
6 characteristic, which would be an increase of two to six  
7 levels, could arguably apply to a broader group of  
8 individuals, as a conviction under a certain statute  
9 would not be required. And probation officers, however,  
10 will be required then to identify and locate that  
11 information to support that adjustment.

12 It would be broader. It would not be  
13 hinged on that statutory conviction, but it may be  
14 difficult again to obtain the information. We have had,  
15 in times in the past, difficulty in obtaining  
16 information to support certain adjustments, particularly  
17 when that adjustment hasn't been anticipated either by a  
18 case agent or a prosecutor in advance. And depending  
19 how quickly that alien is moved -- that inadmissible  
20 alien is moved, that information may just not be  
21 available to us.

22 We did note that if Option 2 were to be  
23 adopted, we would recommend that the Commission might  
24 consider making it also applicable when inadmissible  
25 aliens, under Subsection (a)2, are smuggled,

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1 transported, or harbored. We see that there already,  
2 under the current (a)1, a Level 23, 8 USC 1327, for that  
3 (a)2 subset. But if you add these specific offense  
4 characteristics, it should apply to both subcategories.

5                   And the reason we think that is because  
6 officers anecdotally report seeing cases where the  
7 aliens who are smuggled are inadmissible because they  
8 have a prior aggravated felony. As a matter of fact,  
9 we've seen cases where the government then prosecutes  
10 those aliens for that prior aggravated felony. And so  
11 we think that that specific offense characteristic  
12 should apply there also.

13                   We did note, however, that if you --  
14 well, let me back up and say this. We also support  
15 increasing that base offense level to 14 in those cases  
16 not involving that conviction of 8 USC 1327.

17                   We noted that if you increase that base  
18 offense level of 14 and then let's say you added the  
19 maximum six levels under the specific offense  
20 characteristics, you're going to end up with an offense  
21 level of 20, which is lower than 23(a)1 -- current  
22 (a)1. And I'm not sure if that was intentional or not,  
23 but that is something we noted in the analysis.

24                   Relative to the number of aliens, we were  
25 not so concerned with how the table is broken out or the

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1 strata in the table as much as we were concerned that we  
2 think there should be adjustment for two to five aliens.

3 HONORABLE HEAD: Two to five.

4 MS. BURKS: Two to five aliens smuggled.

5 This view is based on experience with smugglers making  
6 multiple trips and what's perceived to be purposely  
7 bringing in the number below what might be the  
8 prosecutorial cutoff, for example. That appears to be  
9 supported by the Commission's data set, which reflects  
10 46.2 percent of the cases in that 2005 data involved  
11 five or fewer aliens smuggled.

12 Relative to endangerment of minors, the  
13 probation guideline users agree that that increase  
14 harmed associated with the smuggling and transportation  
15 of children should be sanctioned. Our experience is  
16 consistent with the Commission's data set reflecting and  
17 average number of children is two.

18 We support Option 2, which provides a  
19 graduated increase based upon the age of the minor  
20 smuggled. We believe that the harm increases as the age  
21 of the minor decreases due to vulnerability. We would  
22 suggest the Commission clearly define "minor." For  
23 application of this guideline, we anticipate, as others  
24 who have spoken today, an issue of what constitutes a  
25 minor and how do you determine 12, 13, and 14, those

1 types of things. We also noted that the definition for  
2 the "child" in Title 8 differs significantly from what  
3 constitutes a minor.

4                   In the interim staff report, we noted  
5 that some of the guideline units concerning the  
6 smuggling of minors should be punishable severely  
7 regardless whether they were accompanied by a parent or  
8 unaccompanied by a parent, more appropriately said,  
9 would fall into that group. We don't see that the harm  
10 is significantly reduced by the presence of a parent.  
11 We actually pulled some cases and looked at where  
12 parents accompanied children were equally at risk even  
13 though their parent was present.

14                   To allow for circumstances where the  
15 facts might indicate that the parent actually  
16 safeguarded the child, the Commission could consider  
17 adding commentary to address those situations. We  
18 believe that risk factor of endangerment of minors is  
19 more appropriately addressed in the guideline itself,  
20 which is in 3A1.1.

21                   Relative to offenses involving death,  
22 when you support both the proposed changes to 2L1.1,  
23 which would separate death from the current specific  
24 offense characteristic and give an offense level  
25 increase and then the expansion to the cross-reference,

1 we respectfully suggest that the Commission consider  
2 adding to the proposed specific offense characteristic  
3 of threshold offense level to ensure that the guideline  
4 penalty range is established as close to the statutory  
5 maximum penalty as possible when death occurs.

6                   For example, if the offense resulted in  
7 death, increase by ten levels. But if resulting offense  
8 level is less than level blank, increase to level blank.  
9 Additionally, we believe offenses involving multiple  
10 deaths are not adequately addressed and respectfully  
11 recommend the Commission consider providing a special  
12 instruction or other guidance.

13                   As it pertains to abducting aliens or  
14 holding aliens for ransom, we agree that the increased  
15 penalties are in order for offenses that involve that  
16 type of behavior. We recommend that the Commission  
17 clarify what they intend by holding for ransom. How  
18 would that ransom differentiate from the agreed  
19 smuggling fee. What's the delineating factor. You'll  
20 see a fee agreed to once the smuggler arrives here with  
21 the aliens. Then there's, Oh, we need just a little  
22 more. We need another \$1,000. Is that ransom? Just  
23 clarify that for application purposes.

24                   Relative to 2L1.2 on, unlawfully entering  
25 or remaining in the United States, this was an

1 interesting discussion we had in looking at the various  
2 options. You've heard ample testimony today on the  
3 challenges of applying the guidelines on illegal reentry  
4 cases along the border.

5                   In Texas Southern, we experience all  
6 those same frustrations described regarding that  
7 categorical approach. In light of our experience, of  
8 the five options, we would have to say Option 5 was the  
9 most attractive to the probation group, as it completely  
10 removed the need to engage in that categorical  
11 approach. However, we all acknowledge that Option 5  
12 would not provide adequate penalties for the various  
13 types of defendants that we see.

14                   We had suggestions for possible  
15 modifications to Option 5. We did some work with maybe  
16 breaking out offense levels based on subsections of the  
17 statute as a basis of conviction. Ultimately, we  
18 concluded that we'd like to see the Commission explore  
19 refining that Option 5, and we believe the Commission  
20 should continue to distinguish the more serious types of  
21 illegal reentry defendants.

22                   Further, we'd like to also see the  
23 Commission explore providing a guideline that is an  
24 inversion of the current 2L1.2, meaning that base  
25 offense level would be established at a higher level. I

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1 think the proposal varies between 16 and 24, if I'm not  
2 mistaken, and adjustments would be subtracted from that  
3 level. That appeared to be consistent with the data in  
4 the 2005 data set which reflected 40 percent or so of  
5 the cases getting the 16-level increase.

6                   In the absence of a refined Option 5,  
7 Probation Officers in Texas Southern agree that would be  
8 an improvement over what we currently have. It  
9 delineates the types of prior convictions, as the  
10 current guideline does, but it tracks the statutory  
11 definitions.

12                   And while we're not totally satisfied  
13 with that option, we agree that it should simplify that  
14 categorical approach somewhat and would categorically  
15 address the need to differentiate sanctions for the  
16 different types of defendants.

17                   COMMISSIONER HINOJOSA: Thank you, Becky.  
18 Judge?

19                   HONORABLE HEAD: I think Becky and her  
20 group have done a good job. And she doesn't speak for  
21 the Court here today, nor do I. She speaks for her  
22 group, and I speak for myself. I think we've seen some  
23 basic themes today. I think we've seen the theme of the  
24 base offense level for smuggling needs to increase. I  
25 think -- I think I picked that up from most of the

1 persons that I've heard. I agree with that.

2 I think that we need to recognize we have  
3 some special categories of persons that are being  
4 smuggled. Minors, I can remember sitting on the bench  
5 not long after December the 24th of last year, which was  
6 the first snowfall in southern Texas in the memory of  
7 man, and I do mean the memory of man, since nobody would  
8 have been living since the last time it snowed and snow  
9 accumulated in the amounts that it did.

10 And there were persons who were being  
11 smuggled across the ranchlands of South Texas at that  
12 time. And not long after that came the first case where  
13 I couldn't believe the misery of some of the persons who  
14 were being smuggled, as they must have crossed the  
15 ranchlands not in any manner prepared to take 30 degree  
16 temperatures, six inches of snow. It must have been  
17 horrible. And there were children throughout that  
18 entire region being smuggled at that time.

19 So I do think that they warrant the  
20 protection of the law and I think, if the Commission  
21 sees fit, that minors should be recognized.

22 It is a difficult matter to do. It makes  
23 more sense to break it down, as probation has suggested  
24 and as others have suggested, into different tiers. It  
25 also makes sense, as some of the judges have suggested,

1 just drop it at 18 and let the judge take care of the  
2 various fact variances in the cases, including the age  
3 of the child. Because I think what's going to happen  
4 is, when minors are brought forward as potential  
5 witnesses, we're going to have a real hard time finding  
6 out where to keep these witnesses. I mean, we don't do  
7 that now. Where will we house the minor witnesses? So  
8 that's -- that's a real problem.

9 I, like Becky, don't believe it makes  
10 much difference whether the parents are with them or  
11 not. I think that a parent could get lost, could become  
12 a victim of the smuggler, could become ill, and the  
13 parent and the child become separated. So I don't  
14 believe that, because they're still together at the time  
15 of capture, that makes any difference. Besides, I think  
16 it may be very difficult to determine whether a person  
17 claiming parenthood is in fact the parent. How do we  
18 know that?

19 The terrorists obviously scare all of  
20 us. And I guess Ms. Howell wondered if terrorists cases  
21 had ever been before the Court. I don't recall any in  
22 my court in Corpus Christi, and don't recall my fellow  
23 judges speaking of it very often. But I am concerned  
24 about those circumstances when we don't know that  
25 terrorists are in fact terrorists. We don't know what

1 they are. But if there is the opportunity to discover  
2 it, I think we should be able to take it into account.  
3 And I think the Commission is in the best position to  
4 help us decide what that aggravating factor should be.

5 I have a a problem with an interpretation  
6 of the characteristics for a punishment increase in  
7 offense level when we talk about death and bodily injury  
8 during smuggling. Right now the proposal would separate  
9 out death and put it in a different category, and I --  
10 and I think the words were results in death.

11 I have a case coming before me probably  
12 on the next docket call in which there was a tragic  
13 automobile accident and there were, I think, six aliens  
14 who were killed. I do not know the circumstances of  
15 that event, except what I saw in the newspaper. I think  
16 it was a pickup truck in a wreck.

17 But assume that it wasn't exactly that  
18 wreck, but it was another in which the smuggler had  
19 everybody buckled in their seat belts in their  
20 automobiles, was driving within the speed limit down the  
21 road on a clear day and a dry highway. And someone else  
22 commits a traffic violation and, without any fault on  
23 the part of the smuggling driver, crosses the center  
24 stripe and kills all of the -- all of the persons  
25 smuggled.

1                   Is the interpretation proper that the  
2 driver should receive an increase in punishment because  
3 of the deaths of the aliens or not? It's indicated in  
4 the cases that I've read that there's somewhat of a  
5 strict liability position taken by the court's of  
6 appeals, except each of those opinions that I've read  
7 goes on to explain at great length how there is some  
8 fault on the part of the driver; and, therefore, he is  
9 worthy of the additional increase.

10                   I find it very difficult to interpret the  
11 ruling to be that if there is the happenstance of death  
12 during trafficking, that there should be some additional  
13 punishment. On the other hand, I would have absolutely  
14 no problem with imposing the appropriate sanction as  
15 defined by you for those persons who are culpable in  
16 death.

17                   I think trafficking people across the  
18 wastelands of South Texas, or the deserts -- there  
19 aren't that many people who might consider it  
20 wasteland -- but if you'd like a nice word, the  
21 ranchlands of South Texas and the deserts of Arizona, I  
22 think they -- from the moment they set out, they're  
23 culpable.

24                   But there are many circumstances when  
25 probably the smuggling event is not unsafe. And to

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1 impose a results in the standard, if that's without  
2 causation, is a little -- is a little harsh in my view.

3                   With respect the categorization problem,  
4 I don't think it bears any further comments, except I  
5 would like to join in the comments of Judge Jones, that  
6 sentencing needs to be something we can do without  
7 creating very, very difficult sentencing proceedings.  
8 We are being inundated with crime.

9                   We're not going to have a lot of money to  
10 hire probation officers. They can only do so much.  
11 They can only prosecute so many cases, and we need to be  
12 able to try these cases and provide the appropriate  
13 sentencing answer without having to deal with complex  
14 issues, at least to the extent possible, when it comes  
15 to sentencing. Sentencing is something that's  
16 transparent. And I think the problems that Judge Jones  
17 was expressing are certainly poor reflection as the  
18 circumstances now seem. That's all I've prepared.  
19 Thank you.

20                   COMMISSIONER HINOJOSA: Any questions?

21                   HONORABLE HEAD: Can we go?

22                   COMMISSIONER HOWELL: May I just ask,  
23 Ms. Burks, that I thought your comments were, you know,  
24 very well thought out, and I really appreciate the  
25 effort that you took to collect all of your minions to

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1 have them bring all their best thoughts and critical eye  
2 to the proposals.

3                   You've got a lot of it written out. I  
4 know we have a lot of it transcribed here. But I think  
5 it would be very helpful for us to have, in written  
6 form, a copy of your comments so we can actually review  
7 it in our hotel rooms and actually look in more detail  
8 of the specifics. I think that will be very helpful.

9                   HONORABLE HEAD: May I enclose my dissent  
10 on one or two of her points?

11                   COMMISSIONER HOWELL: Absolutely.

12                   COMMISSIONER STEER: Ms. Burks, on the  
13 2L1.2 options, you didn't say anything about Options 1,  
14 2, or 3. I take it that the group did not prefer any of  
15 those -- you did not see them as an improvement?

16                   MS. BURKS: Well, I think what was  
17 primarily focused on in the comment of the group was  
18 that this is somewhat stepping back to the pre-2001  
19 amendments, before the stratification of the delineation  
20 of the prior -- the nature of the prior offenses began,  
21 and they did not see this as an improvement. They  
22 saw -- really, most of the discussion centered around  
23 Option 5, frankly.

24                   Once you set Option 5 aside, Option 4,  
25 tracking the language but then tying the statutory --

1 the definition to the statutory definition was the  
2 closest to what they're doing now. And, frankly, they  
3 are to the thought of more major change is pretty  
4 overwhelming because of the volume and the numbers that  
5 we deal with, although we all acknowledge this  
6 categorical approach is really difficult. So I think  
7 that's where the focus came from.

8                   COMMISSIONER STEER: You now do Options  
9 1, 2, and 3, or at least Option 1, in a fashion where  
10 you do it for criminal history purposes in looking at  
11 length of sentence. So that's not such a big change, is  
12 it, to -- to basically bring in that component of the  
13 criminal history determination into Option 2? It may or  
14 may not be a good idea. But I'm just looking at it from  
15 the standpoint of whether the difficulty of doing it --  
16 the ease or difficulty of doing it.

17                   MS. BURKS: I don't think it was  
18 perceived to be easy. Now, I think there was also  
19 discussion of the aggravated felony part of that. And  
20 then the discussion on the criminal history brought us  
21 into, should we -- I think one of the questions for  
22 comment was, in those cases where the criminal history  
23 Subsection D and E, the double counting discussion, or  
24 should the Commission not count older convictions for  
25 purposes of the aggravated felony.

1                   And from that perspective, the group's  
2 consensus was that recency's not addressed in the  
3 statute; therefore, we don't see that recency should be  
4 addressed in the guideline.

5                   COMMISSIONER HINOJOSA: I guess one of  
6 the frustrations in the Fifth Circuit is the definition  
7 of crime of violence. And the frustration being that  
8 the sentencing judge knows that, in some of these cases,  
9 it is a crime of violence but it somehow doesn't meet  
10 the categorical approach and it's, therefore, not going  
11 to include the enhancement for crime of violence.

12                   What about the 16(B) idea of throwing  
13 that in, that it will also include a felony that, by its  
14 nature, involves a substantial risk of physical force  
15 being used against a person and leaving out the property  
16 and that it has to be a felony and that, by its nature,  
17 involves a substantial risk?

18                   HONORABLE HEAD: Mr. Chairman's  
19 suggestions.

20                   COMMISSIONER HINOJOSA: Thank you. I  
21 also want to say that -- and I didn't mention this when  
22 we had some of the judges from the Western District.  
23 One of the big jobs of the Commission is to get the five  
24 documents sent to us that are required by statute to be  
25 sent to the Commission. And both the Western District

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1 of Texas and the Southern District of Texas, with as  
2 many cases as they have, have done an excellent job of  
3 getting us those documents timely and in complete  
4 fashion and which has made our job much easier. And I  
5 failed to mention that when we had the judges from the  
6 Western District of Texas.

7 But it's hard to see, with as many cases  
8 as are handled in both of those districts, the  
9 proficiency and the manner in which those documents are  
10 sent to us. And we appreciate that, and we're sure it's  
11 going to continue.

12 COMMISSIONER HOROWITZ: I just wanted to  
13 follow up on the fast track questions that we were  
14 talking about. If I understand, the Chair has told us  
15 your district also has different policies and different  
16 divisions. How have -- how has it worked in practice in  
17 the different divisions where it has been used, and has  
18 it been a tool that's been necessary to -- to move cases  
19 along in those districts?

20 HONORABLE HEAD: Why don't you tell them  
21 what the differences are.

22 MS. BURKS: Okay. Currently in  
23 Brownsville, fast track applies to 8 USC 1326s, illegal  
24 reentries, if they plea at arraignment and they have no  
25 prior conviction for an illegal reentry. It's a

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1 two-level departure.

2 In McAllen it applies in 1324 and 1326  
3 cases. That's a two-level reduction departure unless  
4 they have a pending federal revocation or prior crime of  
5 violence conviction.

6 In Laredo it applies to drug cases only.  
7 And I think that Marjorie Meyers made reference earlier  
8 to the fact that, in Laredo, cases that might in other  
9 areas go to the state court level are brought  
10 federally. And so it applies in drug cases only.

11 It's up to three levels off for an early  
12 plea and a waiver of appeal, but it doesn't apply in  
13 immigration cases. And those are only three divisions  
14 in the district where we have the fast-track program.

15 COMMISSIONER HOROWITZ: And has it proven  
16 from a docket management standpoint to be a helpful tool  
17 from the court's perspective or probation -- the  
18 probation officer's perspective?

19 HONORABLE HEAD: I think the answer is  
20 yes. In Laredo we've had an unusual situation for  
21 years. The district attorney's office in Laredo  
22 would -- would take many of the smaller drug cases,  
23 which there are many, many. And now they no longer do  
24 so, and it's been the case for several years. And so  
25 the smaller drug cases that were in state court now move

1 through the federal system. And I think Judge Kazen, if  
2 he were here, would say the answer to your question is  
3 yes.

4 I've heard Judge Hinojosa tell me the  
5 answer to my question with respect to McAllen is yes,  
6 and I think that probably the answer is yes in  
7 Brownsville. I don't think it's necessary in  
8 Corpus Christi, and I don't know why that is. I have  
9 the statistics of the cases from just last year that  
10 Becky brought today.

11 In Brownsville last year, there for 49  
12 cases involving bringing in and harboring aliens, and  
13 there were -- there was reentry deported aliens, 301  
14 cases, for a total of 366 felony cases involving  
15 immigration cases. Now, there were certainly a lot more  
16 misdemeanor cases. But felony pleadings, this is what  
17 was filed.

18 In Corpus Christi where I am, we have  
19 five times as many more smuggling cases and probably a  
20 third as many reentry of deported aliens for 385. We  
21 have 30 more cases, and we don't use fast track. I  
22 personally don't like fast track for the reasons that  
23 have been articulated everywhere.

24 I think that if -- if the U.S. Attorney's  
25 Office says they need it, I suppose they do. I frankly



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1 to mind are the guidelines applied to the child  
2 pornography cases and what constitutes a prepubescent.  
3 And we have had several cases, at least in the Houston  
4 division, where that has come to debate, what  
5 constitutes it. And experts are brought in and  
6 testimony is had on, okay, this picture, why these  
7 characteristics -- it would be the expert's opinion that  
8 this is prepubescent male, et cetera.

9 I think that, as far as the probation  
10 officer's perspective on what constitutes a minor, our  
11 suggestion centers around the comments that Judge Head  
12 just made. Let's don't complicate the sentencing  
13 processing more than we have to.

14 So if there's a way that you can clarify  
15 that and be sure that it's consistent with all other  
16 parts of the guidelines, any other area, any other  
17 guideline that applies to a minor, then we would ask  
18 that you do that.

19 COMMISSIONER HINOJOSA: And I guess  
20 another part of the problem is, immediately, these young  
21 minors are turned over to the Mexican Consulate and then  
22 they're sent back. And so unless they're kept as  
23 material witnesses in custody, it's going to be very  
24 difficult for us really to prove what the age was  
25 because they're automatically -- immediately there's a

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1 concern about the welfare of the child, as there should  
2 be. And there's an immediate attempt to contact the  
3 Mexican Consulate and try to get them into safe hands.  
4 And so, therefore, we've lost them and how do we ever  
5 prove how old they were.

6 HONORABLE HEAD: The border patrol would  
7 have to be brought into the scheme immediately so that  
8 they could provide protection for them. I'm not sure  
9 the Department of Justice would be willing to pay for  
10 the medical testimony that it might take to prove  
11 somebody was 11 or 12 or 13. I do think that's a  
12 serious difficulty. Not to mention the disappearance of  
13 the witnesses, which Judge Hinojosa pointed out.

14 COMMISSIONER HINOJOSA: If we don't have  
15 any other questions, again, thank y'all very much.

16 HONORABLE HEAD: Thank you for being  
17 willing to listen to us. Thank you.

18 COMMISSIONER HINOJOSA: That concludes  
19 our public hearing. I think we all agree that this has  
20 been very worthwhile and informative. We could not have  
21 asked for better panels, both from the judges, from the  
22 probation officers, from the circuit judges, district  
23 judges, as well as the practitioners, both on the  
24 defense and certainly the Department of Justice. So we  
25 thank y'all very much.

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