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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

WASHINGTON, D.C.

THURSDAY, MARCH 13, 2008

The Commission convened at the Thurgood
Marshall Federal Judiciary Building, Mechem Conference
Center, West Side, Washington, D.C., JUDGE RICARDO H.
HINOJOSA, presiding.

COMMISSION MEMBERS PRESENT:

DABNEY C. FRIEDRICH
BERYL HOWELL
RICHARD MURPHY

OTHER ATTENDEES PRESENT:

HENRY E. HUDSON
DIANE J. HUMETEWA
MARIANNE MARIANO
TODD A. BUSSERT
SUZANNE E. FERREIRA
JOSEPH KOEHLER

P R O C E E D I N G S

1
2 CHAIRMAN HINOJOSA: Good morning. This
3 morning on behalf of the United States Sentencing
4 Commission, I want to thank the individuals who will be
5 presenting statements this morning concerning the
6 Commission's priorities and agenda for this particular
7 cycle.

8 Our first panel consists of one individual,
9 the Honorable Henry Hudson, who is a United States
10 District Judge in the Eastern District of Virginia.
11 And in 2005, the Judge was appointed to -- by the Chief
12 Justice, Conference on Judicial Security. And so it's
13 an honor for us to have him here today representing the
14 Committee as well as the Judicial Conference on issues
15 of importance to his Committee as well as to the
16 Conference.

17 And, Judge Hudson, if you would like to go
18 ahead and start, sir.

19 JUDGE HUDSON: Thank you very much, Mr.
20 Chairman. Thank you again for having me here today.
21 In addition to representing the Committee on Security,
22 I also speak on behalf of the Criminal Law Committee of
23 the Judicial Conference.

24 If you all could envision just for a second
25 being a U.S. District Judge or a U.S. Attorney in your

1 | district and applying for a home equity loan to
2 | perhaps fund your kid's education, and on the eve of
3 | closing getting a phone call from the mortgage company
4 | saying, Judge, how come you didn't disclose to me that
5 | \$10 million lien you have against your property? Can
6 | you imagine the humiliation? Well, it happened. And
7 | even though the Department of Justice represents judges
8 | and prosecutors in trying to get title cleared and
9 | trying to get their credit restored, the embarrassment,
10 | the inconvenience and the humiliation is tremendous.
11 | Now believe it or not, everywhere around the country
12 | these things are not uncommon. During the last 15
13 | years, over 80 malicious liens have been filed against
14 | federal judges alone; most of them in the western part
15 | of the United States, and particularly in the State of
16 | Washington. I'd invite you also to review the
17 | statement of my colleague, Judge Edmund A. Sardis of
18 | the Southern District of Ohio, who had just such a
19 | fictitious lien filed against him. Luckily, he's a
20 | judge in a rural part of Ohio. His wife also happened
21 | to be a public figure. The clerk of the court
22 | recognized it before it got too far, but, again, it
23 | could have been catastrophic for him credit-wise if he
24 | had attempted to get some type of a loan during the
25 | period of time it was filed.

1 Now these liens, I guess probably more
2 specifically they are *lis pendens*, are filed in clerks'
3 offices in state courts around the nation. And what
4 makes it particularly difficult is there is no notice
5 whatsoever; and, in most states, the clerk has no
6 discretion whether or not to file it. There's no
7 mechanism for screening, and the only way you find out
8 is when you file an application for credit or for a
9 loan of sometime. And in addition to malicious liens
10 against personal property, my good friend and former
11 member of the, of the Security Committee, Steve McMamie
12 (ph.) who is a judge in Arizona, was briefing us on the
13 fact that now they're getting fictitious foreign
14 judgments filed in clerks' offices under the UCC and
15 having the sheriff or someone execute process against a
16 car or personal property of federal judges. Imagine
17 coming out of the -- store and somebody is towing your
18 car away because some disgruntled litigant has put a
19 lien against it. Well, I think you get the idea of
20 what the problem is.

21 Thankfully, the Court Security Improvement
22 Act of 2007, specifically 18 U.S. Code Section 1521,
23 enacted in January of 2008, includes a provision making
24 it a 10-year felony to file, conspire to file or
25 attempt to file a lien or encumbrance against the

1 | property of a federal judge or federal law enforcement
2 | officer as a result of the performance of his or her
3 | duties.

4 | The judicial of the United States has been
5 | pressing for this legislation now for over 10 years;
6 | but up to this point, the only relief that's been
7 | available has been a civil remedy, basically clearing
8 | title. And in some cases, you can file a lawsuit, but
9 | most of these folks are judgment-proof anyway. There
10 | are some states that have had some criminal statutes,
11 | but none of them are specific to judges and law
12 | enforcement officers. All of them are just merely
13 | slander of title type of actions.

14 | Before I talk about specific guideline
15 | recommendations we have, I want to reiterate on behalf
16 | of all my judicial colleagues how much we appreciate
17 | the speed with which this Committee has moved forward
18 | to promulgate guidelines to implement this new statute.
19 | This is much needed legislation.

20 | Now in passing the guidelines for Section
21 | 1521, I'd ask the Commission to keep a couple of things
22 | in mind. First of all, all of these filers are
23 | disgruntled litigants, who are unwilling to accept the
24 | judgment of the trial court and unwilling to accept an
25 | appeal. When a disgruntled litigant is able to file a

1 | malicious lien and blemish the credit of a federal
2 | judge or federal prosecutor, it is a self-gratifying
3 | act of revenge, which if unchecked, reinforces the
4 | behavior.

5 | You know, in America during the last five
6 | years the number of threats against federal judges has
7 | increased by 69 percent. It's come a long way. When I
8 | was Director of the Marshal Service, we had a lot of
9 | threats, but not as many as we have today. I don't
10 | know what is causing this, but the bottom line is that
11 | people who are able to file malicious liens, their
12 | behavior begins to escalate, and they become more and
13 | more brazen, and it can have more serious implications
14 | over time. It's got to be checked by firm, firm
15 | treatment by courts and the sentencing guidelines.

16 | Most filers have a deep antagonism against
17 | the judicial system, and merely obtaining an injunction
18 | against filing does no good whatsoever. In fact, most
19 | of these folks already have injunctions against them
20 | barring them from filing malicious liens. The
21 | underlying conduct represents a direct attack against
22 | the integrity of the judicial system. It is a not so
23 | subtle attempt to sway the court's judgment.

24 | Now let's talk about guidelines specifically.
25 | The gravamen of this offense is not financial gain.

1 | It's not fraud. It's not economic harm. In fact,
2 | rarely does the judge sustain a monetary loss as a
3 | direct result of the lien. There may be collateral
4 | consequences in not being able to go to closing on a
5 | loan, et cetera. But this flows from a deep-seated
6 | content -- discontent. It is a desire to launch a
7 | counterstrike against the judiciary. Therefore, our
8 | Committee feels that *Sentencing Guideline* 2B1.1, which
9 | deals with crime against theft and fraud, just doesn't
10 | capture the essence of the behavior addressed here.
11 | Moreover, taking a look at 2J1.2, Obstruction of
12 | Justice, we feel this would often fall short of the
13 | mark because many of these liens are filed after
14 | litigation is formally concluded, and it would be
15 | difficult for prosecutors to demonstrate a specific
16 | intent to obstruct justice or impede the case.

17 | For those reasons, our Committee urges you to
18 | consider violations of 15.21 for what they actually
19 | are. They are threatening or harassing communication,
20 | and they should be governed by Section 2A6.1, because
21 | they are a threat to the integrity of the legal
22 | process, and they are designed to communicate and send
23 | a message to the judge.

24 | Now, in addition, we believe that there are a
25 | number of enhancements, which could apply, and we're

1 recommending that you consider some other enhancements.
2 Under a 2A6.1, it would be a basic offense leveled as
3 well. Judges would have the opportunity to enhance by
4 three levels under 2A6.1(3) if the offense involved a
5 violation of a court order; and, frequently, as you can
6 glean from reading Judge Sardis' statement, these
7 people have had injunctions filed or been barred by
8 courts from filing any type of liens or other process
9 without leave of court. There is a potential for an
10 adjustment under 3A1.2 for official victim. In
11 addition, our Committee recommends that you consider
12 the following possible enhancements:

13 Filing of multiple liens. Under the notes
14 that follow 2A6.1, you all have suggested that filing
15 of multiple liens may be grounds for upward departure.
16 Certainly I think that may be true. But, however, we
17 believe that in the case of people who are so defiant
18 as to file liens against judges, prosecutors, probation
19 officers, clerks of court, the entire bevy of people
20 bringing, casting misery across the board, we think
21 that there should be a specific enhancement for that
22 level of disrespect for the court system.

23 I think when a filer causes substantial
24 economic harm, extended litigation or the loss of use
25 of their property as a result of the filing, there

1 | should be an additional enhancement very much akin to
2 | what you provided in 2A6.1(b)(4). And in those cases
3 | where communication or a filing is specifically
4 | intended to disrupt the legal process or occurs during
5 | a trial or preceding, an obstruction of justice
6 | enhancement is certainly appropriate.

7 | Obviously, these folks have no remorse
8 | whatsoever, and it's reflective of any contrition they
9 | may have toward the proceedings or the judge.

10 | The final analysis on behalf of both
11 | Committees I represent today, all members of the
12 | federal judiciary, I appreciate your time today, and we
13 | salute the fine work you do.

14 | Open for questions, Mr. Chairman.

15 | CHAIRMAN HINOJOSA: Judge Hudson, first of
16 | all, I want to -- I will introduce the Commission
17 | members shortly, but I do want to thank you for having
18 | taken time from your busy schedule. You bring special
19 | expertise to this matter in that you are a former
20 | Director of the U.S. Marshal Service and have been on
21 | the bench for about six years. And so we very much
22 | appreciate your sharing your thoughts with us and the
23 | Committee's thoughts as well as the Criminal Law
24 | Committee's thoughts on, on this matter.

25 | I do want to introduce our Commissioners. We

1 | have Commissioner Beryl Howell, who is an attorney here
2 | with a firm in Washington, D.C. She's former counsel
3 | to Senator Leahy's Office, Senator Leahy, and
4 | Commissioner Dabney Friedrich, who is also an attorney
5 | here in Washington, DC, and formerly worked in the
6 | White House Counsel's Office, and ex officio,
7 | Commissioner Murphy, who is the Department of Justice
8 | representative on the Commission, who is in the U.S.
9 | Attorney's Office in Iowa.

10 | And so I will open it at this time for any
11 | Commissioner who has -- may have any questions.

12 | Commissioner Howell.

13 | COMMISSIONER HOWELL: Judge Hudson, thank you
14 | again for being here.

15 | You know, one of -- we, we suggested two
16 | alternatives, forms of the enhancement for multiple
17 | liens that cause substantial pecuniary harm. One was,
18 | you know, a plus four associated special offense
19 | characteristic, and the other was just giving the judge
20 | the discretion to have an upward departure. Does the
21 | conference or -- have a preference for one or the other
22 | and --

23 | JUDGE HUDSON: The difficulty, Commissioner
24 | Howell, is that in many of these instances, it's hard
25 | to prove substantial economic harm. Many of these

1 | prevent a judge or a prosecutor from getting a loan.
2 | In some instance perhaps because they're unable to go
3 | to -- closing, and they're in default. They may have
4 | to pay a penalty, but rarely is there substantial
5 | economic harm. It is the humiliation, the
6 | inconvenience and the threatening impact these things
7 | have on the judiciary, which is the real core of
8 | behavior we're addressing.

9 | COMMISSIONER HOWELL: Right, and I think
10 | that, I think that the Commission, you know, recognizes
11 | that both from you and from Judge Sardis' letter, which
12 | was also quite detailed. And now in terms of -- and,
13 | and I think that the harm would be very -- may vary
14 | depending on the circumstances, how many liens were
15 | filed, the circumstances of the particular judge,
16 | whether the judge was just about to get a loan, was
17 | just about to close versus, you know, the, the period
18 | of time and so on. So, you know, giving a plus four
19 | SOC in all of those cases that may vary so much, I
20 | think, you know, may, may be too much, one size fits
21 | all as opposed to just upper departure discretion. I
22 | just --

23 | JUDGE HUDSON: Well --

24 | COMMISSIONER HOWELL: -- wanted to know if
25 | you had a reaction to that.

1 JUDGE HUDSON: Okay. What I would suggest to
2 you is that in those instances where multiple filers
3 are able to, to require either litigation or
4 substantial effort to remove the lien, perhaps there
5 could be a two-level adjustment, and it could progress
6 upwardly to a four-level adjustment if there is actual
7 economic harm. But I think some, some additional
8 sanction should be exacted for those people who create
9 misery across the board to all these people in the
10 system. And some of these folks have filed 12 and 15
11 of these things, every judge they've ever dealt with.

12 CHAIRMAN HINOJOSA: And I take it, Judge, for
13 the victim it starts off with certified letters from
14 these individuals over a period of time that start
15 making these threats and saying these are going to be
16 filed if you don't respond in a -- within a certain
17 time limit. And for some individuals, for judges at
18 least, you know, we can turn that over to the U.S.
19 Attorney's Office; but for some individuals, they may
20 have to go talk to a lawyer or try to determine what it
21 is they can do about this.

22 JUDGE HUDSON: Yes, sir. You're right. In
23 smaller communities sometimes you can contact the local
24 clerk of the court or they know who you are, and many
25 times they might be able to intercept it. But in the

1 | larger areas, Washington, New York, Chicago, there are
2 | a lot of federal judges, and not many state clerks of
3 | the court know who they are. So that's the real harm,
4 | Mr. Chairman.

5 | CHAIRMAN HINOJOSA: Judge Hudson, in your
6 | experience with the Marshal Service, which I realize
7 | it's been awhile since you were with the Marshal
8 | Service, I, I take it there were prosecutions that were
9 | brought to your attention or individuals who were
10 | brought to your attention that prosecutions proceeded
11 | with regards to threats like this or actions like this?

12 | JUDGE HUDSON: I don't know of any specific
13 | cases involving threatening liens. We've sure had our
14 | fair share of threats against federal judges and other
15 | public officials. And, as you well know, having heard
16 | a portion of my presentation in -- that is something
17 | we're trying to heighten public awareness about. We're
18 | trying to heighten sensitivity. At this point, we want
19 | judges and public officials to notify the Marshall
20 | Service of every threat. Let us -- let the Marshall
21 | Service decide whether or not it's actionable. But we
22 | need to develop a database to know who these people are
23 | so that we have an idea when a person files a
24 | threatening communication just what history they have
25 | and what potential behavior you may see from them.

1 CHAIRMAN HINOJOSA: And, and you touched on
2 this also. Obviously some of these happened with
3 regards to federal judges and, you know, we are the
4 ones who sign the orders and make the decisions, but
5 it's also with regards to a lot of people that are good
6 public servants who work with the court, who have
7 nothing to do with the decision-making process that we
8 as judges have engaged in. And you touched on that
9 when you talked about probation officers and clerks of
10 courts, and you also talked about U.S. Attorneys and
11 other individuals who have -- I, I -- in your
12 experience have been subjected to this. I guess it's
13 not just the judges that sometimes --

14 JUDGE HUDSON: It is the federal agents as
15 well, FBI agents, IRS agents. They are also the
16 subject of just these kind of communications.

17 COMMISSIONER HOWELL: Judge Hudson.

18 JUDGE HUDSON: Yes, ma'am

19 COMMISSIONER FRIEDRICH: You mentioned the
20 specific offense characteristic that you analogized to
21 2A6.1(b)(4), and you mentioned three factors. I caught
22 the first two; the first being pecuniary harm, the
23 second being extensive litigation to remove the lien.
24 And I thought there was a third.

25 JUDGE HUDSON: Loss of property. In those

1 | situations like Judge McNamie mentions, where the judge
2 | has had his or her car towed from a parking lot
3 | somewhere or other property attached as a result of
4 | this false process, that is an aggravating factor I
5 | believe warrants some type of enhancement.

6 | COMMISSIONER FRIEDRICH: And with respect to
7 | the multiple liens that you think would be better
8 | addressed as an SOC rather than a departure.

9 | JUDGE HUDSON: Yes, ma'am, I, I think so.

10 | COMMISSIONER FRIEDRICH: Do you have a
11 | recommendation as to the amount of the specific offense
12 | characteristic or whether it's graduated according to
13 | the number of liens?

14 | JUDGE HUDSON: Well, as I mentioned in
15 | connection with Commissioner Howell's question, I
16 | believe that where it does cause substantial economic
17 | harm, there should be a higher number there, perhaps
18 | four; but I think simply filing multiple liens and
19 | creating inconvenience, humiliation for public
20 | officials, multiple people, that should be at least a
21 | two-level enhancement. When you file a malicious lien
22 | against everybody involved in a case, from the
23 | initiating agent, clerk of the court, probation
24 | officer, deputy marshal, judge, clerk, everybody, that
25 | just shows a different level of disrespect from the

1 | person that may file an isolated lien, if you can parse
2 | those out. I realize you're grinding the saws very
3 | finely here, but different level of hostility.

4 | COMMISSIONER FRIEDRICH: Thank you.

5 | JUDGE HUDSON: Sure.

6 | COMMISSIONER MURPHY: Judge Hudson.

7 | JUDGE HUDSON: Yes, sir.

8 | COMMISSIONER MURPHY: You had advocated a, an
9 | increase for official victim to options that had been
10 | published provide for either a six or a three level
11 | bump for official victim. Do you have a position on
12 | that?

13 | JUDGE HUDSON: You know, I rally don't. I
14 | haven't focused on that. I should have before I came
15 | here, but I haven't reviewed it that finely, Mr.
16 | Murphy.

17 | COMMISSIONER MURPHY: Thank you.

18 | CHAIRMAN HINOJOSA: Anybody else have any
19 | other questions?

20 | Judge Hudson, again, on behalf of the
21 | Commission, thank you so much. We did have two members
22 | who are ill today, but they have copies of the written
23 | statement from the Committee. Certainly we'll have the
24 | copy of the tape that we have with regards to this
25 | hearing. But on behalf of all the Commission, we thank

1 | you very much, and the Committee's interest on the
2 | subject, and we appreciate the help that you give us on
3 | a regular basis.

4 | JUDGE HUDSON: Thank you. The pleasure is
5 | mine, sir.

6 | CHAIRMAN HINOJOSA: Ready for the next panel,
7 | if they would step forward.

8 | And on behalf of the Commission, I also want
9 | to thank each one of the members of this particular
10 | panel who will be addressing several subjects that are
11 | under consideration by the Commission with regards to
12 | either new guidelines or guideline amendments, the new
13 | guidelines being reaction on the part of the Commission
14 | with regards to the new congressional or directives
15 | from Congress. I realize each one of you brings
16 | expertise to the Commission's hearing today, and also
17 | are devoting your time (some of you are from other
18 | parts of the country) to share this expertise with us,
19 | and it is very much appreciated. We do have Ms. Diane
20 | Humetewa, who is U.S. Attorney for the District of
21 | Arizona. I almost called it the District for
22 | Immigration. Coming from the Southern District of
23 | Texas, I can do the same with regards to my district.

24 | MS. HUMETEWA: We feel that way sometimes
25 | too.

1 CHAIRMAN HINOJOSA: I could do the same with
2 our district.

3 She is accompanied by Mr. Joseph Koehler, who
4 is the Deputy Chief of the Criminal Division of the
5 Immigration Unit.

6 We also have Ms. Maureen Franco, who is the
7 Deputy Federal Public Defender for the Western District
8 of Texas.

9 Ms. Marianne Mariano, who is the Acting
10 Federal Public Defender for the Western District of New
11 York.

12 Mr. Todd, Todd A. Bussert, who is the
13 representative of Practitioners Advisory Group today,
14 and we thank him for being here also.

15 And Ms. Susan Ferreira, who is the
16 Supervisory United States Probation Officer for the
17 Southern District of Florida.

18 I realize each one of you brings expertise
19 from different perspectives. The way the Commission
20 operates is, as I have often told people, is very much
21 the way I operate in my courtroom when I decide matters
22 with regards to sentencing. We hear from people with
23 different views in the courtroom, usually from the
24 prosecutor and the defender as well as sometimes we
25 hear from victims as well as other individuals who have

1 | written. Sometimes we get letters with regards to
2 | particular sentences, and as judges then we make a
3 | decision based on all of the information in front of
4 | us. The Commission does this in a similar way, and
5 | does very much the same considerations that a U.S.
6 | District Judge does in the courtroom. We consider the
7 | 35.53(a) factors. We take into account everything that
8 | is -- all of the information that we have. We hear
9 | from judges on a regular basis through their statement
10 | of reasons also, and then we then proceed to take
11 | action on guidelines that are national with regards to
12 | different violations of the law. But it is a process
13 | very much, and many of you are familiar with the
14 | courtroom, very much like the courtroom process, just
15 | at a different level because it is a national guideline
16 | that we as a Commission come to the decision satisfies
17 | the 35.53(a) factors under our statutory requirement
18 | with regards to a national wholesale distribution as to
19 | what a guideline sentence should be on a national level
20 | with regards to a particular crime committed by
21 | individuals who are similar. And so, for that reason,
22 | we do thank you very much for your taking your time to
23 | be here. You were present when I introduced the other
24 | commissioners.

25 | And at this point, I guess we'll start to my

1 | left here with Ms. Humetewa, and I think you will be
2 | addressing immigration issues.

3 | MS. HUMETEWA: I certainly will.

4 | CHAIRMAN HINOJOSA: If you have thoughts on
5 | any other issues, you're welcome to express them also.

6 | MS. HUMETEWA: Thank you. Chairman Hinojosa,
7 | distinguished members of the Commission, thank you for
8 | allowing me the opportunity to testify. It's a
9 | pleasure to appear before you on behalf of the
10 | Department of Justice. I have with me today, as you
11 | mentioned, Joe Koehler, who I believe you know from
12 | previous hearings. I would like to address in an
13 | abbreviated fashion what we've submitted in writing
14 | regarding immigration; and, in particular, the
15 | proposals to amend Section 2L1.2.

16 | As you are aware, the Department has been
17 | urging wholesale change to this guideline for the past
18 | three years. We've not sought to increase or decrease
19 | the length of sentence; rather, we have suggested ways
20 | that we believe would help fix a guideline that,
21 | despite all good intentions in the past, is broken.

22 | Let me try to put this issue into
23 | perspective. When the Commission published the first
24 | manual, there were only 2,289 defendants prosecuted for
25 | immigration crimes in federal court or approximately

1 four percent of all defendants that year. Last year
2 there were 17,592 defendants prosecuted for immigration
3 offenses, and that now constitutes 24.2 percent of the
4 federal docket. I will not repeat all of the
5 statistics, but in my district, immigration cases
6 comprise 58 percent of the entire docket. We
7 anticipate that percentage will continue to increase.
8 Of the 1,849 cases sentenced under Guideline 201.2, 89
9 percent received an increase under Subsection B. In
10 2007, each of our judges sentenced approximately 250
11 felony defendants. The national average is about 75.
12 On average each day, all year long, in every courtroom,
13 a defendant is being sentenced. Not surprisingly, in
14 most illegal reentry cases the length of the
15 prospective sentence stands as the lone issue
16 triggering litigation in the case and, thereby,
17 delaying resolution of the matter. This delay creates
18 difficulty throughout the criminal justice system,
19 tying up judges, probation officers, prosecutor,
20 defenders, and consuming valuable detention space. As
21 you are aware, the stakes are high. If a court
22 determines that a prior conviction qualifies as a crime
23 of violence, that will probably double the defendant's
24 sentence, and these are not easy things to determine.
25 First, we must get the record of the previous

1 conviction. Even when all the conviction records can
2 be obtained, the parties and the court must labor to
3 determine under oft-changing circuit precedent whether
4 the records contain sufficient information to cause the
5 conviction to qualify as a predicate for any of the
6 enhancements under 201.2B. Unfortunately, it doesn't
7 end there, and appeals follow. The total financial
8 cost, much less the diversion of personnel to the
9 judicial system, is mind boggling. It is clearly a
10 frustrating situation to everyone and especially to
11 you.

12 I will not repeat now the long history of
13 201.2 and the changes that have taken place. I'm sure
14 you've read our written testimony. We think that it's
15 important to remember how long everyone has been
16 struggling with this issue, and I hope that summary
17 gives some context to the options available now and why
18 we believe that another attempt at redefining terms
19 will not alleviate this problem.

20 There is no question that the Commission has
21 had a difficult, if not impossible task. Periodically,
22 Congress has changed the statute, increasing the
23 penalties or expanding the offenses included as
24 aggravated felonies. The courts have rendered often
25 conflicting opinions on what offenses qualify under

1 various categories, while also placing restrictions on
2 the manner of proof, thus limiting the ability to use
3 prior convictions anticipated by the statutes and
4 guidelines as the basis for increased sentences.

5 I believe that the specific examples from my
6 district that we gave in our written submission
7 illustrate the difficulties and inequities that have
8 unexpectedly arisen. How do we explain to a defendant
9 that his sentence may be different if he enters
10 illegally into Texas rather than into Arizona? As a
11 result of these differing options -- opinions, excuse
12 me, trying to interpret the current guideline, we
13 believe that the courts, the probation offices, defense
14 attorneys and prosecutors, are unnecessarily expending
15 significant time and effort parsing over words and
16 statutory construction of state and local laws, without
17 any real benefit to the ultimate outcome, namely, a
18 fair, predictable and appropriate sentence.

19 The Department favors a variation of Option 3
20 of the proposed amendments. Under Option 3, the
21 guideline calculation would be driven primarily by the
22 length of sentence imposed for prior convictions.
23 Although state sentencing regimes are not entirely
24 uniform, we believe the length of sentence imposed
25 provides a far more objective and readily determinable

1 | basis for an increased offense level under 201.2 than
2 | does the current categorical approach, which is
3 | governed entirely by varying practices in charging and
4 | record keeping among the 50 states and thousands of
5 | counties and parishes throughout the United States. At
6 | the same time, for a limited number of very serious
7 | offenses, it would keep the present categorical
8 | approach.

9 | We would note that for most of those specific
10 | offenses, there hasn't been the litigation that has
11 | proven so problematic as with other offenses currently
12 | listed in 2L1.2(b). We believe length of sentence has
13 | proven to be an appropriate indicator of the
14 | seriousness of an offender's prior record. While some
15 | have expressed concern with the with the disparate way
16 | sentences are imposed from one jurisdiction to another,
17 | we would note that currently 201.2 determines the
18 | application of certain drug offenses based on the
19 | length of sentence imposed. In our written
20 | submission, we suggest a couple of changes to proposed
21 | Option 3 by including certain parts of other options.
22 | Let me address a couple of the issues that have been
23 | raised with regard to this proposal. First, while
24 | overall average length of sentence would not change
25 | under Option 3, for some groups of offenders there

1 | would be those whose sentences would generally be
2 | shorter, and for others their sentences would be
3 | longer. Presently many defendants who have a simple
4 | assault conviction qualify for a 16-level SOC under
5 | Section 2B1.2(b) (A) (2) because the maximum potential
6 | sentence is more than a year. Thus, under the current
7 | guideline and under Option 1, they are treated
8 | equivalently to murder, manslaughter, kidnapping, among
9 | other very violent offenses. Under Option 3, they
10 | would generally receive a lower sentence. On the other
11 | hand, under the present guideline, a defendant who had
12 | been convicted of a major fraud, disrupting the lives
13 | of hundreds of people, and was sentenced to four years
14 | or more imprisonment and then was deported, now only
15 | gets a four-level increase if he illegally reenters.
16 | Under Option 3, if the original trial court felt it was
17 | serious enough offense to merit substantial
18 | incarceration, then the illegal alien could get a 16-
19 | level increase. We believe these changes are
20 | appropriate.

21 | The other concern has been whether using the
22 | length of sentence for a prior conviction is an
23 | adequate substitute for determining the increase in
24 | offense level when compared to the nature of the prior
25 | offense. Perhaps if we had a unitary judicial system

1 | where all defendants were charged under a single
2 | statutory scheme, the current guideline would work, but
3 | we don't. Instead, we must try to interpret and equate
4 | hundreds of often unfamiliar federal, state, local and
5 | foreign statutes attempting to identify what was in
6 | effect on a particular date and how that might fall
7 | within one of the categories within 201.2B. Variances
8 | in the sentencing policies of the myriad of
9 | jurisdictions are no different than charging decisions
10 | and at least much more transparent.

11 | Further, as we had mentioned, we at least
12 | have the assurance from empirical studies that the
13 | prior length of sentence can be linked to a clear,
14 | current sentencing objective. On the other hand, we
15 | have no such support for individual offenses.

16 | In our written submission, we addressed
17 | Options 1 and 2, and for the sake of brevity, I will
18 | not repeat those points now. Regardless of how one
19 | balances the various factors regarding the proposed
20 | changes, we believe there is an additional factor that
21 | has already impacted the fairness of the application of
22 | the current 2L1.2(b). That problem would also apply to
23 | Option 1, and that is the disappearance of the complete
24 | records necessary to make the factual and legal
25 | determinations required by the SOC's. More and more

1 | often when we request court records pertaining to a
2 | suspect's record, we're getting at best an abstract of
3 | the conviction record. Sometimes we get nothing. The
4 | information contained is often generic rather than
5 | specific, leading to an inability to identify the
6 | specific charge that would serve as the predicate for
7 | the SOC. In many instances, the abstract will only
8 | give a statute number or maybe combine that with a
9 | generic name for the offense. Using the United States
10 | Code as an example, an abstract might state that the
11 | defendant had been convicted of tampering with a
12 | witness, victim or an informant in violation of 18
13 | U.S.C. 15.12. A court, looking at that statute, would
14 | find violent and non-violent offenses, felonies and
15 | misdemeanors. It would be necessary to find additional
16 | information before the court could determine whether
17 | one of the SOC's applied to that conviction. Further
18 | complicating matters, as I mentioned earlier, is the
19 | disappearance of the underlying record that might help
20 | provide the necessary information. We have heard of
21 | jurisdictions that are destroying their paper files and
22 | relying exclusively on abstracts. As a result, we now
23 | have disparate treatment under the enhancements in
24 | existing Section 201.2 and would under Option 1,
25 | depending on how the local jurisdiction keeps and

1 | reports its records. This problem is going to get
2 | worse in the future. Option 3 helps avoid that
3 | disparate effect.

4 | That concludes my prepared remarks. The
5 | Department will be submitting within a few days a
6 | letter responding to many of the other issues raised by
7 | the Commission's proposed amendments.

8 | And let me say again how much I appreciate
9 | the Commission's time and their attention on addressing
10 | in particular this issue. We stand ready to assist
11 | the Commission in any way that we can. I appreciate
12 | the opportunity to be heard. Thank you.

13 | CHAIRMAN HINOJOSA: Thank you very much, Ms.
14 | Humetewa.

15 | Ms. Franco.

16 | MS. FRANCO: Thank you. I would also like to
17 | thank the Sentencing Commission for allowing me to come
18 | here to testify on behalf of the federal public and
19 | community defenders. I live in El Paso, Texas, on the
20 | U.S./Mexico border and have worked in the El Paso
21 | branch of the Federal Public Defenders Office for
22 | nearly 15 years. During that period of time, I have
23 | seen a drastic increase in sentences imposed as a
24 | result of the application of 2L1.2, a guideline which,
25 | in the view of many in the criminal justice community,

1 | does not fulfill the purposes of Title 18, U.S.C.
2 | 35.53(a) because it regularly prescribes sentences that
3 | are greater than necessary to achieve the goals of
4 | sentencing.

5 | Since the Supreme Court decisions in *Booker*
6 | and *Kimbrough* and *Gall*, district court judges in El
7 | Paso have on numerous occasions imposed sentences,
8 | which were less than the sentence recommended by the
9 | application of 2L1.2. These lower sentences do not
10 | reflect departures under an early disposition program
11 | as contemplated by the policy statement in 5K3.1, as
12 | there's no fast track in El Paso. Instead, these below
13 | guideline sentences generally reflect a judicial
14 | determination that in many cases broad application of
15 | 2L1.2 causes sentences which are unreasonably severe,
16 | especially when compared to Chapter 2 guideline
17 | provisions based upon a defendant's criminal history
18 | such as 2K, 2.1, Felon in Possession of Firearm. Since
19 | *Kimbrough*, below guideline sentences have additionally
20 | been based on the view that the severe sentences
21 | required by Guideline 2L1.2 lack a sufficient empirical
22 | basis, either in pre-guideline practice or otherwise.
23 | I believe the experience in El Paso reflects a nation-
24 | wide discontent with the undue complexity and severity
25 | of the current guideline.

1 As the Commission has recognized, the
2 original guideline for illegal reentry was largely
3 based on past practice, but subsequent revisions to the
4 guideline beginning in 1988 and including the 16-level
5 enhancement in 1991 caused penalties to soar with the
6 average length of sentences nearly tripling between
7 1990 and 2001. No empirical study or policy analysis
8 was conducted to justify the 16-level enhancement.
9 This enhancement is far more severe than other
10 increases that depend on prior convictions. Yet the
11 Commission's recidivism's data indicates that offense
12 level increases have no apparent relationship to
13 recidivism risk, and that's based upon the recidivism
14 study that was conducted in 2004. This data further
15 indicates that firearm offenders present a greater
16 recidivism risk than the average defendant. Yet,
17 unlike the enhancement provisions of 2K2.1, under which
18 only scoreable convictions can be used to enhance a
19 sentence, 2L1.2 allows any prior adult conviction to be
20 used, regardless of whether a defendant incurred such a
21 conviction. In the absence of empirical data or
22 experience, 2L1.2 does not exemplify the Commission's
23 exercise of its characteristic institutional role. In
24 practice, all courts have recognized the disparity
25 between the two major guideline provisions dealing with

1 | recidivism and have granted downward departures or
2 | variances for 2L1.2 offenses on an average of 38
3 | percent since 2004. Post *Booker*, the average rate of
4 | departures or variances in illegal reentry cases is 39
5 | percent. In contrast, downward departures or variances
6 | were granted for 2K2.1 offenses on an average of 15
7 | percent since 2004. Indeed, the past four years
8 | illegal reentry offenses reflect the highest rate of
9 | departures or variances for all major offenses in the
10 | *Guidelines*.

11 | I suggest that if the Commission decides to
12 | amend 201.2 in this cycle, it should do so with a mind
13 | to providing the *Guideline* with a firmer empirical
14 | fitting. This would require (1) that the Commission
15 | significantly reduce the sentences the *Guideline*
16 | produces; and (2) that the Commission amend it so that
17 | it treats criminal history in accordance with
18 | recidivism research. The best way to accomplish these
19 | goals is to adopt some version of the defenders
20 | proposed option for the *Guideline*, which reduces
21 | sentences for many defendants and allows an offense
22 | level increase for a prior conviction only if it counts
23 | for criminal history score. The defenders proposed
24 | option also simplifies *Guideline* application bringing
25 | 201.2 in line with 2K2.1, while reflecting the fact

1 | that persons who illegally reenter the United States
2 | are in general far less dangerous than offenders with
3 | prior convictions who possess weapons. In all these
4 | ways, the defenders proposal would render 2L1.2 less
5 | vulnerable to public criticism and legal challenge.

6 | Although the courts have expressed some
7 | frustration with the various definitions of crime of
8 | violence and drug trafficking offense and would welcome
9 | a simplification of these terms, the greatest
10 | frustration with this *Guideline* is reserved for the
11 | unreasonable application of the enhancement adjustment
12 | for remote prior convictions. In my experience in El
13 | Paso, the most cited reason for departure or variance
14 | from the sentence called for by 201.2 is that the
15 | *Guideline* includes a prior conviction for enhancement
16 | purposes, which would not count for criminal history
17 | scoring. Prior convictions used to increase a
18 | defendant's offense level should be subject to the same
19 | remoteness rules in Chapter 4 to reflect more
20 | accurately Congress' intent to deter and increase
21 | punishment for those individuals who do present the
22 | most serious risk of recidivism.

23 | While reducing sentences and bringing 2L1.2
24 | in line with other *Guideline* provisions would be an
25 | important improvements, further simplification and

1 | modification of the *Guideline* is necessary.
2 | Nevertheless, considering the ongoing national debate
3 | about federal immigration law and the inevitable
4 | changes to come with the new administration, the
5 | defenders suggest that amending 201.2 at this time may
6 | not be prudent. There's a, a bill recently that was
7 | passed by the House, and there's two pending in the
8 | Senate right now, as a matter of fact. The best course
9 | for the Commission may be to wait until stability has
10 | been established, after which we can begin a
11 | comprehensive solution that is consistent with national
12 | policy and is consistent with other *Guideline*
13 | provisions.

14 | I would be happy to discuss any of the
15 | proposed options before the Commission or answer any
16 | questions the Commission may have.

17 | And, again, I thank you for the opportunity
18 | to present the defenders views on this important topic.

19 | CHAIRMAN HINOJOSA: Thank you, Ms. Franco.
20 | Ms. Mariano.

21 | MS. MARIANO: Good morning. I'm resisting
22 | the urge to say may it please the Commission. This
23 | feels a little like an appeal. So with that, may it
24 | please the Commission. Thank you for the opportunity -

25 | -

1 CHAIRMAN HINOJOSA: It does please the
2 Commission.

3 MS. MARIANO: It pleases me too, Your Honor.
4 Having been a former visiting defender here at the
5 Commission, this really is an honor for me this
6 morning, and it is a privilege to have the opportunity
7 to testify on behalf of the Federal Defender and
8 Community Defenders with regard to the non-immigration
9 proposals, this Commission's amendment cycle.

10 I intend to address the proposed amendments
11 to the Commission's Rules of Practice and Procedure as
12 well as the proposed amendment to Criminal History, and
13 rely on our written testimony with respect to the other
14 issues, though happy to address any questions the
15 Commission has.

16 With respect to the proposed amendments to
17 the Rules of Practice and Procedure, we join with PAG
18 and agree that the proposed amendment to Rule 2.2 will
19 eliminate the need for at least three votes at a public
20 hearing before staff can start to prepare retroactive
21 analysis of a particular amendment. And we further
22 agree that Rule 4.1 should be amended to eliminate the
23 requirement that the Commission decide retroactivity at
24 the time the amendment is promulgated.

25 In making these amendments, however, we do

1 | not believe that we will need to specify a timeframe
2 | for final action on retroactivity. We are confident
3 | that the Commission will move thoughtfully and
4 | expeditiously in making these determinations.

5 | Our rationale for supporting these amendments
6 | is that we fully support any amendment to the
7 | Commission's Rules of Practice and Procedure that will
8 | allow the Commission the time and opportunity to gather
9 | and review all the input of all interested parties,
10 | build consensus, and reach well-considered decisions on
11 | retroactivity. For this same reason, we believe that
12 | the Commission should also amend Rule 4.3 to require
13 | public notice and comment with respect to amendments to
14 | policy statements and commentary; or, at a bare
15 | minimum, to amend that rule to allow for public comment
16 | and a public hearing where the amendment to a
17 | commentary or policy statement would affect a
18 | substantial number of defendants. Again, we support
19 | any amendment that facilitates input and discussion on
20 | proposed amendments before they take effect.

21 | The Commission has historically included
22 | important information and guidance in the commentary
23 | and policy statements of the *Sentencing* Guidelines.
24 | Without an opportunity to fully vet a proposal, the
25 | Commission puts itself at risk of missing needlessly

1 | complicated issues or problems with the proposal. A
2 | recent example of this problem is with the Drug
3 | Equivalency Table in 2D1.1 for multiple drug cases
4 | involving crack cocaine. This table was submitted to
5 | Congress in May with the Commission's proposed crack
6 | amendments without an opportunity for comment. While
7 | we fully appreciate the time pressures the Commission
8 | was operating under and the hard work done on the crack
9 | amendment last amendment cycle, it is under -- it is in
10 | the Commission's best -- I, I beg your pardon. It is
11 | the Commission that is best served by having before it
12 | a full examination and discussion of any change in the
13 | *Guideline* regardless of the category of the text.

14 | As the Commission is well aware, there is a
15 | huge problem with the Equivalency Table leading to
16 | analogous and at times unjust results in cases
17 | involving crack cocaine and other substances. We are
18 | strongly urging the Commission to fix this problem this
19 | amendment cycle. The need for action in this regard is
20 | underscored by the decision of three district judges,
21 | all of who have written lengthy opinions imploring the
22 | Commission to remove the inadvertent irrationality from
23 | the tables. In all three cases, the District Judge
24 | applied the *Guideline* as directed and then chose not
25 | to sentence the defendant with regard to those

1 | *Guidelines*, finding them irrational. One judge even
2 | referring to the result as absurd. When in the
3 | Commission's history has it so promptly received such
4 | feedback from the judiciary on an issue of such
5 | widespread impact? The lessons from the procedural
6 | deficiencies produced by the current Equivalency Tables
7 | need not be learned again as had the changes to the
8 | Equivalency Table been publicly vetted this anomaly may
9 | have come to light and been fixed.

10 | The Federal Public Defender Guideline
11 | Committee and community are in a position to respond to
12 | any request of the Commission in relatively short
13 | order. We have done so in the past, most recently with
14 | the amendments regarding immigration. And we welcome
15 | an opportunity to support the Commission in such a
16 | manner whenever needed. We have resources and
17 | experience to fully inform the Commission's decisions.
18 | We strongly believe that this anomaly must be
19 | rectified. As such, we urge the Commission to act
20 | expeditiously as possible and would welcome an
21 | opportunity to discuss potential solutions in detail at
22 | the Commission's convenience. We support, again, any
23 | amendment to the Commission's Rules of Practice and
24 | Procedure that provides for greater opportunity of
25 | input because it's our belief that through the exchange

1 | of ideas that justice is ultimately accomplished.

2 | With respect to the proposed amendments to
3 | the Criminal History Chapter, we oppose the proposed
4 | modification to Section 4A1.2(a)(2) as an unwarranted -
5 | - I beg your pardon, as unwarranted, and in that it
6 | injects unnecessary complications into the *Guidelines*.

7 | Our research reveals no empirical basis for this
8 | amendment, as the situation does not appear to occur
9 | with any frequency. In fact, even after canvassing
10 | federal defender offices, we found no anecdotal
11 | evidence to suggest that this amendment is necessary.
12 | The proposed amendment is also contrary to the
13 | Commission's goals of simplification, including the
14 | second sentence, which is favorable to defendants. As
15 | such, we oppose the promulgation of this amendment in
16 | its entirety.

17 | With respect to issues involving criminal,
18 | the Criminal History Chapter, however, we remain
19 | hopeful that the Commission will soon turn its
20 | attention to the *Career Offender Guidelines*. Post
21 | *Booker*, the rate of below *Guideline* sentences for those
22 | who other qualified for *Career Offender* status has, has
23 | marketedly increased. In fact, even pre-*Booker* under
24 | mandatory guidelines, the departure rate for career
25 | offenders was significant.

1 We urge the Commission to seize the
2 opportunity to improve the *Career Offender Guidelines*
3 to reflect the empirical data the Commission has
4 collected, demonstrating that the *Career Offender*
5 *Guideline* is too -- far too often results in sentences
6 that fail the purposes of sentencing.

7 Thank you for your time and consideration
8 this morning.

9 CHAIRMAN HINOJOSA: Thank you, ma'am.

10 Mr. Bussert.

11 MR. BUSSERT: Good morning. On behalf of the
12 Practitioners Advisory Group, I appreciate the
13 opportunity to testify today. I'd like to address
14 three general areas of the proposed amendments. The
15 first would be the Court Security Act of 2007.
16 Preliminarily, these types of cases appear to be
17 particularly sensitive in that class of victims,
18 identified victims, are also tasked with actually
19 administering the penalties. That said, the PAG agrees
20 generally with Judge Sardis' written testimony as well
21 as the testimony offered by Judge Hudson here today
22 that with respect to 51.21 offenses, 2AG -- or 2A6.1
23 would be the most appropriate guideline. For one, in
24 terms of simplicity and continuity, offenses under 18
25 U.S.C. 115, threatening offenses, are already referred

1 | to this guideline. Two, it appears most analogous in
2 | terms of the type of conduct that you're trying to
3 | capture. As Judge Hudson, I think, and Judge Sardis,
4 | both appropriately point out, obstruction cases
5 | typically involve matters that are pending, whereas
6 | this type of harassing activity usually applies post-
7 | judgment. And, therefore, it appears that 2A6.1 would
8 | more fully capture this type of conduct.

9 | Where the PAG would diverge from the judicial
10 | conference is with respect to setting the base offense
11 | level. In particular, given the enhancements in the
12 | *Guideline* Section 3A1.2, as well as the, the fact that
13 | 15.12 offenses are not inherently threatening, it would
14 | appear that the appropriate base offense level would be
15 | six. That accounts for the fact that under 3A2.1(b),
16 | there would be a six-level enhancement in practically
17 | every case in which court officers are affected. So
18 | you're essentially starting with a 12, a level 12, and
19 | then other adjustments can be made or enhancements that
20 | are already, I think, accounted for within 2A6.1 as
21 | well as those recommended by Judge Hudson.

22 | With respect -- and having just heard those
23 | for the first time, because I don't think that they
24 | were fully captured on Judge Sardis' written statement,
25 | I would note that Judge Hudson did acknowledge that the

1 | substantial harm situation, where there may be
2 | financial harm, is a rare occurrence. And I think that
3 | warrants particular consideration where within 2A6.1
4 | there is a discussion that this is a very broad area.
5 | It cannot fully be captured in every instance, and it
6 | gives the court some flexibility in terms of deviating
7 | from the *Guidelines*. Second, and I think as made
8 | abundantly clear by both judges, there are civil
9 | remedies available.

10 | As to obstruction, that would appear, at
11 | least by analogy, to be a situation where 2A6.1(b)(4)
12 | may apply. So, therefore, reference to the Obstruction
13 | Guideline would appear unnecessary. In fact, I think
14 | that provision actually provides a greater enhancement
15 | to the obstruction.

16 | With respect to the base offense level of 12,
17 | we submit respectfully that it's disproportionately
18 | severe, and it gives the impression, albeit unintended,
19 | that penalties for offenses involving court officers
20 | measure -- or excuse me, merit some type of special
21 | status. What we've I think seen largely is anecdotal
22 | information, and I don't know if there's been an
23 | empirical study to suggest exactly what the prevalence
24 | of these cases are and the exact -- to the extent that
25 | one could find an average case in terms of the type of

1 | conduct that's involved.

2 | And another important point would seem to be
3 | by all accounts up until Congress' recent action, there
4 | were essentially no criminal penalties for this type of
5 | conduct. So we believe that in the ordinary course
6 | one who may be predisposed to harass judges or other
7 | court officers by filing these types of harassing liens
8 | may reconsider or reassess whether or not they actually
9 | want to have their individual liberty at stake in terms
10 | of criminal penalties. And related to that, we believe
11 | it's important too to bear in mind that where Judge
12 | Sardis' written testimony speaks to one criminal
13 | defendant, who I believe was serving a very extensive
14 | term of imprisonment and the actions that he took,
15 | retaliation he took against the court, generally it
16 | would appear that many of these individuals who engage
17 | in this type of conduct may actually be individuals who
18 | are disgruntled civil litigants, not criminal
19 | defendants. So, again, their motivation may differ
20 | once they recognize that there are criminal penalties
21 | that may attach to this type of conduct.

22 | To the extent that one engages in a form of
23 | threatening conduct as that is traditionally considered
24 | by filing false liens, they may actually expose
25 | themselves to other types of criminal penalties such as

1 prosecution under 18 U.S.C. 119. I think we made some
2 passing reference in our letter, but we'd be clear
3 today that for purposes of simplicity and consistency
4 that too should be an area that is referred to 2A6.1 in
5 terms of capturing the threatening type of conduct.
6 And where there is an actual threat in place, then it
7 would be appropriate to apply a base offense level of
8 12, and that would be more analogous to the types of
9 conduct that are already referred to that base offense
10 level.

11 I would next like to turn attention briefly
12 to the issue of the Food and Drug offenses the
13 Commission heard testimony on, on February 3rd -- or
14 13th, excuse me. Specifically we'd like to just
15 address briefly the HGH proposals currently under
16 consideration.

17 Reviewing the testimony I was offered, there
18 appears to be some disagreement about the typical HGH
19 offender. On the one hand, I believe Mr. Collins
20 testified about the individual who uses a daily dose of
21 the 1 milligram of powder that's then converted with
22 the water and injected. And Dr. Pearlstein (ph.) on
23 behalf of the FDA, I think spoke to a greater use, and
24 in fact much greater than even the prescribed, which I
25 think Mr. Collins made the distinction that the 1

1 milligram is actually less than the ordinarily
2 prescribed amount of HGH, and Dr. Pearlstein is saying
3 that individuals who use HGH actually is far in excess
4 of the prescribed amount. And where that disagreement
5 seems to lie, which I don't think was fully captured
6 perhaps in the testimony, and unfortunately I wasn't
7 here for the, the hearing, but perhaps it was
8 discussed, but is the idea that Mr. Collins seems to be
9 speaking of the person who is trying to help
10 themselves, a middle-aged older individual who is
11 trying to improve their general quality of life,
12 whereas Dr. Pearlstein is speaking more to the anabolic
13 steroid user who is trying to get an additional
14 enhancement. So someone maybe for athletic purposes.
15 And we simply feel that however these penalties are
16 ultimately crafted that the penalties capture that
17 distinction in terms of culpability and intent.

18 We also believe that it's important to
19 recognize, and this seems to be fairly undisputed, that
20 HGH is actually not as harmful as anabolic steroids.
21 Most of the adverse effects cited I think in the
22 testimony and the studies that are referenced and
23 otherwise available talk about effects that are
24 essentially associated with fluid retention in HGH use.
25 The swelling of the joints and the like. And those

1 | effects tend to, I think, disappear after several
2 | weeks. And the scientists, the doctors who have
3 | investigated, studied this, are consistent in that
4 | regard. What appears to be a more problematic area are
5 | those individuals who use HGH over an extensive period
6 | of time and who use a larger quantity. And, again, we
7 | just simply feel that the *Guidelines* should reflect the
8 | varying degrees of use; and I think that's what Mr.
9 | Collins and others talked to in terms of being able to
10 | capture that 1 milligram regularly used quantity. And
11 | as to that point, we would submit that Dr. Pearlstein
12 | seems to concede the point in saying that HGH is
13 | potentially equal to anabolic steroids. He doesn't say
14 | that it is. And I think that's an important point to
15 | make. It seems as if over the past decade in
16 | particular as more attention has been given to HGH, the
17 | doctors are beginning to appreciate more the potential
18 | harm, but there's really no definitive evidence as to
19 | potential harm related to abuse of HGH.

20 | Just briefly with respect to animal fighting,
21 | Congressional record, the House report, seems to make
22 | clear that the purpose was in creating a felony offense
23 | as opposed to a misdemeanor was to simply encourage
24 | prosecutors to prosecute these types of cases where
25 | they effectively haven't for the past 30 years. And

1 | for that reason, we believe that base offense level of
2 | eight with scrutiny and monitoring of the sentencing
3 | trends that may result would be appropriate, and
4 | further amendments can be made in the future.

5 | In closing, PAG looks forward to working with
6 | the Commission during this year on other priorities
7 | that have been identified, including simplification,
8 | amending the manual to conform with recent Supreme
9 | Court precedent, cocaine policy and alternatives to
10 | imprisonment.

11 | Thank you.

12 | CHAIRMAN HINOJOSA: Ms. Ferreira.

13 | MS. FERREIRA: Good morning, Commissioners.

14 | CHAIRMAN HINOJOSA: Maybe we should have put
15 | you in between the Department of Justice and the
16 | defenders, but you're at the end her.

17 | MS. FERREIRA: In the middle.

18 | Thank you for the opportunity to speak on
19 | behalf of the Probation Officers Advisory Group. We
20 | considered a number of amendments and issues at our
21 | last meeting, and I'm going to present our position
22 | paper to you here this morning.

23 | With regard to immigration, which is a very
24 | big issue in a lot of districts, including mine. I'm
25 | in the District of Florida, Miami. We as a group

1 | decided that Option 2 would be the easiest to apply in
2 | terms of any changes you make to the immigration
3 | guideline. The reason we find it easier is it moves
4 | away from the categorical approach to crimes, which as
5 | others have reiterated, is very complicated, prolongs
6 | the sentencing process, and creates legal issues that
7 | have to be researched by the probation officers, the
8 | prosecutors, the public defenders. It's very time-
9 | consuming. It's very difficult, and it's very
10 | difficult for the judges to make decisions based on the
11 | records that are available. So we have in the past
12 | supported the position of moving away from categorical
13 | approach, moving more towards looking at sentence
14 | imposed to determine seriousness of the offense. We
15 | also liked the increase in the offense level for
16 | defendants who sustained a conviction for another
17 | felony offense that was committed subsequent to
18 | illegally reentering. We think that is an excellent
19 | SOC to add to the immigration guideline, because
20 | oftentimes these folks are identified because they are
21 | sitting in jail on new charges after they illegally
22 | reenter. That is very common. That's how they most
23 | often come before the federal criminal justice system.
24 | Particularly when you're in a community like South
25 | Florida where there are so many illegal immigrants

1 | there is no active pursuit of illegal immigrants, and
2 | they generally come into the criminal justice system
3 | and at that juncture are identified.

4 | We also like the approach of increasing the
5 | base offense level and allowing for downward
6 | adjustments in cases where there are no prior
7 | convictions. This also simplifies the process of
8 | trying to identify priors, categorize priors, determine
9 | what the sentence was imposed and what the nature of
10 | the offense was. Most typically, these types of cases
11 | do have prior record of some degree, whether it's
12 | misdemeanor felony, serious. So we liked the approach
13 | of increasing offense levels and then allowing for
14 | decreases that would get you back to that offense level
15 | eight if you have no priors. That is a much easier
16 | approach for everyone in applying the guidelines to
17 | these type of cases.

18 | We also wanted to recommend the higher base
19 | offense levels and other adjustments, as we agree that
20 | those levels, in looking at examples applying those
21 | levels, would most closely mirror the existing
22 | guidelines, and we would not recommend any decrease in
23 | terms of the offense levels for these types of
24 | offenses.

25 | With regard to the specific offenses

1 | described in 8 U.S.C. 1101(a)(43)(A), the Probation
2 | Officers Advisory Group oftentimes has recommended that
3 | when you're going to make reference to statutes,
4 | particularly statutes that aren't readily available in
5 | the publications that we have available to us that if
6 | you could list them in the, in the commentary, it is
7 | helpful, if it's not a statute or a reference that's
8 | too long.

9 | We also agreed as a group that the upward
10 | departure from multiple removals prior to the instant
11 | offense should be included under any option. We like
12 | the idea of encouraged departures. We find as
13 | probation officers the courts are hesitant to consider
14 | departures under 5K2.0. Although they have that
15 | option, that they are more likely to consider a
16 | departure if it's an encouraged departure specifically
17 | stated somewhere within the application of the
18 | *Guideline*. And it makes it easier for the probation
19 | officers to bring that issue forward at sentencing,
20 | particularly when you are dealing with plea agreements
21 | that have pled away any opportunity for departures,
22 | upward or downward departures. So we would recommend
23 | that that be included in any sort of revision to the
24 | immigration offenses.

25 | We also reviewed the emergency disaster fraud

1 | amendment, and we considered the option including a
2 | minimum offense level. We were concerned only with
3 | regard to the minimum offense level that it would
4 | capture all individual, including those who might be
5 | victims of the disaster and perhaps applied for more
6 | benefits than they were entitled to. Living in South
7 | Florida, I'm very familiar with disaster fraud cases,
8 | and we had other members of the group, who are very
9 | familiar with them, in areas where there are hurricanes
10 | and other natural disasters. And there is an awful lot
11 | of FEMA fraud, and we recognize that, and we do believe
12 | that there needs to be some address of this. But we
13 | also recognize that the victims of these disasters are
14 | oftentimes in a very vulnerable position. When you've
15 | lost your home and you've lost everything you own and
16 | you're trying to get compensation, there is, I suppose,
17 | a -- it's very easy for them to get caught up in
18 | overstating or in some way misstating what their losses
19 | are in order to get more money than they're entitled
20 | to. And we are concerned about that particular group
21 | of individuals. It's somewhat separated out from the
22 | opportunist who, and we see a number of those cases
23 | too, who don't even live in the disaster area but apply
24 | for FEMA assistance, and they get it.

25 | So we would just ask that if you are going to

1 use the minimum base offense level for these type of
2 cases that perhaps there's some differentiation whether
3 you're an actual victim of a disaster or if you're just
4 an opportunist going in trying to get as much money as
5 you can out of these disaster agencies.

6 We also were concerned with regard to
7 aggravating mitigating factors, number of victims
8 adjustment under 2B1.1(b)(2). As it's currently
9 defined, it may not be employed in disaster relief
10 fraud as the victim is usually one agency or relief
11 organization that services many people. Under the
12 current definition of victim, only the agency or
13 organization would be considered. And particularly
14 when you have a large-scale fraud where they're
15 stealing large sums of money, we're concerned that
16 we're not going to be able to apply the victim
17 adjustments, the upward adjustments for multiple
18 victims. When in fact these people who are stealing
19 from these disaster relief agencies are victimizing a
20 number -- they are victimizing all the people who are
21 going to go without relief and benefits because the
22 money has been squandered by the thieves and the
23 opportunists.

24 So we would recommend to the Commission that
25 there might be some specific application note or some

1 | specific SOC that defines multiple victims in a
2 | disaster relief fraud case as being presumed when
3 | you're stealing from agencies that provide help to a
4 | large number of people.

5 | The special rule found in 2B1.1, Commentary
6 | Note 4(c)(2), to account for the multiple victims of
7 | the offense, is -- it's -- I believe it's the postal,
8 | special postal exception that when you're stealing the
9 | mail there's presumed to be a certain number of
10 | victims. Perhaps there could be an SOC or an
11 | application note that would give special designation to
12 | disaster relief organizations that's having multiple
13 | victims.

14 | With regard to the food and drug offenses, we
15 | concluded that based on the information that we had
16 | been given regarding the use of HGH, it seems to be
17 | used in a manner very similar to steroids. So we
18 | recommended that it be treated similarly to steroids.
19 | However, the group was in agreement that although we
20 | made this recommendation, that we rarely, if ever, see
21 | any of these types of cases. We have very little
22 | experience with them as a group. So we were hesitant
23 | to comment any further with regard to those type of
24 | offenses. And also with regard to the offenses
25 | referenced to 2 and 2.1, we also declined to comment in

1 | that area as we have never seen as a group, the
2 | probation officers around the country have very little
3 | experience. These are just cases we never see
4 | prosecuted, so.

5 | With regard to the animal fighting, the group
6 | agreed that the base offense Level 10 with an upper
7 | departure for extreme cruelty would provide the court
8 | with the most latitude and the most sentencing options.

9 | A base offense Level 8 is basically the same as a 6.
10 | You know, you're going to have a zero to 6. If you
11 | increase it a little bit, you still have the
12 | opportunity to bring it down to a probation sentence,
13 | but it also gives the judge a little more leeway in
14 | sentencing options for cases where there is extreme
15 | cruelty or some unusual circumstance.

16 | With regard to the Court Security Improvement
17 | Act, for offenses charged under 18, 50 and 21, our
18 | group concluded that perhaps 2J1.2 might provide the
19 | best or may be the best guideline to capture the intent
20 | and harm caused by this offense. We would also request
21 | that there be an application note added to instruct the
22 | use of 3A1.2 official victim to that particular
23 | offense.

24 | With those two, with a base offense level of
25 | 14 and official victim plus 3, you've got an offense

1 | level 17. That's a pretty high offense level. It's in
2 | Zone D. It requires a sentence of imprisonment. I
3 | think it adequately captures the harm that these
4 | offenses caused. As we heard earlier today, it can be
5 | devastating to the victim of this type of offense.
6 | We've had this happen in our district. Probation
7 | officers and other officials have had liens put on
8 | their property, and it does become problematic,
9 | particularly in this day and age when people do
10 | frequently refinance to get better interest rates and
11 | get equity lines of credit on their homes. It can be,
12 | it can be very difficult to get it resolved. So we
13 | felt that the Obstruction of Justice guideline would
14 | most adequately incorporate this new offense.

15 | With regard to the 18 U.S.C. 119 offense, we
16 | considered both recommended Guidelines 2H3.1 and 2A --
17 | 2A6.1, and our group concluded that 2A6.1 may be the
18 | better option as it incorporates the threatening nature
19 | of the offense to facilitate a crime of violence.

20 | That's one of the -- the way the statute is worded. It
21 | includes threats and facilitating a crime of violence.

22 | We felt that 2A6.1 more adequately captured that harm,
23 | which is a little more serious than the, than the other
24 | statute, and that also including the three level
25 | increase for official victim would adequately take into

1 account the aggravating factors of that offense.

2 Let's see. We also considered alternate
3 approaches to the application of this guideline
4 relative to the new offense. The first approach we
5 suggested includes adding an SOC for a three-level
6 offense if the offense, conviction is a violation of 18
7 U.S.C. 119, and an app note instructing that adjustment
8 for official victims should be applied.

9 The second option would provide for base
10 offense level of 15 for defendants convicted of this
11 violation, and no new SOC's. Either alternative would
12 provide a three-level increase for conviction under
13 this section, which might not otherwise apply under
14 3A1.2. When the victim is a witness, informant, juror,
15 or some other person covered by the statute, he may not
16 fit into the definition of official victim.

17 That concludes my comments regarding the
18 amendments, and I appreciate the opportunity.

19 CHAIRMAN HINOJOSA: Ms. Ferreira, we thank
20 you very much, and we thank you and your membership as
21 well as Mr. Bussert's membership in two advisory groups
22 that are very helpful to the Commission. We have
23 advisory groups that we set up with regards to advice
24 that we receive from different people, and so we
25 appreciate both of your services and those two groups

1 | that are very helpful to the Commission.

2 | MS. FERREIRA: Thank you.

3 | CHAIRMAN HINOJOSA: At this point, I will
4 | open it up for questions. I already introduced our
5 | Commissioners who are here today, and I will open it up
6 | for any Commissioner who may have any questions.

7 | Commissioner Howell or --

8 | COMMISSIONER HOWELL: I, I have a couple of
9 | questions on a number of different subjects.

10 | Mr. Bussert, thank you very much for
11 | addressing the HGH issue. We've spent an enormous
12 | amount of time on the HGH issue in this amendment
13 | cycle, despite the fact that there aren't that many
14 | cases, and it's hard to get a handle on exactly what
15 | the harm is and the, and the request from the FDA to
16 | schedule this drug has put us in the situation of
17 | trying to figure out what is the abusive dosage level,
18 | and we have struggled with, you know, trying to elicit
19 | the expert testimony that you summarized with
20 | disparities between exactly what, you know, what the --
21 | how it's used, when it's abused, you know, the, the
22 | variety of different users of it. So I take it that
23 | your, your recommendation is that we wait until we get
24 | additional information before moving on any amendment
25 | on HGH in the cycle. Am I understanding that

1 | correctly?

2 | MR. BUSSERT: It just appears in area
3 | scientifically that's inconclusive that when you're
4 | looking at quantities, and obviously this is an issue
5 | true of any drug guideline, and using that to equate
6 | harm, it becomes -- again, it's very ambiguous, and it
7 | would seem at least, particularly with respect to those
8 | offenses that the FDA seemed to talk to, speak to, Dr.
9 | Pearlstein in particular, the individual is probably
10 | looking at exposure for anabolic steroids. That may
11 | control the whole process, and obviously the cap is
12 | there. So that may capture the essence at least for
13 | that class of offenders.

14 | MS. HOWELL: Well, do you think that instead
15 | of scheduling HGH, we ought to just focus on its use in
16 | connection with anabolic steroids and perhaps do, you
17 | know, either an application for upper departure, you
18 | know, invitation if there is HGH use in combination or
19 | an SOC? I mean do you think that would be a more
20 | appropriate approach to take with HGH?

21 | MR. BUSSERT: I think that's where the --
22 | that's really where the difficulty lies, if all the
23 | various authorities are to be believed, which I think
24 | they are. And that is there are a large group of
25 | individuals who simply use HGH alone. And to the

1 | extent that Department of Justice seeks to prosecute
2 | those individuals, how do you account for that conduct?

3 | And, clearly, it would appear to be much less. And,
4 | again, whether real abuse, and, again, there is, you
5 | know, varying opinions on this, but it seems to be
6 | fairly consistent where you have these people who kind
7 | of use it for quality of life. And ironically if the
8 | docketts are to be believed, there's really no benefit
9 | in it. Maybe some general benefit of appearance in the
10 | short-term while it's being used, but long-term, it's
11 | not generally considered a performance enhancing drug.

12 | It's not actually helping someone build muscle mass or
13 | improve their physique. It essentially burns fat and
14 | strengthens hair and skin, things of that nature.

15 | MS. HOWELL: All really great things.

16 | MR. BUSSERT: You're not going to become huge
17 | by using HGH alone. And again that's --

18 | CHAIRMAN HINOJOSA: It sounds like it's okay.
19 | That's a joke. Especially the reference to grows
20 | hair.

21 | MS. HOWELL: Well, I mean and the, and the
22 | problem though, if, if the government brings cases
23 | involving HGH and the court is left without a
24 | guideline, and so then follows the follows the
25 | direction to actually look at the more -- most closely

1 | analogous drug, they will probably look at steroids.
2 | And so, you know, is, is that appropriate, you know, is
3 | that an appropriate step to take? So that, that is the
4 | dilemma that we face. Perhaps we should be giving more
5 | explicit direction than having them look at steroids
6 | because my personal view, having listened to the
7 | experts and read the testimony and our staff's, you
8 | know, enormous amount of excellent work on the subject,
9 | you know, it's hard to say that HGH is a serious, you
10 | know, has as serious side effects and, and problems as
11 | steroids, you know, have. Anyway, okay, so thank you
12 | for that.

13 | One, one issue that I was particularly
14 | interested in, in your testimony was on our proposed
15 | amendments for our rules, and particularly to our rule
16 | on when we would decide the retroactive effect of
17 | amendments that lower guideline sentences. You, PAG,
18 | has suggested that we impose a six and a half month
19 | time constraint on our decisions on retroactivity,
20 | whereas federal defenders, you know, suggest that we
21 | don't put any time constraints on that. Is it PAG's
22 | view that if we, we could not make a retroactive
23 | decision given the, you know, and I think our most
24 | recent, you know, decision on retroactivity of our
25 | crack amendments was a good indication we couldn't get

1 | it done in six and a half months. We would just
2 | suspend the rules, and so even though we would have a,
3 | a -- if we, if we accepted PAG's suggestion of putting
4 | g a six and a half month time limit on our
5 | retroactivity decisions that if we couldn't get it done
6 | in that time we would simply suspend the rules as
7 | necessary but still have us on goalpost our six and a
8 | half months.

9 | MR. BUSSERT: I think that was really the
10 | impetus for it. We had discussed internally November
11 | 1st to have them coincident with the amendment going
12 | into effect, but we had talked and said that the rules
13 | do allow, as they, as they currently exist for
14 | suspension in appropriate circumstances. And so what
15 | we were trying to encourage with goalpost for purposes
16 | of certainty and the like. And, clearly, it's most
17 | clearly demonstrated, I guess, with the crack
18 | amendment, because there's been this overwhelming
19 | interest by defendants across the country, and we've
20 | clearly been hearing that. But I think for their
21 | purposes, for defendants' purposes, for the families'
22 | purposes, the idea that they have a date certain to
23 | look to, and that in extraordinary circumstances or
24 | unusual circumstances where the Commission feels it's
25 | appropriate to inquire further, that it may suspend the

1 | rules.

2 | MS. FRIEDRICH: If I can just follow-up on
3 | that. I'm just curious why that date certain, the
4 | goalpost would be set two weeks after the date the
5 | amendment becomes effective if in fact you are
6 | concerned about expectations and the like and you've
7 | got this two-week period where everyone is in limbo,
8 | I'm just curious why you wouldn't -- you'd view it as a
9 | goalpost, set it no later than November 1st?

10 | MR. BUSSERT: I think it was out of an
11 | appreciation for the uncertainties that may surround a
12 | November 1st date, and to allow some flexibility in
13 | terms of -- is a presumption perhaps that every
14 | amendment that Congress -- accept, and we didn't want
15 | necessary to assume that, because there will be the
16 | rare circumstances, and I think history suggests it to
17 | be clearly rare, but then to allow a little bit of
18 | flexibility for time to address any outstanding issues,
19 | a short window. Understand that the Commission would
20 | have been looking at these issues from the beginning
21 | over that six and a half or six-month period up to that
22 | point, so.

23 | MR. MURPHY: Believe Congress should know
24 | before it deliberates on an amendment that the
25 | Commission may intend to apply it retroactively?

1 MR. BUSSERT: It would seem as if the
2 Commission were engaging in retroactivity study and
3 accepting testimony or comments that Congress would be
4 on notice that's being considered.

5 MR. MURPHY: So Congress should just kind of
6 take its best shot at anticipating what the Commission
7 might do?

8 MR. BUSSERT: I think that authority is left
9 exclusively to the Commission. So -- the Commission
10 should feel constrained in any way by Congress'
11 perspective as to it.

12 MR. MURPHY: Do you think that that factor
13 might affect Congress' views on a given amendment?

14 MR. BUSSERT: I couldn't say.

15 MR. MURPHY: Pardon me?

16 MR. BUSSERT: I couldn't say.

17 CHAIRMAN HINOJOSA: By the authority,
18 obviously, you mean Title 28, U.S. Code, Section
19 994(u). Obviously Congress knows that the Commission
20 has this authority to decide under what circumstances
21 and to what extent a reduction should be allowed when
22 there's been a guideline amendment or a guide -- that
23 reduces sentences. I guess that's what you mean.

24 MR. BUSSERT: Exactly.

25 CHAIRMAN HINOJOSA: And so Congress is on

1 | notice that they've given the Commission the authority
2 | to do this.

3 | MR. BUSSERT: Exactly.

4 | CHAIRMAN HINOJOSA: And when you combine it
5 | with 35.82(c)(2) that then limits a consideration of
6 | the 35.53 -- factors on the part of the courts to the
7 | extent that they're inconsistent with the policy
8 | statements of the Commission, Congress itself has made
9 | the decision that the Commission has the authority to
10 | do this.

11 | MR. BUSSERT: I simply don't have a frame of
12 | reference to offer an opinion in terms of historically
13 | where Congress' interests may have lie with respect to
14 | a given amendment being made retroactive. Clearly the
15 | crack amendment is an anomaly, I think, when you look
16 | at the affected class of defendants and the numbers
17 | that are involved. Obviously that's drawn a lot of
18 | attention. But as to other amendments that may be made
19 | retroactive, maybe perhaps not as much of concern.

20 | MS. HOWELL: I'll just -- I just have one
21 | more question. And but thank you for both the Federal
22 | Defendants and to PAG for paying attention to our
23 | rules. And I think we're taking your comments, you
24 | know, under serious consideration, you know, in
25 | particular. Thank you for pointing out the anomaly in

1 | our -- drug calculations and crack, and if the
2 | Defenders or PAG have any suggestions on how to fix
3 | this anomaly, we would greatly appreciate your
4 | suggestions on that, because it is, it is, quite
5 | frankly, it is embarrassing, and, and the results are
6 | ones that we want to fix promptly.

7 | I want to turn for a second to the disaster
8 | fraud amendments. In our, in our published proposed
9 | amendments, we have made a suggestion about including
10 | reasonably foreseeable pecuniary harm as -- and define
11 | that to be included in the loss, which could affect the
12 | offense levels for people convicted of the new disaster
13 | fraud case. None of you talked about this particular
14 | aspect of the disaster fraud proposed amendment in your
15 | oral statements, and even though we have similar, you
16 | know, in, in -- we have similar kinds of calculations
17 | for reasonably foreseeable pecuniary harm that's
18 | included in calculations for, for other types of fraud
19 | under this, this proposed guideline where we're going
20 | to be putting the new disaster fraud offense. I wonder
21 | whether any of you have any concern about how the
22 | calculation of, you know, reasonable foreseeable
23 | pecuniary harm that would include the administrative
24 | cost, any government entity or commercial or not-for-
25 | profit entity of recovering the benefit from any

1 recipient might be calculated very differently
2 depending on what organization was the victim of the,
3 of the disaster fraud. There may be some organizations
4 expend a lot of energy doing fraud finding, others that
5 did nothing and just relied on government officials to
6 do the investigation, and government officials did it
7 more efficiently than perhaps a private organization.
8 And that, depending on how the investigation of the
9 fraud occurred, it could result in different offense
10 levels, if the, if this loss is included in the offense
11 level. And I just wondered whether any of you had any
12 reaction to that aspect of our proposed amendment.

13 MS. FERREIRA: Our group saw that as
14 problematic. Our, our consensus was that we probably
15 wouldn't even be able to get that information from
16 whatever agency investigated the fraud. Whether it was
17 a government agency or charitable organization. That
18 would just be a very difficult application. It would
19 be very difficult to even get the, the victim agency to
20 provide that information. You know, just as an example
21 under the tax statutes, there's a cost of prosecution
22 provision in addition to fine. And in 20 years of
23 practice, I've never once been able to have the federal
24 government tell me or the Justice Department tell me
25 what it costs to prosecute a tax fraud case. So it is

1 | very difficult to get that information. And I think
2 | probably in most cases it will just simply be ignored
3 | because the information is not available.

4 | MS. FRIEDRICH: What about in the case of
5 | procurement fraud? We have a similar provision
6 | application there at 2B1.1. Is that the same in those
7 | cases?

8 | MS. FERREIRA: In the procurement fraud
9 | cases, I -- frankly, we rarely ever see those type of
10 | cases. But generally speaking, the few cases that I
11 | have seen in the past, it -- the, the -- I don't think
12 | there have been administrative costs included in their
13 | calculations. I mean I have just in 20 years of
14 | experience have never seen any case under any fraud
15 | where any sort of administrative costs or costs to
16 | investigate or prosecute the case were included or that
17 | anyone could even come up with a number that could
18 | closely resemble or something that could be defended in
19 | terms of those type of costs.

20 | MR. MURPHY: You need to check with the
21 | District of Iowa.

22 | MS. HOWELL: Mr. Bussert, Ms. Mariano, do you
23 | have any reaction to that part of the proposal?

24 | MS. MARIANO: We did present testimony of
25 | federal defender Margie Myers on this specific issue,

1 | but we do join POAG in the concern that this type of
2 | administrative cost simply could be calculated, and
3 | would add that attempting to calculate the cost would
4 | be quite costly in and of itself. We think that it is
5 | not a definition that should be expanded in this
6 | guideline and in this context.

7 | MS. HOWELL: Ms. Humetewa, do you have a view
8 | on that? Have you had any cases in Arizona involving
9 | procurement fraud?

10 | MS. HUMETEWA: I, I have not seen them myself
11 | as either a federal prosecutor, but I think you would
12 | have -- I took what the Probation Department's sponsor
13 | has said, and I will report that back to the Department
14 | of Justice in terms of calculating costs and the
15 | concern.

16 | CHAIRMAN HINOJOSA: I guess I have some
17 | questions on immigration. And, Ms. Humetewa, as, as
18 | you know, 35.53(a) factors, there are seven. Two of
19 | them -- the guidelines and the policy statements, and
20 | if you read the statute, obviously they were of great
21 | importance to Congress. The other factors include
22 | considering the sentence if available. One of the
23 | things that has happened with regards to immigration,
24 | illegal entry cases, for those of us who have been
25 | around a long time, when I first came on the bench, the

1 | maximum possible punishment was two years. It then
2 | went from two years to 10 years if you were removed or
3 | deported or excluded after you had committed a felony,
4 | and up to 20 years if you had been removed or excluded,
5 | deported after you had committed an aggravated felony.

6 | And so we, in considering the sentences available, I
7 | know there's a lot of discussion about how we come to a
8 | conclusion with regards to what are the 35.53(a)
9 | factors, and we can't ignore that one of them is we
10 | have to consider the sentences available, and that you
11 | obviously have to treat something different when your
12 | maximum is 2 years as opposed to 20 years or 10 years.

13 | And one of the, the reason that we have this *Guideline*
14 | from the Commission with regards to the base offense
15 | levels increase is because it's an attempt to comply
16 | with the factors in considering the sentences available
17 | and all of the other factors, including the criminal
18 | history and characteristics of the defendant. And I
19 | think that's why we have these enhancements because
20 | they are a part of the congressionally -- the
21 | congressional decisions as to what the sentences
22 | available are. But Option 3 is not geared to that.
23 | And are we complying with that when it's geared based
24 | on just having committed a felony and making no
25 | distinctions and then go into it's a sentence of more

1 | than 48 months? And treating all felonies the same
2 | when the statute itself does not. It makes
3 | differentiations between felonies and aggravated
4 | felonies and actually gives us clues and states what
5 | the aggravated felonies are.

6 | MS. HUMETEWA: Your --

7 | CHAIRMAN HINOJOSA: Have we placed other
8 | factors above that one factor or have we not paid any
9 | attention to that one factor?

10 | MS. HUMETEWA: Well, your, your question
11 | poses some, something that has frankly been a
12 | frustration for practitioners and I'm sure the
13 | Commission itself because of the changing landscape
14 | that you mentioned in increasing the penalties, the
15 | statutory penalties available and how, how then do you
16 | continue to modify a guideline to account for the
17 | increases in penalties. And I think -- and I have to
18 | say you have a difficult dilemma in keeping up with
19 | those changing congressional views.

20 | CHAIRMAN HINOJOSA: But you obviously realize
21 | that in keeping up with those congressional views,
22 | we're keeping up with the 35.53(a) factors that there
23 | are a lot -- that there are seven factors, two of them
24 | of which are the guidelines and the policy statements,
25 | but that we obviously have to have a reaction and

1 | consider those as important parts. I mean it is
2 | Congress that wrote the 35.53(a) factors.

3 | MS. HUMETEWA: Yes. And I think what we
4 | believe is that looking at the length of the sentence
5 | of prior conviction, that that incorporates -- we
6 | believe it would incorporate. So for example, when you
7 | have a state conviction and a state judge who sentences
8 | a particular defendant to a particular length of
9 | sentence, they are taking into consideration the nature
10 | of the offense and so on and so forth and the statutory
11 | maximums of the state or local county level. We
12 | believe that that is part and parcel of
13 | determining the length of sentence. We believe Option
14 | 3 gets at the heart in a sentence-neutral fashion of
15 | the problem and the dilemma that we are seeing on an
16 | increasing basis, at least in the District of Arizona.
17 | And I, I think I can comfortably say for the, the five
18 | U.S. Attorneys Offices in, in the Southwest as well as
19 | others through the nation, the increasing volume of
20 | these cases, we believe it is sentencing-neutral. We
21 | are not recommending increasing sentences or decreasing
22 | sentences. We think it gets at the heart of the
23 | problem that we are facing in terms of parsing out
24 | statutory terms from local governments and the
25 | increasing problem of disappearing court records. And

1 | we now have, as the Commission knows, Ninth Circuit
2 | case law as well as other circuit case law that tells
3 | us what documents we can use to determine whether or
4 | not an individual should receive an increase for a
5 | particular crime of violence, and it is becoming
6 | increasingly confusing. And we believe that our
7 | option, although it does keep in some form or fashion
8 | the categorical approach, we believe it will reduce
9 | litigation.

10 | CHAIRMAN HINOJOSA: Do -- you know, Judge
11 | Rawl (ph.) from your district has written us, and he's
12 | expressed serious concern with regards to the
13 | unwarranted disparity that would be created if we rely
14 | on the length of sentence. Because, for example, in
15 | Texas it may matter as to where you were arrested and
16 | convicted with regards to the type of sentence that you
17 | received in similar circumstances and similar
18 | commissions of offense by similar defendants may give
19 | you very varied sentences. And he's expressed the view
20 | that if we rely on the length of sentence -- that can
21 | create a problem with regards to 51 jurisdictions when
22 | we looked at all these documents, and, and try to
23 | determine is it similar conduct and was that the
24 | congressional intent with regards to increasing it to
25 | 10 and 20 years? And that -- he's, he's been very

1 eloquent in what he has written the Commission on this
2 subject, and he's probably expressed it to you all
3 also.

4 MS. HUMETEWA: Actually, he -- I've met with
5 him on, on -- primarily on immigration matters, but he
6 has not raised this specific issue to me, and I have
7 not seen the letters, but I, I believe --

8 CHAIRMAN HINOJOSA: Maybe they were just
9 addressed to me, but I know that he has expressed this
10 viewpoint.

11 MS. HUMETEWA: I understand that he has taken
12 a very strong position, but I believe one of, one of
13 the -- one of his concerns can be addressed in taking
14 into Option 3 that footnote that was proposed, I
15 believe it was in Option 4, which provides for upward
16 or downward departures for, for over or under
17 represented criminal histories. And I think that's one
18 way of getting to the problem. No doubt there will be
19 those situations where throughout the country we are
20 going to have courts that for whatever reason as -- and
21 as suggested perhaps you have a court who suspects that
22 if they give a very, a short length of sentence, it
23 will somehow expedite the removal process. That may be
24 the case in some situations. And I believe that is
25 part of the question that you, you asked, that you

1 | asked me. But I believe overall implementing Option 3
2 | will add transparency. And, again, in adding that
3 | additional application note, we can get to those
4 | situations where an individual has been sentenced to a
5 | extremely long or an extremely short length of
6 | sentence. I think that application note will address
7 | that discrepancy. But I think in the, in the whole, in
8 | the entire context, we get to the heart of the problem,
9 | the increased litigation, increased uncertainty of a
10 | defendant's sentence really would -- oftentimes boils
11 | down to the court documents available at the time. And
12 | it has led to a haphazard result, as we pointed out in
13 | our written testimony in various districts coming to a
14 | different conclusion based on their analysis of a
15 | particular statute.

16 | CHAIRMAN HINOJOSA: And I, I guess it's clear
17 | to every practitioner in the room that it is a
18 | difficult situation, but at the same time, sometimes
19 | we're tempted to go the simple way and the fastest way
20 | as opposed to trying to determine the most fair way to
21 | deal with a sentence, and so, therefore, that's why
22 | this is a difficult subject.

23 | And, Ms. Franco, I was a little surprised by
24 | your statements with regards to the Western District.

25 | MS. FRANCO: Yes, sir.

1 CHAIRMAN HINOJOSA: Because in the Fiscal
2 Year 2007, with regards to 201.2, they had it within
3 range of 83.1 percent compared to their within range of
4 all their cases of 80 percent. And then they had a, an
5 upward departure of 3.76 percent, which is more than
6 double the national average of departures in general
7 with regards to other offenses, which is almost a
8 message to the Commission as to maybe they don't, they
9 don't think we're high enough. I don't know what that
10 message is. And then they had a downward departure or
11 variance of about 8 percent, and, and you quoted the
12 38, 39 percent, but --

13 MS. FRANCO: That's a national, the national
14 --

15 CHAIRMAN HINOJOSA: Yeah, but you, you didn't
16 mention that 31½ percent of that are early disposition
17 programs, which is disparited [sic], but it's created
18 by congressional decision that it is not unwarranted
19 disparity. And actually the national average is nine
20 percent or so with regards to that particular
21 guideline, which is about four percent lower than the
22 national average in general.

23 MS. FRANCO: Well, it --

24 CHAIRMAN HINOJOSA: With regards to other
25 crimes, and I'm, I'm a little -- I don't know what the

1 | message is with this from your district.

2 | MS. FRANCO: Well, no, and I understand what,
3 | what you're saying, Judge. You know, a lot of times in
4 | the downward departures in our district, there -- they
5 | are fueled by the substantial assistance that someone
6 | has done in a drug case, and it at times will happen in
7 | an immigration case too. But what is happening in El
8 | Paso, because of the, the lack of the fast track is
9 | that the -- I think that it's important that we include
10 | the data for the fast track departures too that don't
11 | happen in my division, but happen outside of our
12 | division and happen in Idaho and places that aren't
13 | even on the border, is those departures sometimes will
14 | encapsulate the type of departures that the judges in
15 | El Paso are doing, which is if there -- if -- sometimes
16 | they could have old criminal history that doesn't score
17 | for criminal history purposes but are used for an
18 | enhancement. And I can tell you as a practitioner in
19 | the El Paso courts, all four of the district judges, if
20 | you're -- if you can get their ear on a departure, it's
21 | going to be because of the fact that a stale conviction
22 | is being used as a 16-level enhancement, for instance.
23 | That's the most typical departure that we will get in
24 | El Paso. Now does that happen a lot? Well, no. But
25 | on a, on a -- across the board for the four judges that

1 | are there, they, they will listen to an argument that
2 | using that especially in light of the fact when you
3 | have the 2K provision with the firearms, 2K2.1, that it
4 | is timed out, that those priors are timed out. So it's
5 | a complete anomaly between those two recidivist-type
6 | guidelines. And that is something that, that they will
7 | listen to. But we don't have a plethora in El Paso of
8 | departures, and I don't want you to get that
9 | impression.

10 | CHAIRMAN HINOJOSA: No, I, I -- yeah,
11 | obviously not, and certainly not in this particular
12 | offense. What are the 3.76 percent upward departures
13 | more or less --

14 | MS. FRANCO: On the immigration cases? Those
15 | --

16 | CHAIRMAN HINOJOSA: Because that, that is
17 | higher than, than the national average for departures
18 | in general, and, and higher actually than within the --
19 | it's almost, it's almost like one percent maybe upward
20 | -- about one percent higher than your upward departures
21 | in your district for other offenses.

22 | MS. FRANCO: From, from me being, as I said
23 | before, a practitioner in the four courts, that they
24 | are departing not on the 16 levels or even the 12-level
25 | enhancement or 8-level. It's on someone who has no

1 | enhancement, and it's someone who has a criminal
2 | history that are misdemeanors that don't add up to get
3 | to the 4-level increase, or it's someone that has
4 | used the border as a revolving door, so to speak, and
5 | that -- the judges have taken that into consideration.
6 | Maybe their guidelines are 2 to 8, and they end up
7 | giving them 12 months. Those are the types of
8 | departures that we're seeing. They're on the low end
9 | of the offense levels as opposed to the departures on
10 | the higher end.

11 | CHAIRMAN HINOJOSA: The other thing is, and I
12 | don't know if you see this in your part of the State,
13 | but it, it's my impression that if somebody is here
14 | illegally and they get a state charge, they're more
15 | likely to have been given time because they never
16 | bonded out. And so that any conviction that is based
17 | on the length of sentence would be different for them
18 | than it would be somebody else who was a citizen or
19 | here legally as a result of an offense.

20 | MS. FRANCO: I think that that's true, and it
21 | also leads to the position where defendants will accept
22 | a sweetheart deal, so to speak, from the state, even
23 | though they may have had a defense to the underlying
24 | conviction. So what the problem is there is they may
25 | get possibly a lower sentence, but they're accepting

1 | that because they, they are in jail. They're
2 | incarcerated, and they feel like they don't have any
3 | other choice but to accept whatever deal is being
4 | offered to them. So that's problematic too. Not just
5 | well maybe they're getting less time when they're super
6 | guilty and just to get them deported, but it could
7 | happen that a lot of wrongful convictions occur for the
8 | same reason, that they just want to get out of jail.

9 | CHAIRMAN HINOJOSA: Ms. Ferreira, on your
10 | issue on this particular issue, and this will be my
11 | last question, at least at the present time. But you
12 | indicated that you liked the approach or POAG (ph.)
13 | liked the approach with regards to someone who commits
14 | a felony after they have come back here illegally.

15 | MS. FERREIRA: Right.

16 | CHAIRMAN HINOJOSA: Because a lot of people
17 | are found because they are either in the city jail or
18 | the county jail or the state prison system.

19 | MS. FERREIRA: Correct.

20 | CHAIRMAN HINOJOSA: And the state prison
21 | system being different, because by that point they may
22 | have been convicted. But my impression at least in our
23 | area is that they get brought before us before there is
24 | the conviction. And so if we have that enhancement,
25 | are we going to have to have the hearing in the federal

1 | court with regards to whether this person actually
2 | committed another offense or not? Because most of the
3 | time if their attorney knows what they're doing in the
4 | state system, they will not have pled them out or had,
5 | had the hearing because it will have increased the
6 | criminal history if they have a prior conviction. And
7 | so does that enhancement being put in the guidelines
8 | put us as federal courts in the situation where we have
9 | to have a hearing as to whether there was a commission
10 | of an offense, because obviously we don't have a
11 | conviction yet?

12 | MS. FERREIRA: Right. Well, apparently your
13 | district works a lot quicker than ours. Because in
14 | most cases, they've already been convicted before they
15 | come over to the federal system. So that really hasn't
16 | been an issue in our district. But I can see the
17 | complication there, and but I think that that
18 | particular adjustment should rightfully apply only if
19 | there is a conviction. And if in the event they do
20 | come before the courts prior to a conviction being
21 | sustained, that that adjustment isn't going to apply.
22 | But from my perspective and my experience, it will
23 | apply in most cases because the conviction will occur
24 | before they get over to federal court.

25 | CHAIRMAN HINOJOSA: And no one has ever made

1 | the speedy trial argument that we're bringing them into
2 | the federal court system way after they were found?

3 | MS. FERREIRA: Never. I've never seen that
4 | happen.

5 | MS. MARIANO: We've had that raised in our
6 | district, Judge, with mixed success.

7 | CHAIRMAN HINOJOSA: Does anybody else have
8 | any --

9 | MS. FRIEDRICH: Just a couple on immigration.
10 |

11 | Ms. Franco, you've suggested that we should
12 | change the recency status rules as they apply to 13.26
13 | defendants. I'm just wondering, given our concerns,
14 | wanting to distinguish between those who've just come
15 | back and those who are coming back and committing
16 | crime, why we would draw that distinction particularly
17 | in this context when I don't think we applied any --
18 | other offenders? You're not -- I, I take it you mean
19 | don't include the plus 1, the plus 2 for committing an
20 | offense soon after another offense or being found in
21 | prison?

22 | MS. FRANCO: Well, that was -- that would be
23 | the case, because it's kind of the -- it's within the
24 | same course of conduct that they are coming back in
25 | while it's a continuing offense, so to speak.

1 MS. FRIEDRICH: So you I mean you have a lot
2 of situations where someone's been in the country for
3 months and then commits a robbery. Just -- you know,
4 how, how can we be consistent with the guidelines as a
5 whole when we're going to draw those distinctions in
6 case of a deported alien?

7 MS. FRANCO: Well, no, I understand what the
8 -- the point that you're making, and it is a departure,
9 so to speak, from the definition as used in other
10 offenses in Chapter 2. But what we're more concerned
11 with is the scoring of or reasoning for enhancement
12 purposes timed out or remote convictions. That is a
13 major problem with this guideline, and that was really
14 we -- we would ask that the Commission take a, a good
15 look at that. Because it really does not make any
16 sense that in -- that firearm offenses that those are
17 timed out, and they aren't in immigration offenses;
18 and, yet, your own study showed that felons in
19 possession are far more likely to re-offend than an
20 immigration offender. And so that is of more
21 importance to us than the, the remoteness. I'm sorry.
22 Than the, the using the, the scoring for the recency.

23 MS. FRIEDRICH: Ms. Humetewa, you had
24 suggested, I think, as well as the defenders, some
25 concern about changing the definitions of crime of

1 | violence and drug offense that at least initially
2 | that's going to generate increased litigation. And yet
3 | you suggest incorporating it to your Option 3. Are
4 | there particular, particular improvements you think we
5 | can make to that proposed definition? I'm concerned
6 | when I hear, you know, our, our reason for changing the
7 | definitions would be to try to, to minimize litigation.

8 | Are there specific concerns you have with respect to
9 | it? And it seems like in the end you think the
10 | benefits outweigh the costs, but --

11 | MS. HUMETEWA: I think that's a fair
12 | statement about the benefits outweighing the cost, but
13 | I think what our option does, it does keep a
14 | categorical approach, but only for very violent
15 | offenses such as the murders, rapes, child pornography.
16 | It assumes that there may be litigation with respect
17 | to those terms, but I think our experience is that even
18 | today that litigation in that area isn't of the volume
19 | that we're seeing in the other areas. So I think it's
20 | sort of a cost benefit analysis.

21 | MS. FRIEDRICH: And, and a primary reason you
22 | give for supporting sentence based approach is the --
23 | it will cut down on the number of documents you need to
24 | produce in court to prove a sentence. Is that fair?

25 | MS. HUMETEWA: It actually -- well, that's

1 | part of the reason. I think again it's -- overall it
2 | is neutral in terms of, of the sentencing. We're not
3 | as the defenders are suggesting, seeking decreasing
4 | sentences. We're not seeking to increase sentences.
5 | We're seeking a good process that provides everyone,
6 | everyone sitting at the table here, defendants and the
7 | courts, with some form of transparency.

8 | MS. FRIEDRICH: On the, on the document
9 | front. Can you just, can you explain to me what
10 | documents you're producing now when you're having to
11 | prove these SOC's that you won't have to produce if we
12 | go to a sentence-based option?

13 | MS. HUMETEWA: You know it's a case-by-case
14 | basis, depending on the defendant, depending on the
15 | crime that it has occurred, depending on the court that
16 | that individual has appeared before. You can either
17 | have a minute entry. If it's a prior federal offense,
18 | there could be a judgment and commitment order that
19 | reiterates the, the crime that the individual is
20 | convicted of or pled to, and the length of sentence,
21 | without more. It could be an abstract. I was reading
22 | some of the other case law out of the Ninth Circuit.
23 | Apparently there are -- and I'll lose the, I'll lose
24 | the term of the, the case, but there are no contest
25 | pleas involved in some of the California courts that

1 | simply reiterate to this particular case that stands
2 | for no contest pleas without more. So you have a --
3 | just a reiteration of the statute that was pled to. So
4 | in any given case, we can have a defendant where we
5 | have complete documents, and that will probably be the
6 | case in -- where a defendant has more recently
7 | committed an offense. But as I understand it, in some
8 | courts in Texas for example, they are purging their
9 | documents after five years. So we may have just an
10 | abstract or a minute order or something on a docket
11 | sheet. It really is very haphazard.

12 | MS. FRIEDRICH: Well in the cases where
13 | you're appearing before courts that are requiring you
14 | to produce the maximum, the, the -- they want the full
15 | panoply of documents, what is it that you think they
16 | won't require, if we move to sentence-based approach?

17 | MS. HUMETEWA: I, I think looking at the case
18 | law, at least in the Ninth Circuit again, there are
19 | those documents such as minute entries and abstracts
20 | that are, as I understand it, not categorically
21 | unreliable, but they go to the fact of conviction. As
22 | the case law stands now, those documents can't be used
23 | in the modified categorical approach required by
24 | *Taylor*. So I, I believe that under that line of cases,
25 | abstracts, minute entries, going to the fact of

1 conviction, a reiteration of the length of sentence
2 imposed, I think that would be sufficient. And if I
3 could ask Mr. Koehler if he has anything to add to
4 that.

5 MR. KOEHLER: Certainly. The, the state of
6 the law right now with -- especially in the Ninth
7 Circuit and other circuits are following suit declaring
8 that certain types of abstracts of judgment are
9 insufficient leaves us with the need to get charging
10 documents, to get jury instructions, plea agreements,
11 transcripts of plea hearings and transcripts of trials,
12 and the oral pronouncement of sentence by the judge in
13 the case. Because in California under the Ninth
14 Circuit law, the abstract is merely a clerk's
15 recitation of what the judge decided the offense was,
16 and the oral pronouncement of sentence is the, is the
17 actual judgment in the California case And so you need
18 to have a transcript of that. And as time goes on, the
19 ability to gather those transcripts becomes less and
20 less. And so that's why going to a sentence length
21 based scheme will avoid the arbitrariness of a
22 defendant from California not receiving the enhancement
23 because the records are gone versus a defendant from
24 another state like Arizona, where the records are
25 intact.

1 MS. FRIEDRICH: So what records --

2 MR. KOEHLER: But --

3 MS. FRIEDRICH: -- do you use to prove the
4 sentence, if we move to the sentence-based system?
5 What do you get away with not having to --

6 MR. KOEHLER: If, if it goes to a sentence
7 length based scheme, the abstract will be sufficient.
8 The Ninth Circuit has held in both *Snellenberger* (ph.)
9 and in another case, that is *Via Montalbo* (ph.) that
10 the abstract of judgment is sufficient to prove the
11 fact of the conviction. And, you know, something to
12 look at here in, in terms of that, those types of
13 documents are relied on currently by the courts for
14 criminal history points, and they are likewise relied
15 upon by prisons to hold someone in prison, so --

16 CHAIRMAN HINOJOSA: But isn't it true --

17 MR. KOEHLER: -- those documents --

18 CHAIRMAN HINOJOSA: -- that that would still
19 be the correct, the correct approach if we were clear
20 about what a drug trafficking offense. The only reason
21 -- or a crime of violence offense is. The only reason
22 it becomes difficult is because the circuit courts have
23 made the decision that either the statutory definition
24 or the Commission's definition of what a drug
25 trafficking offense does not necessarily meet every way

1 | that you can violate a statute. And that the abstract
2 | would be perfectly sufficient if we were clear, for
3 | example, that an offer to sell was a drug trafficking
4 | offense or transportation was a drug trafficking
5 | offense in the Ninth Circuit, then the abstract of
6 | judgment would be sufficient because we would know what
7 | statute was violated and that that would be sufficient,
8 | that we have covered everything in the statute, that is
9 | the drug trafficking statute in California.

10 | MR. KOEHLER: If the statute categorically
11 | qualifies --

12 | CHAIRMAN HINOJOSA: Right.

13 | MR. KOEHLER: -- then the abstract is enough.
14 | However, every time that statute might get amended or
15 | if another state's statute has not been taken into
16 | account in the definition of the offense, then you're
17 | going to have the same categorical analysis problem and
18 | the same insufficiency of an abstract.

19 | CHAIRMAN HINOJOSA: Right. But the reason
20 | that this has developed as a problem is because the
21 | court, the appellate courts view mainly that crime of
22 | violence as defined in the statute meets -- has to meet
23 | certain standards. But if we define crime of violence
24 | in a way that would encompass whatever was necessary to
25 | satisfy an abstract of judgment would be enough. That

1 | you can either solve the problem by being clear about
2 | what you mean what a drug trafficking offense is or you
3 | can solve the problem by this other one that may create
4 | in the eyes of some an unwarranted disparity with
5 | regards to the length of sentence.

6 | MR. KOEHLER: One would hope that that would
7 | be true, but I would never want to count on that. And,
8 | again that is something that --

9 | CHAIRMAN HINOJOSA: Well --

10 | MR. KOEHLER: -- have to relitigate in a
11 | court of appeals, whether the, the Commission's
12 | adoption of crime of violence definition was broad
13 | enough to cover the particular statute at issue. So
14 | we're always going to be faced with that to one degree
15 | or another. And one just can hope that the, the
16 | definition is broad enough to capture the statute
17 | without being too broad and creating collateral
18 | problems as a result of that.

19 | MS. HOWELL: Can I just follow-up on
20 | something that was -- that Dabney was pursuing that I
21 | found very interesting. It's something that we have
22 | wrangled with privately in terms of the Justice
23 | Department's proposal for going to a basically
24 | sentence-imposed framework for, for this guideline, and
25 | that is really how much we would, we would -- how much

1 | time we would really save in terms of time to collect
2 | all the documents relating to the underlying
3 | conviction, and whether or not the, the abstract,
4 | which, which sets forth general description of the
5 | crime of conviction, which, as you said, is -- has been
6 | deemed sufficient in the Ninth Circuit or the, the --
7 | I think the word you used was the, the fact that there
8 | was a conviction. But if we go to time served, will
9 | that abstract prepared by a clerk be sufficient to show
10 | what the time -- the sentence imposed actually was in
11 | that case, even though it may say that? Courts may
12 | say that's not sufficient proof of that. You're going
13 | to have to go back and get the oral judgment. And so
14 | you're still going to be having to go back even under
15 | the Justice Department's proposal to gather underlying,
16 | you know, documentation so that moving to this, you
17 | know, sentence-imposed framework would not only divorce
18 | us from the underlying statutes, as Ricardo was sort of
19 | alluding to, and the aggravated felony definitions of,
20 | of the types of crimes that constitute an aggravated
21 | felony, but it would not in fact actually resolve the
22 | problem we are trying to solve of, of avoiding the
23 | time-consuming effort to get underlying documents.

24 | MS. HUMETEWA: I, I don't think we will ever
25 | fully resolve that, and I don't necessarily agree that

1 | we should. In each and every case that you have a
2 | defendant with a prior criminal history some documents
3 | are obviously going to be sought. But it's much easier
4 | to get a judgment and a commitment order for a minute
5 | entry from the court than it is to find a transcript of
6 | a plea change where the person states the factual basis
7 | under which he is admitting his conduct. It's much
8 | easier to get those documents than it would to get a
9 | trial transcript and the jury instructions for that
10 | particular offense. It's much easier to get those
11 | documents than it is to parse out individually in city
12 | and state courts throughout the nation the types of
13 | documents that are at the moment being sought by
14 | probation officers, public defenders and AUSA's, and
15 | then parsing them out in terms of the statutory --
16 | whether or not they meet the statutory interpretation
17 | required under the *Taylor* approach. It will decrease
18 | significantly the, the problem at hand.

19 | CHAIRMAN HINOJOSA: Did you have something
20 | you --

21 | MS. FRANCO: I, you know, I think that this
22 | debate that we're having really illustrates our point
23 | that we should -- really should wait to adopt any of
24 | the options because this area is so fluid right now in
25 | Congress with -- the one that's in the Senate right now

1 | is trying to assess a mandatory minimum for people who
2 | have just come in illegally, if they've come in more
3 | than once, and it's going -- in all likelihood, a lot
4 | of this is going to change in the next few months. And
5 | I think that it would be imprudent to try to fix this
6 | problem right now. Because as we've all been talking
7 | about, there are so many different areas that will lead
8 | up to more litigation. And the, the numbers that were
9 | done by the Commission, it -- for the lowest level
10 | offenders, it raises their sentences. And on some of
11 | the more culpable people or people that have more
12 | serious histories, it's lowering theirs. So of course
13 | that's great for us, but we don't want the people on
14 | the lower end to get increased sentences too. So I
15 | think none of the options, even our option before the
16 | Commission that -- well that's you all are considering
17 | it, but what we had submitted before in the past, you
18 | know, it raises the sentences for the least culpable of
19 | all offenders. And so I think it really brings back
20 | the fact that we should wait until we know exactly what
21 | Congress is going to do with the immigration case.

22 | MS. HUMETEWA: Could we respond?

23 | CHAIRMAN HINOJOSA: Sure.

24 | MS. HUMETEWA: I'd asked Mr. Koehler to
25 | respond directly.

1 MR. KOEHLER: Respectfully. We've been
2 waiting over three years for Congress to do something,
3 and there is no prospect in the current Congress of
4 anything getting done. The bill that was mentioned
5 hasn't hit the floor in the Senate. The bill to --

6 CHAIRMAN HINOJOSA: You don't see there's
7 any hope that any point there will be any immigration
8 legislation in this country?

9 MR. KOEHLER: I don't see any hope for in the
10 near future a change to this specific statute, okay.
11 If you go back two years ago, Senate 26.11 that was
12 passed in 2006, that bill had a very similar
13 formulation to what Option 3 proposes. It went to a
14 sentence length base sentencing scheme for Section
15 13.26 with limited exceptions for the most egregious
16 crimes, which is exactly the way Option 3 is
17 structured. The bill last year that made it to the
18 Senate floor and failed to reach a closure vote had the
19 exact same formulation. So, again, the sentence at
20 least implied direction that they had been looking to
21 go in, and that bill did not fail because of this
22 particular provision. It failed because of
23 disagreement over the temporary workers and other
24 things like that in the bill that were things that
25 people couldn't reach agreement on. That's where the

1 | real contention was on that bill.

2 | But the point is that the Senate has given a
3 | signal that that's the direction that they would like
4 | to go. The House has yet to act. Section -- the House
5 | Bill 4437 from 2006, late '05 and early '06, that
6 | particular bill did not touch the aggravated felony
7 | scheme. It just left it intact but added minimum
8 | mandatory --

9 | CHAIRMAN HINOJOSA: Ms. Franco is right. It
10 | includes mandatory minimums, does it not?

11 | MR. KOEHLER: 44.37 did add mandatory
12 | minimums. It just did not touch the aggravated felony
13 | scheme.

14 | CHAIRMAN HINOJOSA: Ms. Franco, I want to get
15 | back to one of the matters you -- and I hope none of
16 | these questions are taken personally, because you all
17 | appear in the courtroom, and you know they happen in
18 | every sentencing case that you appear in, but you
19 | mentioned the felon in possession versus the illegal
20 | entry situation, and if you were the judge, wouldn't it
21 | make a difference to you realizing that the illegal
22 | entry is going to be deported. They will be out of the
23 | country. And so recidivism becomes more of an
24 | important factor with the felon in possession when in
25 | all likelihood if they were a non-citizen they would

1 | have been charged with a, a person who is not qualified
2 | to have legally in -- and they, they get charged
3 | differently normally than felon in possession. And
4 | that when it comes to illegal entry, deterrence becomes
5 | more of a factor under A2 than the recidivism factor of
6 | somebody who is going to be deported to another
7 | country, and that that's -- those are one of the things
8 | that we need to look at, that the deterrence rises to a
9 | higher level because recidivism when somebody is going
10 | to leave the country is, is slightly different.

11 | MS. FRANCO: Well, I would say this. That in
12 | the 13.26 context where you're punishing someone for a
13 | prior, I mean you are punishing. It's not just
14 | deterrent. It's also punishing them for recidivating,
15 | for coming back in and committing a crime, and when
16 | we've had -- I'm sure you have too, Judge, plenty of
17 | people that their criminal history just composes of
18 | basically coming in and out of the United States
19 | without permission. But in, in that context,
20 | deterrence, it loses its strength when it's a prior
21 | that happened 30 years ago or 20 years ago or 10 years
22 | ago. And when that person was deported during that
23 | time period, they were admonished, you have to stay out
24 | or you could look at two years when you come back. So
25 | they come back. They stayed out of the country. So it

1 | worked as a deterrent for them, and they decide to come
2 | back. Well, 20 years have passed. Surely, you know,
3 | they've forgotten all about this, and I was just warned
4 | that the most I could look at is two years. That, that
5 | aggravated felon comes back now as looking at a minimum
6 | probably around a three-year sentence. And that's the
7 | type of results that are untenable when you're using
8 | those old convictions. And, secondly, the, the
9 | Department of Justice and the U.S. Attorney here from
10 | Arizona talks about the difficulty in getting the
11 | documentation from the various courts because now as
12 | things become more automated things are getting on the
13 | computer. Well, if you adopt our approach that you
14 | only use convictions that are within a certain time
15 | period, that doesn't become such a problem anymore.

16 | CHAIRMAN HINOJOSA: John Sands told you to
17 | say that.

18 | UNIDENTIFIED SPEAKER: No, Marianne.

19 | MS. MARIANO: It was me.

20 | CHAIRMAN HINOJOSA: Ms. Mariano, unless
21 | somebody is going to have another question.

22 | MR. MURPHY: I have some for Ms. Franco.

23 | CHAIRMAN HINOJOSA: Okay. Go ahead.

24 | MR. MURPHY: As I -- first of all thank you
25 | for your testimony and your written, your written

1 | testimony as well. As I read your testimony, I under -
2 | - if I understand your position correctly, you
3 | basically object to any of the proposals because in
4 | some way at least the way the staff has projected out
5 | their impact, they might affect in some small or some
6 | greater fashion an increase in sentence for some of
7 | them. So you, you object on that basis, is that
8 | correct?

9 | MS. FRANCO: That's right.

10 | MR. MURPHY: So assuming that, that there was
11 | one of these proposals that was -- that benefited every
12 | defendant, which, which scheme, if you will, is the one
13 | that you would favor?

14 | MS. FRANCO: Well, I think that the ones that
15 | most interest us is Option 1B and Option 3, that is the
16 | Department of Justice is sponsoring. And the -- but
17 | with a caveat that neither one of them have the timed
18 | out portion that we really think that this guideline
19 | needs, which is the, the remoteness. But neither one
20 | of those has that. And with 1B, the problem that we
21 | have with 1B is that it includes the alien smuggling
22 | offenses as a enhancement. And I was a participant in
23 | the roundtable discussion in Houston back in September,
24 | and that was something that appeared that the district
25 | court judges were concerned that that was in there,

1 | that that provision was in there. Because it's going
2 | to -- will harshly punish people that may have just
3 | smuggled in one person or a family member or something
4 | like that and were convicted under that statute. Under
5 | the Department of Justice, their proposal talks about
6 | human trafficking, which I think is a better definition
7 | than the alien smuggling definition.

8 | MR. MURPHY: Okay. You also talked about the
9 | revolving door and the Chairman has, has talked about
10 | the upward departure rates, and you attribute those to
11 | the revolving door. Do you agree that the revolving
12 | door, to use your word, that's an appropriate basis for
13 | upward departures?

14 | MS. FRANCO: Well, I believe the Commission
15 | had that at some point in time and then removed it
16 | because it wasn't used by the courts. And I think that
17 | now that these are advisory in the border districts, I
18 | think the judges are -- they don't need the Commission
19 | to put that in there. Because that's something that at
20 | least in my experience that that's something that the
21 | court looks at in fashioning its sentence that complies
22 | with the 35.53(a) factors. And so I, I don't think
23 | that it's a -- probably a good idea to put that back in
24 | the guidelines when you all removed it before when it
25 | was in there.

1 MR. MURPHY: Would you agree with the
2 Probation Office that when it's in that the courts are
3 more likely to consider it as --

4 MS. FRANCO: I don't agree with that, no. I
5 think that since *Booker* and with the other, all the
6 other decisions, the courts recognize that they have
7 the ability to grant departures or variances and give
8 outside guideline sentences that I don't think that
9 telling them that you can do it affects it one way or
10 the other.

11 MR. MURPHY: One last area then. You're
12 critical of the, the length of sentences overall as I
13 understand it in, in the immigration area, and I'd like
14 to explore something. As I understand your testimony
15 today, and your written testimony, you're, you're
16 critical that the Commission has never justified with
17 any data or policy analysis based upon experience a 16-
18 level increase, is that correct?

19 MS. FRANCO: Well, that's the empirical that,
20 that I believe the first original guideline was based
21 upon practice and procedure, what the courts were doing
22 at the time. And then when it was amended to have the
23 16-level increase, I don't believe that that was done
24 on a fully vetted empirical study that was done.

25 MR. MURPHY: So are you -- I mean by studies

1 | and experience, I take it you mean going out talking to
2 | probation officers or judges and prosecutors and
3 | looking at case stats?

4 | MS. FRANCO: -- numbers, right, uh-huh.

5 | MR. MURPHY: Would your opinion change if you
6 | knew that in fact did happen before the 16 level?

7 | MS. FRANCO: Well, I think that the problem
8 | is, is that there's, there's no real justification for
9 | the -- it's -- it doesn't just double the offense
10 | level. It's more than that. Because it's 16 plus 8.
11 | So you're getting to a situation where it didn't just
12 | double it for that. But if that was done, it would
13 | certainly you know we would need to, to look at it and
14 | see how it was formulated that way. But I think that
15 | when the 2001 amendments came out -- when the 16-level
16 | enhancement was used pretty much across the board, I
17 | mean you saw the reaction to that. Because that's when
18 | now we have the tiered system. And even the tiered
19 | system was a recognition that the 16 level was overly
20 | harsh and it punished people and captured people that
21 | really weren't meant to be in there. And so how the,
22 | the 12 and then the 8 and then the 4 that's always been
23 | there at least from my understanding, once again it was
24 | just kind of we're trying to guess at this. And what
25 | we're suggesting is, is instead of guessing at this or

1 | trying to figure it out is that we really need to sit
2 | down and comprehensively look at this and maybe
3 | overhaul this whole guideline to take into
4 | consideration all the factors under 35.53(a).

5 | MR. MURPHY: I would just, I would just say
6 | that I was here in '90 and '91, when that 16 level went
7 | into place, and I know that there was significant
8 | travel, significant consultation and study before the
9 | 16 level. I don't know whether it's reflected in any
10 | of the publicly available materials, but perhaps the
11 | Commission staff or somebody else might, might be able
12 | to inform me about that.

13 | Thank you.

14 | CHAIRMAN HINOJOSA: Well, I, I guess part of
15 | the Commission's reaction at the time is Congress
16 | multiplied by 10 the maximum punishment from 2 to 20
17 | years. I mean so -- and I, I guess as Chair, I get to
18 | make the last question, ask the last question or
19 | somewhat of a statement. Just to indicate that we
20 | haven't ignored the fact that criminal history
21 | continues to be one of the biggest reasons for
22 | departures by judges.

23 | Ms. Mariano, you touched on career offender,
24 | and you've done a detail at the Commission. Now I
25 | don't know if you're aware of the fact that staff

1 prepared for the Commission some information with
2 regards to the career offender that starts at the fact
3 that the statute itself, the enabling statute for the
4 Commission said the Commission should be sure to set at
5 the maximum of the statutory maximum career offender
6 penalties, and then goes through the history, including
7 court decisions with regards to career offender that
8 have put the Commission in the situation that it is
9 with regards to the career offender penalties. And if
10 you haven't seen it, it may be on our website or
11 certainly the Commission staff would be glad to make
12 that available. And it's -- we enjoy the relationship
13 we have with the defenders as well as obviously with
14 the Department of Justice, and certainly with the POAG
15 and PAG. And every viewpoint that we receive is
16 helpful, just like it is for those of us who are judges
17 in the courtroom, and it becomes helpful for all of us
18 as Commissioners as we try to decide on a national
19 level what sentencing policy should be. And so we, we
20 realize each one of you has come and taken time away
21 from -- whether it's searching for documents or
22 whatever else you may be doing, to come and share your
23 views with us. And I speak on behalf of all of us when
24 I say it has been very helpful, and we really
25 appreciate it. Thank you all very much.

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(Whereupon, the hearing of the United States
Sentencing Commission was concluded.)

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CERTIFICATE

This is to certify that the attached proceeding before:

UNITED STATES SENTENCING COMMISSION

PLACE: Washington, D.C.

DATE: March 13, 2008

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

Sean Williams
Court Reporter

Katherine Motley
Transcriber