

U.S. SENTENCING COMMISSION

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Commissioners Present:

Michael E. Horowitz

Beryl A. Howell

Ruben Castillo

John R. Steer

Michael J. Elston

Commission Staff Present:

Judith W. Sheon

Krista Rubin

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Judicial Perspective from the District
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1 SAN DIEGO, CALIFORNIA MONDAY, MARCH 6, 2006 9:48 A.M.

2 --oOo--

3 COMMISSIONER CASTILLO: We're starting today. I'd
4 like to welcome everybody on behalf of the Sentencing
5 Commission. My name is Ruben Castillo. I'm a District Court
6 Judge in Chicago. I'm also on the Sentencing Commission.

7 Starting on my left is Commissioner Michael
8 Horowitz, Commissioner Beryl Howell, Commissioner John Steer,
9 and Commissioner Mike Elston, who is ex officio from the
10 Department of Justice. Unfortunately, we're missing our
11 chair, Ricardo Hinojosa, who has been under the weather, but
12 is getting better. It was under his fine leadership that we
13 agreed to have a series of regional hearings, principally
14 along the U.S./Mexican border, to evaluate the proposals that
15 we are looking at this year in terms of immigration and
16 criminal law.

17 We greatly respect and appreciate the work of all
18 the judges along the U.S./Mexican border. They are pressed
19 to do too much with too little. Simply put, our statistics
20 show that there has been a five-fold increase in immigration
21 offenses that are being dealt with along the border. We
22 appreciate also, on behalf of the Commission, that the vast
23 majority of these cases are sentenced within the guidelines.

24 What does the Commission want to do? Well, we want
25 to help. We certainly don't want to in any way pass any type

1 of guidelines that would hinder the great over-tasked work
2 being conducted by our colleagues along the U.S./Mexican
3 border.

4 This is our second regional hearing. The first was
5 in San Antonio, Texas last month. We heard what was
6 occurring in Texas. Today we hope to continue and expand our
7 dialogue with judges from San Diego, the Southern District of
8 California, New Mexico, Arizona. And I really want to
9 emphasize that this is just the start of what we hope will be
10 an ongoing dialogue. We had tried to, by having working
11 groups -- and I know some of you participated in that in
12 D.C. -- we also previously sent Judges Kendall and Judge
13 Sterling-Johnson to a Fifth Circuit conference. Maybe we
14 don't get out from D.C. often enough. It's not because we
15 don't want to. We think it was important that these hearings
16 be conducted here, especially in the Southern District of
17 California.

18 Where we're concerned, as I said, is the proposed
19 amendments that deal with the unfortunate events at the
20 border. The focus is not only on analyzing those who come
21 from Mexico to the U.S., but more importantly, on protecting
22 their safety and their lives, while maintaining the integrity
23 of our borders in this challenged post-911 era that we all
24 live in.

25 We're not here also to set any type of immigration

1 policy on who should come across and who should not. Our job
2 is strictly to try and get the penalties right with regard to
3 violations of the criminal law. It will be up to Congress to
4 decide as part of the national policy what the immigration
5 laws should be with regard to who comes in and who does not.

6 So with that, I'd like to welcome our first panel
7 from the over-tasked Southern District of California. I call
8 upon Chief Judge, and my good friend, Irma Gonzalez, and also
9 the previous Chief Judge, and my good friend, Marilyn Huff,
10 to please step up. Thank you. And we can proceed in
11 whatever order you want.

12 JUDGE GONZALEZ: I'm going to start.

13 (Pause; adjusting microphone.)

14 Thank you for the opportunity to provide testimony
15 before the Sentencing Commission here today concerning the
16 proposed amendments regarding the immigration guidelines. As
17 Chief Judge of the Southern District of California, I'd like
18 to extend a warm welcome to all of you, and hopefully you'll
19 have an opportunity to enjoy our beautiful city, and
20 hopefully the weather will hold up. I know tomorrow you have
21 a tour of the border scheduled, and hopefully that will go
22 forward without any problems as far as the weather is
23 concerned.

24 The judges in the Southern District of California
25 appreciate the opportunity to discuss the proposed changes to

1 the immigration guidelines due to the high volume of cases
2 that this court handles -- immigration cases this court
3 handles. The most recently published numbers in the 2003
4 Source Book of Federal Sentencing Statistics indicates that
5 our district sentenced 2,046 immigration defendants out of
6 the total of 15,081 defendants, or approximately 13.6 percent
7 of the total immigration cases in the District Courts. For
8 that reason, we are grateful that the Sentencing Commission
9 is here for this public hearing to discuss these very
10 important issues that are raised by the proposed amendments.

11 Our court also compliments the Sentencing
12 Commission for the thoughtful and reasoned analysis
13 accompanying the proposed amendments. We encourage the
14 Commission to carefully consider the proposed amendments in
15 light of all the testimony you will hear from everyone here
16 today, not only the judges, but the members of the Department
17 of Justice, and also the Federal Defenders or Federal Public
18 Defenders. As judges, we welcome comments from all those
19 that are interested in this topic of public concern, as I'm
20 sure you also welcome these comments.

21 In general, our district supports the concept that
22 amendments to the immigration guidelines might help achieve
23 the statutory purposes of sentencing, while providing
24 advisory guidance to the District Courts in immigration
25 cases. I will highlight in particular certain issues

1 relating to the proposed amendments for Section 2L1.1, that
2 is, smuggling, transporting or harboring unlawful aliens,
3 while my colleague, Former Chief Judge Marilyn Huff, will
4 address special issues that relate to high-speed chases and
5 unlaw entry under Section 2L1.2, and also the overall
6 uniformity of the immigration guidelines compared to the drug
7 smuggling guidelines, and the success in our district of the
8 Fast Track Program.

9 As far as Section 2L1.1 is concerned, the court
10 supports the proposed amendment to increase the base offense
11 level for national security concerns, and leaves it to the
12 Commission to determine the best option after public comment.
13 The Commission might also want to consider whether a similar
14 adjustment for national security concerns might be available
15 in appropriate cases under Section 2L2.2, that is,
16 fraudulently acquiring documents relating to naturalization,
17 citizenship or legal resident status for own use. I notice
18 that there are some -- just one small proposed amendment for
19 trafficking in fraudulent documents, but not for fraudulently
20 acquiring the documents, although the court in this district
21 has limited experience with document cases. We see very few
22 of those in our district.

23 The court supports an increase for offenses
24 involving a large number of aliens, that is, over 100. I had
25 the opportunity to attend the last round table discussion in

1 Washington concerning these issues. It is a very big issue
2 in some districts that more than 100 undocumented persons are
3 being smuggled into the country. I agree, and this court
4 agrees, that it requires some attention and more guidance as
5 far as the larger number of aliens that are being smuggled.
6 However, the court leaves it to the Commission to determine
7 the best option after public comment.

8 The court supports an increase for offenses if the
9 defendant smuggled, transported or harbored a minor
10 unaccompanied by the minor's parent, and leaves it to the
11 Commission as to which option is best. Again, this court has
12 few cases where a minor is unaccompanied by an adult. I know
13 that that is a significant problem in other districts. I
14 know there are two options that are being proposed by the
15 Commission, and one option defines the age of the minor. I
16 think our Federal Defender and the other Federal Public
17 Defender that's here I believe will address that issue more
18 appropriately.

19 The court supports the changes to the guidelines in
20 cases where death occurs, and agrees that it is appropriate
21 to allow for cumulative enhancements in cases where both
22 bodily injury and death occur. So, therefore, the court
23 supports this stand-alone specific offense characteristic.
24 That is a severe problem, not only in this district, but in
25 other districts where, unfortunately, when a large number of

1 aliens are being smuggled, and in particular, when there is
2 a high-speed chase, when there is the high probability that
3 not only serious bodily injury will occur, but death will
4 occur. Our judges have found it a little frustrating, when
5 death does occur, that that guidelines don't appear to
6 provide an appropriate adjustment for that. So we support an
7 increased adjustment for that. We find that a stand-alone
8 specific offense characteristic would be appropriate.

9 As far as the high-speed chases are concerned and
10 evasion of law enforcement, I'll hand that matter over to my
11 colleague, Judge Huff.

12 JUDGE HUFF: Thank you.

13 Touching on that, particularly problematic in our
14 district are those cases where there's a high-speed chase, or
15 a failure to abide by the port, or a failure to stay at the
16 checkpoint, or a non-response to lights and sirens. I had
17 attached an article, which was in the news at the time we
18 were preparing our testimony. But then, coincidentally,
19 yesterday, sadly, again, there was another incident where 20
20 undocumented aliens were in a van that overturned -- failure
21 to comply with the red light -- and seven were taken to the
22 hospital. So some of our judges have commented that the
23 increase for death and serious bodily injury is appropriate
24 in many cases, but you might also take a look at the high-
25 speed chase and see if you need to correlate those two a

1 little bit better.

2 Next issue that I want to briefly talk about is the
3 consistency between the immigration guidelines and the drug
4 guidelines, because the sentencings are not just in a vacuum.
5 The more you address the immigration adjustments, then
6 typically, at least in our district, it's a smuggling. It's
7 a smuggling of individuals or it's a smuggling of drugs. And
8 in the drug smuggling, one may get two levels for the safety
9 valve. Frequently, the U.S. Attorney here will offer two
10 levels for minor role. Those four level of adjustments may
11 or may not be available -- well, safety valve is not
12 available -- in the alien smuggling cases. So in the big
13 picture, whatever is done in the immigration guidelines,
14 there should be some proportionality and consistency with the
15 drug smuggling. In the materials that we got, I didn't see
16 it cross-referenced to that. So that's something that you
17 might take a look at.

18 The next issue that I want to talk about are the
19 proposed amendments. Very interesting attempts to fix this
20 issue under 2L1.2, unlawfully entering or remaining in the
21 United States. This raises the issue of, what do you do
22 about the categorical approach required by law by Taylor and
23 Shepard? We took a look at the five proposed options, and
24 then concluded that, as long as the phrase "aggravated
25 felony" remains in the guidelines and the law, and if the

1 court is required to determine whether something is an
2 aggravated felony as a predicate to sentencing, then by law
3 one needs to do the categorical approach, which I think you
4 heard at your round table is document-intensive, sometimes
5 the documents are not available, and is a difficult challenge
6 for the courts.

7 So we are not sure that these amendments would
8 necessarily fix the proposed challenge. However, we
9 compliment you on the various approaches. Of the approaches,
10 there's pros and cons with each. We do think that some
11 symmetry in the immigration guidelines and the sentencing
12 approach is warranted.

13 Also, of the various options, I think we've sort of
14 settled on perhaps option one or option two. Option one
15 provides more clarity and certainty. It's the 13 months, and
16 one can then look at the rap sheet, and then decide whether
17 the 13-month threshold is met or not. But some of my
18 colleagues prefer option two, which has more grades, and then
19 also then perhaps gives more proportionality and more
20 punishment for the type of offense.

21 So on this issue, I think we would like to hear
22 from the views of everybody else, too, because it is an issue
23 that comes up. I can tell you from personal experience that
24 there have been at least three trials that I had in the last
25 year that, in my estimation, probably went to trial over a

1 guideline dispute, over whether the 16 levels applied or it
2 didn't apply. And so to the extent that one of these options
3 can assist the courts -- and defense attorneys and
4 prosecutors and everybody involved -- in deciding ahead of
5 time what is done, then I think that that would be helpful.
6 And I'm sure you'll hear this from probation, as well, but to
7 the extent that we can ease the burden on the record-keeping,
8 that's always helpful. Remember that people plead, at least
9 in our district, 11 weeks before we ever get a presentence
10 report. So the certainty and clarity is appreciated.

11 Finally, I'd like to close by touching on the
12 success of our Fast Track Program, which is authorized by the
13 Protect Act. In doing this, I got some statistics from our
14 U.S. Attorney's Office that they received from Customs and
15 Border Protection. The number that hit me, again, was that
16 in our district, there were 85 million immigration
17 inspections -- 85 million. We have six ports of entry, and
18 the busiest land port of entry is at San Ysidro, which
19 hopefully you'll get a chance to look at.

20 What this means is that there is a huge potential
21 for cases, and depending upon prosecutorial discretion, they
22 decide which cases to bring and which cases not to bring.
23 But there is a huge potential for cases to be brought in our
24 district. And indeed over the years, we've seen the
25 tremendous increase in the immigration cases. So with that

1 said, it's a tribute to our system that, despite the plethora
2 of cases that have been brought in our district, our district
3 remains, according to the 2005 statistics -- the Federal
4 Court Management Statistics -- the second fastest in
5 disposition of criminal cases.

6 What that means as a practical matter is it saves
7 marshal's cost. Housing prisoners in downtown San Diego is
8 far more expensive than housing prisoners in Oklahoma or
9 maybe some other places on the Southwest border. It's just
10 very expensive for them. It saves interpreter cost,
11 investigator cost, Federal Defender cost, U.S. Attorney's
12 cost, judge cost, probation cost, the whole plethora of items
13 that go into a federal prosecution. And so Congress
14 recognized the benefit of this when it enacted the Protect
15 Act, and it requires the support of the Attorney General.
16 That support is there in our district. And we do believe
17 that the early disposition programs do save costs and
18 conserve resources.

19 So thank you again for coming. We again compliment
20 you on trying to address these very challenging issues.

21 JUDGE GONZALEZ: Do you have any questions?

22 COMMISSIONER CASTILLO: We certainly do. We're not
23 a shy group.

24 JUDGE GONZALEZ: Good.

25 COMMISSIONER CASTILLO: Mike, do you have a

1 question?

2 COMMISSIONER HOROWITZ: Well, let me ask the
3 judges, at our prior hearing in San Antonio, we heard mostly
4 from judges from the Western District of Texas. They
5 indicated that they were concerned that the guidelines on
6 smuggling were too low. Generally across the board, in cases
7 they had seen, they thought the guidelines were on the low
8 side. I'm obviously generalizing, but that was, I think, a
9 fair impression to take away. They had different thoughts on
10 the illegal reentry. Some thought there were occasions where
11 they were too high based on some concerns you've indicated.

12 Focusing, though, on the harboring and smuggling
13 guidelines, do you have a sense as to whether they are
14 generally too low across the board? Do you think that it
15 creates any problems or issues by increasing the guidelines
16 as we've proposed?

17 JUDGE GONZALEZ: I'm just going to make one
18 comment, and then if Judge Huff wants to comment. I
19 personally don't think they're too low. Most of our
20 smuggling cases involve cases where a person's in the trunk
21 or a person is being smuggled in a special compartment.
22 There's already an 18 -- it's increased to 18. We rarely
23 have smuggling cases where you start at a base offense level
24 under 18. So when you're starting at 18, then I think that
25 the guidelines do provide for appropriate punishment, and

1 there are always other enhancements that we can look to. But
2 if you were talking about guidelines that just start at 12,
3 and then you worked your way down with downward adjustments,
4 then certainly I would be concerned that they may not be high
5 enough.

6 We also have -- we just have started the Fast Track
7 Program with regard to the smuggling cases. So, obviously,
8 the Department of Justice, at least in our district, views
9 some of these smuggling cases as not being as serious as
10 perhaps in other districts. But the fact that they do
11 provide a Fast Track Program for those who plead guilty early
12 on leads me to believe that at least our U.S. Attorney's
13 Office feels that the seriousness of these offenses are well
14 addressed by the guidelines as they are.

15 JUDGE HUFF: I would add that, as I said, where
16 there's the death, serious bodily injury, high-speed chase,
17 the egregious conduct, then on occasion those are too low.
18 But in our district, since our bread and butter cases are
19 drugs at the border and aliens at the border, if you make
20 alien smuggling too high, then the drug ones become too low.
21 And I'm sure you used to hear that the drug ones were too
22 high. So there is that balance. At least with the kinds of
23 cases that we get in our district, I think if you took a poll
24 of our judges, maybe a couple would say they're too low, a
25 couple would say they're too high, but probably most would

1 say, with a couple of exceptions of the high-speed chase
2 cases, they're about right.

3 JUDGE GONZALEZ: Because we're generally talking
4 two or three persons being smuggled, as opposed to a hundred
5 or with the high-speed chases.

6 COMMISSIONER HOROWITZ: That was going to be my
7 other question that we also heard in San Antonio, was that
8 most of the smuggling cases there, they never even come close
9 to the six-level -- to the six-person cutoff that we have for
10 an enhancement. So from their standpoint, talking about 100
11 or 200 or 400 being additional levels being added, they
12 actually talked about perhaps lowering the number six down to
13 pick up the three, four, five-person smuggling operations.
14 Do you have any sense of that, as well, in your district?
15 Are you seeing smuggling cases that generally involve larger
16 numbers, or are you seeing also the one, two-person type
17 smuggling operations?

18 JUDGE GONZALEZ: Generally the one, two-persons.
19 Once in a while we'll have trucks, like the ones that Judge
20 Huff referred to, where we have 20 or 24. We never see the
21 really high numbers at all. But it's usually two or three or
22 four. In this district, I agree, we rarely reach the six --
23 more than six. And so, therefore, that enhancement doesn't
24 apply as much.

25 COMMISSIONER HOWELL: Just to pick up on that, it

1 was interesting to me that the Federal Public Defenders have
2 told us that, you know, increasing the numbers for, you know,
3 a hundred and over in terms of the smugg- -- the numbers of
4 smuggling of aliens just would be over-complicating to the
5 guidelines, and, you know, there are only two percent of the
6 cases nationally that involve that number of aliens. It was
7 interesting to me to hear in San Antonio that the judges
8 thought that we really should actually increase the offense
9 levels for numbers of aliens before -- you know, that are --
10 when the numbers of aliens involved are under six.

11 But you all don't -- you don't feel that that's
12 really a necessary step to take?

13 JUDGE HUFF: The reason is because you go up to an
14 18, so often the number of alien adjustment is subsumed
15 within the 18. So most of ours that are prosecuted are
16 compartment cases where the person has a prior, where they
17 were given a pass before, and then did it again. So I guess
18 the answer to your question is that it wouldn't really make
19 that much difference in our district if there was an
20 enhancement for under six, because we're already starting at
21 an 18.

22 COMMISSIONER HOWELL: Judge Huff, I was interested
23 in your comment that you had three trials just in the past --
24 just fairly recently over the lack of clarity over guidelines
25 issues in over what an aggravated felony is. Is there -- I

1 mean, there may be no way that the Commission can provide --
2 you know, can provide sufficient clarity to reduce, you know,
3 all -- you know, all necessary trials on these matters. But
4 is there anything from those fairly recent experiences that
5 you've had that you could share with us in terms of ideas for
6 how we might clarify the aggravated felony provision in the
7 guidelines?

8 JUDGE HUFF: I wish I knew. Some just requires
9 taking a look at whatever the state statute is, and doing an
10 element-by-element analysis, and then there -- in the cases
11 I had, there was a disagreement. One side said, we think the
12 trend in Ninth Circuit law will be that you do not apply the
13 16-level enhancement. Another, the prosecution, felt that
14 the 16-level enhancement under the case law was appropriate.

15 I was talking to somebody from the U.S. Attorney's
16 Office, and one comment was, what if you took out the word
17 "aggravated" from the guidelines entirely, and just made it
18 felony-based? I don't know. The statute right now says
19 "aggravated felony," so I think we're stuck with "felony."
20 But the -- when "aggravated felony" got -- became broadened
21 to include the kitchen sink -- almost everything is an
22 aggravated felony -- and so how ironic, you get 16 levels for
23 an aggravated felony, but you only get ten levels for death.
24 So I just don't have the answer. I hope that other people
25 smarter than I am will come and provide that, because it does

1 seem that, apparently, perhaps a conditional plea would be
2 something that could be evaluated. But we can't get involved
3 in that. And I do think that these cases were going to trial
4 simply because there was a disagreement over this guideline
5 enhancement.

6 COMMISSIONER HOWELL: Well, do you think that if we
7 did take, as we're proposing, a much more nuanced approach to
8 when the 16 levels kicks in, that there wouldn't be such a
9 dramatic jump up from 16 levels, and that that might help in
10 some of those sentencing disputes?

11 JUDGE HUFF: One of my colleagues likes that. I'm
12 on the flip side, because the more you have those nuanced
13 approaches, then you need to get the records. You don't get
14 the criminal hist- -- we get rap sheets, but rap sheets are
15 not set in stone, and often they're wrong. In the
16 derivations of the name, a lot of times you pick up things
17 later in the presentence report that weren't in the rap
18 sheet. So to me, the nuanced approach is good because it
19 punishes those people that should be punished. The nuanced
20 approach is bad in that it provides more uncertainty as to
21 whether you fit within that.

22 For example, the one proposal that says three
23 misdemeanors, misdemeanor records are very spotty, and
24 sometimes hard to get from high volume metropolitan areas.
25 So we might be spending a lot of time and effort by having

1 investigators and other people go out and get these records.

2 JUDGE GONZALEZ: In Los Angeles, most of the
3 records are just printouts -- computer printouts -- and we
4 don't get actually an abstract of the conviction. So our
5 probation office has a very difficult time determining what
6 the offense was for. So that's a reason why some of our
7 defense lawyers argue that this was not an aggravated felony.
8 So it's just really difficult.

9 Right now, with the word "aggravated felony" in
10 four of your options at least, you have to go back to 1101
11 anyway and figure out whether in fact these apply, and you
12 still have to apply the Taylor and Shepard analysis.

13 COMMISSIONER CASTILLO: When we were out in Texas,
14 the Federal Defenders gave some, I thought, compelling
15 testimony that said, in the first instance, the Commission
16 has never articulated a justification for the 16-level
17 enhancement. My question to you as judges here in the
18 Southern District is, have you seen instances where the
19 16-level enhancement, which is a big draconian factor in any
20 sentence, is over-inclusive, just sweeps too broadly in
21 bringing in defendants into that category?

22 JUDGE GONZALEZ: Well, I think one of the issues in
23 your questions is whether we should count felonies that are
24 more than, let's say, 15 years old. And so at time, I know
25 personally I have felt the 16-level enhancement is somewhat

1 draconian if in fact the conviction -- there's maybe one
2 conviction that's 20 years old, but it is an aggravated
3 felony, and I have to apply the 16-level enhancement. And I
4 know that's one of the issues that you're trying to resolve
5 is whether the age of the conviction should track the
6 sentencing guidelines. I know that there are pros and cons.
7 The statute is another issue.

8 COMMISSIONER CASTILLO: They actually went to the
9 trouble of drafting a proposal, and we will get that to you.
10 I wonder if we could ask you all to submit later on any
11 reaction to their proposal on 2L1.2, illegal reentry, because
12 it is something that I would like to take a look at. The
13 problem is, there's not a great deal of time. But if you'd
14 be good enough to do that, that'd be great.

15 Here's my last question, and then I'll turn it
16 over: I take it -- and I'm not a big fan of the Fast Track
17 Program -- I have to tell you quite honestly -- but if there
18 ever was a district that should have it, it's the Southern
19 District of California. I take it you could not survive in
20 this district without a Fast Track Program. Is that fair?

21 JUDGE HUFF: I think it would be very difficult.
22 And then it also creates, interestingly, different
23 disparities. On our drug cases, for example, many go to the
24 state court, and in the state court system, the judge that
25 was primarily handling it would give a day a pound. So you

1 might have a marijuana case that happens at the border where
2 somebody gets 60 days for 60 pounds. So you end up -- by --
3 if we have too many cases, something will happen to those
4 cases. It might be charge bargaining, it might be something
5 else. This, in my estimation, maximizes resources, where the
6 U.S. Attorney can decide which are the worst cases to
7 prosecute, and then devote those resources to those cases
8 that should be prosecuted.

9 JUDGE GONZALEZ: I think we would be departing
10 more. I mean, we just don't depart because the Fast Track is
11 at the front end, and it takes into consideration issues that
12 we may have relied upon in departing from the guideline. So
13 our district, I don't think, would've survived had we not had
14 the Fast Track Program. I think the U.S. Attorney's Office
15 realized that, and the judges, for the most part, welcomed
16 that.

17 COMMISSIONER HOWELL: Can I just -- oh, go ahead.

18 JUDGE HUFF: Could I just add, on the material
19 witness issue, that became, after Crawford, not an alien
20 smuggling case at all, but an evidence case. It became a
21 real issue: What do you do with our material witnesses? --
22 where our Ninth Circuit law says you need to process them
23 very quickly. Well, then that set up videotaped depositions,
24 which, at the outset, cost a thousand dollars. The defenders
25 would say they don't have, at the very outset of the case,

1 all of the necessary information in order to cross-examine
2 this witness that's going to be the critical testimony for
3 trial. So it was an example of a case that -- perhaps the
4 Supreme Court wasn't really thinking about alien smuggling
5 cases -- but it had a big impact in our district. The Fast
6 Track Program is an attempt to balance these issues and
7 address that, and release the material witnesses quickly
8 without losing the case.

9 COMMISSIONER HOWELL: Let me just make one last
10 comment, which is the concern you raised about additional
11 downward departures is something that we're particularly
12 sensitive to, you know, in the post-Booker world -- that --
13 and that the proposals that we have would increase
14 sentences -- guideline sentences for alien smuggling and
15 unlawful entry and various other things. So one of the
16 things we've been looking at is, you know, will that produce
17 just additional downward Booker variances outside of the
18 guideline sentences, because, with the increases, judges are
19 going to feel like the sentences are going to be too
20 significant and look for ways to downwardly depart? So in
21 that context, I really appreciate your thoughts about some
22 more symmetry between some of the safety valve, the
23 mitigating role abilities for downward departure in the
24 immigration context, because -- and that's another thing just
25 to echo something else from the Federal Defenders'

1 proposal -- they also had some interesting suggestions on
2 downward departures, so that, at the same time, if we are
3 increasing penalties, that we also provide judges with this
4 ability within the guideline structure in appropriate cases
5 to find appropriate downward departures.

6 JUDGE GONZALEZ: Right. Because right now it still
7 is difficult to depart. I think most judges would rather
8 look at the advisory guidelines and not depart if not
9 necessary.

10 COMMISSIONER CASTILLO: Any other questions? Yes,
11 Commissioner Steer?

12 COMMISSIONER STEER: A number of my questions have
13 been addressed. Let me ask you, Judge Huff, you mentioned
14 the need for some coordination between the drug smuggling and
15 the alien smuggling guidelines. I think you mentioned the
16 lack of safety valve in the alien smuggling guideline as
17 being -- are you suggesting that the Commission should
18 consider creating something like that in the alien smuggling
19 guideline?

20 JUDGE HUFF: I think it would be good. What we
21 typically see in our district is a person who is hired as a
22 driver. They are very low level. They're hired at the
23 border to simply drive somebody across. And it could be
24 drugs or it could be aliens. And so I've always struggled
25 with, why do you get minor role and safety valve for drugs,

1 but you don't get it for aliens? And so it's something to
2 think about. I think it would add some symmetry in at least
3 the cases that are frequently brought in our district.

4 JUDGE GONZALEZ: I think most of our judges adjust
5 downward for role because the driver of these aliens many
6 times is just one of them, and has just been hired, or is
7 just doing it in lieu of payment. So, therefore, we adjust
8 downward. It's usually opposed by the U.S. Attorney's Office
9 because they see a difference between smuggling drugs and
10 smuggling people, and that's their argument.

11 COMMISSIONER STEER: Of course, one of the
12 principal ideas behind the safety valve as applied to drug
13 offenses was to avoid the mandatory minimum. You don't
14 generally have a mandatory minimum for alien smuggling, do
15 you?

16 JUDGE GONZALEZ: We have a three-year minimum
17 mandatory.

18 COMMISSIONER STEER: Well, that's for smuggling the
19 child in?

20 JUDGE GONZALEZ: Oh, no. Whenever someone is going
21 to make any money, any profit, for the smuggling venture,
22 including not having to pay, there's an argument that could
23 be made that that person is facing a three-year minimum
24 mandatory sentence. That's a real issue.

25 JUDGE HUFF: Almost always there are two counts.

1 One is alien smuggling, and one is alien smuggling for
2 financial gain. And if there are more than one alien
3 involved, then it could go from a three-year mandatory
4 minimum up to a five-year mandatory minimum. And so it's
5 most typical that the defendants are facing some type of
6 mandatory minimum charge, at least in our district.

7 COMMISSIONER STEER: That seems to be something
8 maybe different for your district. I don't think that that
9 is -- that's something new from what I've learned --

10 JUDGE GONZALEZ: One of the draconian sentences
11 that I did have to impose had to do with just a mule, a hired
12 driver. He happened to be transporting several aliens. I
13 think it was three. And he did go to trial, and he was
14 facing -- and it was for profit -- and he -- I had to give
15 him five years, and that was my only choice. He had no prior
16 record. He was 19 years old. I felt it was just very -- it
17 was very difficult to impose that sentence.

18 COMMISSIONER ELSTON: Is that sentence that
19 could've been avoided if the person had gotten a Fast Track,
20 or is that --

21 JUDGE GONZALEZ: Back then there was no Fast --
22 this is a couple years ago, so there was no Fast Track at
23 that time.

24 COMMISSIONER ELSTON: But typically that would be
25 the kind of case that would be charged differently under the

1 Fast Track Program; is that correct?

2 JUDGE GONZALEZ: Probably, yes.

3 COMMISSIONER STEER: On the illegal reentry, one of
4 the difficulties with going entirely with a sentence length
5 measurement that you saw proposed in a number of the options
6 there is that there may be some serious offenses that were
7 not -- that you don't recognize that also may overstate the
8 seriousness of some. Since you get only the rap sheets, I
9 guess looking at the underlying facts of the prior conviction
10 would be difficult, as well. You don't get information about
11 that. Some have suggested, for example, that instead of
12 using the crime of violence definition, that if you had
13 something that -- language more like the safety valve,
14 "involves violence," or involves some of these other kinds of
15 behavior that are considered to be particularly
16 objectionable, like "involves drug trafficking," or whatever,
17 that that might be -- that in combination with a sentence-
18 linked approach might be a way to get at this. I'm wondering
19 about the practicality from what you said about the
20 information you get.

21 JUDGE GONZALEZ: Well, we get a little more
22 information when there's a presentence report written
23 11 weeks later. But as I mentioned, sometimes it's even
24 difficult for the probation office to get these records.

25 One of the problems we have in California is that

1 the state drug statute is very broad. We have many arguments
2 with the defense lawyers over whether that is an aggravated
3 felony, especially when it's charged as transportation of
4 drugs, which may not be covered under the definition of
5 "aggravated felony." So sometimes it's charged that way, and
6 so you really have to dig and look at what the person pled
7 to, and you have to get a transcript of the plea colloquy
8 usually, and the judgment, and the charging documents.

9 JUDGE HUFF: I like your idea on the crime of
10 violence, to then broaden, and not just say -- have us say,
11 is it or is it not a crime of violence, but make it broader.
12 I think that would help to clarify some of these cases that
13 come before us. I had one that went to trial over whether
14 statutory rape of a 15-year-old was or was not a crime of
15 violence under California law. One side said yes, and the
16 other side said no. So if it was broader, maybe that's a way
17 to help people understand whether the enhancement is or isn't
18 going to apply.

19 COMMISSIONER STEER: Thank you.

20 COMMISSIONER CASTILLO: Any other questions?

21 (No responses.)

22 COMMISSIONER CASTILLO: Let me just say -- I didn't
23 mean to overlook this -- my good friend and colleague, Judge
24 Sessions, is on the phone from Vermont. Bill, are you still
25 there?

1 MS. RUBIN: Judge Castillo, he had to step away.

2 COMMISSIONER CASTILLO: He had to step away. Okay.
3 Well, then he won't get on my case about overlooking him.

4 Thank you very much.

5 JUDGE HUFF: Thank you.

6 JUDGE GONZALEZ: Thank you.

7 COMMISSIONER CASTILLO: We will switch gears to the
8 District of New Mexico. Maybe I'll give people a chance to
9 get some coffee while we do that.

10 (Recess from 10:30 a.m., until 10:35 a.m.)

11 COMMISSIONER CASTILLO: Now we're going to turn our
12 attention to the District of Mexico, and my good friend,
13 Chief Judge Martha Vazquez, along with Anita Chavez, the
14 Chief Probation Officer from the District of New Mexico, and
15 Phillip Munoz, the Assistant Deputy Chief Probation Officer
16 from the same district. Welcome, and we're happy to hear
17 from you.

18 JUDGE VAZQUEZ: Thank you. Thank you very much for
19 inviting us. We are very pleased to be here. We value very
20 much the work that the Commission's doing on this very
21 important topic, and we're very pleased to come and to share
22 the experiences that we have in New Mexico.

23 Over 63 percent of the cases that come before my
24 district involve immigration. It is apparent that these
25 numbers will continue to increase based upon the increased

1 funding of Border Patrol and the increased emphasis on
2 national security. I'm here today with our Chief Probation
3 Officer, Anita Chavez, and Phillip Munoz, our Assistant
4 Deputy Chief, to offer our perspective based upon our
5 experience to ensure that the immigration guidelines fulfill
6 the congressional mandate of 18 United States Code 3553.

7 This is a particularly difficult directive when it
8 comes to fashioning immigration guidelines, and I do not envy
9 your task. We will be highlighting a few of our observations
10 and comments with regard to the proposed guidelines. We've
11 attempted to redraft some of the amendments in a manner that
12 addresses our concerns. We've been doing so for the last two
13 weeks. I must say that we really appreciate the challenges
14 of your job.

15 We have worked hard in the last two weeks
16 attempting to address our concerns, and trying to find a way
17 that -- with our experiences of sentencing all of these
18 defendants in these immigration cases, had no idea how
19 difficult it was to try to put into the amendments all of the
20 different problems that we always complain about in the
21 guidelines.

22 I'm going to start with 2L1.2. My comments will be
23 general, and then I will turn it over to our probation team.
24 The country is rightfully very focused on terrorists crossing
25 our borders. But the most egregious immigration cases that

1 make the nightly news do not reflect what we see in our
2 courtrooms on a daily basis. In our district, over 90
3 percent of the cases were sentenced under the primary
4 guideline of 2L1.2, unlawfully entering or remaining in the
5 United States. These aliens are not terrorists, and the vast
6 majority of them are not violent criminals. Overwhelmingly,
7 they are motivated by poverty to come to the United States to
8 work. They come from Mexico or Central American countries to
9 support their families or to reunite with family members who
10 are already in the United States. The bottom line is that
11 they come for the many jobs that are available to them in the
12 United States. I need to refer you only to your interim
13 staff report on immigration reform in the Federal Sentencing
14 Guideline recently published in January, in which you state
15 that our economy is based in large part on our illegal
16 immigrant work force.

17 The fact that, in our experience, the aliens who
18 appear before us in New Mexico are not terrorists does not
19 mean that we don't treat them as potential terrorists. Every
20 illegal entry case in the District of New Mexico is treated
21 as a potential terrorist case. The cases are screened by our
22 pretrial division, and the judge is given a bail report with
23 that defendant's criminal history, so that every judge is
24 able to make an informed decision about release. A
25 defendant's background is again screened at sentencing, where

1 a more thorough investigation about the defendant's
2 background, the defendant's whereabouts in the United States,
3 and the defendant's criminal history category is provided to
4 the sentencing judge. Even during times of severe financial
5 restraints, as the judges on the Commission know we've had in
6 the last few years, even during those times, although
7 tempted, we never took any shortcuts during this period of
8 time, and continue to provide all of our judges exhaustive
9 and complete pretrial and PSR reports to all of our judges.

10 These measures to protect our borders are necessary
11 and can be done. These measures protect our borders without
12 having to exhaustively punish an entire class of defendants
13 who do not present a national security threat. In light of
14 this, and keeping in line the requirements of 3553, it is
15 critical that this guideline reflect the actual offense
16 conduct and the characteristic of the defendant's sentence
17 under it. We feel strongly that the harshest enhancements
18 should be reserved for those with the most serious prior
19 aggravated felony convictions, and those who pose a risk to
20 American society.

21 For this reason, of the options related to this
22 guideline presented by the Commission, we have redrafted
23 option number one to address our concerns. Those will be
24 pre- -- that option will be presented to you -- actually, I
25 think it has been presented to you, and Mr. Munoz will go

1 over that with you.

2 In our opinion, option one, in its present form,
3 and options one through three, as they have been presently
4 drafted by the Commission, we believe inappropriately lump
5 all defendants who have committed an aggravated felony, as
6 defined in 8 United States Code 801(a)(43) into a single
7 category. These three proposals calls for long prison
8 sentences for all entering felons, including those who
9 committed offenses such as property crimes. As a rule, a
10 defendant who's sentenced for an underlying offense
11 committed -- I'm sorry -- that exceeds 13 months would face
12 a minimum of 51 to 63 months without getting acceptance of
13 responsibility.

14 As a policy matter, we may choose to punish more
15 harshly those illegal aliens who reenter after having been
16 convicted of drug crimes or crimes of violence. But I
17 question whether even these criminal defendants should be
18 punished under these guidelines that are designed to target
19 terrorists who pose national security threats.

20 Using the statutory definition of "aggravated
21 felony" as proposed in the amendments would indiscriminately,
22 and yet significantly, increase the sentences of defendants
23 who have been convicted of non-violent offenses and
24 misdemeanors. Based on our experience, we're concerned that
25 this approach would fail to provide appropriate penalties

1 based on the relative seriousness and the risk levels of the
2 different prior offenses. It would result in unfair
3 sentences, and would unnecessarily burden the prison system,
4 while perhaps doing little to protect the public.

5 Too often these prior convictions triggering the
6 16-level adjustment involve assault charges stemming from
7 drunken bar fights, or drug convictions where the defendant
8 was a low level mule or back-packer, or the defendant
9 suffered a state felony conviction for possession of a small
10 amount or drugs for personal use.

11 I will give you an example from our district in
12 which probation, pursuant to the guidelines, assigned a 16-
13 level increase where the defendant had a prior Colorado
14 conviction for a third degree assault. The conviction arose
15 from an incident in which the defendant threw a rock at the
16 rear window of an SUV after the driver had attempted to run
17 over the defendant four times during a dispute over a Sony
18 Discman. The defendant pled guilty and spent 24 days in jail
19 for this offense. At the time of his conviction, Colorado
20 codified third degree assault as a misdemeanor punishable by
21 a term of 6 to 18 months. Because third degree assault in
22 Colorado has as an element the knowing or reckless use of
23 force against the person of another, it was a crime of
24 violence under the guideline, and thus it warranted a
25 16-level enhancement -- I'm sorry -- an adjustment.

1 The defendant in this case was lucky. The
2 documents were available for that conviction, and the judge
3 was my colleague, Judge Brack. He was able to carefully
4 assess the offense conduct, and he granted a downward
5 departure. This is the United States versus Perez-Nunez
6 case, 368 F.Supp.2d at 1265, a 2005 case.

7 In light of the problems such as this one, we're
8 particularly concerned with option five. We believe that a
9 better approach would be to limit the reach of the 16-level
10 adjustment to felons who actually pose a risk to society or
11 who have committed crimes that are particularly repugnant to
12 society rather than increasing the base offense level of all
13 reentering defendants, and decreasing the level only if the
14 prior conviction was not for a felony. We would suggest that
15 a guideline that makes distinctions among reentry defendants
16 through the use of specific characteristic adjustments and
17 more harshly punishes the more dangerous individuals. An
18 underlying prior offense that is non-violent or involves
19 minimal offense conduct should not prompt an adjustment equal
20 to those underlying offenses that demonstrate the defendant's
21 propensity for violence or danger to society.

22 In my experience, in too many cases the 16-level
23 adjustment for illegal reentry does not fulfill the
24 sentencing goals set forth in 3553. I raise the following
25 point only by way of comparison. I was again reminded of the

1 harshness of this enhancement when I reviewed the 2005
2 amendment to Section 2R1.1, the guideline for antitrust
3 crimes and related conduct. That guideline now has a base
4 offense level of 12. Under 2R1, to reach the highest special
5 offense characteristic adjustment, that is the 16-level
6 increase, an antitrust defendant would have committed an
7 offense that affected a volume of commerce to the tune of
8 \$1.5 billion. By contrast, we have the defendant I just
9 discussed above, who would have the 16-level adjustment for
10 illegally reentering the United States after having been
11 convicted of throwing a rock at the SUV.

12 The application of the 16-level adjustment for a
13 relatively minor prior offense is troubling for another
14 reason. Because the prior offense is accounted for in the
15 criminal history, it is, in effect, used twice to increase
16 the defendant's sentence. This double-counting problem
17 becomes triple-counting when the prior conviction is recent
18 enough to warrant the application of two additional criminal
19 history points because the defendant reentered the United
20 States less than two years after his or her release from
21 custody. The prior offense, in effect, is counted four times
22 in terms of raising the defendant's sentence if the defendant
23 reentered the United States while still on probation or on
24 supervised release from the prior offense. And let us keep
25 in mind and not lose sight of the fact that this is an

1 offense for which the defendant has already paid his debt to
2 society.

3 Another related concern is what we see as a shift
4 in the burden of proof in these cases. This 16-level
5 adjustment for prior convictions in effect transfer the
6 burden of proof of establishing the character and the quality
7 of this prior offense. Defendants, like the rock-thrower
8 that I've discussed, who wish to argue for a departure based
9 on the fact that the offense conduct of the triggering felony
10 should not warrant a 16-level increase faces challenges.
11 These defendants are in trouble if they do not inform their
12 attorney, probation officer or the court about the relatively
13 minor nature of their prior offenses, or if they don't
14 remember the details, or if they cannot obtain the records of
15 their prior offense. How many judges are going to believe
16 the word of a defendant under these circumstances? It seems
17 inappropriate that this burden is in effect shouldered by the
18 defendants, who, for the most part, have very little
19 education, are very inarticulate, can barely read or write in
20 their own language, much less in the English language, and
21 have not been raised in our country, have overburdened state
22 public defenders as their attorneys for the underlying
23 offenses.

24 Next, I wish to go on with very brief comments with
25 regard to the smuggling, transporting or harboring unlawful

1 aliens pursuant to 2L1.1. Offenses relating to smuggling
2 only make up eight percent of the immigration cases in my
3 district. People illegally crossing the Mexican/American
4 border take incredibly dangerous risks and are exposed to the
5 desert conditions in our district. And while we all read
6 about the terrible instances where smugglers inflict injury
7 and death, these types of cases account for only a tiny
8 percentage of the smuggling cases we see.

9 The average case we see usually involves fewer than
10 six individuals who pooled their resources to make the trip
11 and obtain a car or rent a motel room. By the time they are
12 arrested north of the border, the coyote who took them across
13 the border is long gone. The driver of the car may be
14 charged as the smuggler, when in fact he may have just been
15 the least tired of the group, or the one who happened to have
16 a driver's license, or the one whose turn it was to drive.

17 Post-Booker statistics from your Commission which
18 were extracted from the December 21st, 2005 documents show
19 that, of the 1,314 immigration cases sentenced in this
20 district during this period, only 101 were for smuggling
21 offenses. In only two of these cases the defendant was
22 assessed points because a victim was injured. Likewise,
23 there were only two cases in which the defendant was assessed
24 points because the smuggling victim died.

25 In light of these statistics, and based on our

1 experiences at this district, we provide the following
2 observations and our proposed solutions. The challenge is to
3 craft a guideline that protects the United States from
4 terrorists, but avoids an overly broad sweep. We are
5 concerned that the proposed amendments may be too broad. Our
6 probation team will address our proposal specifically.

7 Additionally, we are concerned with the practical
8 impact of increasing the base offense level from 12 to 14.
9 There already exists a disparity in sentencing based on
10 nationality, creating a higher base offense level aggravates
11 this disparity for all defendants, not just those engaged in
12 smuggling terrorists.

13 An additional concern about the amendment is its
14 recommended base offense level of 23 if the assisted alien,
15 not the defendant, had a conviction for any aggravated
16 felony. I believe Judge Huff has talked about this and
17 addressed this issue a little bit. But the broadening of
18 that definition triggers and encapsulates many, many more
19 defendants. We worry that the proposed guideline will
20 include too many defendants who simply should not be
21 sentenced at a base offense level of 23. Our fear is that
22 these unjustifiably inflated sentences would waste judicial
23 resources without advancing the goals of 3553 or promoting
24 our national security.

25 In light of these concerns, and consistent with

1 both the statute of conviction and with the principle of
2 enhancing punishment in relation to danger or risk to our
3 society, we offer the proposals that Mr. Munoz and Ms. Chavez
4 will address more specifically. We would ask the Commission
5 to consider our proposals, which sets a lower base offense
6 level, and increases with special offense characteristics.

7 I now wish to turn to the proposed adjustments
8 under the category of endangerment of minors. We would ask
9 the Commission to consider adopting a guideline that does not
10 enhance the sentence for harm involved in the smuggling of a
11 minor unaccompanied by his or her parents, because these
12 proposals would enhance sentences for conduct that does not
13 constitute endangerment, and would most harshly punish
14 defendants who are most often the least morally culpable.

15 I will explain. While the most widely publicized
16 of these cases involves smugglers bringing children into the
17 States for nefarious purposes, the vast majority of the cases
18 that we see do not involve those types of facts. We see
19 parents who have entered the United States long before they
20 bring their children in. They leave their children in Mexico
21 or in other Central American countries, and after they have
22 settled, they ask a friend or family members to bring their
23 children back into the United States after they have found a
24 job, and after they have made a home for them in the United
25 States.

1 These parents are less likely to entrust their
2 children to the care of strangers who are professional
3 smugglers. Thus those defendants who are committing the
4 offense of bringing in children unaccompanied by their
5 parents are most often not the traditional for-profit
6 smugglers, but rather, they are friends or family members,
7 who may have received compensation for expenses, but who are
8 primarily motivated by the goal of family reunification, and
9 for whom an increased sentence is inappropriate.

10 If you do decide to include this provision, a
11 possible protection for the least culpable defendants would
12 be to limit the application of this adjustment if the
13 defendant is eligible for a mitigating role adjustment. This
14 would help minimize the problem that we see too often where
15 minor players or mules face the same severe sentences as the
16 more culpable defendants.

17 I raise an additional concern based on a cultural
18 pattern that we have seen in our courts. Too many Mexican or
19 Central American children, very young children, at the age of
20 12, 13, or even younger, on their own pay their own fare to
21 a smuggler or come on their own to the United States. These
22 children may be orphaned, abandoned. They leave their
23 impoverished families to find work in this country, or to
24 find their parents who left them behind when they come to
25 find work in the United States. While those who smuggle,

1 transport or harbor these children expose them to the same
2 dangers that adult immigrants face, the proposed adjustments
3 may not account properly for these defendants' culpability.
4 Thus I am concerned about a guideline that would sweep too
5 broadly and encompass these individuals.

6 I don't know if any of the commissioners saw last
7 Friday's Good Morning America or the Today Show. I don't
8 remember which show had it. But they were chronicling the
9 voyage of a young boy called Enrique, who came from a Central
10 American country. It was a book that was written about
11 Enrique, but the author chronicled Enrique's trip from his
12 country. I believe it was Honduras. Enrique's mother left
13 Honduras and left Enrique with family, and she came to the
14 United States illegally to work. She was a housekeeper
15 cleaning people's homes in a state on the East Coast. She
16 told Enrique that she would be back. She kept sending home
17 money to Enrique and to his brothers and sisters.

18 Two years and three years passed, and she didn't
19 return. She kept sending money, but she didn't return, and
20 Enrique got to be too homesick for his mother. At the age of
21 ten, Enrique left his home in Honduras and travelled to find
22 his mother in the United States. The story is about this
23 author retracing Enrique's steps. It's a harrowing story
24 about how this boy, at the age of ten, rode on boxcars and
25 travelled on foot, no money, by himself, at the age of ten.

1 Some people helped Enrique with free food, because
2 apparently many children make this trip. They stretch out
3 their arms as the boxcar travels, and people -- other people
4 just as poor as Enrique -- apparently reach out and give all
5 these children in the boxcars who are stretching out their
6 hands food.

7 Enrique made it across. Some people were not kind,
8 and Enrique was lucky to be alive. But he made it across,
9 made it to New York or wherever it was that his mother lived.

10 I bring that point out because all of those
11 individuals that helped Enrique make it to the United States
12 could potentially come within the grip of this guideline. We
13 need to be careful. I found it very difficult to do the job
14 that you are attempting to do here, trying to think about all
15 the potential cases that have come before our courts, and
16 this was one example.

17 I conclude by reiterating my greatest concern about
18 fashioning immigration guidelines. While there is a great
19 deal of repetition in these types of immigration cases, the
20 range of offense conduct, the circumstances and character of
21 of the defendants in these cases are more varied in
22 immigration offenses than in any other cases that we see.
23 For this reason, I ask the Commission to fashion guidelines
24 that give judges refined options and more alternatives, which
25 would allow us to make critical distinctions among these

1 highly fact-specific cases. It is much easier for a court to
2 increase a sentence based on readily available evidence than
3 it is for a defendant to marshal the resources and evidence
4 needed to convince a court to grant a departure from a
5 guideline sentence in those cases where a lower sentence is
6 justified.

7 This is the case because the courts and probation
8 are overloaded, and immigration defendants are likely non-
9 English speaking and unfamiliar with the court system, and
10 without resources to higher a lawyer and investigators
11 necessary to prove that the guideline is inapplicable in
12 their circumstances, and unduly harsh as applied.

13 Again, I thank you for the opportunity to appear
14 here today, and I am grateful to you for the opportunity to
15 present the faces and the lives of the people that we
16 sentence. Thank you very much.

17 COMMISSIONER CASTILLO: Thank you, Chief Judge
18 Vazquez. Thanks for participating in our immigration round
19 table in Washington. Now we'll pass the baton over to your
20 probation officers.

21 JUDGE VAZQUEZ: Thank you very much.

22 MS. CHAVEZ: Good morning. Thank you.

23 We have prepared a packet that I believe you've all
24 received. That's to help get through some of these questions
25 that you've posed to us. I'm going to start, and Phillip and

1 I will be kind of bouncing back and forth in terms of
2 different issues. The first one will address the 2L1.1, and
3 that's the Attachment A that we've given you.

4 I want to speak first to the choice that we've had
5 in terms leaving a level 12. We believe that, first of all,
6 this adequately captures the behavior. I believe those
7 questions were there before.

8 To out one issue of what we consider maybe
9 disparity, a U.S. citizen who transports six or less aliens
10 would be at a level 12, and usually receives a minus-two for
11 acceptance of responsibility, resulting in an offense level
12 of ten. The illegal alien would receive the same offense
13 level of ten under the same circumstances. The U.S. citizen
14 would be subject to a probationary period with electronic
15 monitoring, community confinement or a jail, while the
16 illegal alien must serve at least five months in custody.

17 If it's to be raised to a 14, we think that might
18 create a larger disparity, in that the U.S. citizen would
19 then face five months in custody at the bottom of the
20 guideline range, while the illegal alien would face ten
21 months automatically, which would double the sentence.

22 We do understand that in reentry cases appellate
23 courts have rejected the argument that the status as a
24 deportable alien is not a basis for a downward departure.
25 The argument for a downward departure based on deportable

1 alien status is based on adverse penal consequences that
2 illegal aliens sentenced to prison will face, such as
3 ineligibility for assignment to a community correction center
4 or home confinement for the final portion of that sentence.

5 Notwithstanding these opinions, however, we are
6 concerned as to the disparity here based on their illegal
7 status. Because of that concern, we believe 2L1.1(a)(1)
8 should remain at a level 12. So we would start with that
9 recommendation.

10 I'm going to let Phillip discuss the specific
11 offense characteristics. We've kind of gone with the option
12 two, of making those specific offense characteristics, as
13 opposed to starting at level 25 and 23.

14 MR. MUNOZ: Good morning.

15 COMMISSIONER CASTILLO: Good morning, Mr. Munoz.

16 MR. MUNOZ: I would just turn your attention to our
17 Attachment A, in that we really felt that the smuggling
18 guideline should start at a 12, and it would build from that
19 point on depending on the specific characteristics of that
20 particular offense. I would point out that the specific
21 offense characteristic contained in (b)(1), a particular
22 concern was the language contained in 8 U.S.C. 1182(a)(3).
23 I would also point out that this issue was also raised in the
24 interim staff report, is that it would be too broad in
25 defining in fact what an inadmissible alien was. Because of

1 that reason, we have specifically struck that provision in
2 the statute -- (ii) I believe -- and have limited the
3 application of this enhancement to 13 levels to (i) and
4 (iii). I would only point that out as we proceed here.

5 The only other issue I would say is we -- the base
6 offense level 13 in (b)(1) and (b)(2) are also consistent
7 with what the proposed amendment is, in that they would
8 ultimately result in a cumulative level of 25 and 23,
9 respectively.

10 If I could have you -- the only other changes -- if
11 I could have you look at page 2, we have added two additional
12 levels for death. In New Mexico, we have had -- in the last
13 18 months, we've had six cases. During that time, ten
14 Mexican nationals have died as a result of those accidents.
15 We just had six die last week alone. For those reasons, and
16 because the accidents involved are usually traffic-related
17 accidents involving either criminally negligent conduct or
18 reckless conduct, we have provided all of you with an
19 additional gradation of either eight or ten levels to account
20 for that, which would mirror the language contained in the
21 involuntary manslaughter guideline currently in the
22 guidelines.

23 And I believe --

24 COMMISSIONER ELSTON: So let me make sure I
25 understand that.

1 MR. MUNOZ: Certainly.

2 COMMISSIONER ELSTON: Under that proposal, the
3 Government would have to show by a preponderance of the
4 evidence that the defendant acted with -- acted negligently
5 or acted recklessly, and that's what -- we have to make that
6 distinction to determine whether it's eight or ten levels?

7 MR. MUNOZ: If -- if -- in the involuntary
8 manslaughter guideline, because of the reckless behavior that
9 is usually created during these transporting cases, that
10 would be in the charging document, and, yes, the Government
11 would be the one that would charge that.

12 COMMISSIONER ELSTON: We're not talking about the
13 charging document. We're talking about this guideline --
14 this proposed guideline. This is an additional decision
15 point and additional evidence that the Government would have
16 to prove at sentencing would be the intent of the defendant.

17 MR. MUNOZ: It would be the --

18 COMMISSIONER ELSTON: You see my problem and
19 concern.

20 MR. MUNOZ: Right.

21 COMMISSIONER ELSTON: One of the things that
22 makes -- I think drives everybody in the system crazy is when
23 you create more decision points and more factors and more
24 litigation issues that have to be decided at sentencing.
25 It's one thing to prove that somebody died. That's a fairly

1 straightforward thing to prove and to establish at
2 sentencing. This strikes me as something that's very
3 complicated to establish at sentencing.

4 MS. CHAVEZ: If I may address that, I believe the
5 intent was to follow the guidelines that are set forth under
6 involuntary manslaughter, which gives specific behaviors that
7 can relate to that guideline. Our difficulty was, in our
8 district, especially a death and an increase of ten levels,
9 sometimes it's not intentional. They're more died into
10 involuntary manslaughters, like maybe a DWI that resulted in
11 deaths in the vehicle, which is more reckless, as opposed to
12 somebody that left somebody in a boxcar for ten days without
13 food and water. We just felt that if we gave some gradation
14 to address these issues, that the officer would have a better
15 chance to address the actual behavior. It really was not our
16 intent to have to have it in the language to specify that the
17 government has proven negligence, or the Government has
18 proven reckless behavior. I believe the involuntary
19 manslaughter guideline gives us guidance as to what some of
20 those behaviors may be. So I think that was more our intent,
21 to try to create an understanding that there are different
22 ways that people die in these situations, and that it's not
23 just always an aggravating factor.

24 COMMISSIONER ELSTON: And I understand that, but
25 there would be -- there is a cross-reference to those

1 guidelines where the level would be below that. And doesn't
2 that take care of the occasions where you would want to
3 import that language about whether it's voluntary
4 manslaughter or involuntary manslaughter, or whatever else?

5 MS. CHAVEZ: I don't believe I understand. You're
6 indicating that it's already --

7 COMMISSIONER ELSTON: Well, what you're essentially
8 saying is that we should have a cross-reference to these
9 other guidelines.

10 MS. CHAVEZ: Well, we would have options, I guess.
11 You could do a cross-reference to try to mirror what they've
12 already set forth in the involuntary manslaughters, and the
13 eight-level increase really matches the negligent behavior
14 that you find in a homicide guideline section. Or we could
15 incorporate more language again within this guideline that
16 mirrors that, but would address this specific offense
17 behavior. That's, I think, our only intent is to try to show
18 that there are different levels of culpability in what may
19 have happened in the actual offense, as opposed to just
20 trying to capture all of it with a level ten increase.

21 Our other concern with this is that, in the current
22 guidelines, and as we see them, and in our recent discussion
23 that Phillip had mentioned, we had a rollover accident of --
24 I think it was 14 defendants -- I mean, victims -- in a
25 Suburban, and four died, and there's six still in the

1 hospital. There's not a multiple death guideline either, and
2 that concerns us also. We feel that this guideline better
3 addresses that in that it's more cumulative to at least two
4 victims, and that you can go to 5K2 to do the death penalty
5 enhancement. So -- or I'm sorry -- not penalty, but the
6 death -- multiple death enhancement for an upward departure.

7 I think we're just trying to be fair because of
8 what we've seen, and trying to address the issues as they
9 come up, and also address the multiple death issue when it
10 does, unfortunately, hit our cases.

11 COMMISSIONER HOWELL: Can I just address this
12 point?

13 MS. CHAVEZ: Sure.

14 COMMISSIONER HOWELL: I think that's one of the
15 things that sort of jumps out, you know, from your proposal,
16 what Commissioner Elston was focusing on as, will this be
17 just inviting a lot of litigation? Although if I understand
18 your concern correctly, from our proposed amendment, it's
19 that just a blanket trigger of ten levels may not really be
20 appropriate in some circumstances and sufficiently reflect
21 the different circumstances where death may result, where
22 there could be some people who leave somebody, as you said,
23 in a trailer for ten days without food or water, I mean,
24 that's just blatant intentional murder, versus somebody who
25 had a DWI, and that it would be unfair to give both of them

1 a ten-level increase and treat them both the same. Am I
2 understanding the intent of what you were trying to do here?

3 MS. CHAVEZ: Yes.

4 COMMISSIONER HOWELL: There may be different
5 ways -- perhaps in an application note -- to make suggestions
6 to the court for consideration of departures either up or
7 below ten levels if death results, depending on the
8 circumstances that may avoid -- that may address your concern
9 about a more nuanced approach, and plus certainly what would
10 be the judges' and the Government's concern about -- and
11 defense lawyers, too -- about just increasing, you know,
12 trials over, you know, points and circumstances.

13 I have to say, I just want to thank you very, very
14 much. It's very, very helpful to us when people have -- and
15 you've clearly thought through some of the things that we're
16 struggling with here, and so I just want to say how much,
17 certainly from my perspective, we appreciate the effort that
18 you took to put your proposals on paper. It's very, very
19 helpful for us in helping to put in concrete form some of the
20 concerns that you have.

21 MS. CHAVEZ: Thank you.

22 MR. MUNOZ: I believe the only other highlight that
23 we'd like to -- or the only other point we'd like to make as
24 it relates to 2L1.2, the reentry guideline, would be that a
25 large majority of cases in New Mexico that are most

1 problematic are these 16-level increases resulting in these
2 Colorado assault cases and which the judge included in her
3 remarks. The only point we would make is that the Commission
4 consider keeping those misdemeanor convictions resulting --
5 the misdemeanor convictions, regardless of the statutory
6 penalties, that they would be considered misdemeanors. If
7 they're considered misdemeanors in the state, then for
8 guideline applications, they would also be considered
9 misdemeanors for that particular guideline.

10 COMMISSIONER ELSTON: Well, let me -- I always jump
11 in and ask questions --

12 MR. MUNOZ: That's fine.

13 COMMISSIONER ELSTON: -- and forget to do the
14 things that Beryl does, and that's why I appreciate her all
15 the time making us appear to be more generous, and we ought
16 to be more generous, especially given the amount of time that
17 you've put into this. And you certainly have put a lot of
18 time into this, and the time and the travel to come here.
19 And I do appreciate that, as well.

20 On that last point, though, allowing the states to
21 define a misdemeanor versus a felony I think creates a great
22 deal of disparity in the system, rather than having a
23 uniform -- which is what we generally have now -- which is
24 that a felony is more than a year. We have the same problem.
25 I'm from Virginia and was a prosecutor in Virginia for a

1 number of years. And in Maryland, there are a lot of two-
2 year misdemeanors, where you can get up to two years. They
3 call them misdemeanors for a variety of things. But wouldn't
4 we be inviting a lot of disparity from state to state,
5 depending on how the state legislators fix these things?

6 MR. MUNOZ: We did discuss that, and quite
7 honestly, Commissioner, what we were trying to do is, as it
8 relates to this particular guideline and what cases bring us
9 most problems, is that if we don't take another nuanced
10 approach to how we're going to do these, these become
11 problematic. I think some of the cases that have been
12 highlighted, both this morning by the judges from the
13 Southern District, as well as Judge Vazquez, is that they --
14 we do get these cases in which 16-level enhancements are
15 given, and quite honestly, it may not be warranted. I think
16 that these aggravated felony cases out of Colorado, for
17 example, that we get in New Mexico, and the problems with all
18 the records that are needed in order to get to that level,
19 are becoming increasingly difficult for the Probation
20 Department to really pour over in the limited amount of time
21 that we often get.

22 Oftentimes they do result in evidentiary hearings.
23 I think that if you wanted to simplify it -- and I -- I -- I
24 can appreciate what you're saying, and yet I think that some
25 of these cases, if we really limit 'em to the misdemeanor

1 definition of anything that is considered a misdemeanor in
2 the state, it may help out for applicability purposes.

3 COMMISSIONER ELSTON: One of the things that we're
4 considering is this 13-month time period. That sounds like
5 it would correct the 24 days. I understood from the judge
6 that it was a 24-day sentence. So if you're looking at cases
7 where the judges in the state courts have said this is
8 serious enough that we're going to put you away for 13 months
9 or more of actual imprisonment, versus 24 days, I guess maybe
10 that strikes me as a better way of looking at it, rather than
11 what the state legislature labels it as, a felony or a
12 misdemeanor, looking at what the judge has imposed and how
13 serious the conduct they thought it was based on the length
14 of imprisonment. I don't know if that helps -- would help or
15 not.

16 MR. MUNOZ: We are actually -- we like proposal --
17 or option number one, as well, and for those reasons. We're
18 just worried about some of those cases that -- in which an
19 18-month sentence could be imposed. Again, for the conduct
20 that is there, and the record-keeping that is involved, and
21 the analysis that is required --

22 COMMISSIONER ELSTON: Well, that's another issue
23 altogether --

24 MR. MUNOZ: Yes.

25 COMMISSIONER ELSTON: -- with the categorical

1 approach and all of those things.

2 MR. MUNOZ: And I think that for that particular
3 guideline -- I'm sorry to cut you off -- but for that
4 particular guideline, that becomes a real problem.

5 COMMISSIONER ELSTON: I understand. I agree.

6 JUDGE VAZQUEZ: We wrestled with that one,
7 Commissioner. That's when we started realizing what a tough
8 issue this is, because we've wrestled with that. I mean, we
9 see cases from the states where the state public defenders
10 are so overburdened that some defendants get long sentences
11 just because people forgot they were in jail. And when you
12 look at their records, the records are an embarrassingly
13 minor misdemeanor, and they ended up serving time in jail
14 because their state public defenders are so under-funded. I
15 mean, these are tough, and sometimes -- I mean, it's just a
16 tough issue. We spent a lot of time on this one, and, you
17 know, came up with the best we could.

18 COMMISSIONER HOWELL: I was also interested very
19 much in your comments about how to deal with the smuggling of
20 minors, because this is one -- and we're going to hear from
21 Judge Roll later -- where we've heard very, I think, powerful
22 stories about children being drugged and abused, you know, if
23 not kidnapped and held for ransom when they're brought by
24 coyotes or other smugglers for profit, not friends of the
25 family. It's a very hard -- you know, it's a very hard, you

1 know, drafting issue, let alone the factual issue, depending
2 on -- even if we draft it correctly, it will then become a
3 factual issue for how to separate the family friend who's
4 doing a good deed for family reunification versus a smuggler
5 who may be really hurting -- putting a child at very serious
6 risk.

7 Is your -- I mean, what I -- I mean, I couldn't
8 tell from your proposal is, is it your sense that, given, in
9 your experience, the family reunification purpose and the
10 friendly smuggler of children, that we shouldn't be
11 addressing this, or -- or --

12 JUDGE VAZQUEZ: I was concerned that it would be so
13 broad that it would necessarily encompass this situation that
14 we see too often, and I just urged caution to make sure that
15 it wouldn't encompass this situation. I am very familiar
16 with those stories, as well. I'm also very concerned about
17 those incidents. It seems to me -- however, I can't say
18 that -- because I don't have experience with those types of
19 smuggling with children, I can't say that I've studied those
20 provisions of the guidelines that I think would be
21 applicable. But it seems to be that there are provisions of
22 the guidelines that could punish those defendants. The
23 kidnapping provisions and the other sex offenses provisions
24 would be applicable in those situations.

25 But in any event, my point and the reason in

1 bringing it up is that I just wanted to make sure that you
2 were familiar with those types of cases that we see just to
3 make sure that those scenarios wouldn't be included somehow
4 in the redrafting of those situations.

5 COMMISSIONER HOWELL: Well, we do -- I mean, we do
6 have language, I think, in the amendment about the smuggler
7 not being authorized to have the child. So maybe that is
8 the -- it would then become a factual issue whether it's a
9 family friend who was authorized by the parents to bring the
10 child versus somebody who wasn't. But I think it's an issue
11 that -- you know, as you can tell from our amendments, we've
12 been very interested in addressing and responding to very
13 thoughtful correspondence that we've gotten from judges, but
14 yet some of us also share your same concern.

15 COMMISSIONER CASTILLO: Any other questions?

16 (No responses.)

17 COMMISSIONER CASTILLO: Let me just thank you. We
18 appreciate the hard work and your putting yourselves in the
19 place we are. We're certainly going to take all your
20 comments to bear. It is too bad that our chair, Judge
21 Hinojosa, is not here, because I'm reminded that our
22 Commission benefits from having a chair who is, in essence,
23 along the Mexican/U.S. border. We hope to bring all of this
24 to bear, and somehow end up with something that is along the
25 lines that you outlined, Judge Vazquez.

1 Thank you.

2 JUDGE VAZQUEZ: Thank you very much.

3 COMMISSIONER CASTILLO: We'll go on to our next
4 panel. I know we're running behind. I don't want to keep
5 anyone. We'll get the Department of Justice perspective, and
6 Speaking about Texas, switch back to the Western District of
7 Texas. I welcome the U.S. Attorney from that district, Mr.
8 Sutton. Thank you for being here.

9 MR. SUTTON: Thank you. Good morning everyone.
10 Thank you, Mr. Chairman, and members of the Commission for
11 letting me come before you today. Good morning.

12 It is my privilege to appear before you to discuss
13 these important issues surrounding immigration and federal
14 sentencing policy. My name is Johnny Sutton. I'm the United
15 States Attorney for the Western District of Texas. Before
16 becoming a U.S. Attorney, I served as an associate deputy
17 attorney general for the Department of Justice. I was on the
18 transition team that had the pleasure of transitioning in
19 2001, which was a very exciting event we can talk about
20 another time, when I discovered that the Department of
21 Justice was 125,000 strong, and we had to be ready to go on
22 January 20th.

23 I was also, before that, the criminal justice
24 policy director for then-Governor Bush, George W. Bush. And
25 before that, I was a front-line prosecutor as an assistant

1 district attorney with Harris County, Texas -- that's
2 Houston -- for eight years as a state prosecutor. I am
3 currently the Acting Chairman of the Attorney General's
4 Advisory Committee.

5 The reentry of criminal aliens after deportation,
6 aside from displaying general disrespect for our laws,
7 presents a significant threat to public safety. The vast
8 majority of defendants we prosecute for reentry after
9 deportation have felony convictions, and a very large
10 percentage of those defendants have multiple felony
11 convictions.

12 As the sentencing guidelines acknowledge, repeated
13 criminal behavior is an indicator of limited likelihood of
14 successful rehabilitation. Every conviction of a criminal
15 alien represents a reduction in the risk of future crimes in
16 the United States. With this in mind, the Department
17 believes it's important to maintain the strength of the
18 existing sentencing guideline scheme in order to deter future
19 criminal conduct, and incapacitate criminal aliens, thereby
20 preventing them from committing further crimes. It is the
21 Department's hope that amendments to the immigration
22 sentencing policy address and reflect the threat to public
23 safety that is presented by aliens who return after being
24 deported.

25 The Department also believes that we can further

1 strengthen the sentencing guidelines by making them simpler.
2 Prosecutors, agents and probation officers spend an
3 inordinate amount of time identifying and documenting and
4 researching prior convictions to determine whether they
5 qualify as aggravated felonies. Defense attorneys must
6 perform the same analysis, and eventually judges must do so,
7 as well. If a case proceeds to sentencing, the process
8 begins anew to determine not only whether a particular
9 conviction qualifies as an aggravated felony, but also to
10 determine which, if any, of the enhancements set forth in
11 Section 2L1.2 of the sentencing guidelines will apply in the
12 case.

13 As the interim staff report notes, the application
14 of Section 2L1.2 does not always depend on whether a crime
15 qualifies as an aggravated felony. This is especially true
16 in the context of the definition of "crime of violence" in
17 the statute and in Section 2L1.2.

18 It is important to put these proposals and hearings
19 in context. Our position regarding the amendments to the
20 guidelines is part of a comprehensive strategy addressing
21 border security. As President Bush recently stated:

22 "Keeping America competitive requires an
23 immigration system that upholds our
24 laws, reflects our values, and serves
25 the interests of our economy. Our

1 nation needs orderly and secure borders.
2 To meet this goal, we must have stronger
3 immigration enforcement and border
4 protection, and we must have a rational,
5 humane guest worker program that rejects
6 amnesty, allows temporary jobs for
7 people who seek them legally, and
8 reduces smuggling and crime at the
9 border."

10 To achieve these goals, the administration, working
11 with Congress, has been seeking ways to improve border
12 security, discourage, and prevent illegal entries, and
13 hopefully, as a result, reduce the number of such cases
14 brought before the courts. We are using new technologies to
15 detect and identify individuals attempting entry at our
16 borders, and to discourage anyone from entering except at
17 authorized entry points.

18 We have increased security, particularly here in
19 the Southwest, where we have increased and will continue to
20 increase the number of federal agents who patrol the border.
21 Just recently, the President signed the Department of
22 Homeland Security Appropriations Bill, which provides funding
23 for an additional 1,000 Border Patrol agents. The increased
24 funding will allow Immigration and Customs Enforcement --
25 ICE -- to add roughly 250 new criminal investigators to

1 better target human smuggling operations. It will also allow
2 ICE to add 400 new immigration enforcement agents.

3 The Department is also working with the Congress on
4 a number of proposals to amend the criminal and civil
5 provisions of the Immigration and Nationality Act, as well as
6 Chapter 75 of Title 18, which deals with passport and visa
7 violations. In addition, the administration has expanded
8 detention and removal capabilities to eliminate the "catch
9 and release," and has greatly increased interior enforcement
10 of our immigration laws, including increased work site
11 enforcement.

12 In the Del Rio Division of the Western District of
13 Texas, my office has worked closely with Border Patrol and
14 the U.S. Customs and Border Enforcement to carry out
15 Operation Streamline II, a no-tolerance approach to illegal
16 entrance without inspection. Border Patrol was apprehending
17 a large number of aliens from South and Central America in
18 this area who were surrendering voluntarily to secure their
19 release into the United States pending removal hearings. The
20 vast majority of those released disappeared into the interior
21 and did not return for their scheduled hearing.

22 With a view to ending this catch and release
23 practice, and to deterring illegal entry in the Eagle Pass
24 area, we began prosecuting all undocumented aliens
25 apprehended in certain zones between Eagle Pass and Del Rio,

1 Texas for misdemeanor reentry without inspection. From late
2 December of 2005, when the operation began, through late
3 February, more than 1600 illegal entrants have been
4 prosecuted under this operation. Of course, prosecution is
5 an important component of border strategy, and one most
6 relevant to today's hearings. As your statistics reveal
7 unequivocally, the number of immigration cases has steadily
8 increased over the last decade, so that now immigration and
9 related cases dominate the work of the courts along the
10 Southwest border, and account for 22 percent of the entire
11 federal criminal docket.

12 In the Western District of Texas, for example, in
13 fiscal year 2002 through fiscal year 2005, felony immigration
14 cases increased from 35.3 percent of our docket to 54.2
15 percent of the docket. During that period, the total number
16 of immigration felonies increased from about 1400 to over
17 2700 cases. The vast majority of those cases involved
18 illegal reentry after deportation or removal.

19 The Department as a whole also continues to see
20 increases in the number of reentry cases prosecuted. Between
21 2001 and 2005, the number of such prosecutions rose to some
22 59 percent. We expect this trend to continue, if not
23 accelerate.

24 Although we hope to reduce the number of new cases
25 through the deterrence factor that accompanies increased

1 border security, we recognize that the number of new reentry
2 cases continues to rise, in part as a result of ever-
3 improving ability to identify returning criminal aliens.
4 Along the Southwest border, the staggering and ever
5 increasing number of these cases has forced U.S. Attorneys to
6 develop innovative strategies to handle their case loads.
7 We're all doing all that we can to maintain our ability to
8 prosecute every deserving case by maximizing efficient use of
9 our finite resources.

10 To that end, some of our offices employ the
11 Attorney General-approved early disposition program, as
12 authorized by Section 401(m) of the Protect Act and Section
13 5K3.1 of the sentencing guidelines. To be effective in
14 protecting the public, we must assure that returning criminal
15 aliens are caught, and that they receive appropriate and
16 proportional punishment. With the staggering number of
17 immigration cases now being prosecuted, we believe the goals
18 of this guideline amendment cycle should include ensuring
19 that guidelines account for the risk factors and aggravating
20 circumstances that are presented by returning criminal
21 aliens. By accounting for such risk and aggravating
22 circumstances, deterrence and incapacitation can be targeted
23 where they are most needed. At the same time, we are keenly
24 aware of the burdens of large numbers of cases on all the
25 elements in the criminal justice system, and the need for

1 sensible reform that simplifies application of Section 2L1.2
2 in a fair manner in order to relieve the litigation burdens
3 on the participants in the sentencing process.

4 The Department believes that the options described
5 in the January 25th proposed amendments to the sentencing
6 guidelines are a step in the right direction towards
7 achieving these goals. We further believe that improvement
8 can be attained by simplifying the guidelines to eliminate
9 the Shepard/Taylor categorical approach altogether in the
10 guideline sentencing context, or by avoiding the creation of
11 undue narrow categories of application.

12 Let me turn to the proposals in the section. As
13 the interim report notes, under this section, the current
14 specific offense characteristics require duplicate, sometimes
15 conflicting analysis when first determining the statutory
16 maximum penalty, and then determining which, if any, of the
17 specific offense characteristics apply under Section 2L1.2.
18 Indeed the categorical analysis has led to counter-intuitive,
19 it not capricious, results in some cases, allowing bad actors
20 to avoid appropriate punishment on seemingly technical
21 grounds.

22 Let me give you a few examples from my district.
23 In one case, the defendant had a prior conviction for an
24 aggravated battery under Illinois law. Although the prior
25 conviction involved nearly strangling his victim with a rope

1 to death, we had to take the position at his conviction that
2 his conviction was not a crime of violence. Under the Fifth
3 Circuit authority applying Shepard, aggravated battery under
4 Illinois law is not a crime of violence because it can be
5 committed without the use or attempted use of force.
6 Although the prior crime was clearly violent, the defendant
7 was not subject to the 16-level adjustment under the
8 guideline as presently formulated.

9 In another case, we had to conclude that an assault
10 on a police officer under Texas law was not a crime of
11 violence, even though the defendant conceded that he gave the
12 arresting officer a head butt to the eye, tore a ligament in
13 the officer's thumb, and kicked the officer in the shin while
14 resisting arrest. Because the offense could've been
15 committed without the use of force, the prior conviction did
16 not satisfy the categorical test of crime of violence.
17 Again, we were compelled to concede that the 16-level
18 adjustment did not apply to the undisputedly violent
19 offender.

20 The analysis of qualifying convictions is performed
21 according to the Supreme Court decisions in Taylor and
22 Shepard. Under these decisions, a conviction qualifies as an
23 aggravated felony or triggers a specific offense
24 characteristic only if, one, the statute of conviction fits
25 within the definition of qualifying offense, for instance,

1 the modern generic definition of "burglary," or two, if the
2 statute of conviction contains offenses that fall within the
3 definition, or others that do not, in the limited judicial
4 records establish the conviction was for an offense that fits
5 within the definition. This analysis is cumbersome, and
6 obtaining the necessary records is a time-consuming process
7 for prosecutors, defense attorneys and probation officers.

8 In addition, the categorical analysis has sparked
9 a seemingly endless wave of litigation in the trial and
10 appellate courts. Eliminating the need for this analysis
11 would greatly reduce the workload for the participants in the
12 sentencing process and improve the efficiency and reliability
13 of sentencing determinations.

14 The Department favors moving towards a system in
15 which the length of the prior sentence is the guiding factor.
16 Such a sentence could still include enhancements for prior
17 convictions for certain serious offenses, such as murder,
18 rape, kidnapping and terrorism. The defendants who believe
19 their sentences were unduly harsh in the underlying case, and
20 therefore trigger too stiff an enhancement, could move for
21 downward departure and rely on reports and other records in
22 the underlying case to support their request, similar to
23 current practice.

24 Of the options presented to the Commission to
25 address the categorical approach, the Department favors

1 option one, with one modification. This option requires an
2 aggravated felony conviction to trigger the enhancements in
3 Subsections (b) (1) (A), (B) and (C) of Section 2L1.2. As the
4 interim staff report notes, this would result in only one
5 categorical analysis being performed, but would not do away
6 with the analysis completely. However, as proposed, this
7 option would create an unduly narrow class of cases subject
8 to enhancement in Subsection (b) (1) (B) through the use of the
9 term "aggravated felony" in that subsection.

10 Many of the crimes included as aggravated felonies
11 in 8 U.S.C, Section 1101(a) (43), include crimes of violence,
12 theft and burglary, and require a sentence of at least 12
13 months' imprisonment to have been imposed in order to
14 qualify. As a result, a requirement that a conviction be
15 aggravated -- be an aggravated felony to trigger the
16 enhancement in Subsection (b) (1) (B) means only defendants who
17 receive a sentence between 12 and 13 months of imprisonment
18 would be subject to that specific characteristic. We would
19 submit that this is not a large enough class of repeat
20 criminals to justify a special guideline enhancement.

21 We think the better option would be to drop the
22 word "aggravated" from Subsection (b) (1) (B), which would
23 result in enhancements ranging from four levels for those
24 defendants convicted of three or more misdemeanors or
25 ordinary felonies with a sentence of probation, to 16 levels

1 for defendants convicted of aggravated felonies with
2 sentences of imprisonment exceeding 13 months.

3 I'm going to let the record reflect that I'm
4 skipping to the end to save time. There's a couple other
5 issues that we address, but we'll address those in our
6 written -- in written form, and I can answer any questions.
7 But in conclusion, I want to thank you all for this
8 opportunity to address the Commission on these important
9 issues. And particularly I want to commend you all's staff
10 for diligently listening to the views of the Department,
11 public defenders, judges, probation officers and others in
12 preparing their interim staff report and developing the
13 various options that we are discussing today.

14 Thank you very much.

15 COMMISSIONER HOWELL: Mr. Sutton, I'm just going to
16 start out here. It was interesting that you -- you know, you
17 point out that, you know, Congress is now taking up a lot of
18 this policy debate on immigration issues, and they're very
19 thorny, very important, you know, issues for our economy, our
20 national security, and so on. The Federal Defenders also
21 commented in their testimony that Mr. Sands submitted for
22 today, you know, saying quite vociferously that the
23 Sentencing Commission shouldn't be acting because Congress is
24 taking up these issues. And I have to admit -- and I don't
25 think I'm revealing anything -- that this is an issue that we

1 on the Commission have thought about. You know, Congress is
2 taking this up. We think it's also a very important issue
3 for us to address. You know, so I'm just going to ask you
4 this simple question: Should we be acting now, or should we
5 wait for Congress?

6 MR. SUTTON: We are encouraged by the steps that
7 are being taken, so I think -- you know, I don't want to get
8 too far out on a limb here in speaking for the Department,
9 but, I mean, a lot of the steps you're taking we're
10 encouraged to see, and we think they're helpful steps. I
11 mean, that'd be my short answer. I guess I'm a little
12 hesitant to jump too broadly into gigantic issues of
13 immigration policy, because it's very difficult --

14 COMMISSIONER HOWELL: Let us do that.

15 MR. SUTTON: -- and thorny. But we're certainly
16 encouraged by some of the steps we are seeing.

17 COMMISSIONER ELSTON: Do you think it would be fair
18 to say that the proposals that you've advocated in your
19 testimony are largely consistent with the legislative
20 proposals that the Department is advocating with Congress?
21 Is that a fair statement?

22 MR. SUTTON: I think that's a very fair statement.
23 Much of what we're seeing here is consistent with the
24 sentencing structure that the Congress set up. So I don't --
25 from what we've seen, we don't see any dramatic departures,

1 and it's consistent and good.

2 COMMISSIONER ELSTON: And just so my fellow
3 commissioners don't think that I've done a terrible job
4 organizing the Department's responses to their invitations,
5 the reason that you were not able to testify in San Antonio
6 is that you were not available that day. Correct?

7 MR. SUTTON: That's right. I was traveling that
8 day, and in classic Department fashion, I'm in San Diego when
9 my home base is San Antonio. But I apologize for that.

10 COMMISSIONER CASTILLO: Did you get a chance to
11 look at the proposal the Defenders made from Texas?

12 MR. SUTTON: Yes, sir.

13 COMMISSIONER CASTILLO: And what's your position
14 with regard to that?

15 MR. SUTTON: We think it weakens the guidelines and
16 raises the burden on the Government, which we don't approve
17 of either one of those ideas.

18 COMMISSIONER CASTILLO: You think the net effect of
19 that is to lower the penalties in an unfair manner?

20 MR. SUTTON: We think that that's accurate, that it
21 would weaken the guidelines and lower the penalties. We also
22 are concerned about some of the proposals and the
23 entitlements of defendants to return to visit family and
24 cultural assimilation. We really feel that those are
25 issue -- those are truly issues that are best left to

1 Congress to identify.

2 COMMISSIONER CASTILLO: Do you see any way to
3 target the 16-level enhancement any better? Because there's
4 been a lot of thought that, number one, it was never really
5 fully explained to begin with, and number two, it is overly
6 inclusive at this point in time.

7 MR. SUTTON: Can you be more specific on what you
8 mean?

9 COMMISSIONER CASTILLO: Well, that the term
10 "aggravated felony" just includes too many felonies. Why are
11 we labeling them all as a 16-level enhancement, which, as you
12 know, under the sentencing guidelines, has a dramatic effect
13 on someone's sentence? Can't we do any better?

14 MR. SUTTON: I think there's widespread agreement
15 that it causes a lot of grief in a lot of places. We like
16 option one. We think that removing "aggravated" and having
17 some set time might make it more streamlined. We're dealing
18 in such huge volume, especially in the Western District of
19 Texas, that our judges and probation officers are literally
20 pulling their hair out because of trying to stop and figure
21 this out. So the Department supports the idea of a set
22 number and the idea of, if we can remove "aggravated," that
23 that may help. But I certainly am not claiming any expertise
24 to solve that issue.

25 COMMISSIONER HOWELL: And may I just interrupt and

1 follow up on that?

2 COMMISSIONER CASTILLO: Yes.

3 COMMISSIONER HOWELL: What do you think about the
4 proposal from our two distinguished judges on our first panel
5 about having a safety valve because of mandatory minimums
6 that are at play in alien smuggling, both three years and
7 five years, and also for mitigating role?

8 MR. SUTTON: Right.

9 COMMISSIONER HOWELL: I don't want to put you on
10 the spot.

11 MR. SUTTON: Yeah, it's a little bit of putting me
12 on the spot there.

13 COMMISSIONER HOWELL: You have a very senior
14 Department person here also.

15 MR. SUTTON: Yeah. At least I'm not in my district
16 with my judges.

17 (Laughter.)

18 MR. SUTTON: We would probably be resistant to
19 that.

20 COMMISSIONER HOWELL: Why is that?

21 MR. SUTTON: Well, I guess the main thing is that
22 one of our struggles is always to get the appropriate
23 punishment on alien smugglers, and in our district at least,
24 we feel that they're not getting the punishment they deserve
25 in many situations. We resist, I guess, dropping that down.

1 We feel that we move cases fairly well, with reasonable
2 results. But I think you heard from some of our judges that
3 were concerned that alien smugglers were not getting maybe
4 the punishment they deserve in every case. Anything that
5 sends the message to the smugglers that, you know, you can
6 make a whole bunch of money, and it's going to be a
7 punishment level that may come down, we would resist.

8 COMMISSIONER HOWELL: Okay. Well, I just have one
9 last question, because you talked about deterrence. I was
10 just curious about this, and it really doesn't have to do
11 with the guidelines per se. But in 8 U.S.C. 1324(e), there
12 is a provision that asks -- you know, that requires the
13 Department of Homeland Security and the AG to develop and
14 implement an outreach program in the U.S. and abroad to help
15 deter -- to educate the public about penalties for alien
16 smuggling and harboring.

17 Do you know anything about -- is there such a
18 program?

19 MR. SUTTON: Honestly, I -- I mean, I'm sure
20 there's someone at the Department that is probably working on
21 that. I honestly do not know the answer to that question.
22 I know that we do work very, very closely with the Mexican
23 Government. When I was with the Department, we would have
24 meetings all the time in Mexico City and in Washington to try
25 to educate folks. From my experience, the Mexican Government

1 was pretty good about getting the message out. There's parts
2 of it that are not, and we've gone back and forth on that.
3 But I assume that what that is -- well, maybe I shouldn't
4 assume anything. I can call the Department and follow up on
5 that. And Mike may know the answer.

6 COMMISSIONER CASTILLO: And I take it you're a
7 believer in the Fast Track Programs that exist.

8 MR. SUTTON: We are. We are a believer. We think
9 it's important. Obviously, there's some dynamics to it that
10 are difficult. But on the Southwest border, I mean, we did
11 over 5,000 felony indictments, 2500 in our El Paso Division
12 alone, which is 31 lawyers, of which, you know, probably only
13 21 of them are full-time non-supervisor criminal lawyers. So
14 it's an incredible burden. Frankly, we don't -- you know,
15 there's districts like San Diego that use it a little more
16 strongly than we do. But we think it's an important tool.
17 It's something that the Attorney General is looking at very
18 closely to determine where it should be appropriately used,
19 and that's something that we're reviewing at the current
20 time.

21 COMMISSIONER CASTILLO: Is it accurate that El Paso
22 does not have a Fast Track Program?

23 MR. SUTTON: We do have a -- well, it's a little
24 bit of a nuanced answer there. We are authorized for Fast
25 Track. We are able to move a lot of cases without doing a

1 lot of Fast Track, but we want to have Fast Track in El Paso,
2 and a lot of it is internal situations that are unique to
3 that district -- to our division. But we don't do a great
4 deal of Fast Track. But I certainly don't want that to give
5 you an impression that we don't want it and have that tool
6 available, because it's very important to us.

7 COMMISSIONER ELSTON: Just to follow up on that,
8 and since you are the Acting Chair of the AG, and seeing an
9 issue presumably that all the U.S. Attorneys are struggling
10 with and are dealing with, I think one of the concerns that
11 we all have on the Commission -- I think you've heard it from
12 those of us here, and the Western District hearing in San
13 Antonio, I think it's fair to say the other two commissioners
14 mentioned it also -- it's the concern being that it seems
15 still somewhat haphazard how Fast Track is being used.
16 Hearing about it in the Southern District of Texas and in
17 your district, for example, some divisions have them, some
18 don't. The Chair who sits on the border does not have it in
19 his district, and is able -- and he can speak for himself on
20 this -- but is obviously able to handle his case load. I
21 think it's those kind of examples that cause all of us to sit
22 back somewhat and scratch our head on, when is it really
23 necessary? Obviously, 85 million border entries in this
24 district speaks quite powerfully to a problem. But I think
25 one of the things we hear as we have these hearings and hear

1 from people on the subject is a concern that it's somewhat
2 haphazard, that -- also a concern, I think, that we all have
3 is, in terms of application of the guidelines, whether it
4 makes sense for someone to get a four-level reduction, say,
5 under a Fast Track Program if you're caught in El Paso, but
6 not if you're caught at a border crossing 200 miles away, or
7 flip it around to the Southern District of Texas, if you're
8 caught at certain borders. So I think that's the concern
9 that we have in a sense of a need to, on the Department's
10 part, to put together some more coherent strategy or plan for
11 where Fast Track is truly needed and where it's not.

12 MR. SUTTON: Well, I can tell you the Department
13 definitely has Fast Track under review, as the Congress
14 allowed us to do the Fast Track. So it's certainly something
15 that's approved and was considered when having this debate
16 over disparity. And again, generally it's a choice between
17 a reduction in sentence versus nothing happening at all,
18 which is -- you know, the question is, how do you balance
19 that in fairness nationwide, and keep it in control? All I
20 can say is the Department is carefully reviewing it right
21 now, and is, I think, doing a pretty good job of controlling
22 it. There's always going to be dynamics that are very unique
23 to certain divisions, like El Paso versus San Diego, that
24 are -- you know, are very hard to, without explaining a whole
25 lot of factors and a lot of time, explain why certain

1 districts need it and others don't need it as dramatically.
2 But I can tell you, the Southwest Border Team -- U.S.
3 Attorney Team -- feels very strongly that we should keep it,
4 and that it makes America safer.

5 COMMISSIONER CASTILLO: John -- Commissioner Steer,
6 any questions?

7 COMMISSIONER STEER: I did have one sort of derived
8 from the Defender proposal. It raises the issue of a
9 heightened offense level for the individual who reenters
10 after having multiple prior convictions for aggravated
11 felonies. In your experience, is that a frequently occurring
12 situation?

13 MR. SUTTON: To see people come back with multiple
14 priors?

15 COMMISSIONER STEER: Yes.

16 MR. SUTTON: Unfortunately, that does happen more
17 than we'd like.

18 COMMISSIONER STEER: Not just multiple priors, but
19 multiple prior aggravated felonies.

20 MR. SUTTON: Uh-huh. And that is one of the
21 dynamics that we're trying to address here, is not only do we
22 have an illegal alien, but many of them have been convicted,
23 gone to prison, been deported, come back, been deported. So
24 that's, I think, one of the reason we feel so strongly about
25 increased punishment, and really not giving much in this

1 regard, because this is a class of offender that we feel very
2 strongly about that we've already made the decision to keep
3 them out, and the only thing that we can do to keep America
4 safe is to, you know, ramp up their punishment as they
5 continue to come back, because our experience, unfortunately,
6 is they will continue to come, and that the best deterrent
7 for us is increased punishment, literally locking them up in
8 some time.

9 COMMISSIONER STEER: Punishments are pretty severe
10 in this area, but we don't seem to come anywhere close to
11 what Congress has authorized for aggravated felony
12 conviction, 20 years. So I don't know what category would --
13 we ought to be looking at, other than the terrorist, of
14 course.

15 MR. SUTTON: Right.

16 COMMISSIONER STEER: But no one's talking about
17 enhancements that come anywhere close to pushing penalties to
18 that range.

19 MR. SUTTON: Right.

20 COMMISSIONER CASTILLO: Anything else?

21 COMMISSIONER ELSTON: One quick question. I notice
22 that option five didn't attract a lot of interest. I just
23 wanted to get a little bit of your sense on that, because
24 from a prosecutor's perspective, you would think that option
25 five would be a good one, because it does tend to shift the

1 burden to have the different -- you know, you get the top
2 level unless you can establish that your criminal history is
3 less serious than others. But I take the Department is not
4 in favor of option five.

5 MR. SUTTON: Well, our choice is option number one
6 is our first option. We think that option five is an
7 attractive option. It's simple, it's easy, and it would
8 eliminate a lot of the categorical problems that we see.
9 Option one's our favorite, but we certainly don't not like
10 that one.

11 COMMISSIONER ELSTON: Right. Understood.

12 COMMISSIONER CASTILLO: Thank you very much,
13 Mr. Sutton.

14 MR. SUTTON: Thank you.

15 COMMISSIONER CASTILLO: We'll continue right along
16 with the perspective from the defense. I'll recognize Mr.
17 Sands, Federal Public Defender from the District of Arizona,
18 someone who's (coughing; indiscernible) Commission. And then
19 I also welcome Mr. Reuben Camper Cahn, Executive Director of
20 the Federal Defenders of San Diego.

21 MR. SANDS: I note that Commissioner Howell had to
22 step out for a conference call.

23 COMMISSIONER CASTILLO: Yes, she did. So excuse
24 her absence, but a record is being kept. So -- have you
25 decided who would go first? -- flipped a coin?

1 MR. CAHN: I think I'm the choice to go first.

2 COMMISSIONER CASTILLO: Okay, Mr. Cahn.

3 MR. SANDS: He's getting acceptance of
4 responsibility.

5 COMMISSIONER CASTILLO: Hometown advantage. We'll
6 let you proceed first.

7 MR. CAHN: Let me begin by thanking the Commission
8 for giving me the opportunity to speak. I appreciate that.

9 I should begin probably by a confession of my
10 limitations, which is that I am neither an expert on
11 immigration nor on the guidelines. I'm a trial lawyer, and
12 I've practiced here in San Diego, and in another district
13 with a fairly difficult immigration problem, the Southern
14 District of Florida, where I was for 13 years. What I'd like
15 to do is give a perspective based upon my experience in those
16 two different places.

17 Let me begin with my adopted city, my adopted home
18 of San Diego, and talk about the way things really work here
19 in San Diego. And I think it works well. Let me begin with
20 that. I echo the judges' comments that Fast Track works well
21 here. It's appropriate. It's absolutely necessary. But
22 beyond being necessary, I endorse it because it results on
23 the whole in more just sentences than would be obtained
24 solely by application of the guideline.

25 What that means in reality here -- here in San

1 Diego, on the whole, the U.S. Attorney's Office does not
2 prosecute 1326 cases that don't involve felony -- prior
3 felony convictions or prior aggravated felonies.
4 Nevertheless, the general offer made in the average case is
5 a 30-month offer. That's the vast majority -- well, let me
6 just say the majority of cases are resolved by a 30-month
7 offer under the Fast Track Program.

8 The next category of cases are those cases that
9 involve either someone with a category five or category six
10 criminal history, or particular priors that lead to greater
11 scrutiny and a fear that there's greater risk in their
12 returning, greater punishment is called for. Those
13 individuals receive an offer of 48 months. In the
14 exceptional case, those cases where neither of those
15 sentences is felt to be adequate, those cases where, for
16 instance, someone has a prior conviction for a sexual
17 offense, sexual assault, or some sexual offense involving a
18 minor, in those cases, there's simply no offer made, and the
19 offer is only to a guideline sentence to be determined by the
20 court after a full sentencing hearing.

21 The Government appears to have, one, no difficulty
22 in making the distinctions that need to be made in
23 determining, who are the real people who need to be punished
24 most severely? Who are the people who need to be punished
25 less severely? And who are those that fall in the middle?

1 The extensive litigation that has plagued so many
2 districts, and at times plagues our district, about the fine
3 distinctions made in the guidelines and in immigration law is
4 eliminated and the system works well. And as I said, the
5 sentences are just, and what are more just than might
6 otherwise be obtained. And when I say that, I want to
7 emphasize that these are offers made by the prosecution, and
8 when the prosecution -- DOJ -- the Government -- comes in,
9 they are neither holding their nose nor swallowing hard in
10 making these offers. And judges, I don't believe, are having
11 any problems in imposing the sentences called for by these
12 offers.

13 So I think when the Commission looks at the
14 possibility of ramping up penalties well beyond where they
15 are now, it needs to look at the fact that these are
16 sentences being imposed in so many cases in a district which
17 has, as Judge Gonzalez and Judge Huff said, 13.6 percent of
18 all the immigration offenses, and they're considered to be
19 adequate, sufficient and just, that it makes little sense to
20 look hard at ramping up all penalties without focus on
21 specific harms that might justify some particular action.

22 On the other hand, having practiced here -- I also
23 practiced, as I said, a long time in Miami -- and Miami is a
24 district with -- I don't know if a Fast Track Program has
25 ever been authorized, but there's certainly never been one

1 implemented. All our cases were done as strict guideline
2 sentences. As a result, all the cases involved protected
3 litigation, both to look for possible defenses, because the
4 sentences were so severe, and protracted litigation about the
5 sentencing itself. So I was often involved in sentencing
6 hearings that lasted many, many hours, if not an entire day
7 or longer. And there was a general sense, I think, at least
8 amongst the judges, and I think amongst practitioners as a
9 whole on both sides, both the Department of Justice and
10 defense attorneys, that the sentences were out of whack. And
11 when I say that, I mean that -- let me step back and say that
12 the District of -- the Southern District of Florida has a
13 very broad range of crimes being prosecuted there. So we saw
14 a lot of gun cases, we saw a lot of bank robberies, we saw a
15 lot of drug cases, both importations, but other sorts of drug
16 cases. What was very difficult for me, and I think very
17 difficult for many judges, and for some of the prosecutors,
18 as well, was trying to understand why somebody who had
19 reentered, often somebody who had been in the country for a
20 good period of time after their reentry, had committed no
21 further crimes, had not harmed the country beyond their
22 simple reentry into the country, would be subject to a
23 sentence as long as somebody who was facing a felon in
24 possession charge, a drug charge, or some other very serious
25 charge. There was just something out of kilter in that

1 regard, that these severe sentences were being imposed
2 regardless of the actual conduct of the person after
3 reentering, and regardless of any harm they had caused.

4 So looking at these two different situations, I'm
5 troubled by the idea that a more severe guideline system
6 would be generally imposed in those districts without Fast
7 Track. Aside from increasing the disparities that exist
8 already, I think they would simply be unjust, and I think
9 that the injustice, when people look at particular cases,
10 would be recognizable to almost anyone.

11 I'd like to give a couple brief comments very
12 targeted on the alien smuggling cases. I won't attempt to
13 give any broad perspective on them. But I wanted to address
14 particularly the adjustment that's included in the proposals
15 for smuggling of children, unaccompanied minors. The way in
16 which it's drafted, I feel reaches far too broadly, as I
17 understand the harm that's being sought to be prevented.

18 When I was at the immigration round table that took
19 place in Washington, there was a very specific harm that was
20 talked about, and that was the harm of young children brought
21 to this country by smugglers who were in no way connected
22 with the family themselves, and children of such an age that,
23 when there were apprehensions and arrests, there would be an
24 inability of the children to identify relatives, parents, and
25 there were extreme difficulties on the part of authorities

1 here in the United States and in Mexico, or whatever country
2 these individuals came from, in reuniting these minor
3 children with their parents. That was a specific harm about
4 which concern was voiced. And yet the proposal, reaching all
5 the way up to children who may be as old as 17, children in
6 name only, doesn't seem in any way to address that harm, and
7 seems likely to simply ramp up penalties in ways that don't
8 make sense.

9 I would note that in this district -- this is not
10 something I saw in Miami because Miami was very different --
11 we have unaccompanied minors who are coming on their own.
12 They're not seeking to reunite with parents. They're simply
13 coming here to work -- age 15, 16, 17. Oftentimes these
14 individuals are acting as guides coming across the mountains.
15 So to impose enhanced penalties in that range of ages for
16 minor children being smuggled simply seems too broad and
17 doesn't seem to address the harm with which the Commission
18 was concerned.

19 Last -- or actually, I guess there are two other
20 things I'd like to briefly comment on based on my experience
21 as a practitioner and somebody who's often been flummoxed by
22 the complexity of these guidelines and the difficulty of
23 litigating under them.

24 The Department of Justice representative said that
25 they advocated the Commission acting despite all the bills

1 that are pending in Congress and the myriad approaches that
2 might be taken. And while the Commission's -- some of the
3 Commission's suggestions may be in line with some of those
4 bills that are pending, they may not be in line with some of
5 the other bills. One of the greatest difficulties as a
6 practitioner in dealing with these cases, and advising our
7 clients, and in litigating these matters before the courts
8 is uncertainty in new law. I would hate to put this
9 district, to put my office, to put my clients, and to put the
10 judges in a position of litigating what would essentially
11 become a brief interim regime. I'm reminded of the position
12 we were all in between Blakely and Booker, when none of us
13 knew what was happening. We were all litigating in
14 anticipation of the Supreme Court acting. I can see us being
15 put in exactly the same position here, and this just being
16 incredibly difficult for everybody who operates in our system
17 in very difficult conditions already.

18 Last, I have one comment that I imagine is not
19 authorized by the defenders or anyone else, but it comes out
20 of my particular experience. One of the things I didn't
21 mention is that before becoming a Federal Defender in Miami,
22 I was a state public defender in Broward County, Florida, and
23 I did that for four years after leaving corporate law. I
24 spent a lot of time, as most state public defenders do, in
25 arraignments 21 days after the arrest of defendants, talking

1 to defendants who were sitting in the jury box with nothing
2 but what's called a PC affidavit, which is a very, very brief
3 complaint, talking to them about their case, and oftentimes
4 resolving their cases at arraignment.

5 In federal court, I think we tend to get the idea,
6 well, we really -- we have the luxury of time and resources,
7 even if we're pressed. So we believe, because this is what
8 we do, that when a 13 or 14-month sentence is imposed instead
9 of a six-month sentence or an eight-month sentence, or a
10 22-month sentence, there are very good and proper reasons for
11 that, that all the litigants have brought to bear their
12 resources to convince the decision-maker, the judge, about
13 what's appropriate, that the judge, with the benefit of a
14 good deal of information, has really very carefully decided
15 what sentence to impose. And that's true in federal court.
16 But I can tell you that is absolutely not true in the state
17 courts of Florida, and I imagine it's not true at all in any
18 other state court in this country.

19 Oftentimes decisions were made on things as simple
20 as whether or not the client didn't want to litigate his case
21 because there was a time-served offer that day. I made
22 decisions to plead people to what were, generally speaking,
23 very lengthy terms of imprisonment, because I knew at various
24 times when I was in the State of Florida that they would
25 serve as little as a month on a year sentence. Those are the

1 realities of what I did, doing the best job I could do with
2 160 case files as a public defender in the State of Florida.

3 So I'm really concerned about the idea of tying
4 fine gradations in the guideline to sentences in state court
5 that may in no way reflect considered judgments about the
6 culpability of the individuals who are involved in those
7 cases. And so I'd ask the Commission to look very hard at
8 that, and be very skeptical about that possibility.

9 And with that, I'd pass it over to my far more
10 learned colleague.

11 MR. SANDS: Hardly. Hardly.

12 We are grateful for the opportunity to appear in
13 front of Commission once again. For 15 years, we've had this
14 dialogue about what is a proper sentence, what is fairness,
15 and we are appreciative of the spot at the table, the spot at
16 previous tables, working with the staff, especially in
17 immigration.

18 The topic we talk about are sentences. And
19 although the grammar may have been changed because of Booker,
20 we are still seeking the right thing, which is an appropriate
21 sentence in this matter.

22 The Commission's proposals are put forth at a time
23 which there are voices in Congress that are discussing other
24 options. The Department has talked about it, and the
25 Commission itself is aware. As Mr. Cahn has said, it is

1 troublesome to imagine a state of maximum uncertainty in
2 which the Commission finally acts on guidelines, and then
3 Congress acts, and then the Commissioner has to come back yet
4 again. We are then talking about not only three looks, but
5 three supplements, and what are we going to do? So despite
6 the fact that the Commission has spent a great deal of time
7 looking at this, a go-slow approach, given the uncertainties,
8 might be something the Commission should think about.

9 The Commission's proposals in this matter are
10 troublesome on several aspects. The Defenders' proposal,
11 while not perfect, attempts to adopt the graduations and the
12 calibration that has been the hallmark of the Commission for
13 the past 15 years. It seeks to target the most culpable
14 defendants, using language, using a matrix that the
15 Commission is aware of, trying to find within the language of
16 the guidelines ways of punishing, as I said, the most
17 culpable, and yet having least punishment for those that are
18 least culpable. What our proposal does, as the Commission is
19 aware, is look at those that have several priors, looks at
20 the length of sentences, and gives the court the guided
21 discretion that the Commission has sought.

22 Against this, we are looking at the proposals from
23 others that use the plus-16, again, as the bludgeon to try to
24 sweep in all these sentences. The plus-16, as the
25 Commissioners have pointed out, has never really been

1 justified. It is there, and that has caused a great deal of
2 trouble and a great deal of criticism for some time.

3 The Commission is an expert body. It was
4 recognized as such at its formation. It's been lauded as such
5 by the courts. The Supreme Court has recognized its
6 expertise in Booker, the case whose name should be spoken.
7 It's just one of those things, I thought I would say "Booker"
8 and not shy away from it. The Commission should undertake
9 that responsibility of saying why it's level 16, a level, as
10 previous panelists pointed out, is a billion dollars in
11 antitrust, 25 million in fraud, approximately the same as
12 manslaughter. That is a huge cliff, the steepest -- or
13 not -- one of the steepest in the guidelines. The
14 Commission, in trying to rectify that, should go back to
15 first principles.

16 The definition of "aggravated felony,"
17 unfortunately, is overbroad and ambiguous. It sweeps in far
18 too many. At the present rate, it seems like close to 40,
19 soon to be 50 percent of the cases are defined as aggravated
20 felonies. You're looking at sentences for a defendant who
21 may have served days or a few months in the state all of a
22 sudden facing three, four or five years in the federal system
23 for offenses that he's truly not cognizant of.

24 There's been a great deal of discussion by my
25 learned adversary, Mr. Sutton, about homeland security, about

1 keeping the border safe. But a lot of -- most of the
2 defendants that are coming back are pulled by economic
3 reasons, family reasons. They are still guilty. They
4 shouldn't come back. It is illegal. But it's far different
5 to recognize why they're coming back from that very small
6 percentage of cases of people coming back to do ill or coming
7 back with a wish to do ill against the country. The pull for
8 most of the illegal reentries is economic and family.

9 In looking at the proposals that the Commission has
10 done, and looking at the prior history, as Reuben pointed
11 out, the state sentences are not a good marker. The
12 Commission was forced to use that 15 years ago because, at
13 the time, it was one of the better ways of predicting priors.
14 Scholarship and commentators have cast doubt on that. We
15 know that there are some states in which a sentence of 21
16 months is really three months or four months. King County in
17 Seattle, Washington routinely gives 21 months for drug cases
18 for very small amounts. They don't serve nearly that amount.
19 But we see them coming in, and they are caught as much as
20 someone who's given just a few months in California. It is
21 difficult using a prior state as a marker. It just brings in
22 that unwarranted disparity that the Commission has been
23 concerned about for some time, and which it's studying even
24 now in its criminal history report.

25 Of all the options, aside from ours, which we

1 embrace and trumpet, option four is probably the least ill-
2 advised. We would argue and ask that the Commission consider
3 putting in just what I said, and maybe a time frame for the
4 sentences of drug use and crimes of violence, and to limit
5 crimes of violence against the person. Crimes of property is
6 of a different magnitude, far less, I would argue, than a
7 crime against a person. It's one that we could deal with.

8 In all of these proposals that deal with
9 calibration, that deal with looking at the priors, there's
10 been criticism of Shepard and Taylor as having it being over-
11 complicated. In some respects, sentencing, as I've heard
12 judges state, is the most difficult thing for a court to do
13 because you have a person's liberty at stake. A court should
14 take the time, and the resources of the federal courts should
15 be brought to bear on giving that appropriate sentence.

16 I wish to laud the court in the District of Arizona
17 and the Probation Office in providing us with the materials
18 for doing that. I have heard complaints from other
19 districts. The system works in the District of Arizona, and
20 it's the commitment of the court and the probation officer to
21 providing the prior records, to getting us the information.

22 I must take issue with Commissioner Horowitz with
23 saying that San Diego is the only district that would call
24 out for Fast Track. I imagine that Judge Roll and Maggie
25 Jensen would say that the District of Arizona would also be

1 in that realm. But all the Southwest faces those issues.
2 It's not too much asking that when someone is facing years
3 and years, that his or her priors -- that the Government does
4 prove it, and prove it by that element. Even if the
5 Government is unable to get the records, it's not as if the
6 person's going scott free. They will do a time, and the
7 Government, the prosecutor, can always ask for a high end or
8 a variance or an upward. The Government has tools to inflict
9 maximum punishment and maximum pain. The Government should,
10 in the appropriate case, look toward that.

11 Lastly, in dealing with the Fast Track, the
12 Department of Justice has authorized it for a number of
13 districts. We scratch our heads at those districts, too. We
14 recognize, as I mentioned, that the Southwest has a problem.
15 North Dakota has a Fast Track, maybe because of the hockey
16 players trying to get in from Canada. Nebraska, Idaho has
17 it. There's that little bit up there. And so --

18 COMMISSIONER ELSTON: The people in Idaho will
19 point out to you that, at one point, the southern border of
20 Idaho was the border between Mexico and the United States.

21 (Laughter.)

22 COMMISSIONER ELSTON: I think that historic anomaly
23 maybe is not the explanation for the --

24 COMMISSIONER HOROWITZ: I think Mexico would like
25 to go back to that border.

1 MR. SANDS: Plus I think there are people in Idaho
2 that want to form their own country, too. Idaho has their
3 own problems.

4 But with Fast Track, the Commission should be
5 concerned that the districts where 75 percent of the cases
6 are coming through do have Fast Track, and where most of the
7 cases are different from what the guidelines are. It's a
8 situation, as Reuben says, in which the prosecutors are
9 coming in and doing an appropriate sentence, unlike
10 San Diego, we have the Fast Track that's based on the
11 guidelines. So if it's an aggravated felony, and you accept
12 the deal, and you have to accept it quickly, you get four
13 levels off for Fast Track, plus three levels for acceptance,
14 which has a result of cutting the sentence in half. That's
15 virtually across the board for all types of defendants. Most
16 of them do not have violent felonies, but have a drug
17 problem.

18 The prosecutors know that this is a fair sentence.
19 The court knows that this is a just sentence. The guidelines
20 should reflect that. There is a concern by the prosecutors
21 that if there is a calibration of the guidelines so that many
22 defendants are facing a lower sentence, that they would just
23 go to trial. That won't be the case. The prospect of
24 getting out in two years as opposed to three years is still
25 a strong incentive. The prospect of getting out in six

1 months as opposed to 18 months is still a strong incentive.

2 If the guidelines are adjusted to accurately
3 reflect the true cost of these sentences, there are not towns
4 in Mexico or Central America in which billboards will go up
5 saying the guidelines have come down, go north, young man.
6 That is not how it works. They're pulled here by economics.
7 They're pulled here by family. We believe the guidelines
8 should reflect the realities. There should be punishment,
9 but it should be calibrated.

10 Thank you.

11 COMMISSIONER CASTILLO: Thank you both.

12 I will tell you, Mr. Sands, we're not afraid to
13 mention the word "Booker." In fact, one of the things we're,
14 unfortunately, spending a lot of time here in San Diego on --
15 and it's not a well-kept secret -- is the issuance of a
16 forthcoming one-year Booker report by the Sentencing
17 Commission. So stay tuned. It'll be out there.

18 Speaking of that, one of the problems with the Fast
19 Tracks is, in a district such as mine in Chicago, the
20 arguments are being made by defense attorneys, and accepted
21 by some of my colleagues -- not yours truly -- that because
22 there is a Fast Track Program in Arizona, or a Fast Track
23 Program in San Diego, therefore, a reentry defendant in
24 Chicago should get the benefit of those Fast Track Programs,
25 because it creates undue sentencing disparity. That's part

1 of the national reality we're dealing with.

2 MR. SANDS: What is so strange about the Fast Track
3 is that we think there is an image that there is this lone
4 border agent on the border grabbing people desperately as
5 this hoard comes. In Phoenix, every couple weeks I go to the
6 County Jail, and anyone with an Hispanic name gets asked
7 (unintelligible). It's not -- it doesn't take a lot of
8 work -- or if they fall into the hands of the Government.
9 The border itself has other problems. It's a reaction. But
10 it is a situation, as one of you pointed out, where a
11 defendant who manages to get through Phoenix, but ends up in
12 Nevada, all of a sudden loses the 30 months opportunity. And
13 it could be a matter of two hours.

14 COMMISSIONER CASTILLO: Right.

15 MR. SANDS: His van is stopped outside of Phoenix
16 as opposed to outside of Las Vegas. Does that make good
17 policy? Does that promote the unwarranted disparity that is
18 the goal of 3553 and the guidelines? It's troublesome. And
19 what we are seeing is the expansion of early disposition,
20 from illegal reentry, to drugs, to smuggling. What's next,
21 low level fraud at various at various parts, expanded
22 firearms? It is a situation in which the Department of
23 Justice, if one listens carefully, is all in favor of them
24 having the full discretion, and they will push that.

25 COMMISSIONER HOROWITZ: So are you opposed to any

1 expansion, then, of the Fast Track Programs to other
2 offenses, to other types of crime? I would assume that's
3 something you actually don't oppose.

4 MR. SANDS: What we think is interesting about the
5 Fast Track is it shows that the Department of Justice
6 recognizes in certain cases that perhaps the guidelines are
7 too high, and that punishment is too severe.

8 COMMISSIONER ELSTON: Well, I can't really let that
9 one slip by. They do pay my salary.

10 MR. SANDS: I was just trying to goad you.

11 COMMISSIONER ELSTON: That certainly isn't the
12 reason why the Department of Justice supports Fast Tracks,
13 and it's not the Department of Justice that has placed the
14 discretion in the prosecutor's hands with respect to Fast
15 Track Programs, but Congress has done that. That's the law.

16 MR. SANDS: But Commissioner, --

17 COMMISSIONER ELSTON: That's the law. Let me
18 finish. The reason why the Department supports Fast Track
19 Programs, particularly on the border -- and I'm not here to
20 defend Idaho or Nebraska or any of that -- but particularly
21 with respect to the border -- because it's about
22 immigration -- is that we believe that there is a more
23 significant disparity created by not prosecuting people
24 coming across the border than by prosecuting everybody, or a
25 larger number of people, and giving them lower sentences to

1 make it work. That's the argument that we hear from judges
2 and defense attorneys in the Southern Dis- -- and prosecutors
3 in the Southern District of California, that if we don't have
4 these Fast Track Programs, we will have to send them back
5 without prosecuting them, and that's a bigger disparity than
6 the disparity that's created by the Fast Track Program,
7 having it here in the Southern District of California and not
8 having it in Pennsylvania or wherever. So the Department's
9 view is not that these penalties are sufficient.

10 I have to take some issue with some of the comments
11 that your colleague made earlier, as well, because it's very
12 clear to me that neither Congress nor the Department thinks
13 that the penalties are too high. In fact, you're seeing
14 significant -- outside of the border area -- significant
15 pressure to not only increase prosecutions, but increase
16 penalties in these areas. That's what the national debate is
17 about. I don't think you're going to see a national debate
18 about lowering the penalties for illegal reentry after having
19 had an aggravated felony. So I don't think that you should
20 assume that the Department's support for Fast Track supports
21 some support for lower sentences in this area, because that's
22 not at all the case.

23 MR. SANDS: I believe I made the point that the
24 Department wanted justice, and you took me at issue with
25 that. So I just thought that --

1 COMMISSIONER ELSTON: You said lower. You were
2 very clear about that, that the Department thinks that the
3 sentences are too high.

4 MR. SANDS: Well, the Fast Track started to come in
5 as early as 1991 and sooner, which is prior to the
6 congressional mandate. And this was being done under 5K2.0,
7 which the Department then sort of used to say that the courts
8 were out of control. So Fast Track has been the bedevilment
9 of the guidelines from day one.

10 COMMISSIONER ELSTON: Absolutely, which your
11 argument, then, is that we shouldn't have them at all, is
12 what I'm hearing.

13 MR. CAHN: Let me comment briefly on -- because you
14 took issue with my point. I want to make clear, my point
15 isn't that the Department of Justice supports lower or higher
16 guidelines. That's not for me to say. What I am saying is
17 that when I go into court, and when my lawyers go into court,
18 individual prosecutors are asking for these sentences,
19 individual judges are imposing them, and everyone is more
20 than comfortable with those sentences. There is not a sense
21 that the sentences need to be higher for any of the
22 legitimate purposes of sentencing. And so I don't speak to
23 DOJ's overall policies. It's not my job or my role. But I
24 do say what I see in the individual courtrooms, and the view
25 is that these sentences are adequate and sufficient and are

1 just.

2 COMMISSIONER ELSTON: But isn't part of that
3 informed by the need in San Diego to have Fast Track?
4 Because if it's not -- if it's not, then I think that the
5 Fast Track Program should be eliminated nationwide, and we
6 should just go to that system. We should sentence people --
7 I wrote it down -- we should sentence everybody to 30 months,
8 unless they have category five or six, or a really bad prior,
9 and then we give 'em 48. And then we have exceptional cases
10 where we give them whatever's beyond that. Is that what
11 you're suggesting, that we do that nationwide?

12 MR. CAHN: What I'm saying is that there is a need
13 in San Diego, and that the program addresses the need, but
14 that separate and apart from that, these are sentences that
15 are seen by real practitioners, who see these cases day in
16 and day out, as just and appropriate sentences.

17 COMMISSIONER ELSTON: (Indiscernible) by the need
18 to have them lower than other parts of the country.

19 MR. CAHN: As I said, I confessed my limitations
20 when I came in here. I am not an expert in immigration or
21 guidelines or on national policies. I can talk about, as a
22 practitioner, as a trial lawyer, what I see in the courtroom
23 and what people who deal with these cases day in and day out
24 see as good, appropriate, just sentences. That's what I'm
25 telling you.

1 MR. SANDS: Prosecutorial discretion rests solely
2 with the Department of Justice and with the district and with
3 the U.S. Attorneys. It's their choice whether to go with
4 1326s for those in category six, or for those with crimes of
5 violence, and to give everyone else 1324s or 1325s, or
6 different types, or petties. It's a way of balancing. The
7 Department of Justice and the U.S. Attorneys have made a
8 decision in certain districts to expand 1326 for everyone --
9 it could easily say that we would only do it for a group, for
10 only drug priors, or only crimes of violence. That is your
11 hands. What we are saying is that Fast Track gets a large
12 number of sentences with approp- -- what we feel are
13 appropriate sentences, and which the court feels are
14 appropriate sentences. If a court did not feel that justice
15 was being done, it would reject it out of hand. But the
16 Government in all these 1326s, under the Fast Track, is
17 saying, this is an appropriate case. And we think that the
18 Commission should be aware of that, and should look at that
19 in fashioning sentences that aren't on the border, or aren't
20 in the Northern District of California, or Nebraska, or
21 Idaho, or the other strange districts.

22 MR. CAHN: Can I add one little piece of
23 information? -- which is that it's worth knowing, I think,
24 for the Commission, that there are times in this district
25 where individual judges have questioned and required the

1 Government to justify particular offers that were made, and
2 the Government has either done that, or sometimes there's
3 been an adjustment of the offer. So it's not that anyone's
4 asleep at the wheel and just shoving these cases through.
5 That is not what's happening. I think it's important that
6 the Commission understand that.

7 COMMISSIONER CASTILLO: Any other questions?

8 (No responses.)

9 COMMISSIONER CASTILLO: Thank you both. I can't
10 let you leave here without thanking you for participating in
11 the round table in D.C. Thank yo for that.

12 MR. SANDS: And thank you.

13 COMMISSIONER CASTILLO: We'll stand in recess until
14 2:30.

15 (Luncheon recess from 12:27 p.m., until 2:40 p.m.)
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1 authorized me to tell you that she concurs in my
2 recommendation concerning that, and also on a few other
3 matters that I would just like to very briefly touch on after
4 I've had a chance to address the smuggling of minors.

5 Our judges in the District of Arizona, Tucson
6 Division, sentence -- we average 500 sentencings per year per
7 judge. We handle about two thirds of the criminal case load
8 for the District of Arizona in the Tucson Division. So,
9 obviously, we are more of a criminal court than Phoenix,
10 which has a much higher civil case load number.

11 I have prepared some materials I'd like to submit
12 to you at the end of my testimony.

13 COMMISSIONER CASTILLO: Absolutely. We'll be happy
14 to take it.

15 JUDGE ROLL: Those materials address the same
16 matters, of course, that I'd like to touch on now, and it
17 includes an appendix that consists of 31 sentencings over
18 which I presided in the last 24 months by a purely random
19 draw of cases. Each of those 31 involved child smuggling
20 cases in the Tucson Division, just in cases assigned to me.
21 Those cases reflect that typically in our child smuggling
22 cases that we see, the children are young, and much below the
23 12-year-old range that has been discussed here. I think
24 virtually all of the cases have involved children under the
25 age of seven, and several of them have involved children

1 under the age of two.

2 As you very well are aware, under the sentencing
3 guidelines, there is currently no provision made or no
4 consideration given as far as offense level calculation to
5 the age of the individual who is smuggled. What I would like
6 to encourage the Commission to do, and Judge Jorgensen joins
7 me, is to take that factor into consideration. Now, the
8 proposal that is in the materials suggests perhaps a four-
9 level increase based on children who are under the age of 12
10 who are smuggled. Judge Jorgensen and I think that is an
11 excellent starting point. But we would also urge the
12 Commission to consider perhaps a six-level enhancement for
13 children under the age of six, and perhaps an eight-level
14 enhancement for children under the age of two.

15 These are the most vulnerable individuals. Several
16 things are present. Obviously, they're not in a position to
17 do anything once they're in the United States as far as
18 extricating themselves ordinarily. We are not urging that
19 you make these enhancements applicable when parents or even
20 immediate relatives are involved. But every one of the cases
21 that I've mentioned involved smugglers who were unrelated to
22 the child, and in only one case was the mother along with the
23 child, and they put the mother and the child in the trunk of
24 the car when they tried to smuggle them into the United
25 States. The entire list of cases that I will be providing to

1 you, these were all stranger cases.

2 It's my practice -- and I think the other Tucson
3 Division judges also use this practice -- I always inquire at
4 sentencing, what is the connection between the defendant and
5 the child that was smuggled? Seldom, if ever, is there any
6 connection. I heard the testimony this morning, and
7 obviously districts can differ, and the experience of
8 different judges in different districts can differ, but it is
9 not a situation where they say, well, I knew the mother, and
10 the mother asked me to bring the child across. These are
11 strangers who accept money to bring children into the United
12 States.

13 The other -- few other items I would like to
14 discuss, with your permission, deal with the early
15 disposition, Fast Track. Chief Probation Officer Magdeline
16 Jensen and Chief Deputy Mario Moreno have prepared some
17 written testimony for you. The District of Arizona has seen
18 53 percent of all of the arrests of individuals who are
19 illegally in the United States for fiscal year 2005. We had
20 over 630,000 individuals arrested in the District of Arizona
21 for being there illegally in 2005. Only about 6800 of these
22 people were prosecuted for crimes. This shows a judicious
23 use of the resources -- the limited resources -- of the
24 Government. It also, I think, reflects concentration on
25 individuals who appropriately are in the District Court

1 facing serious consequences.

2 I know that in discussing illegal reentry cases,
3 also previously there was much discussion about terrorism and
4 about whether the individuals who were arrested were
5 terrorists. That's one component, one factor. But I would
6 respectfully submit another factor is, are these individuals
7 who are habitual criminal offenders? Even if they're not
8 terrorists, are they individuals who repeatedly are arrested
9 for offenses when they are in the United States? That is
10 what my experience is in seeing the individuals who the U.S.
11 Attorney's Office in the District of Arizona prosecute.
12 These individuals are by and large people with formidable
13 records who have come back into the United States, and when
14 they're in the United States, they are committing crimes,
15 many of them serious.

16 I am a very strong supporter and urge continuation
17 of the early disposition Fast Track Program.

18 There was also a reference to ransom -- and the
19 other items are just very brief. There was a reference to a
20 proposal that -- for -- that an enhancement be given when
21 individuals who are held in safe houses for long periods of
22 time. I would only urge that the Commission consider that
23 sometimes, either through extraordinary police work, or
24 through happenstance, individuals who are holding someone for
25 ransom are rapidly apprehended. And that has happened in

1 child smuggling cases in the District of Arizona, as well.
2 Should that person be the beneficiary of not having the
3 enhancement just because, through no fault of their own, they
4 were quickly apprehended?

5 There was also a discussion concerning double-
6 counting in 2L1.2. I would respectfully submit that, at
7 least, again, my limited experience in the District of
8 Arizona, seeing the selectivity of the cases being
9 prosecuted, there is no injustice worked from the double-
10 counting -- so-called double-counting of a prior conviction
11 being used to calculate the offense level in an illegal
12 reentry case, and also being factored in for purposes of the
13 criminal history. Insofar as historical convictions are
14 concerned, and not counting those or considering those, those
15 are sometimes the reason why the individual was originally
16 excluded from the United States. They are oftentimes very
17 serious convictions. And again, I would urge caution before
18 those are necessarily thrown out the window.

19 The final item I would like to touch on is the
20 focus upon the length of sentence in calculating the offense
21 level in illegal reentry cases. That is certainly a factor.
22 But again, it's been my limited experience that many state
23 judges, for the most serious crimes, impose minimal sentences
24 because they believe the person will be deported, and that it
25 is senseless for the Government to bear the cost of

1 incarcerating someone when they're going to be deported
2 anyway. And so in child molestation cases, in sexual assault
3 cases, other cases, I have seen minimal sentences and
4 lifetime probation, or very long periods of supervision. And
5 from that, at least it's my sense that the judge was thinking
6 the person's going to be deported, and we want them deported
7 as soon as possible.

8 Thank you again for the opportunity to appear
9 before you. If I could now --

10 COMMISSIONER CASTILLO: That'll be fine. Let me
11 thank you. In particular, I now have a copy of that -- March
12 '04 you sent me a letter when I was operating as the person
13 who was presiding over the Commission and bringing to our
14 attention the issue of the minors. You can see, sooner or
15 later, we get to this. So thank you.

16 JUDGE ROLL: Thank you very much.

17 COMMISSIONER CASTILLO: Ms. Jensen, thank you for
18 being here.

19 MS. JENSEN: It's a pleasure to be here. I'd like
20 to introduce you to Mario Moreno, one of our Deputy Chiefs.
21 He's in charge of presentence operations throughout the
22 district, and is our primary developer of policies and
23 practices with regard to presentence reports.

24 We thank you for the opportunity to provide
25 comments regarding proposed amendments to the immigration

1 guidelines. Since we apply these guidelines daily, the
2 opportunity to provide input is certainly welcome.

3 During 2005 -- fiscal year 2005, Border Patrol
4 apprehended 1,188,977 unlawful aliens in the United States.
5 632,933 unlawful aliens, or 53 percent of the national total,
6 were detained by Border Patrol along the Arizona border with
7 Mexico. Of these captured unlawful aliens, 6,672 defendants
8 were prosecuted. Why the huge difference? The answer is
9 staffing limitations at the U.S. Attorney's Office. Using
10 limited resources, the U.S. Attorney's Office in Arizona
11 prosecuted the worst of the worst, meaning those aliens
12 committing egregious crimes, or those with extensive criminal
13 histories.

14 The Probation Office produced presentence reports
15 for the felony prosecutions. Of these, 73 percent involved
16 unlawful reentry offenses, and 26 percent pertained to alien
17 smuggling.

18 The overwhelming majority of all of these
19 immigration offenders have pages and pages of criminal
20 history in the United States. This brief statistical profile
21 of our district explains why our primary concerns pertain to
22 2L1.2, unlawfully entering or remaining in the United States,
23 and 2L1.1, smuggling, transporting or harboring an unlawful
24 alien.

25 First we offer comments on 2L1.2. The Commission's

1 interim staff report on immigration reform and prior
2 testimony by border court staff in San Antonio and today
3 suggests that you are well aware of the practical effects on
4 our daily work by the findings in Taylor versus the United
5 States and Shepard versus the United States. These cases
6 require us to use the categorical approach, and sometimes
7 modified categorical approach, in trying to determine whether
8 the defendant has a prior aggravated felony.

9 Only judicially noticeable documents may be used in
10 this analysis, not information contained in prior presentence
11 reports or police reports. Accordingly, we find ourselves
12 endeavoring to obtain court documents, such as indictments,
13 informations and complaints, as well as plea agreements and
14 court transcripts of statements made at the time of the
15 guilty plea, to determine if the elements of a conviction
16 exist to match the definitions of aggravated felonies at
17 18 U.S.C. 1101(a)(43) and the definitions in the commentary
18 at 2L1.2.

19 These documents were not necessarily designed to
20 provide the answers we seek. So even after an extensive
21 investigation and effort to obtain such documents, we
22 sometimes cannot make a clear determination.

23 Probation officers in Arizona perform one
24 categorical approach, to report whether a prior conviction is
25 an aggravated felony. That, of course, determines the

1 statutory penalty. They also perform a second categorical
2 analysis, to determine if specific offense level increases
3 are appropriate. Since there is a statutory definition of an
4 aggravated felony, and sometimes a second definition in the
5 guidelines, the analysis is further complicated. And of
6 course, in addition, the officers must be aware of circuit
7 court opinions that offer guidance on statutory and guideline
8 application.

9 In short, the responsibility to obtain judicially
10 noticeable documents in order to establish if an aggravated
11 felony exists is a vexing and time-consuming one. Since
12 72 percent of our 2L1.2 cases involve the 16, 12, or 8-level
13 increase, any assistance the Commission can provide in
14 streamlining this process will be most appreciated.

15 We have 11 units of probation officers in Arizona
16 writing presentence reports, each of which consists of a
17 supervisor, a guideline specialist, and five probation
18 officers, for a total of 66 people exclusively working on
19 presentence reports every day. We met with our 11
20 supervisors, who spend their days reviewing presentence
21 reports, in order to obtain some informed comments regarding
22 the Commission's proposals.

23 In reviewing the five options to amend 2L1.2,
24 option five is immediately attractive because it would
25 eliminate the second level of categorical analysis and

1 improve the quality of our lives immeasurably. However, it
2 does not provide a graduated structure for different types of
3 aggravated felonies. It makes no distinction between a
4 1326(b)(1), which has a penalty of ten years, and a
5 1326(b)(2) that has a penalty of 20 years. It would make no
6 difference which way it was charged. The way that option
7 five is currently drafted, it would make no difference.

8 Perhaps the Commission could explore option five,
9 this approach, with a base offense level for a 1326(b)(1)
10 conviction, and a higher base offense level for a 1326(b)(2)
11 conviction. Option five, with refinements, might provide
12 some promise.

13 MR. MORENO: Like option five, options one through
14 three have the effect of eliminating a second level of
15 categorical analysis. However, rather than associating
16 offense level increases with certain types of aggravated
17 felony convictions, these options link offense level
18 increases exclusively to the sentence imposed on the
19 aggravated felony conviction. This alternate method of
20 considering the severity of aggravated felony convictions
21 would probably have the effect of redistributing the
22 proportion of defendants who receive the 16, 12 and the
23 8-level offense level increases.

24 A second feature of options one through three which
25 would probably contribute to the redistribution of defendants

1 who receive the various offense level increases is the
2 adoption of the statutory definition of crime of violence.
3 It seems likely that the number of defendants who receive the
4 higher offense level increases would be higher if the
5 property component of 18 U.S.C. 16(a) and the substantial
6 risk component under 18 U.S.C. 16(b) become guideline
7 considerations.

8 Option four provides some procedural improvement in
9 that the guideline definitions match the statutory
10 definitions of the various types of aggravated felony
11 convictions. One set of definitions would provide some
12 simplification in the definitions used in the categorical
13 approach.

14 Another feature in option four that distinguishes
15 it from the others is the combined approach of linking the
16 type of aggravated felony conviction with the length of
17 sentence imposed to determine the higher offense level
18 increases. Realizing that one categorical analysis is
19 necessary, the elimination of a second level of categorical
20 analysis is an improvement, as is the combined approach of
21 considering both the type of aggravated felony and the length
22 of sentence. For these reasons, we support option four.

23 As to 2L1.1, smuggling, transporting or harboring,
24 we support option two, which provides an expansion of the
25 table for the number of unlawful aliens smuggled or

1 transported. As the Commission's interim reports document,
2 we see few cases with an extremely large number of unlawful
3 aliens. But in those cases prosecuted, which we believe
4 occur more frequently in the Western District of Texas than
5 in Arizona, it makes sense to provide some guidance.

6 We also support option two regarding transportation
7 or smuggling of a minor accompanied by strangers. As
8 detailed in the testimony of the Honorable John M. Roll, the
9 phenomenon of very young children being smuggled by strangers
10 is relatively new, but is a serious development. Children
11 who are unable to identify themselves because they are so
12 young run the risk of being displaced when they return to
13 Mexico. We respectfully suggest the language "unaccompanied
14 by the minor's parents" be revised to "unaccompanied by an
15 immediate family member," which could be defined in the
16 application notes to include parents, grandparents, older
17 siblings, aunts, uncles and cousins.

18 We thank you for the opportunity to provide
19 comments regarding your proposed amendments to the
20 immigration guidelines. Your willingness to consider the
21 observations of those of us who work with these guidelines is
22 most appreciated.

23 COMMISSIONER CASTILLO: Thank you. We certainly
24 appreciate that day-to-day work that you're doing every day
25 in your district.

1 Questions? Yes, Commissioner Howell.

2 COMMISSIONER HOWELL: Well, let me -- let me -- I
3 mean, I -- let me just start with the minor issue, since I
4 think all of us felt that your letter was -- you know, really
5 required a response from the Commission, and consideration,
6 which is why you see it as part of the amendments. What has
7 been an interesting learning experience, and I'll speak
8 personally for myself, is how controversial what started off
9 as a fairly no-brainer type of proposal has turned out to be.
10 I would really be interested in hearing, you know, your
11 response to some of the reactions we've gotten.

12 And I'll deal with two primarily. One, we've heard
13 from various people that, rather than having a nuanced
14 approach -- which I -- which was in your original proposal,
15 and has a certain amount of -- you know, I -- I -- I find a
16 lot to be said for that. The criticism has been that it
17 would require too much litigation over the ages of children,
18 and that some people have proposed that, instead of having
19 this nuanced approach, just say any minor being smuggled,
20 because with the nuanced approach, you'd have to go through
21 medical tests almost to determine whether the age of a
22 child -- whether the child is a 12 or a 13-year-old, or a 14-
23 year-old, or a 7-year-old versus a 10-year-old. So that's
24 been one issue that has been raised.

25 I was just curious, since you've had so many of

1 these cases in your courtroom, whether it's been a diffi- --
2 if -- whether you've encountered difficulty in ascertaining
3 the age of the child.

4 Two, and this has to do with, you know, some of the
5 testimony we also have heard today, and we've heard from
6 others, that so often children are being smuggled for family
7 reunification purposes. It's interesting hearing the
8 differences among -- you know, between the districts, and
9 that you're finding that they're mostly strangers, and that
10 in other districts, people are finding them as usually close
11 family friends. I just wanted to ask you whether you think
12 that some of the people who are saying that they are
13 strangers and don't have any relationship with the child, or
14 know anything about the family, whether you think that the
15 defendants are saying that in order to protect the family, or
16 whether it's really been fairly clear that they are indeed
17 strangers just doing this for money.

18 It sort of goes to how we actually frame a targeted
19 approach, which I think your proposal makes an effort to be,
20 to go after the real strangers as opposed to the family
21 members. So I just wanted your reaction to both of those, I
22 think, in my view, the most significant criticisms and
23 considerations that we have to make in drafting a final
24 version of this proposal.

25 JUDGE ROLL: I think that if the categories are

1 broad enough -- under two years of age, under six years of
2 age, and under 12 years of age -- many of the problems as far
3 as identifying exactly how old the child is may evaporate.

4 As far as the family reunification, I don't -- my
5 sense is not that the people are denying that there is a
6 connection with the family because they want to protect the
7 family, because their attorneys and the defendants understand
8 that it would be considered a mitigating factor by me if they
9 say that they have a connection to the family. So they have
10 every incentive to try to do that. Of course, we don't just
11 say, "Is there a connection?" Tell us what the connection
12 is. And sometimes that is the stumbling block, because they
13 may be prepared to say there is a connection, but they can't
14 say anything about -- they can't give us any information
15 about who the family is, how they know the family. So that
16 claim evaporates. But I don't think there is a -- I don't
17 think there's an under-representation of that -- of -- of
18 some connection that exists. I think that these are really
19 stranger smugglings.

20 MS. JENSEN: And I guess I would add, Commissioner,
21 that these aren't either/or. I think our testimony is
22 focusing on a slice of the children who come across. We see
23 a lot of cases with relatives, which is why we suggested --
24 and a lot of times it's not the parents. It might be the
25 grandparents, might be an older sibling who's 18 or 20. What

1 we're focusing on is a smaller slice of this large population
2 that doesn't include children. But there are many that do
3 come with relatives. But that's not what's of concern. The
4 concern are those children who cannot speak for themselves,
5 and get apprehended, or are in the company of strangers for
6 a long period of time until they can successfully cross.
7 Although if we have them, they haven't successfully crossed.
8 But it's not all or nothing. We're looking at one slice of
9 a broader phenomenon.

10 COMMISSIONER HOWELL: No, we understand that. It's
11 just a matter of targeting that specific slice as opposed to
12 being over-broad, which is --

13 MS. JENSEN: And it might also be that we are on
14 the border, and the long border, that, therefore, this might
15 be seen more here than in New Mexico because we've got this
16 huge border, and they're just coming across, probably to
17 their parents. But if they get apprehended, and their
18 parents are nowhere around, that's the problem.

19 COMMISSIONER CASTILLO: Kind of along the same
20 line, switching to reentry, could it be because of the volume
21 of reentry cases that you do have in Arizona, and because
22 they're only prosecuting the more aggravated ones, you are
23 seeing sort of a different group than New Mexico or
24 California or Texas?

25 MS. JENSEN: I think that's true. There was one

1 point about two years ago where the volume was so high that
2 the U.S. Attorney's Office was declining (b)(1)s, and was
3 only going forth with (b)(2)s, just because the volume was
4 just so high. So that may well be the case.

5 MR. MORENO: We've rarely seen a 1326(a).

6 MS. JENSEN: It's just that they don't get
7 prosecuted.

8 COMMISSIONER HOROWITZ: If I could just follow upon
9 the minors point, because I agree with Commissioner Elston
10 and your proposal, Judge, that, on its face, obviously, there
11 are greater harms to younger children, and it makes sense to
12 try and address that. One of the things I've learned through
13 these hearings, both in San Antonio and today, is I gather
14 when minors come across the border and are found through
15 harboring cases, one of the goals of the Border Patrol is to
16 get the child as quickly as possible back into the Mexican
17 Consulate to allow the child to get back to Mexico.

18 So one of the practical questions that I have now,
19 thinking about these issues, and the litigation, and a
20 proceeding, whether it's a sentencing or a trial, given
21 Crawford, is, how do you deal with the confrontation clause
22 issue and the right for defendants to perhaps question the
23 child, assuming the child's old enough to be questioned and
24 be a witness? How do you preserve the evidence, essentially?
25 One of the goals, which I think is a very legitimate goal, is

1 to get the child back, through the Mexican Consulate, as
2 quickly as possible back to their home country, assuming it's
3 Mexico, obviously.

4 JUDGE ROLL: That is certainly a legitimate
5 concern. I think probably the majority of the children that
6 I refer to in the materials wouldn't even be competent to
7 testify they are so young. They wouldn't be in a position to
8 offer testimony, to be able to understand an oath, and to be
9 found to be a competent witness. So the worst cases, at the
10 far end, I don't think that it would be an issue.

11 If I could touch on one other thing related to what
12 was just discussed, and that has to do with -- one of the
13 cases you'll see that I refer to, the children were drugged
14 when they were brought across. And in another case, after
15 the child was across, they contacted the parents, and they
16 said, it's going to be more than what we said because your
17 child is hungry, or your child needs food, or something like
18 that. These children are also ripe for being held for ransom
19 and for higher smuggling fees because they are so vulnerable,
20 and they won't be turned over to the parents unless and until
21 the smugglers decide to do that. And these aren't the ones
22 at the border, obviously. These are the ones when they've
23 actually succeeded in coming into the United States.

24 COMMISSIONER HOROWITZ: And just, again, just in
25 terms of practical questions, to follow up on the immediate

1 family members as opposed to parents, proving who's an
2 immediate family member, or whatever the categorization is,
3 whoever fits in that universe, is that something from a
4 judicial standpoint you have any concerns over being able to
5 resolve? In terms of making the decisions, is that something
6 that creates more of a process cost and lag time in the
7 process, or is there a practical way of dealing with that
8 issue?

9 JUDGE ROLL: Again, just off the top of my head,
10 the attorneys that practice in District Court in Tucson
11 Division are very capable of getting materials, birth
12 certificates, other documents to show the connections when
13 they write on behalf of defendants who are being sentenced.
14 I suspect they would follow the same practice as far as using
15 marriage certificates, birth certificates, other documents,
16 other correspondence to establish it.

17 MS. JENSEN: From Mexico.

18 COMMISSIONER HOROWITZ: That suggests to me just
19 that -- well, I was going to actually put out that, is this
20 one of those rare areas where we should be thinking about
21 starting at a higher number and getting a reduction, and it
22 obviously puts the burden of proof on the defendant to
23 demonstrate that they were transporting their immediate
24 family member, as opposed to having this burden on the
25 Government of trying to go back and figure out who's an

1 immediate family member?

2 JUDGE ROLL: That also has a lot to commend it as
3 an approach. The guidelines, I think, are typically 6 to 12
4 months on these types of smuggling cases when the individual
5 is brought across. And the U.S. Attorney's Office in the
6 District of Arizona charges the bringing across for profit,
7 and then gets an upward -- receives an upward departure under
8 5K1.21 -- I think it is -- for a plea to a charge less
9 than -- that is less than what the individual faces a
10 mandatory minimum. That was discussed this morning, the
11 three-year mandatory minimum, bringing in for profit. And so
12 in some of these cases with child smuggling, the U.S.
13 Attorney's Office is able to obtain pleas above what the
14 guideline range is. But the guideline range is very low
15 considering the risk to the children.

16 COMMISSIONER CASTILLO: Commissioner Steer.

17 COMMISSIONER STEER: I'm sorry to switch gears
18 again and go back to the unlawful reentry, but I did want to
19 ask a question there, again, to try to get at what's
20 practical here. We've talked about the possibility of an
21 approach that uses the length of sentence, and the
22 shortcomings. Judge Roll, I think you've pointed out some of
23 them there. So that might lead us to think about a
24 combination approach, if we can somehow get away from the
25 second categorical determination. Do you think that with

1 respect to that prior conviction, you get enough information
2 to determine in a real offense -- on a real offense basis
3 whether it involves violence, whether it involves child
4 pornography, things of that nature, rather than whether it
5 fits the category of that?

6 MR. MORENO: I would say, Commissioner, that
7 officers would have better success at getting arrest report
8 information or real offense information than obtaining
9 judicially noticeable facts. So to the extent that would
10 make it easier, that would help.

11 COMMISSIONER STEER: Some risk that it may not be
12 accurate -- you know, the -- a lot of things to balance here
13 to find something that works.

14 Well, I appreciate your comments.

15 COMMISSIONER CASTILLO: Any other questions?

16 (No responses.)

17 COMMISSIONER CASTILLO: Then we thank you.

18 JUDGE ROLL: Thank you.

19 MS. JENSEN: Thank you.

20 MR. MORENO: Thank you.

21 COMMISSIONER CASTILLO: We'll move to our last
22 panel, which is the perspective of probation officers in the
23 Southern and Central Districts of California.

24 I'll recognize Michelle Carey, who is the Assistant
25 Deputy Chief Probation Officer in the Central District of

1 California, and Mr. Sultzbaugh, the Assistant Deputy Chief
2 Probation Officer of the Southern District of California.
3 Welcome.

4 MS. CAREY: Thank you.

5 MR. SULTZBAUGH: Thank you.

6 MS. CAREY: Good afternoon.

7 COMMISSIONER CASTILLO: Good afternoon. Who wants
8 to go first? Ladies first?

9 MR. SULTZBAUGH: Absolutely.

10 COMMISSIONER CASTILLO: Okay.

11 MS. CAREY: Good afternoon, members of the
12 Commission. On behalf of the Central District of California,
13 under the leadership of Chief Loretta Martin, I thank you for
14 this opportunity to comment on the proposed amendments to the
15 immigration guidelines.

16 Although the Central District of California does
17 not have the volume of immigration cases that the individual
18 border district handles, the immigration cases do constitute
19 about 15 to 18 percent of our overall case load. I think
20 also fairly significantly, we are tangentially impacted by
21 the overall number of immigration cases to the extent that
22 our office responded to more than 3800 collateral requests
23 from other districts in 2005, and about 50 percent of those
24 collateral requests originated from the border districts.

25 MR. SULTZBAUGH: Sorry about that.

1 (Laughter.)

2 MS. CAREY: Just to put that in perspective, the
3 number of presentence reports and supplemental reports to BOP
4 that we disclosed in 2005 was around 1800. Often the border
5 districts are challenged to determine, based on the
6 categorical approach or modified categorical approach,
7 whether certain crimes meet the statutory or guideline
8 definition of crime of violence or aggravated felony. So
9 they are challenging us to obtain the criminal history
10 records to enable them to make that determination. That just
11 has a tremendous impact on our resources. So for all those
12 reasons, I'm glad to have the opportunity to participate
13 today.

14 I admit up front that my comments often focus on
15 areas where we think that further clarification may be
16 useful. We kind of approached this by looking down the road
17 and applying these amendments and thinking of possible areas
18 of disagreement. So I apologize up front if I come with more
19 questions than suggestions.

20 COMMISSIONER CASTILLO: That's okay.

21 MS. CAREY: Looking at the 2L1.1, the smuggling
22 guideline, officers in my office could not recall a case
23 where we had a base offense level under Subsection (a), the
24 base offense level of 23. So we do not think this amendment
25 will impact our district too much. However, I think we

1 prefer option one to the extent the Government is going to
2 prove up the 1182(a)(3), either at trial or as an admission
3 at the time of the change of plea.

4 We think we may have some challenges with option
5 two if it's relevant conduct-based, because in our district
6 we have had some spy and espionage cases. So we think of the
7 example where you have an alien involved in terrorist
8 activities, and we wonder whether or not we would have the
9 requisite security clearance in order to obtain that
10 information from the Government. So we would think it would
11 be clearer and cleaner if option one is utilized, and the
12 Government is kind of proving that up front.

13 With respect to number of aliens, to the extent
14 defendants who smuggle aliens may not be punished
15 proportionally to the aliens they smuggle, it certainly makes
16 sense to amend the structure of the table to increase the
17 enhancements at the lower levels, since most often the
18 enhancements are at the low end, which is the 6 to 24 alien
19 range. So we support option two.

20 At the other end, in our district, it's rare to see
21 a case in which the number of smuggled aliens exceeds a
22 hundred. I think the example I think of is when you have a
23 case that's a drop house, and the case agent discovers the
24 pay/owe sheets. But those cases are certainly rare, and we,
25 in the past, have dealt with those cases with respect to

1 departures. But if you wanted to ensure greater uniformity
2 with respect to the increase, then it makes sense to also
3 extend the table at the top end of the range so that you have
4 uniformity amongst the districts. So we support that option,
5 as well.

6 Smuggling minors is another issue that we do not
7 see often in our district. Obviously, the trek of an alien
8 from their country of origin to the United States is fraught
9 with dangers and uncertainties. If you want to discourage
10 that behavior, it makes sense for us that you increase the
11 penalty for smugglers who engage in this conduct. We have
12 thought about the options, and in thinking about option two,
13 and in a district where issues are often litigated strongly,
14 we could see option two being fraught with evidentiary issues
15 when you talk about making distinctions -- you know, at the
16 12-year-old I think is one cutoff. Determining whether or
17 not a minor is 12, as opposed to 10 or 11, or 13 or 14, is
18 going to be extremely difficult in our district, unless we
19 have birth certificates or testimony from parents or other
20 close relatives, and, of course, one of the features of the
21 enhancement is that the minor is not in the company of the
22 parents. So that evidence and information may be difficult
23 to obtain.

24 We were thinking that option one with "minor"
25 defined fairly highly at 16 or 18 might be a better approach

1 to dissuading smugglers from bringing children into the
2 United States, because the enhancement will be easily applied
3 in most cases that you want to reach where the minor is
4 visibly young from a lay person's perspective. That may not
5 get at a lot of the teenagers who come across, but if the
6 goal is really to get at the younger, smaller children, then
7 putting that cutoff point at 16 to 18, you will be able to
8 easily capture the younger children who you hope to protect
9 by that enhancement.

10 Some of the things that we were thinking about --
11 and I know it seems obvious -- but we were thinking that we
12 would need a definition for the term "parent." It seems
13 obvious, but is that limited to biological parents? What
14 about step-parents? What if the child's in the company of
15 the legal guardian? Is that a departure ground? So those
16 are some of the things that we were looking at. We saw that
17 there was a definition of "parent" at 8 U.S.C. 1101(a)(44).
18 We thought that was clear as mud -- didn't find that overly
19 useful.

20 I know there's been some talk about possibly
21 avoiding the problem with whether or not the minor is in the
22 company of the parent by just having the enhancement
23 applicable if you have any situation where there is a minor.
24 We thought about that a little bit, too, but then we thought
25 about the situation where the defendant is the parent of the

1 minor. You end up with this really interesting circumstance
2 where you're taking off three levels under Subsection (b) (1),
3 and then adding back however many levels you decide on
4 because there is a minor child involved. And we thought that
5 that sent a very conflicting message.

6 So we were back at option one setting the "minor"
7 definition at around 16 or 18, clearly defining "parent," and
8 thinking that that would certainly dissuade smugglers from
9 bringing minor children into the country who are without the
10 nurture and protection of their parents. There's just
11 something about parents that certainly comes to mind in terms
12 of thinking that, who is most likely to make sure that the
13 children aren't in or try to protect them from harm? It's
14 the parent more so than any other person, even another close
15 family relative.

16 We thought about the vulnerable victim enhancement
17 at Section 3A1.1, and we did not think that that was the best
18 approach. First, the application of the enhancement would
19 not be certain. We felt that case law in the circuits would
20 answer whether or not it would be applied. Second, that
21 enhancement is defendant-based, and maybe that isn't the
22 extensive reach that we would necessarily want. And third,
23 the court -- even if a court decided that the vulnerable
24 victim enhancement could be applied in this situation, the
25 court would still have to determine if the minor was of an

1 age as to make him or her vulnerable. And we thought that
2 that age might differ from circuit to circuit. So we just
3 thought it'd be clearer and cleaner to put the enhancement
4 right in the guideline.

5 Holding aliens for ransom. We certainly see
6 increased smuggling fee cases in our district and unlawful
7 restraint. In the past, this has impacted where within the
8 range we recommend the sentence. If this now becomes an
9 enhancement, we have a few concerns about how the fee
10 increase will be proven up at sentencing. Is the word of the
11 smuggled alien sufficient indicia of a ransom or unlawful
12 restraint? What is the fee, the amount told to the smuggled
13 alien, the price quoted to the family member or relative
14 footing the bill? Whose price quote? Oftentimes we have a
15 middleman in the alien's country of origin, and then you also
16 have the smuggler, so which price quite are we talking about?
17 So those are some questions that were raised in our mind.

18 And then with respect to the term "unlawful
19 restraint," at which point do you have unlawful restraint?
20 If you have an alien who has admittedly not paid the agreed
21 to smuggling fee, and they are required to stay at the drop
22 house, at what point does that become unlawful restraint? So
23 those were some of the questions that came to mind with
24 respect to those amendments.

25 The trafficking guidelines at 2L2.1 and 2L2.2,

1 document cases -- we have lots of document cases, and we
2 certainly have document cases exceeding 100. So extending
3 the table at the high end is supported in our district to
4 make sure that we adequately punish defendants who are
5 engaged in trafficking large numbers of documents.

6 In terms of types of documents, proportionality
7 between the document fraud guidelines -- great idea -- and
8 certainly focusing on foreign passports. We also support the
9 other types of documents that we see a lot of -- of course
10 are visa, resident alien cards and driver's licenses, those
11 documents that enable an illegal alien to work in the
12 country. So those are some of the other documents that might
13 be added to the specific offense characteristic at some
14 point.

15 Moving on to the final one, the 2L1.2, illegal
16 reentry, like a lot of people have said, option five
17 certainly has its plusses. It certainly would relieve us of
18 that collateral problem that we have. But we do not support
19 option five just because it lumps illegal aliens with a vast
20 array of prior felony convictions together in a single pie,
21 and we just don't think that that's a fair outcome. We think
22 the guidelines should make distinctions between defendants
23 with violent prior felonies and lengthier prison terms from
24 those with minor, non-violent felony offenses and shorter
25 terms.

1 We prefer options one, two and three to the extent
2 that there's a single definition of "aggravated felony." The
3 guideline definition mirrors the statutory definition. Some
4 of the time frames may be a little awkward, because first you
5 kind of start with the statute. Let's say you have theft,
6 and you're looking at a sentence of at least one year. And
7 then you go to the guideline, and you're looking at a
8 different time frame for whether a 16, 12 or 8-level
9 enhancement applies. And then you finally move on to chapter
10 four, where there are different considerations regarding the
11 sentencing and computing that criminal history score. I
12 think that applies to all except option three.

13 Overall, comparing to what we have now, those
14 options are the most wieldy, in our opinion, because there's
15 a single definition for "aggravated felony" found at the
16 statute. When you have a case that deals with a particular
17 state statute in your circuit, then that's it for both the
18 guideline and the statute.

19 Also, we like that options one, two and three that
20 one of the considerations is the length of the prior
21 sentence, because that happens to be one of the
22 considerations that our Government has now when they
23 determine whether or not to offer a defendant a Fast Track
24 plea, it's the length of the sentence in the prior case. so
25 that would be consistent.

1 One observation that we had is the term of
2 imprisonment we note in the commentary includes any sentence
3 imposed upon revocation of probation, parole and supervised
4 release. We would seek language mirroring Section 4A1.2(k),
5 that the revocation sentence is added to the original
6 sentence, if that's what the Commission intends. Absence of
7 that specific language might lead to arguments that this
8 guideline only allows you to consider the revocation term
9 separately, and does not permit addition of the revocation
10 term to the original sentence.

11 Option four. Once again, you still have the single
12 location for the definition of aggravated felony, but it's
13 kind of two-tiered. You have certain offenses that are
14 aggravated felonies -- or I should say, certain offenses --
15 itemized aggravated felony offenses that are considered, and
16 then you still look at the length of sentence, as well. I
17 think we just had a preference for one, two or three, which
18 simply looked at the length of sentence. There may be some
19 overbreadth concerns with that, that it may capture too many
20 aggravated felonies, some aggravated felonies that we do not
21 want to capture. But one thing that we noted that's
22 different from prior to the 2001 amendments, there was no
23 threshold sentence requirement prior to the amendments. They
24 used to just be, aggravated felony, you got a plus-16. At
25 least under options one, two and three, at a minimum, that

1 prior sentence would've been 13 months. We think that that
2 may alleviate, at least from our experience in our district,
3 some of the concerns about that specific offense
4 characteristic being overbroad and capturing too many
5 aggravated felonies.

6 So those are all of my prepared remarks. I thank
7 you once again for the opportunity to testify. And I can
8 answer any questions either now or after we hear from my
9 colleague to the south.

10 MR. SULTZBAUGH: Well, that was a hard act to
11 follow.

12 MS. CAREY: No, not at all.

13 COMMISSIONER CASTILLO: That was very
14 comprehensive. So we thank you.

15 We'll proceed to Mr. Sultzbaugh.

16 MR. SULTZBAUGH: Thank you. On behalf of the
17 officers of the Southern District of California, we also want
18 to express our appreciation for the opportunity to provide
19 input in this important process.

20 As the other border districts have indicated, we
21 see these cases every day. This is the overwhelming majority
22 of what our investigation officers handle -- you know, 2L1.1
23 and 2L1.2 -- and that's why I'm going to limit my comments
24 to. Unlike my colleague from the Central District, we really
25 do not see a lot of document cases -- once in a great

1 while -- but when we do see them, they're normally a small
2 number of documents. So I'm going to focus on the other two.

3 I also would like to say by way of introduction is
4 that I have spoken with our judges, and also know with the
5 commentary they made this morning, and we're obviously in
6 support of their positions, as well, and we've worked with
7 them on a lot of those issues. The point of views that I'm
8 going to give are more from the probation officers'
9 perspective who are preparing those reports on behalf of our
10 bench.

11 I'd like to start by saying we believe that a
12 suggested increase in penalties for smuggling individuals who
13 pose a national security threat are appropriate. One of the
14 issues that I think was brought up in some of the literature
15 that was forwarded to us was whether a higher base offense
16 level approach being defendant-specific or offense-specific.
17 We thought that probably it would be more fair if it was a
18 defendant-based approach. However, we recognize that this
19 does open up the issue of trying to prove the defendant's
20 knowledge of the type of people that they were smuggling.
21 And it's been our experience that the overwhelming majority
22 of the folks that are arrested in our district don't really
23 know a whole lot about who it is they're transporting, or
24 certainly they say they don't. But in a lot of the cases
25 they don't. They are given maybe a break on their smuggling

1 fee, or they just get to the border, and someone says, who
2 knows how to drive? -- and they say, I will, and they get in
3 and drive. So we recognize that that might bring up some
4 issues there. But it still seems that maybe a defendant as
5 opposed to offense-based, because if it were offense-based,
6 then those guys who just volunteer to drive are going to be
7 held responsible for a much higher -- almost twice as high --
8 base offense level.

9 On the issue of the base offense level, we think
10 the current of 12 is probably okay for most of the majority
11 of the cases.

12 The number of aliens, as in the Central District,
13 we don't see a lot of the huge numbers. We see them
14 occasionally. But we see the smaller numbers, and so more of
15 a graduated maybe at that lower level might be appropriate.
16 We think that anything over a hundred, perhaps the departure
17 that we currently have would be appropriate. But we would
18 leave that to the Commission to determine, because know there
19 are some districts who do see those huge numbers, and
20 certainly have a better experience than we do.

21 Although not specifically under consideration at
22 this time, there's another area that the supervisors in
23 particular in our district have discussed and other officers
24 have brought to our attention that we would like to comment
25 on. That is, when applying the guidelines as currently

1 written, the number of aliens is considered prior to the
2 enhancement for dangerousness. Our question would be, has
3 the Commission given any consideration to reversing the order
4 of those adjustments?

5 And the reason we ask this question is, we were
6 thinking of it from the perspective of, if an individual
7 smuggles one person in the trunk of a vehicle, it's
8 dangerous, automatically goes to 18. If they smuggle, as we
9 often see, 15 or 20 maybe stacked on top of each other in a
10 van, automatically goes to 18. Now, you give 'em plus-three
11 to start with for the number, but that becomes moot because
12 it goes to 18. So the person that smuggled the one and the
13 person that smuggled the 20, they are ultimately subject to
14 the same guideline range, all things being equal, obviously,
15 criminal history and those types of things.

16 You could, of course, argue that, well, we could
17 give the person the high end, or maybe a departure, or
18 something like that. But we're usually at relatively low
19 ranges of imprisonment, and there's not that big of a
20 difference. So the question is, is smuggling one person
21 basically the equivalent of smuggling 20, or whenever you get
22 to the threshold where you actually go high enough that
23 another two levels would make a difference?

24 For smuggling of minors, which we don't see a whole
25 lot in this district either, we also would agree with what

1 Ms. Carey said earlier. The option one would seem to be the
2 easier to apply certainly in practice for us, because we
3 often have no idea what the age of the people that are being
4 smuggled, or even oftentimes the defendants themselves. We
5 get some who say they are minors. We don't know necessarily
6 whether they're minors or adults. We can certainly see a lot
7 of litigation over the fact of whether this person is 12 or
8 10 or 8 or 14, or whatever age they might be. So it appears
9 that if there was going to be some type of enhancement, it
10 would be easier if it were just the fact that the person was
11 transported without a family member.

12 We would also support an additional increase -- and
13 I think our judges referenced this earlier -- for causing the
14 death of any individual being smuggled, and agree that
15 adjustments for both injury and death, should they be present
16 in the same offense, are appropriate. The extent of the
17 increase for the death of an individual being smuggled is an
18 area that we think might benefit from further consideration.
19 We were talking about, as an example, if one person was
20 smuggled, that person died during the offense, we would end
21 up with an offense level of 28. It'd be 18 for
22 dangerousness, assuming -- and then plus 10, I believe. If
23 the defendant received an acceptance of responsibility,
24 they'd be at level 25. That's 57 to 71 months, less than
25 five years for the death of someone.

1 From our district's perspective, when we see the
2 sentences that many of the drug couriers are subjected to, as
3 opposed to someone who actually was causing a death, it seems
4 like there might be some consideration that that may not
5 necessarily be a sufficient sentence if someone who's
6 smuggling drugs is getting five, six, eight, ten years, and
7 someone who caused the death of another individual is looking
8 at less than five years. Although we also recognize there is
9 the cross-reference to the homicide guideline, and maybe in
10 some cases that would take that into consideration, but
11 perhaps not all.

12 I also believe our judges mentioned this morning
13 that we see a lot of high-speed chases in this district. The
14 Border Patrol's policies change occasionally whether they're
15 going to actually pursue them. They try spike strips and
16 various other things to try to stop them. But I do believe
17 that there might be some consideration given to, if that's
18 the type of thing that occurs prior to an injury or death of
19 an alien, it might be something else the Commission could
20 consider. It can be reckless endangerment during flight, but
21 is that a sufficient increase? That maybe is an issue that
22 we would want to address further.

23 Okay. Moving on to the 2L1.1 reentry, we share the
24 frustration voiced just a few minutes ago by our colleagues
25 from Arizona, the categorical analysis in obtaining the

1 documents. And we're one of the districts that's the main
2 offenders probably for the Central District of asking for all
3 of these documents. And so anything that would make it
4 easier for us to not have to go through that would obviously
5 help.

6 However, as both the previous officers have
7 commented, option five we're not in favor of. Although it
8 might eliminate some of the categorical analysis, might make
9 it easier obtaining the documents, we honestly believe that
10 the seriousness of the defendant's prior offense is an
11 important consideration, and should still be considered when
12 determining the sentence. One of the things that we discuss
13 in our office is, in California, if you commit two petty
14 thefts, the second one could be charged as a felony. So a
15 petty theft with a prior, you would get the same offense
16 level as someone who murdered someone, or assaulted, or did
17 any other type of serious offense under option five, and we
18 just don't feel like that would be an equitable way of
19 sentencing.

20 The amendments -- I guess the section of the
21 amendment that we would be most in favor of -- and Ms. Carey
22 also touched on -- is just to bring the statutory and
23 guideline definition of "aggravated felony" and "crime of
24 violence" together. We have historically struggled in a lot
25 of those cases -- and they're not all that rare in this

1 district, and I'm sure other border districts -- where the
2 two definitions are somewhat at odds, or there's some
3 disagreement about, okay, is this an aggravated felony? Is
4 it a crime of violence? Is it both? Is it neither? If
5 there was a way that at least there was a starting point that
6 everyone could agree upon -- I know I spoke with our court,
7 and they talked about the categorical analysis and whether
8 you would still need to do that. And perhaps you would still
9 need to do it, but at least we'd all be starting from the
10 same agreed-upon point of what is the definition, and then
11 starting on the categorical analysis.

12 As for the individual options, the first two, and
13 even the third, probably would be the ones that we would be
14 most in favor of. Again, the obtaining of the documents to
15 determine is still going to be an issue regardless of any of
16 those, I think, in the future. If we could have the
17 definitions to start with, then we can leave it to the courts
18 and the litigants to decide the more pressing issues.

19 The question of time frames is also one we feel is
20 worth further discussion. We talked about whether a
21 defendant with one extremely dated prior conviction should
22 receive the same sentence as an individual with a similar
23 conviction who returns to the United States almost
24 immediately after being deported. One of the remedies we
25 thought of is that maybe the Commission could consider if

1 they were going to implement that type of guideline is a
2 commentary which is similar to under-representation in
3 criminal history, that if the person has numerous prior
4 offenses, or some very serious prior offenses that are
5 outside the time frame, that could be a consideration for an
6 upward departure. So we think it's something that could
7 still be explored further.

8 I believe that's all my prepared comments.

9 COMMISSIONER CASTILLO: Questions?

10 COMMISSIONER HOWELL: I just have a comment, which
11 is, one of the things that has been very impressive, and it's
12 demonstrated by this panel, is the dedication and the
13 commitment, and just how lucky we are in the criminal justice
14 system to have such really wonderful probation officers who
15 have spent -- I know you all have spent a lot of time putting
16 together these remarks, talking to your colleagues, to give
17 us sort of your best advice. And I just wanted to say thank
18 you.

19 MR. SULTZBAUGH: Thank you. We appreciate the
20 time.

21 COMMISSIONER CASTILLO: I will echo that. On
22 behalf of all of the commissioners who are here, we all went
23 through all kinds of different hoops to get out here. I will
24 tell you, as I sat at Chicago's airport, which was full of
25 snow, the thought did cross my mind, would today be worth it?

1 I can tell you my answer to that is a resounding yes. Not
2 only your panel at the end of the day, which is difficult,
3 but every single panel really showed such devotion and
4 dedication to trying to give us their best input. All we can
5 say is thank you, and we will try and do our best to do the
6 right thing, and certainly not do anything that hurts the
7 work that you're doing.

8 So we'll end on that note. Thank you very much.

9 (Hearing adjourned at 3:39 p.m.)

10

11 CERTIFICATE

12 I certify, under penalty of perjury, that the
13 foregoing is a verbatim transcription prepared from the
14 electronic sound recording produced at the proceedings in the
15 above-entitled matter, and is a true and accurate transcript
16 of said proceedings to the best of my ability and belief.

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Michael J. Williamson, Transcriber

Date

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