



U.S. Immigration and Customs Enforcement

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**BEFORE THE
UNITED STATES SENTENCING COMMISSION**

**REGIONAL HEARING
ON THE STATE OF FEDERAL SENTENCING**

**PHOENIX, ARIZONA
JANUARY 20, 2010**

INTRODUCTION

Members of the Commission:

On behalf of Secretary Janet Napolitano, thank you for the opportunity to discuss the role of U.S. Immigration and Customs Enforcement (ICE) in our nation's border enforcement efforts, the challenges ICE faces in carrying out its mission, and ICE's experience with the United States Sentencing Guidelines in important immigration and firearms cases.

The Department of Homeland Security (DHS), as well as the Departments of State and Justice, play critical roles in the nation's response to border enforcement. ICE, as the nation's second largest federal law enforcement agency, investigates crimes related to illicit travel, trade, and finance that serve to weaken the border. In addition to this critical criminal investigative mission, ICE also protects public safety and the integrity of our immigration system by enforcing the nation's civil immigration laws. This includes identifying, apprehending, detaining, and removing criminal aliens. With our criminal and civil tools, ICE plays a critical role at the Southwest border. Of course, with ICE's position comes particular challenges, some of which I will describe below.

As the members of the Commission well know, violence has increased on the Mexican side of our southwest border, particularly around Ciudad Juarez and Tijuana. Today, I echo a sentiment that I have expressed before on this issue: controlling our borders and preventing the spread of violence into the United States is vital to our national security interests. Led by our Southwest Border Initiative (SWBI), announced by the Secretary last March, ICE is dedicating substantial resources to protect the border and disrupt the trade, travel, and financing of criminal networks, particularly those responsible for the increase in violence.

There is still work to be done, but over the last several months, we have seen measurable success as a result of our strengthened commitment to enforcement at the border. Naturally, partnerships with U.S. Attorneys' offices and successful prosecutions are a key component of our border enforcement strategy. After providing an overview of the SWBI and describing some of our successes at the border, I will describe a few areas in which, ICE believes, amendments to the United States Sentencing Commission Guidelines Manual would better serve the goals of appropriate sentencing, efficiency, and the public interest.

ICE'S EFFORTS ON THE SOUTHWEST BORDER

The Southwest Border Initiative

Last March, the Secretary announced the SWBI, a major set of initiatives aimed at enhancing the security of the southwest border. The SWBI is designed to support the Mexican Government's campaign against violent drug cartels by limiting the flow of firearms and cash from the United States to Mexico. As part of these initiatives, the Department stationed additional personnel and resources in the Southwest, including technology to crack down on the illegal activities that fuel the drug war in Mexico. Prior to the SWBI, ICE had 3,419 law enforcement, intelligence, and attorney personnel along the southwest border. ICE now has 3,784 attorneys, law enforcement and intelligence personnel along the border, including 189 personnel temporarily assigned in support of the SWBI.

Since the announcement of the SWBI, the results have been significant. From March 24 through October 22, 2009, ICE sizably increased seizures of weapons, money, and narcotics along the southwest border over the same period in 2008. For example, the Phoenix Area of Responsibility (AOR) reported a 32 percent increase in narcotics seizures, and the San Antonio AOR reported a 108 percent increase in weapons seizures. Because the movement of narcotics and weapons ultimately fuels border violence, these increases signal important success.

Likewise, ICE is seizing more currency. For instance, the San Diego AOR has reported a 137 percent increase from \$2,332,332 to \$5,517,166. These seizures are critical; they represent the profits from criminal activity and the means by which transnational criminal organizations fund their illegal activities of smuggling drugs, weapons, and people.

Finally, ICE offices along the southwest border have noted increases in criminal arrests. The Phoenix AOR has reported a 15 percent increase in criminal arrests – from 861 to 1,006 –

while the San Diego AOR has reported a 24 percent increase in criminal arrests, from 1,429 to 1,779.

The success of ICE's surge throughout the southwest border is exemplified by our results here in Arizona, where we have detailed 59 special agents and 45 detention and removal officers to the border area. We have assigned 25 ICE intelligence analysts and officers to support these agents on a full-time basis. ICE already had 201 special agents and supervisors in Arizona directly supporting surge activities as part of investigative groups focused on human smuggling, drug smuggling, weapons smuggling, and financial investigations. In just a 60-day period from September 5 through November 5, 2009, ICE's efforts in Arizona resulted in the:

- filing of 178 criminal charges against those involved in illicit cross-border activity;
- discovery of a tunnel originating in Nogales, Sonora, Mexico, with an exit in the United States;
- enforcement actions at 20 drop houses resulting in the arrests of 275 aliens;
- seizure of more than \$112,000, 33 vehicles, and nearly 50 firearms, 16 of which were headed to Mexico;
- removal from the U.S. of 3,500 illegal aliens;
- repatriation of more than 10,000 Mexican nationals between August and September 2009 through the bi-lateral Mexican Interior Repatriation Program;
- seizure of over 8,500 pounds of marijuana;
- production of 68 intelligence dossiers on gang members, drop houses, and criminal aliens; and
- completion of 78 requests for information to create intelligence-driven criminal investigations.

Removal of Criminal Aliens

ICE has authority to remove criminal aliens from the country, an authority unique within law enforcement. On April 24, 2009, ICE's Office of Detention and Removal Operations (DRO) temporarily reassigned 100 deportation officers and immigration enforcement agents to augment our criminal alien enforcement efforts in San Diego, Phoenix, San Antonio, Houston, and El Paso. From September 5, 2009, through December 31, 2009, the initiative resulted in 5,558 screenings, 5,548 arrests, and the issuance of more than 3,644 charging documents to criminal aliens subject to removal from the United States.

Three important DRO programs support ICE's border enforcement efforts. The Criminal Alien Program (CAP) identifies criminal aliens who are incarcerated within federal, state, and local prisons and jails for removal from the United States. A component of CAP is the Violent Criminal Alien Section (VCAS), which screens recidivist criminal aliens encountered through CAP to identify cases amenable to criminal prosecution. In addition, the National Fugitive Operations Program locates fugitive aliens (those aliens with outstanding final orders of removal) to enforce their final order and remove them from the United States. Finally, ICE created a Law Enforcement Agency Response Program in Phoenix to provide around-the-clock support to local law enforcement officers who request immigration-related assistance.

ICE's DRO programs aim to deter and reduce future recidivism rates of violent criminal aliens by seeking criminal prosecution whenever possible. In coordination with U.S. Attorneys' Offices, ICE prioritizes federal criminal prosecution of egregious recidivist criminal aliens for felony violations. Illegal reentry after deportation in violation of 8 U.S.C. § 1326 is currently the most prosecuted federal felony nationwide. In FY 2009, 4,115 prosecutions were accepted along the southwest border (3,572 of which were under 8 U.S.C. §1326).

Border Enforcement Security Task Forces (BESTs)

In response to border violence, ICE has also augmented the Border Enforcement Security Task Forces (BESTs)—a platform in which interagency and international partners can work together to address cross-border crime. BESTs incorporate personnel from ICE, U.S. Customs and Border Protection (CBP), the U.S. Coast Guard, U.S. Secret Service, U.S. Drug Enforcement Administration (DEA), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), the Federal Bureau of Investigation, and respective U.S. Attorney's Offices, along with other key federal, state, local, tribal, and foreign law enforcement agencies. BESTs are operational task forces that utilize intelligence from all member agencies to drive investigations and then mobilize member agencies as force multipliers for enforcement on the border.

No law enforcement task force focused on the border could be effective without the support and participation of our foreign partners. Therefore, ICE has worked diligently with Mexico to secure participation in the southwest border BESTs. The Mexican government has agreed to provide representatives to every BEST team on the southwest border – a sign of the success of the task forces. Additionally, other Mexican government agencies and foreign partners are working with ICE to expand their participation in the BESTs, increasing our bilateral foreign law enforcement participation – an important aspect of investigating crimes from both sides of the border. Since the launch of the SWBI on March 24, 2009, ICE has established new BESTs in locations such as Las Cruces and Deming, New Mexico, and Mexico City, Mexico, resulting in a total of 17 BESTs covering high-threat smuggling corridors, including some on our northern border.

When it is fully operational, the Mexico BEST will work with the ICE Attaché in Mexico City, and will include approximately 35 personnel from Mexican law enforcement agencies,

vetted by ICE. Expanding BESTs to Mexico enables ICE to work in a bilateral, multi-agency taskforce that enhances information sharing between ICE and the Mexican government, thereby increasing operational effectiveness.

Since implementing the SWBI, ICE BESTs have seized more than 2,137 pounds of cocaine, 49,559 pounds of marijuana, 870 pounds of methamphetamine, 71 pounds of crystal methamphetamine, 478 pounds of ecstasy, and 18 pounds of heroin. In addition, over this same period, ICE BESTs have seized 1,513 weapons, 386 vehicles, and \$9.09 million. All of these categories of seizure represent an increase over the same reporting period from 2008, and can be attributed to the SWBI. The BEST model has been very successful, and we look to build on its successes in our coordinated efforts against illicit activity at the border.

Armas Cruzadas

The BEST program has provided the investigative platform for one of ICE's centerpieces of the SWBI, Operation Armas Cruzadas. ICE will continue to deploy resources for Operation Armas Cruzadas, a comprehensive, collaborative, intelligence-driven, and systematic effort with the Mexican government to identify, disrupt, and dismantle the criminal networks that illicitly transport arms across the border. Just since the initiation of the SWBI, Armas Cruzadas operations have accounted for the seizure of 428 firearms, 45,700 rounds of ammunition, and criminal arrests of 136 individuals. Overall since its creation, Armas Cruzadas has resulted in the seizure of 1,997 weapons, 241,473 rounds of ammunition, and more than \$8.1 million, and criminal arrests of 313 individuals. This bilateral law enforcement and intelligence-sharing operation between U.S. and Mexican law enforcement agencies has helped to curtail drug cartels

and criminal organizations that have sought to acquire more powerful and dangerous firearms, which perpetuate the violence along the Southwest border.

Transnational Gangs

Street gangs and their criminal activities—including human trafficking, narcotics smuggling and distribution, identity theft, money laundering, arms trafficking, and export violations—now transcend borders and have a stake in the globalization of narcotics trafficking. These gangs act as enablers for dangerous criminal organizations, themselves morphing from small autonomous criminal groups into larger trans-border criminal enterprises (TCEs).

Operation Community Shield (OCS) is a DHS anti-gang initiative that combines ICE’s unique statutory and administrative authorities, expert investigative techniques, and new technologies to identify, investigate, prosecute, and remove gang members from the United States. Since the inception of OCS in 2005, ICE agents and law enforcement partners have arrested more than 15,000 gang members and associates, almost 6,000 of whom have had violent criminal histories. In addition, ICE agents have seized 825 firearms during OCS operations.

I’d like to point to a recent example of how ICE continues to realize the impact of its national gang abatement efforts. In June 2009, ICE, in conjunction with our federal, state, and local law enforcement partners in Omaha, effectively dismantled a prolific “Sureño-13” criminal street gang, arresting 36 members and associates. The two-year investigation revealed that this enterprise was engaged in the trafficking of high-powered weapons from the midwest, to the southwest border, to the drug cartels in Mexico, as well as supplying weapons to violent street criminals in Omaha. During the investigation, over 60 weapons, including high-powered military grade rifles, were seized, along with \$40,000 in U.S. currency.

Other ICE Initiatives

ICE is involved in a number of other key agreements with our federal, state, local, and tribal law enforcement partners that directly contribute to reducing border violence. For instance, this June, ICE re-negotiated formal interagency agreements with both DEA and ATF to facilitate closer coordination, increased partnership, and expanded information sharing. Under the Illegal Drug Project, ICE, CBP, and the Department of Justice (DOJ) are collaborating with the Mexican Office of the Attorney General (PGR) to prosecute narcotics seizures that occur at the Nogales, Arizona, port of entry that the U.S. Attorney's office declines to prosecute. ICE, CBP, and DOJ are committed to providing PGR with the necessary information to prosecute these cases, including drug sample testing, the transfer of evidence, official declarations by U.S. personnel, and use of ICE/CBP reports.

Here in Arizona, ICE has partnered with the Tohono O'odham Nation to enlist the help of the Shadow Wolves. This elite unit of Native American patrol officers has worked with ICE, and our partners at CBP, to help identify and track smugglers. This unique relationship has resulted in, on average, seizures of up to 60,000 pounds of illegal drugs each year since 2006.

Finally, ICE maintains a strong presence in Mexico, which enhances our collaboration with our foreign partners, and strengthens our efforts to curb illicit activity at the border. ICE Attaché personnel currently oversee two specialized, vetted investigative units focused on human trafficking and money laundering investigations. Because the violence fueled by cartels and other criminal organizations at the border involve immigration offenses, weapons smuggling, financial crimes, and cross-border narcotics and alien smuggling—all within ICE's jurisdiction—ICE naturally plays an important role in the Administration's coordinated efforts.

We will continue the work we have already done with other federal, state, local, and tribal partners in our combined efforts at the border.

ICE'S SUGGESTIONS FOR CHANGES
TO THE UNITED STATES SENTENCING GUIDELINES

Naturally, successful criminal prosecutions, together with suitable sentences for offenders, are a critical component of ICE's enforcement mission. In spite of our continued support of the Guidelines as a critical element of our justice system, ICE has reviewed the Guidelines and recognizes several provisions that, as drafted, do not adequately address the significant threat that certain conduct poses to ICE's law enforcement interests.

The alien smuggling Guideline does not sufficiently account for large-scale operations.

A defendant convicted for alien smuggling, in violation of 8 U.S.C. § 1324 (bringing in and harboring certain aliens), faces a base offense level of 12, resulting in a 10-16 month sentence for an individual with a Category I criminal history. *See* Section 2L1.1. The section provides for two higher base levels, for aiding or assisting in the entry of aliens inadmissible on national security grounds, or for aiding or assisting the entry of aggravated felons. In many smuggling cases, however, the base offense level is 12.

As drafted and applied, the Guidelines do not take into account the complex, decentralized nature of alien smuggling offenses, which typically do not follow a traditional criminal organizational structure. Commonly, criminal travel networks move aliens from the source location, through transit locations, and ultimately into the United States. This involves coordination between loose, but highly effective, transnational alliances involving various operators such as recruiters, brokers, document providers, guides, transporters, stash house operators, and corrupt foreign officials. As a result of this decentralized structure, in which multiple criminal groups are each responsible for a portion of the enterprise, it has become increasingly difficult to apply base level enhancements based on number of aliens smuggled.

The relatively low guidelines thereby create little incentive for defendants, even when charged, to cooperate with law enforcement to further the investigation of a criminal organization.

Alien smuggling plays a large role in undermining our system of legal immigration and poses a threat to our national security. Moreover, anti-smuggling operations have been a primary focus of DOJ and DHS enforcement operations targeting illegal immigration. Given these two facts, it is ICE's belief that the base level of the offense should be raised to 15 to provide a greater deterrent to defendants (ICE recommends a corresponding three-level base level increase to § 2L2.1). Moreover, such a provision would be more proportionate to the harm that smuggling operations pose to our immigration and national security systems. In addition, ICE suggests that the base level be further increased by 4 levels if the smuggling involved the use of fraudulent or fraudulently obtained passports, travel, or identity documents, or involved the use of corrupt U.S. or foreign officials. Such an increase would assist law enforcement in targeting large, professional alien smuggling organizations, which commonly rely on acts of fraud to further their conduct.

Several provisions do not adequately relate penalties to the actual scope and size of smuggling and trafficking operations.

As you know, prosecutions for document fraud, false statements, fraudulent marriage to evade immigration law, and illegal exportation of arms, munitions, or other military equipment, play a huge role in ICE's enforcement mission. In spite of our concerns outlined above regarding the difficulty in bringing cases involving high-volume alien smugglers, § 2L1.1 presents a problem that is also found in §§ 2L2.1 (dealing with offenses involving document fraud, false statements, and fraudulent marriage to evade immigration law) and 2M5.2 (dealing with offenses involving illegal exportation of arms, munitions, or other military equipment). In

all three sections, the Guidelines provide for level increases based on the extent of the criminal conduct, but fail to account adequately for the full scope of the criminal conduct we regularly confront in our cases at the border. For all three Guideline sections, the Commission should consider raising the threshold for the highest applicable base level increase.

Section 2L2.1 provides a base offense level of 11 for document fraud. The base offense level is increased based on the number of documents involved: trafficking 6-24 documents results in a 3-level increase, 25-99 documents results in a 6-level increase, and 100 or more documents results in a 9-level increase. (Similar enhancements appear in § 2L1.1 for number of aliens smuggled.) The provisions, as drafted, set an artificial and unrealistic cap that fails to reflect the larger volumes of fraud commonly encountered in complex criminal activities. Many smugglers, counterfeiters, and immigration attorneys are responsible for the movement of hundreds – or thousands – of aliens or documents. The Guidelines are both insufficient and disproportionate, because an offender who produces 5,000 documents, or moves 5,000 aliens, can ultimately face the same guideline range as one who produces 110 documents, or moves 110 aliens. The application notes to § 2L2.1 generally suggest that an upward departure “may be warranted” for an offense involving “substantially more than 100 documents.” Given ICE’s concerns as raised above, ICE would prefer that the Guideline’s specific offense characteristics be amended to include increments much larger than 100.

Moreover, the problem in sentences applied to 8 U.S.C. § 1324 is even more pronounced when compared to sentencing for a similar offense under some state laws. For instance, Title 13, Section 2319 of the Arizona Revised Statutes criminalizes the act of intentionally smuggling human beings for profit or commercial purpose. The Arizona legislature classified this criminal conduct as a class 4 felony. A conviction under this statute has been determined to have a

presumptive sentence of two and one half years imprisonment absent any aggravating factors. The Arizona code provides for an increase in the felony rating if certain circumstances are found to have occurred during the commission of the crime. An analysis of the two sentencing schemes demonstrates that the same criminal conduct may be punished more severely under state law. The disparity in sentences creates an incentive to resolve certain transnational complex smuggling matters in state, rather than federal court. It is ICE's belief that the Guidelines should be updated so that the penalties reflect the size and scope of smuggling and trafficking operations.

Similarly, § 2M5.2, as drafted, regarding the illegal export of certain weapons, should be amended to increase the base offense level and specific characteristics to account for assault weapons, grenades, and the number of weapons. Currently 10 weapons triggers an increase in the base offense level. As such, an individual caught exporting hundreds of assault weapons would face the same penalty range as someone exporting 10 handguns. The movement of illegal firearms fuels the violence on the other side of the border. ICE's anti-firearm trafficking efforts such as Armas Cruzadas are degraded when guidelines do not adequately reflect the specific factors that go into individual firearms trafficking offenses.

The Guidelines do not adequately punish the use of money laundering in criminal organizations.

Above, I noted that our increased efforts at the border have led to increases in the amount of money being seized from alien smuggling and other criminal organizations. Section 2S1.1, which covers money laundering, carries a base offense level of 8 (translating to a sentence of 0-6 months for a Category I offender). A defendant would have to launder \$30,000 in order to raise the base offense level to 15-21 months. Even a modest increase of two levels would move the

lowest guideline range for the offense to 6-12 months. While the Guideline's specific offense characteristics provide for level increases for various forms of criminal activity, we believe that an increase in the underlying base level would come closer to acknowledging the critical importance of laundering in enabling criminal activity at the border, and would more adequately proscribe the relevant conduct.

The Commission should consider creating an incentive for aliens to agree to stipulated orders of removal from the United States.

In addition to crafting a sentencing system that more appropriately punishes the conduct to which it is directed, we must also be mindful of effectively and efficiently using our investigative and prosecutorial resources. While I defer to United States Attorney Burke on the specifics about prosecutorial resources today, it is safe to say that few prosecutors' offices are in a position to bring every charged case to trial. Likewise, ICE must similarly target its resources effectively.

One way to preserve the aims of our justice system while promoting efficiency, would be for the Commission to consider implementing a 1-level reduction for any alien who agrees to a stipulated order of removal as a term of his or her plea agreement. The provision could apply in all immigration offenses (other than for illegal reentry of removed aliens per 8 U.S.C. § 1326, as such defendants would have already been subject to final, enforceable removal orders). Such a provision could encourage guilty defendants to plead (thus preserving prosecutorial resources), and would spare the government of having to consume the resources needed for immigration proceedings after the conclusion of the criminal proceedings.

* * *

ICE believes that the four changes proposed above would, in addition to furthering ICE's law enforcement interests, help preserve the integrity of the nation's immigration and customs control systems. We look forward to working with you and our partners to ensure that the United States Sentencing Guidelines fairly and adequately punish all appropriate conduct as intended.

CONCLUSION

Combating violence and other unlawful activity along our border remains an enormous priority for the Department. These efforts present a momentous challenge; organized crime along our shared border exploits what is otherwise a very productive relationship with Mexico that relies upon cross-border commerce, finance, and travel. As I have discussed, we have taken important steps to improve security along the border. We are beginning to see real benefits from our efforts. As effective sentencing policy remains a key component of our success, we look forward to working with you on these, and other issues in the future.

As the Commission marks the 25th anniversary of the passage of the Sentencing Reform Act, I commend the Commission for its thoughtful analysis and critical work on these issues over the years. It is my honor to be able to provide you with ICE's input on sentencing matters today. Moreover, your continued interest in our work is important to the men and women at ICE, who work each day to ensure the safety and security of the United States. I would now be pleased to answer any questions you may have.