

1 UNITED STATES SENTENCING COMMISSION

2 PUBLIC HEARING

3 Phoenix, Arizona

4 January 20, 2010

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8 12601 North 59th Place, Suite 100

9 Scottsdale, Arizona 85254-4312

10 (602) 795-5515

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12 COMMISSIONERS PRESENT:

13 Chair: Chief Judge William K. Sessions III

14 Vice Chairs: William B. Carr, Jr.

15 Judge Ruben Castillo

16 Commissioners: Dabney Friedrich

17 Chief Judge Ricardo H. Hinojosa

18 Beryl A. Howell

19 Jonathan J. Wroblewski

20 STAFF PRESENT:

21 Judith W. Sheon, Staff Director

22 Brent Newton, Deputy Staff Director

23
24 Reported by: JOANNE WILLIAMS, RPR

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CHAIR SESSIONS: Okay. Let's call the hearing to order. Welcome, on behalf of the U.S. Sentencing Commission. Welcome to all. This is the seventh and final regional hearing that we are conducting across the United States. These hearings have provided us with just a great opportunity to listen to practitioners and stakeholders from across the United States and hear advice both about the status of sentencing policy in the United States and also prospective changes to sentencing policy in the future.

The sentencing process is – it is fair to say – complex. Our role on the U.S. Sentencing Commission is equally complex. The branches of government it's fair to say all have a very vital stake in the process. Oftentimes those branches of government from a political-science perspective feel that they – their voice should have a controlling or dominant role in regard to sentencing policy.

Obviously the legislative body is the – is that, serves that function of establishing penalties for criminal acts and reflect the view of the public. And as a result, they feel that their perspective

1 should have dominant sway on sentencing policy. The
2 executive branch is also equally engaged in the
3 process. They have the responsibility of enforcing the
4 laws. And to enforce the laws, the penalties that are
5 provided for criminal activities become essentially a
6 vital part of their responsibility.

7 And then finally the judiciary has the
8 ultimate responsibility of passing judgment on
9 individuals. And judges certainly have told us, and
10 some of us have experienced, that judges are put in
11 that position to reflect and assess not only the
12 activities which resulted in the criminal conviction
13 but also the individual defendant appearing before that
14 judge. And judges would argue that they have – they
15 are in the best position to make what is a fair and
16 just determination in regard to what would happen in a
17 particular case.

18 So as a result, you have essentially three
19 branches of government concerned in the vital ways of
20 the sentencing policy and how it should reflect their
21 own perspective. And the Sentencing Commission is
22 right in the middle of those competing interests. What
23 we have attempted to do is circumvent the globe, at
24 least the North American globe, and to hear from
25 both – or among various groups, practitioners in

1 particular, prosecutors and defense lawyers and
2 probation officers, but representatives of the various
3 branches of government to make sure that we understand
4 all of those interests to help us respond to future
5 changes and demands upon the system.

6 To further enhance the information we are
7 collecting through these hearings, the Commission
8 recently issued a survey to all district court judges
9 seeking their input and comment on the state of federal
10 sentencing guidelines and sentencing in general. We
11 look forward to seeing the results of that survey and
12 combining them with the wealth of information we have
13 already received from hearings just like this one.

14 This is also an extraordinary time to be
15 on the Commission. And I have had the privilege along
16 with Vice Chair Castillo of serving on the Commission
17 for ten years. This is clearly one of the most
18 exciting times that I have experienced being a member
19 of the Commission. My colleagues and I are energized
20 by the commitment that everyone appears to be making in
21 the criminal justice community to review sentencing
22 policy. And we are ready to take a very active
23 leadership role in shaping policy that meets the
24 purposes of sentencing set forth in the Sentencing
25 Reform Act.

1 A system that remains fair and certain
2 protects and promotes public safety and ensures equal
3 justice for everyone involved in the process. Just
4 last week, for example, the Commission voted to publish
5 for public comment a comprehensive package of proposals
6 on a range of topics, including alternatives to
7 incarceration, the relevance of certain offender
8 characteristics in the sentencing process, calculation
9 of criminal history, and other important topics that
10 reflect in large measure the comments we have heard
11 from the criminal justice community at our regional
12 hearings.

13 Congress has also recognized the important
14 role of the Commission in the setting of sentencing
15 policy. In October Congress directed the Commission to
16 provide a detailed review and report of statutory
17 mandatory minimum penalties and their broader role in
18 the criminal justice system. Congress also included
19 the Commission as a stakeholder in pending legislation
20 that would create blue ribbon panels to review the
21 criminal justice system. And the Commission is working
22 closely with the Department of Justice as it conducts
23 its own comprehensive review of the sentencing process.

24 I must also note that the Commission
25 continues to use all of its resources to end the

1 current disparity between crack and powder cocaine
2 penalties. For over a decade, the Commission has
3 called upon policymakers to act in this area. The
4 Commission is pleased that its data and reports are
5 informing the debate. And we stand ready to act the
6 moment Congress does act on this very critical issue.
7 We hope that Congress acts quickly in these areas, as
8 the longer the disparity continues, the more fairness
9 and sense of justice in the system is questioned.

10 So on behalf of the Commission, I would
11 like to thank all of the panelists for taking time out
12 of their busy schedules to share their viewpoints,
13 their wisdom with us over the next two days and we look
14 forward to hearing from all of you. So now it is my
15 pleasure to introduce my colleagues. The last time I
16 introduced them I went on at great length, and I will
17 try to make their introductions briefer and more
18 poignant.

19 Judge Ruben Castillo has served as vice
20 chair of the Commission since 1999. He has served as a
21 U.S. district court judge in the Northern District of
22 Illinois from 1994, as I recall. His experience
23 includes being a partner in a Chicago law firm,
24 regional counsel for the Mexican American Legal Defense
25 and Education Fund, also an assistant U.S. attorney in

1 the Northern District of Illinois. He received his
2 degree from Loyola and Northwestern University School
3 of Law. He actually is a professor, adjunct professor
4 at Northwestern at this time.

5 William Carr has served as vice chair of
6 the Commission since December of 2008. He has been an
7 assistant U.S. attorney in the Eastern District of
8 Pennsylvania from 1981 until his retirement in 2004.
9 He in fact is retired. He has served as an adjunct
10 professor at Widener Law School in Wilmington, Delaware
11 and was a litigation associate in private practice. He
12 attended Swarthmore, graduated from Swarthmore,
13 graduated from Swarthmore and also has a degree from
14 Cornell Law School.

15 Judge Ricardo Hinojosa served as chair of
16 the Commission, subsequently as acting chair from 2004
17 to 2009. This month he has become a chief judge of the
18 U.S. District Court for the Southern District of Texas,
19 one of the largest districts in the United States,
20 having served on that court since 1983, previously
21 served as an adjunct professor at the University of
22 Texas Law School where he taught a course on
23 sentencing. He was also an attorney and partner in a
24 private firm in McAllen, Texas. He graduated from
25 University of Texas and Harvard Law School.

1 Beryl Howell has served on the Commission
2 since 2004. She served as executive managing director
3 and general counsel for an international consulting and
4 technical services firm, former general counsel of the
5 Senate Committee on the Judiciary and also as assistant
6 U.S. attorney, deputy chief of the narcotics section of
7 the U.S. Attorney's Office in the Eastern District of
8 New York. She graduated from Bryn Mawr and also
9 Columbia Law School.

10 Dabney Friedrich served as associate
11 counsel at the White House until her appointment to the
12 Commission in December of 2006. She was counsel to
13 Chairman Orrin Hatch of the U.S. Senate Judiciary
14 Committee, an assistant U.S. attorney for the Southern
15 District of California and also the Eastern District of
16 Virginia, was in private practice. She has received
17 her Bachelor of Arts degree from Trinity University in
18 San Antonio, also a legal studies degree from Oxford
19 and law degree from Yale.

20 And Jonathan Wroblewski was recently
21 designated ex-officio member of the U.S. Sentencing
22 Commission representing the Attorney General. He
23 serves as director of the Office of Policy and
24 Legislation in the Criminal Division of the Department
25 of Justice. Mr. Wroblewski served as trial attorney

1 with the Civil Rights Division, deputy general counsel
2 and director of legislative and public affairs for the
3 Commission. Mr. Wroblewski served – or graduated from
4 Duke and also has a law degree from Stanford.

5 Now, welcome to the first panel. Let me
6 introduce the two panelists. First, John T. Morton is
7 the assistant secretary of Homeland Security for the
8 U.S. Immigration and Customs Enforcement, ICE.
9 Mr. Morton began his federal service as a trial
10 attorney in the honors program in 1994, has since held
11 a variety of positions with the Department of Justice,
12 including as a special assistant to the general counsel
13 and in the former Immigration and Naturalization
14 Service and as counsel to the deputy attorney general.
15 He is a graduate of the University of Virginia School
16 of Law.

17 And next, the U.S. Attorney in the
18 District of Arizona, Dennis K. Burke. Prior to his
19 appointment last year, Mr. Burke held the position of
20 senior advisor to the Department of Homeland Security
21 Secretary, Janet Napolitano, for whom he was chief of
22 staff from 2003 to 2008 while she was governor of
23 Arizona. From 1999 to 2003, he worked in the Arizona
24 Attorney General's Office. From 1997 to 1999, he
25 served as an assistant U.S. attorney in the District of

1 Arizona.

2 Now, Mr. Morton has told me that he's got
3 a very vital meeting I guess later. So he may leave
4 during the course of the hearing. And we will not take
5 offense. We understand that completely. And perhaps
6 we should begin then with you.

7 MR. MORTON: Thank you very much.

8 Mr. Chairman and Members of the Commission, thank you
9 for welcoming me here today in this my first appearance
10 before the Commission as assistant secretary. I have
11 appeared once before many moons ago as an assistant
12 United States attorney when I was happily at the
13 Department of Justice. And actually my testimony then
14 was on many of the same subjects that I think we will
15 discuss today. And some of the recommendations I have
16 for the Commission are similar.

17 Let me also say by way of introduction, I
18 very much appreciate the role of the Commission and I
19 completely agree with the Chairman's comments about
20 sentencing. It's a balance of competing interests and
21 quite legitimate competing interests. And I take the
22 role of the Commission quite seriously having spent
23 much of my life living by its words in court and trying
24 to come up with the right result in terms of sentences.
25 I appreciate the work and thought that goes into it and

1 it's not an easy calculation. So let me start from
2 that point.

3 I also want to state that in that spirit,
4 the recommendations that I make today and the
5 suggestions I make today aren't simply from an old
6 prosecutor with a [inaudible] to greater penalties for
7 defendants. These are areas that we have thought about
8 for quite some time. They're areas that we have
9 discussed with the Commission before and they're just
10 points that we see in our day-to-day practice that
11 comes up that are from our perspective worthy of your
12 consideration.

13 Obviously a lot of agencies play a fairly
14 critical role along the border. The Department of
15 Homeland Security in the form of Immigration and
16 Customs Enforcement and customs and border protection
17 are right at the forefront of this effort. In case you
18 don't know, ICE is actually the second largest criminal
19 investigative agency in the government, behind the FBI.
20 And ICE has nearly 7,000 special agents investigating a
21 whole variety of criminal offenses. Our investigative
22 mandate is in fact quite broad.

23 And we have a particular focus on border
24 crime, namely the smuggling of people, drugs,
25 contraband, money and firearms, but we also spend a

1 tremendous amount of time investigating international
2 child exploitation, intellectual property violations
3 and export control offenses. In my written remarks I
4 explained in some detail some of ICE's recent
5 achievements and successes in carrying out this
6 enforcement mission.

7 But with my oral remarks here today, I
8 would like to focus on what we find in the second half
9 of my testimony, and that is some of our
10 recommendations for areas in which the sentencing
11 guidelines could be modified or improved in a manner
12 that would better serve the aids of efficiency,
13 appropriate sentencing and the public interest.

14 Let me start with the alien smuggling
15 guideline, 2L1.1, and reiterate a concern that we have
16 that the guideline does not adequately account for the
17 type of large-scale alien smuggling organizations that
18 we encounter and can be prosecuted under the basic
19 statute that is at U.S.C. 1324. Under the guideline, a
20 defendant convicted of smuggling faces a base offense
21 level of 12, which results in a ten- to 16-month
22 sentence for an individual in Category I criminal
23 history. And that's not taking into account acceptance
24 of responsibility.

25 The guideline does provide for two higher

1 base levels but in very, very narrow context, namely
2 aiding or assisting in the entry of aliens [inaudible]
3 inadmissible on national security grounds or aiding or
4 assisting the entry of aggravated felons. I would
5 suggest to you that the alien smuggling organizations
6 are – that we encounter are far more complex than the
7 guidelines could have ever anticipated and actually
8 contemplate now. Alien smuggling today is
9 international in scope. It is organized. It's highly
10 lucrative. And it is dangerous to all involved.

11 Commonly we are dealing with networks that
12 move immigrants from a source location far, far from
13 the United States through numerous countries as transit
14 locations and ultimately into the United States, often
15 over a period of months. Take, for example, the
16 movement from China through the Caribbean to the United
17 States. This involves coordination between links but
18 highly effective transnational lines as involving
19 various operators such as recruiters, brokers, document
20 providers, guides, transporters, stash-out operators
21 and corrupt port officials.

22 So to step back for a second, we are
23 facing dedicated international organized criminal
24 syndicates trying to bring people into the United
25 States on a large scale for enormous sums of money

1 every day. And from our perspective, the guidelines
2 don't capture that facet of alien smuggling well. As a
3 result of this structure, it's become increasingly
4 difficult for us to apply base-level enhancements based
5 on the number of aliens smuggled. The relatively low
6 guidelines create little incentive for major defendants
7 even when charged to cooperate with law enforcement to
8 further the investigation of a criminal organization.

9 Given the enormous role that alien
10 smuggling plays in undermining our system of legal
11 immigration and given the central importance of
12 anti-smuggling operations to not only the Department of
13 Homeland Security but also the Department of Justice,
14 we would recommend first consideration of increasing
15 the base level of the offense to 15.

16 Next let me turn to a common problem from
17 our perspective not only with the alien smuggling
18 guideline but also with the document fraud guideline,
19 the immigration fraud guideline in 2L2.1, again
20 remembering from our perspective many of the very
21 large-scale immigration document frauds [are just] alien
22 smuggling by a different name. In some instances the
23 people are transported across great distances and then
24 ultimately over the border evading normal controls. At
25 other times they're brought directly to the control,

1 but through fraud, fraud on a grand scale, they achieve
2 entry to the country.

3 Again, we have the question of a low base
4 offense level from our perspective with 2L2.1. Also
5 I've noted for several years that for whatever reason,
6 it's one point different than the base level offense
7 for alien smuggling. Our sense is that those should
8 be the same. But coming back to a common theme that we
9 have testified about before is that the table for both
10 guidelines doesn't contemplate the reality of what we
11 deal with every day.

12 And in particular the guidelines don't
13 adequately deal from our perspective with those
14 instances in which the number of aliens involved, the
15 number of aliens being smuggled or the number of
16 documents involved is substantially in excess of 100.
17 And we increasingly see these kinds of cases. And
18 while the guidelines do contemplate an upward
19 departure, in practice we find that judges don't quite
20 know how to appropriately implement that.

21 In many instances we are dealing with
22 cases where we have – it's not just 150 more people.
23 It's what do you do with a case which involves the
24 smuggling of 900 or a thousand aliens or document fraud
25 of 2 or 3,000 instances? What is the appropriate

1 calculus when the guideline has three levels and stops
2 at a hundred and then just says that an upward
3 departure may be appropriate?

4 So I won't belabor the point. It is
5 something that we have raised with the Commission
6 before. But from our perspective, those very serious
7 cases aren't adequately contemplated. And it would be
8 useful if the table were adjusted to provide a little
9 more guidance or structure for those very serious,
10 serious offenses that we see.

11 Let me turn next to §2M5.2, which
12 regards the illegal export of weapons. In our view we
13 would like to see that guideline amended to better
14 differentiate the various types of weapons and again
15 the numbers smuggled. Right now the main base of
16 offense level treats ten firearms the same as it would
17 150 hand grenades or highly sensitive technology. And
18 while the base offense level is fairly strong, there is
19 no differentiation between quite, quite different
20 offenses and levels of seriousness.

21 Finally, and in the interest of time, let
22 me recommend as well a change to §2S1.1. And
23 there is a sort of similar concern for 2S1.3, which
24 deals with money laundering and bulk cash smuggling.
25 Again, the basic theme being that in practice we

1 encounter a great number of defendants for whom it's
2 very clear that serious money laundering or serious
3 bulk cash smuggling is occurring. We can't always
4 bring forward evidence that relates to the specific
5 offense characteristics that would otherwise raise the
6 penalty.

7 And so even though the evidence of a
8 criminal violation on the underlying statute is quite
9 strong and clear, because the base offense level is low
10 and otherwise driven by the money table in 2B1.1, we
11 continually find ourselves with fairly low offenses
12 that when acceptance of responsibility is factored in,
13 the individuals are not looking at serious time. Even
14 a modest increase of a few levels in the base level
15 offense for both guidelines would make a very strong
16 difference in our perspective.

17 Particularly when we look at the range of
18 crime across the border, the common denominator in most
19 of them is a significant finance of cash that goes with
20 it, that money laundering is present in almost all of
21 the major organized criminal activities that we are
22 investigating and trying to prosecute. So it's very
23 important for us to spend an enormous amount of time
24 investigating money laundering, investigating bulk cash
25 smuggling. And frankly, it's one of the major

1 challenges that exists now that confronts federal law
2 enforcement along the border.

3 Finally, let me note that in addition to
4 correcting a sentencing system that more appropriately
5 punishes the conduct to which it is directed, we must
6 also be mindful of effectively and efficiently using
7 our investigative and prosecutorial resources. While I
8 am going to defer to my good friend, the United States
9 attorney Dennis Burke, on the specific of the
10 prosecutorial resources today, I think it's safe to say
11 that few prosecutors offices are in a position to bring
12 every charge – case to trial. And likewise we as
13 investigators must target our resources effectively.

14 One of the things I would recommend to the
15 Commission for consideration in the interest both of
16 efficiency for the system and also fairness to
17 defendants is the idea of considering a one-level
18 reduction for any alien defendant who agrees to a
19 stipulated order of removal as a term of his or her
20 plea agreement. Stipulated removal is provided for in
21 the statute. It is possible both as a matter of
22 sentencing and before the district court judge it's
23 also possible administratively.

24 And it is something that Congress clearly
25 has intended to encourage. It's something that we

1 think is quite important from the perspective of the
2 federal government. And we don't think that there is
3 anything inappropriate in recognizing that
4 encouragement in the form of a reduced sentence for
5 those defendants who are immigrants and would agree to
6 a stipulated order of removal. And I don't restrict
7 that in any way to immigration cases.

8 I think from our perspective, it would be
9 appropriate to consider that kind of a reduction for
10 any alien defendant charged with a serious offense,
11 other than something like illegal reentry after
12 deportation where the underlying offense is one of
13 thumbing your nose at the system. But with that small
14 exception, I think it could be something that would be
15 brought to bear across the system.

16 At any rate, let me thank you once again
17 for inviting me. It's an honor to be here. I
18 appreciate the work of the Commission tremendously. I
19 know it's a balance and it's not always easy to draw
20 these lines. So I offer our suggestions as simply
21 that, recommendations for consideration. And I
22 appreciate your time and attention. Thank you.

23 CHAIR SESSIONS: Thank you,
24 Mr. Morton.

25 MR. BURKE: Chairman Sessions, vice

1 chairs, distinguished members of the Commission, my
2 Justice Department colleague on the far right, my
3 former judiciary committee colleague Commissioner
4 Howell, it's good to see you. I thank all the members
5 for being here. I just want to report that the
6 torrential rain last night was an aberration. Today's
7 weather is a little more indicative of what we expect
8 here.

9 Thank you for allowing me the opportunity
10 to appear before you to discuss the practical effects
11 of the Supreme Court's decision in *Booker* and its
12 prodigy on sentencing practices in our district. And
13 to my left and your right is Joseph Koehler, who is an
14 assistant United States attorney in our office and has
15 worked for many years on many of the immigration
16 provisions and what the Sentencing Commission is, has
17 testified before the Sentencing Commission in the past.
18 It is a pleasure to appear before you on behalf of not
19 only the Justice Department but our district.

20 As my written testimony points out in
21 extensive detail, the District of Arizona is one of the
22 most unique, dynamic and busiest districts in the
23 country. We have 6.5 million people who reside in our
24 district. Seventy percent of our land in Arizona is
25 federally owned or controlled. Forty percent of that

1 land is held by 21 federally recognized Indian tribes.

2 We have the largest Native American
3 population in the country. The Navajo Nation in the
4 northeastern part of our state is roughly the size of
5 West Virginia. The Tohono O'odham Nation straddles 75
6 miles of the United States, Mexico border, in fact
7 transcends it. The T.O. Nation is also in Mexico. The
8 entire land is the size of Connecticut. We have over
9 15 military facilities, including the largest
10 F16-trained base in the country. And we have diverse
11 industries so, we see it all in this district.

12 Over the past few years, our office has
13 grown significantly. We have doubled the number of
14 assistant United States attorneys in the past ten
15 years. Arizona has slightly over 6,000 federal law
16 enforcement agents and approximately 3,600 of whom are
17 deployed by the United States Border Patrol. That is
18 massive exponential growth in the last few years. We
19 share a 389-mile border with Mexico, which has become
20 the number one opportunity for illegal crossing along
21 the southwest border. This drives our case load, but
22 it is not the sole driver.

23 Over the past five years, our district has
24 ranked highly in the number of non-immigration
25 prosecutions as well as immigration prosecutions. The

1 case load in our district is as diverse as the many
2 communities we serve. We handle cases ranging from
3 firearms trafficking, as Assistant Secretary Morton
4 referenced, to fraud relating to tribal gaming, from an
5 incredible increase in bank robberies in the Phoenix
6 area, to theft of artifacts, protected plants, wildlife
7 and cultural resources.

8 And as I mentioned, we serve a large
9 number of Native American communities. Sadly, the
10 violent crime rate in Indian Country is six times the
11 national average. So we prosecute a large volume of
12 violent crimes emanating from Indian Country. In
13 addition, Arizona has also been a major source of
14 mortgage fraud prosecutions. But our immigration case
15 load is indeed heavy.

16 We filed nearly 3,200 felony immigration
17 cases in fiscal year 2009 alone and over 22,000
18 misdemeanor cases. Of the 3,200 felony immigration
19 cases, 2,272 were reentry cases under Title 8, §
20 1326. This represents a substantial increase over FY
21 2008, largely as a result of the increase in resources
22 we did receive from the Justice Department. That said,
23 we prosecuted but a small fraction of the number of
24 people actually arrested by the Border Patrol in FY
25 2008 and 2009.

1 As I know you have heard from the
2 department in the past, we continue to bear a difficult
3 burden in obtaining judicially noticeable documents to
4 satisfy our burden of proving that applicability of the
5 guideline enhancements in §2L1.2 as required by
6 the Supreme Court's decisions in *Taylor* and *Shepard*.
7 And as our case load continues to grow in this area, so
8 does our need to gather those records, litigate the
9 immigration guideline issues in district court and then
10 litigate them again on appeal.

11 Our office in the past has had a threshold
12 of 500 pounds in marijuana smuggling cases, but that
13 has been now abolished. So in our Tucson office, every
14 new assistant United States attorney added in the past
15 two years is working at full capacity and we still lack
16 the sufficient resources to prosecute every viable case
17 as the smugglers respond to thresholds and amounts.

18 Regarding *Booker* in Arizona, our
19 experience in the wake of that case has been very
20 largely positive. Our fast-track plea agreements
21 generally provide for downward departures in the
22 context of binding plea agreements under Rule
23 11(c)(1)(C). Variance in departures have occurred
24 outside the ranges provided in our fast-track plea
25 agreements, but such instances have been rare and we do

1 not view them as significant enough to warrant specific
2 attention at this time.

3 Outside the fast-track context, variances
4 under *Booker* generally have not been extraordinary
5 either. In several cases, though, we believe the
6 district court's extreme downward variance from the
7 advisory guideline range resulted in an unreasonably
8 low sentence in light of the guideline range and other
9 factors, but an appeal was not feasible in light of Ninth
10 Circuit decisions.

11 Notwithstanding this differential
12 appellate review, the advent of *Booker* has not resulted
13 in less work for our office. Instead litigation has
14 intensified, not only concerning what the appropriate
15 guideline ranges should be, but also whether a variance
16 is appropriate in cases without a stipulated sentencing
17 range and even in some with such a stipulation.
18 Criminal defendants continue to litigate both at
19 sentencing and on appeal the district court's
20 guidelines determination as well as the overall
21 reasonableness of the sentence even when the judge is
22 given a downward departure or variance.

23 The final aspect of our district that I
24 would like to point out in my oral comments is the
25 large number of Class A misdemeanors and petty offenses

1 that our office prosecutes and the statistic I
2 referenced earlier. Our Tucson office in 2009
3 prosecuted over 1,200 Class A misdemeanors and over
4 16,000 petty offenses. Of course the sentencing
5 guidelines apply to the Class A [mis]demeanors but do not
6 apply to the petty offenses.

7 But in order to handle these cases
8 efficiently, the defendants are offered a plea
9 agreement in which the government agrees to forego a
10 potential felony prosecution. In exchange the
11 defendant agrees to a stipulated sentence, which is
12 generally within the guideline range for a Class A
13 misdemeanor, agrees to waive completion of a
14 presentence report and agrees to an immediate sentence.

15 I have provided more extensive analysis of
16 all this in my written testimony, but which I obviously
17 submit to your record, let me say again how much we
18 appreciate here in our district the Commission's time
19 and attention to these issues and for conducting one of
20 your field hearings in our district. Appreciate this
21 opportunity and will be glad to answer any questions,
22 Mr. Chairman.

23 CHAIR SESSIONS: Thank you,
24 Mr. Burke. And I appreciate the fact that you brought
25 better weather. So, Mr. Morton, do you have until

1 10:00 or 10:15? I promise to get you out by 10:15.

2 That would be --

3 MR. MORTON: Yep, let's shoot for that and
4 I think it will work.

5 CHAIR SESSIONS: So let's open this
6 up for questions. You can go first, Commissioner
7 Friedrich.

8 COMMISSIONER FRIEDRICH: Mr. Burke, I had
9 a question for you regarding the department's early
10 disposition programs. And one of the things that we
11 hear frequently in these hearings, and you certainly
12 see it in case decisions, is that a number of judges
13 across the country are uncomfortable with what they
14 view as uneven application of the early disposition
15 program, the fast-track programs. And some of them
16 claim that it appears to them that in districts with
17 relatively high immigration case loads, there is an
18 absence of fast-track programs. And others with
19 relatively low immigration case loads, some of them
20 have fast-track programs.

21 And I have read Former Deputy Attorney
22 General Ogden's latest authorization for certain early
23 disposition programs. I see that there have been a
24 number of changes, including -- I see that the Southern
25 District of Texas and the Western District of Texas no

1 longer have early disposition programs for
2 transportation or harboring of alien cases. I also see
3 that your district I think has more fast-track programs
4 than any other. I think I counted seven or eight.

5 And I was particularly surprised by a
6 fast-track program for alien baby smuggling cases,
7 which I think your district is the only one in the
8 country that has that, as well as bringing in, which I
9 understand is a three-year mandatory minimum penalty.
10 So I was wondering, aside from the basic directive in
11 Deputy Attorney General Ogden's memorandum which makes
12 clear that districts have to show that they can
13 prosecute a substantially larger number of cases by
14 having these programs, can you shed any additional
15 light on the authorization process and how it is that
16 there is these distinctions across the country?

17 MR. BURKE: Commissioner, the fast-track
18 authority we currently have in the particular
19 provisions which you referenced have been in place for
20 some time in our district. And actually we recently
21 received a reauthorization from the deputy attorney
22 general. Those from our application to the department
23 from our perspective were driven predominantly by the
24 numbers in our district. So I can speak to our
25 application in the practice in our district. I can't

1 speak to the more general issue as to, as you
2 indicated, other districts along the southwest border
3 as to how they receive approval or not.

4 But at least the impression from the field
5 and from our office is that those approvals were driven
6 by the circumstances in our district and the particular
7 numbers. I know that - as I referenced in my
8 testimony, in this district in particular, in the past
9 there was a policy of a threshold of 500 pounds of
10 marijuana and not taking cases below that. And that
11 obviously had an impact on the particular numbers in
12 our district as well as our actual AUSAs, the amount of
13 AUSAs at a time who were dedicated to these particular
14 cases and had an impact on the numbers and then
15 obviously had an impact on our ability and
16 consideration of the fast-track authority.

17 So I can speak to that in particular with
18 regards to our district. I am not in a position to
19 give a more global perspective on behalf of the
20 department as to how particular other districts in the
21 southwest border or their fast-tracks were approved or
22 not.

23 COMMISSIONER FRIEDRICH: Is it not unusual
24 to have a fast-track program for offenses that have min
25 criminal penalties? Is that - just looking at the

1 list, it seems that you are unique in that respect.

2 MR. BURKE: I believe our uniqueness is
3 more driven by the numbers.

4 COMMISSIONER FRIEDRICH: More than -- part
5 of the Texas -- are your numbers that much higher than
6 Southern District of Texas, Western District of Texas?

7 MR. BURKE: I can't speak for the
8 particular overall numbers. With regards to at last
9 our application and seeking of authorization from the
10 deputy attorney general, it was predicated on our case
11 load per AUSA and what we are experiencing in our
12 district with regards to those particular offenses.

13 CHAIR SESSIONS: Okay.
14 Commissioner Howell.

15 COMMISSIONER HOWELL: Good morning. And
16 thank you both for coming and testifying in front of us
17 today. And it's great to see you again, be able to
18 catch up a little bit. I wanted to talk to you a
19 little bit about variances. You are one of the few
20 U.S. attorneys or representatives of the Justice
21 Department who has come before us to say that variances
22 generally are not that big of an issue for you. That's
23 very unusual in this district, except for one area.

24 I think -- and at least in your written
25 testimony you talked about the child pornography area

1 and a child pornography case where there was a
2 significant variance, which is consistent also with
3 today's *Wall Street Journal* article headline, "Judges
4 trim jail time for child porn." And so variances in the
5 child porn arenas and downward departures are an issue
6 in many districts, not just the District of Arizona.

7 Are there – and it's something that the
8 Commission itself is paying attention to, to see why those
9 variances are happening, in what ways are the child
10 pornography guidelines – can be made more relevant to
11 the cases that judges are seeing so that the guideline
12 penalties are making more sense to the judges. Do you
13 have any suggestions in that regard for the Commission?

14 Because, I mean, I understand from your
15 written testimony that the one case that you all –
16 where there was a sentence under the guidelines of 67
17 years that was resultant in downward variance to five
18 years of probation and is one where you considered at
19 appeal but I think ultimately decided not to appeal it.

20 What – you know, many of these variances
21 are happening with defendants who are looking at child
22 pornography images or downloading child pornography
23 images and judges are saying that there is no –
24 finding no actual physical contact with children and
25 finding that the penalties therefore warrant a

1 variance. So what recommendations do you have for what
2 the Commission can do in this area to address the
3 variances that not just your district is seeing in the
4 child pornography area but across the country?

5 MR. BURKE: Commissioner Howell, you
6 reference to my written testimony where there was a
7 particular case where there was a variance that did
8 result in a sentencing of five years of probation. And
9 the difficulty for our office in that in appealing
10 was - I cite it in my written testimony, the case on
11 the Ninth Circuit that actually was a child pornography
12 case, the *Autery* case, that from our perspective put us
13 in a difficult position to prevail and the amount of
14 discretion provided in the Ninth Circuit on those
15 particular cases.

16 And we have - but overall, as you
17 indicated in the beginning and in reference to my
18 testimony, these are pretty distinct cases. In other
19 words, these are not necessarily something that is
20 overwhelming our district or we have a great deal to
21 deal with, but it yet is still problematic. And
22 obviously from our perspective we view the child porn
23 as fueling the demand for the victimization of children
24 in the future.

25 I can't for myself as a official in the

1 Justice Department in this district provide an overall
2 solution to that beyond what we grapple with in the Ninth
3 Circuit. But I assume – my guess – considering your
4 background and my background in this particular area
5 and the attention it's gathering, I assume in the very
6 near future the cases of *Autery* and what's happened in
7 this district and what you are hearing from other
8 districts will garner attention from Congress.

9 CHAIR SESSIONS: Mr. Wroblewski.

10 COMMISSIONER WROBLEWSKI: Thank you,
11 Mr. Chairman. And thank you both, John and Dennis, for
12 being here. As the Chairman indicated early on, this
13 is the last in a series of hearings that we have had.
14 And in many ways, I think it's perhaps the most
15 important. The southwest border, as you know, accounts
16 for – I don't know – maybe a quarter of all the
17 cases. And it's becoming an increasing part of the
18 federal criminal justice system. So we appreciate you
19 both being here.

20 A couple of questions. We have heard from
21 judges as we have gone across the country about
22 concerns about aliens actually serving more jail time
23 than non-aliens who were sentenced to a similar
24 sentence. John, could you describe what actually
25 happens when an alien finishes his Bureau of Prisons

1 sentence, actually what – the process, how long it
2 takes? And if we took up your suggestion about a
3 one-level reduction for stipulated order of removal,
4 how would that process change?

5 MR. MORTON: First of all, where that
6 concern comes from from judges is that they sometimes
7 conflate or believe that they are the rough equivalent.
8 They conflate that criminal sentence with the period of
9 detention that is necessary to remove someone from the
10 country. And our aim as an agency and as a department
11 is for the amount of time that a criminal offender
12 should spend in civil detention be as little as it
13 possibly can be. And in many instances, we seek to
14 have a final order of removal in place prior to the end
15 of the service of the criminal sentence.

16 And that's particularly true in the
17 federal system where we have quite good coverage and
18 increasingly true in the state system, so that the
19 problem doesn't arise at all. It's just a question of
20 making sure that the person has travel documents and is
21 removed from the country. It doesn't always work well.
22 The size of the criminal justice system is such the
23 number of criminal defendants going through the
24 criminal justice system each year means that a large
25 number of criminal offenders do come to our civil

1 custody without a final order of removal.

2 When that happens, we have to put the
3 people in the immigration proceedings. And that takes,
4 depending on the country that they're from, anywhere
5 from 40 days to months, in very rare instances, years.
6 Typically most criminal offenders don't have much in
7 the way of relief in the immigration process. So the
8 process is a fairly quick one. And it comes down to
9 whether or not we can obtain the travel document from
10 the host country to remove them. And in some cases
11 that's difficult. China, India, Jamaica in particular
12 it takes us some time. So the people while they're
13 removable remain in our custody until we can get the
14 necessary travel documents in order.

15 I think we all recognize that the best
16 result from the matter of public policy is for the –
17 for criminal offenders to spend the least amount of
18 time possible in immigration custody following the
19 conclusion of their criminal sentence, in other words
20 that they should be removed from the country assuming
21 the criminal offense renders them removable, which most
22 of them do. They should be removed as soon as their
23 criminal sentence is done.

24 And that's why – that's a motivating
25 factor behind our recommendation for a one-level

1 reduction, is we think as a matter of public policy,
2 we – the system should encourage final order of –
3 stipulated final orders of removal as much as it
4 possibly can so that people don't spend an extra three
5 or four months in civil immigration detention before
6 they're ultimately removed from the country based on
7 their criminal offense.

8 COMMISSIONER WROBLEWSKI: Can I just
9 follow up for just a second on that? If we had the
10 immigration bar here, would they raise any concerns
11 about that, about the idea that the criminal defense
12 bar, whether it's the federal public defender or CJA
13 lawyer, is now going to have to determine at the
14 criminal stage whether or not there is some civil
15 immigration claim?

16 MR. MORTON: The great challenge here is
17 there has traditionally been a tension between the
18 criminal defense bar and the immigration bar as to the
19 wisdom of some of these recommendations. From the
20 criminal defense bar's perspective, they come and say
21 why is my client spending another three or four months
22 in immigration detention? He wants to go home. He was
23 convicted of an offense. He doesn't have any relief
24 available to him. Why are you making him in fact serve
25 a longer sentence? He wants to go home. Let him go

1 home.

2 And on the other hand, from the
3 immigration perspective, the immigration bar is
4 concerned that individuals are being rushed into
5 perhaps stipulating to removal when they might perhaps
6 have some relief that they could pursue and they might
7 have a chance at staying in the country through some
8 form of immigration benefit. The tension exists. It's
9 not readily resolved. Although I do think in fairness
10 to the immigration bar, it's largely a question for
11 them of process.

12 They don't object to the principle of
13 someone who is clearly removable being removed as fast
14 as possible if there is no other rational alternative.
15 They don't want their client to be spending any more
16 time in detention than they should either. But from
17 their perspective, they want to make sure that the
18 stipulation is an informed and knowledgeable one and
19 made in the context where the defendant doesn't really
20 have any immigration relief.

21 I won't say - I think in practice that is
22 almost always the case. I haven't seen many instances
23 at all of people rushing to a snap judgment on
24 stipulated removal to save themselves two or three
25 months worth of detention time. But I recognize the

1 tension in the system. The beauty of the guideline
2 approach would be that it would require as part of a
3 criminal sentencing process that has the constitutional
4 right to representation that doesn't exist in the
5 immigration context.

6 So people often forget that a lot of the
7 individuals who leave the criminal system that come to
8 the immigration system then don't have an attorney who
9 represents them during that process. It is not -- you
10 don't have a constitutional right to a paid lawyer in
11 the immigration process. You can lose your public
12 defender. You come into our custody and you spend
13 three or four months and you don't have an attorney.
14 So there is a real benefit I think from our perspective
15 of doing it in the criminal justice system.

16 COMMISSIONER HINOJOSA: Just a follow-up
17 to that question. Under the present system, about how
18 many people stipulate to removal? What would be the
19 percentage more or less of people who automatically
20 stipulate to that?

21 MR. MORTON: In federal proceedings it's
22 quite low, quite low. There is administrative
23 stipulation as well. Because the --

24 COMMISSIONER HINOJOSA: I don't mean in
25 the federal criminal system. I mean as far as -- many

1 of these defendants get placed in prisons that are
2 close to centers where they are going to be eventually
3 put through the removal or deportation process. And
4 they are limited as to where they are placed because of
5 that. But of those that get put into the
6 administrative process, how many automatically
7 stipulate to the removal?

8 MR. MORTON: I don't have the exact
9 figure. I will need to get back to you on that. But
10 where we have a criminal alien program or an
11 institutional hearing program and a new program called
12 secure communities, when the process is in place and we
13 actually have, you know, put into place the opportunity
14 for people to stipulate, a very significant portion of
15 those people do in fact stipulate to removal and are
16 removed without further time in our detention. The
17 problem is a very large number of the people in state
18 and local jails, there is - the system is so large.
19 We don't have those in place.

20 COMMISSIONER HINOJOSA: But it is true
21 that that delay is going to occur regardless of whether
22 they stipulate to it or not because depending on what
23 country they are from and how close they are to the
24 Mexican border if it's Mexico that they are citizens
25 of.

1 MR. MORTON: It's true that in some
2 instances there will continue to be some delay. It's
3 always much less delay if you've stipulated to your
4 order because all that's left is the arrangement of the
5 travel documents and removal. But you are correct in
6 suggesting that it's not – it doesn't remove all the
7 way. There are still the mechanics of removal. But if
8 you are engaged in a removal proceeding even if you
9 ultimately decide that you're going to contest to it,
10 you have to have a hearing. You have to come before
11 the immigration judge. It takes several months in the
12 entire time you are in our detention, at taxpayer
13 expense.

14 COMMISSIONER HINOJOSA: And you would make
15 an exception to the suggestion of the one point
16 reduction 2L1.2 cases that were convicted under illegal
17 reentry after a prior deportation as well as a prior
18 removal?

19 MR. MORTON: Yeah.

20 COMMISSIONER HINOJOSA: I know you refer
21 to them as a small number of cases, but that would be a
22 large number –

23 MR. MORTON: That would be a large number
24 of cases particularly for Dennis. The basic point
25 being that I can envision some criminal offenses for

1 which a reduction of this sort would be inappropriate.
2 I don't - but generally speaking I would think that an
3 alien -

4 COMMISSIONER HINOJOSA: Would you make
5 that exception also for someone who commits another
6 offense who has been removed and/or deported previous
7 to that and convicted of that but this time a charge is
8 another charge?

9 MR. MORTON: By definition anybody who is
10 coming back after a deportation is already going to
11 have a removal order that would be reinstated. So to
12 the extent that you have a prior removal order, there
13 should be no reward to you for agreeing to it again
14 after you've come to the country -

15 COMMISSIONER HINOJOSA: So all those that
16 already have had a prior conviction for that even if -

17 MR. MORTON: Who have an existing removal
18 order, regardless of whether you have been convicted
19 for it.

20 COMMISSIONER HINOJOSA: Mr. Burke, you
21 made the mention of I guess until 2008, you weren't
22 taking any cases under 500 pounds I guess; is that
23 correct?

24 MR. BURKE: There was a policy in the
25 Tucson office that was from I think about 2002 to 2008

1 where the office was declining cases that were brought
2 to us by agents that – where the amount in question
3 was below 500 pounds of marijuana.

4 COMMISSIONER HINOJOSA: Of your 1,200
5 Class A misdemeanor and petty offenses – let's start
6 with Class A misdemeanors. How many of those do you
7 think are drop-down felony cases that you would
8 normally prosecute as felony cases, would qualify as
9 felony cases, but for whatever reason you decide to
10 take them as Class A misdemeanor cases or drop down to
11 a Class A misdemeanor?

12 MR. BURKE: I don't know. I would have to
13 get back to you on that, Mr. Commissioner. I do know
14 that the great reason driving a lot of that is separate
15 and apart from whether they are actually a felony but
16 the amount of time and resources that would be spent on
17 it. But I will get back to you on –

18 COMMISSIONER HINOJOSA: If you would
19 include the petty offenses also, that would be helpful,
20 that they could be brought as felonies but because of
21 the number of cases or the time involvement, they have
22 been prosecuted as either Class A misdemeanor or lower
23 misdemeanors.

24 MR. BURKE: I will do so.

25 COMMISSIONER HINOJOSA: Thank you, sir.

1 CHAIR SESSIONS: Mr. Morton, I have
2 a couple of questions. The first relates to alien
3 smuggling. You said that today's world is not
4 necessarily reflected in the guidelines because the
5 scope of these alien smuggling conspiracies is much
6 broader. Your proposal is to increase the offense
7 level. My question is obviously as a part of 2L1.1, we
8 have the size of the conspiracies reflected in the
9 number of aliens that are submitted. Why not
10 propose – as opposed to increase the offense level,
11 which deals with low-level alien smuggling as opposed
12 to high-level, why not increase possible penalties for
13 number of aliens above 100 as opposed to go the offense
14 level? That's the first one.

15 And I am really intrigued with this
16 one-level [decrease] by voluntary waiver. How would the
17 world be different both for individual defendants and
18 also for ICE if there was a proposal adopted which
19 would give a one-level decrease assuming that the
20 defendant before the court did not have an existing
21 removal order in place? And how would that make the
22 world better for you in doing the work that you do as
23 well as the individual defendants?

24 MR. MORTON: Your first question,
25 Mr. Chairman, I am proposing both. And I think you can

1 tackle the alien smuggling guideline either way. In my
2 prior testimony to the Commission, I did recommend
3 exactly that, that we should increase the – provide
4 for an additional level in the table, both in 2L1.1(a)
5 and 2.1, for those cases that we now regularly see that
6 are substantially in excess of a hundred. That's one
7 way to do that.

8 The other way would be to increase the
9 base level offense just to recognize from our
10 perspective alien smuggling is a scourge. It is a
11 major challenge for the United States. It is not a mom
12 and pop operation where people are being brought across
13 the border in twos and threes. This is international
14 organized crime on a grand scale.

15 And it is difficult for us to achieve the
16 necessary deterrents when we are engaged in very
17 long-term sophisticated organizations trying to arrest
18 and capture people who are operating in foreign
19 countries and have absolutely no intention of coming to
20 the United States because they know we are going to
21 arrest them, yet they are making literally millions off
22 of violating U.S. law on a daily basis and putting
23 people at enormous personal risk traveling across great
24 distances. It's a real problem.

25 But to your basic question, I have no

1 objection – in fact we would advocate one way of
2 dealing with the issue through adding an additional
3 structured layer in the table beyond a hundred. With
4 regard to your second question, I think the world would
5 be greatly improved for several reasons. First, I
6 regularly hear – I heard it as a prosecutor and now we
7 hear it all the time as the immigration enforcement arm
8 from criminal defendants who say, "I have done my time.
9 I want to go home." And I am having to spend another
10 four or five months in what from the defendant's
11 perspective is a jail.

12 That it's civil in nature as opposed to
13 criminal in nature, obviously that subtlety is lost
14 upon them, and rightly so. Often we detain people in
15 these circumstances in a jail. We use excess jail
16 capacity to carry out our detention function. And from
17 our perspective, the law already recognizes this issue,
18 already encourages in the form of stipulated judicial
19 orders of removals, finality at the end of the
20 sentencing process so that criminal defendants for whom
21 there is no immigration relief don't have to spend any
22 additional time in immigration detention. And then the
23 government in turn doesn't have to spend time on
24 detention space, trial attorneys, immigration judges
25 for those cases in which there is no relief available.

1 The provision in Title 8 is used but is
2 not used uniformly. Practice varies tremendously from
3 district to district. I think – and that's true both
4 with regard to the district courts and the U.S.
5 Attorney's Office. And from our perspective, the best
6 way to encourage what I think most people when they
7 look at it on the merits makes a lot of sense both for
8 the government and for defendants – the greatest way
9 to encourage more uniformity in the stipulated orders
10 is to provide some benefit to the defendants who are
11 willing to engage in it where then the defendant
12 receives a reduced sentence.

13 We receive a defendant who has stipulated
14 to what would have been the outcome anyway three or
15 four months or longer down the road. And we are able
16 to remove that person much more quickly at much less
17 expense at much less hardship to the defendant in
18 question. All we have to do is get the travel document
19 and make the necessary arrangements, recognizing as the
20 statute does that it has to be voluntary.

21 This is – if a particular defendant feels
22 that notwithstanding their criminal conviction they
23 have an avenue of relief, more power to them. Come to
24 immigration custody. Go through immigration
25 proceedings and seek relief. For most individuals who

1 have a felony conviction, the law is such that that's
2 quite unlikely, particularly if you are also here
3 unlawfully. The only exception to that is lawful
4 permanent residence. If you have a serious criminal
5 conviction, there are some avenues of relief generally
6 for those individuals.

7 And they often do decide to come to
8 immigration proceedings and seek relief. But for the
9 vast majority of the people that are coming out with
10 serious drug offenses, violent offenses, there is no
11 room for immigration law. They're just coming into our
12 detention for a period of processing to be removed from
13 the country based on the criminal convictions they were
14 just sentenced for.

15 CHAIR SESSIONS: Well, I appreciate
16 your comments. It is 10:15. I'm sorry. It's 10:16.
17 But I appreciate the extra minute. And thank you very
18 much for coming and speaking with us.

19 MR. MORTON: Thank you.

20 MR. BURKE: Thank you for the opportunity.

21 CHAIR SESSIONS: Let's take a
22 recess and be back at 10:30.

23 (Whereupon, a recess was taken at 10:16 a.m.
24 until 10:36 a.m.)

25 CHAIR SESSIONS: Good morning and

1 welcome. This is one of my favorite parts of the
2 hearings, is to listen to judges speak about their own
3 experiences, their sense of how the guidelines are
4 currently working and also their thoughts about the
5 guideline system should that change. So let me
6 introduce – I have known Martha Vazquez for many
7 years.

8 She has been a district judge in the
9 District of New Mexico since 1993. She has served as
10 chief judge of the District of New Mexico for almost
11 seven years, since 2003, soon to pass on that
12 responsibility to others. She worked in private
13 practice in Santa Fe, served as an assistant public
14 defender in the public defender department of the State
15 of New Mexico. She holds a B.A. from Notre Dame and
16 also a J.D. from Notre Dame.

17 And next, Judge Marilyn Huff has been a
18 district court judge in the Southern District of
19 California since 1991. Should I offer condolences for
20 the loss of the football game? You must be in a state
21 of mourning.

22 JUDGE HUFF: It's heart breaking.

23 CHAIR SESSIONS: A city of
24 mourning.

25 JUDGE HUFF: That's what you get when you

1 are a Charger fan. We are used to it.

2 CHAIR SESSIONS: She served as
3 chief judge of the Southern District of California from
4 1998 until 2005. She previously worked in private
5 practice. She received her B.A. from Calvin College
6 and J.D. degree from the University of Michigan. So I
7 welcome both of you. Have you decided among yourselves
8 who wishes to go first or – I guess Judge Vazquez.
9 Thank you.

10 JUDGE VAZQUEZ: First of all, I learned
11 this morning that this is your – the end of your road
12 trip. And I am – I have to tell you that I am very
13 impressed that you have taken so much time to listen to
14 so many voices about such an important topic. I want
15 to thank you very much for letting me be a part of
16 that.

17 For the most – for the past 25 years, our
18 federal system has sentenced its people under mandatory
19 scheme. We must look at what we have done. We must
20 look back before we go forward and ask ourselves
21 whether we have acted fairly. We are Americans and we
22 cherish our freedom. I am a first-generation American.
23 And I still remember my father walking around our home
24 trying to recite and remember, memorize the preamble to
25 our Constitution as he prepared to become a naturalized

1 citizen.

2 To me it seems incongruent that under the
3 sentencing scheme, our great country which was founded
4 under the principles of liberty and freedom could have
5 earned the shameful distinction of imprisoning more of
6 our own people for longer periods of time than any
7 other nation in the world. It is our system of harsh
8 sentencing guidelines as well as statutory mandatory
9 minimums that have placed us at the top of this list.
10 At a time when we can least afford it, we are spending
11 \$50 billion a year to do this.

12 To understand the role the Sentencing
13 Reform Act of 1984 has had in this crisis, we need only
14 look at this. For the 40 years between 1940 and 1980,
15 the federal prison population hovered at under 25,000.
16 However, between '84 and '94 the population doubled.
17 And then it doubled again in the next ten years. Today
18 we have more BOP employees than we have prisoners
19 before the act.

20 Looking back after almost 17 years that I
21 have been sentencing defendants, I can say this: The
22 goal to eliminate sentencing disparity is a laudable
23 one and one that is definitely worth pursuing. But
24 Members of the Commission, we have incarcerated our
25 people for too long. The numbers on the grid are too

1 harsh, especially in the context of drug cases. Today
2 we can achieve this noble goal with the discretion the
3 Supreme Court has finally given us without the heavy
4 price we have paid as a society.

5 Appearing before the House Appropriations
6 Committee in 2004, Justice Kennedy characterized
7 mandatory minimums as unfair, unjust and unwise. At
8 some point he said we have to look at what we are doing
9 to ourselves in this country. That time has come. A
10 survey contained in this commission's 15-year report
11 revealed that 70 percent of our district court judges
12 and 83 percent of our circuit judges thought that the
13 punishment for drug offenses called for in the
14 guidelines was greater than appropriate to reflect the
15 seriousness of the offense. That was ten years ago.
16 Yet we continue to sentence defendants day in and day
17 out under the sentence – under the sentencing scheme.

18 It is difficult to acknowledge a mistake
19 when our mistake has so profoundly impacted people's
20 lives and curtailed their liberty, but it is precisely
21 because people's lives are involved that we must fix
22 this now. The goal of uniformity and fairness in
23 sentence – sentencing was a laudable one, but for 25
24 years we have used a process that has resulted in as
25 Justice Kennedy described in 2007 a system wherein our

1 resources are being misspent. Our punishments are too
2 severe. And our sentences are too long.

3 I will speak briefly about New Mexico and
4 how we as a border district worked before pre-Booker.
5 And then I will touch upon the changes that we have
6 made since Booker. I will also be submitting written
7 materials at a later date. Our state is a very poor
8 state. The census bureau ranks us as the poorest state
9 in our nation with 18.4 percent of our population
10 living below the poverty line. We share many of the
11 characteristics of Arizona.

12 Twenty-four percent - I'm sorry.
13 Twenty-four Native American tribes live within our
14 state. Hispanics comprise 44.9 percent of the
15 population. Besides English and Spanish, we have 12
16 Native American languages that are spoken in our state
17 as well as a number of dialects indigenous to Mexico
18 and Central America. Our cases are as varied as our
19 population. In Indian Country, as my colleague Judge
20 Roll will tell you also, we handle very tragic child
21 molestation cases, many sexual assault cases. We have
22 drug and alcohol cases that result in very violent
23 crime, some resulting in death and vehicular homicide
24 cases.

25 A great many of our defendants in Indian

1 Country do not have telephones. They do not have
2 electricity. They do not have running water. They
3 have no transportation and no way to get to communities
4 in which very vital services are necessary such as drug
5 counseling, sex offender counseling and mental health
6 services. Despite our best efforts, we have not been
7 able to get BOP to place a halfway house in Indian
8 Country.

9 In the urban parts of our state, we handle
10 the typical crime that any urban community has except
11 we have a great deal of immigration cases. Near the
12 Mexican border, as you know, it's drugs and
13 immigration. Our immigration defendants are of course
14 primarily Mexican or Central American. They do not
15 speak English, most of them. They have very limited
16 education if they have any at all. Many do not read
17 and write even in their own languages.

18 And with the violence that we have all
19 read about that has erupted in Mexico, we are now
20 seeing young parents coming across the border with
21 their entire families not just in the border areas
22 around Juarez but from the interior. And they are
23 fleeing Mexico, not just for economic reasons as they
24 have had in the past, but in order to protect their
25 young families, to keep them alive, to protect them

1 from the violence that we read about but that they
2 endure.

3 Yet because of Operation Streamline, an
4 enforcement campaign at the Department of Homeland
5 Security which prioritizes criminal prosecution for
6 civil deportation whenever possible, it seems everyone
7 gets prosecuted, even them. Border courts – it's no
8 secret – are busy. When it was first announced that
9 Border Patrol was going to add hundreds of new agents
10 and then we read thousands of new agents, every border
11 district looked for ways to handle the onslaught of new
12 cases that we knew were going to result in many new
13 agents being brought in and many new drug and
14 immigration cases being added to all of our dockets.

15 So long before *Booker*, in New Mexico and
16 all along the southwest border, judges have been
17 sentencing defendants day in and day out who were
18 bringing backpack loads of marijuana as a way to pay
19 their coyote. We have been sentencing semi truck
20 drivers with huge loads of drugs, some who only knew
21 they were carrying contraband but didn't know the type
22 of drug or the amount they were carrying. We have been
23 sentencing young mothers who are bringing in a load of
24 drugs in their car typically being paid a small fee
25 when they were aware that they were carrying contraband

1 but again did not know the amount of drugs or the type
2 of drug they were carrying.

3 During my tenure as chief, I have been
4 applying the sentencing guidelines and the mandatory
5 minimums to these very common scenarios without being
6 able to avoid the tragic results when the particular
7 circumstances cried out for a different result. We
8 have all seen people lose their legal residency after
9 having lived in the United States their entire lives,
10 returning to a country in which they are strangers.

11 In New Mexico I decided we had to do
12 something. To be a deterrent, those that are affected
13 need to know before committing the crime about the
14 harshness of our sentencing laws. And this did not
15 seem to be the case in our state. For seven years now,
16 we have been going to the toughest high schools and
17 middle schools as well as our juvenile detention
18 facilities all over the state. Our judges go, our
19 district judges, our magistrate judges, all of our
20 probation officers.

21 We talk to students about mandatory
22 minimum laws, about firearm enhancements, about the
23 sentencing guidelines, and very importantly, about our
24 conspiracy laws, so that they know how easily a person
25 can get in trouble for the acts of others, the acts of

1 their friends. We take the guideline charge and we
2 show them the type - how the type and the amount of
3 drug controls the sentences under our system. Kids,
4 even the toughest kids, are stunned.

5 We have done interviews periodically on
6 Spanish radio with our U.S. Attorney, our chief
7 probation officer on the harshness of immigration
8 sentencing laws and about how easy it is to lose your
9 legal residency, which I think you all know is
10 incredibly difficult to obtain in the first place. We
11 have met with Mexican government officials, with
12 Mexican federal judges, in an effort to have this
13 communicated in Mexico, to have this communicated along
14 our border. There didn't seem to be anything more we
15 could do in order to lessen the blow of our sentencing
16 laws, just to warn as many people as one could.

17 Now, much has been said in your hearings
18 that you have had all over the country about the
19 disparity that has been created by us, us judges, in
20 sentencing outside of the guidelines, but your
21 statistics seem to indicate that those disparities are
22 quite modest. And in any event, those disparities do
23 not appear to be unwarranted. It is the unwarranted
24 disparities that one is concerned about. The judges
25 sentencing outside of the guidelines consider the

1 guidelines as one factor. They are persuaded that a
2 guideline sentence is not appropriate based upon 3553
3 factors. And they are required to explain their
4 decision based upon these factors.

5 What has always been a glaring source of
6 possible unwarranted disparity is that which comes from
7 the government or law enforcement. These types of
8 cases that escape the harsh penalties of pre-*Booker*
9 mandatory scheme are not subject to reporting
10 requirements or any explanation to provide
11 transparency.

12 When a drug case is referred to the state
13 for prosecution instead of the federal government
14 because of some local police officer or even a federal
15 agent made a deal with the defendant, as we all know
16 the difference can be a mandatory minimum sentence or
17 straight probation. Then there are cases in which the
18 government dismisses an indictment and brings in
19 information and a cooperating defendant pleads to a
20 lesser non-mandatory sentence. Sometimes these cases
21 are filed with the judge who does not have any of the
22 other related cases and then it's assigned to a
23 probation officer who doesn't have any other
24 co-defendants. And therefore the judge that gets the
25 case gets a very limited view of what that defendant

1 did.

2 The judge may go along with the
3 recommendation that both lawyers provide that judge
4 when in fact the guidelines may have been totally
5 manipulated in that case by both counsel in that the
6 uncharged conduct was never included in the presentence
7 report. Therefore the true extent of that defendant's
8 actions and role was never disclosed to the judge or
9 reported to anyone that keeps track of these sentencing
10 statistics.

11 The 17 years that I have been on the
12 bench, I have had four United States attorneys in our
13 district. And I can tell you that 5K motions are
14 handled completely differently. In one case that I had
15 many years ago, one defendant had a local prosecutor
16 testify on his behalf. The defendant made a murder
17 case possible according to this local state prosecutor.
18 That was not good enough for the government in that
19 case who refused to file a 5K motion. There is of
20 course, as you know, nothing that the court can do
21 about that.

22 In other cases 5K motions seem to be filed
23 freely, in some cases even when the defendant's
24 cooperation does not lead to an indictment. We have
25 all seen pleas where parties stipulate to concessions

1 for which there is no factual basis in an effort to get
2 out from under the harshness of the guidelines. This
3 disparity does not seem to be the subject of concern,
4 yet it results in negotiated dispositions where too
5 often the judge is given only whatever information the
6 parties believe that the judge needs in order to accept
7 the agreement. It often puts the court in a very
8 difficult position.

9 But now 25 years later what does it mean
10 for us, the court, us judges to also have some
11 discretion? I can tell you it means everything. It's
12 truly extraordinary after 17 years to have some
13 discretion. It means to be able to be fair. It means
14 individualized sentencing. It means to be able to ask
15 for information from both parties and for once to be
16 able to do something with the information that you were
17 never able to do before.

18 And yes, I know that you have heard from a
19 number of judges that it's difficult and time consuming
20 to do and to impose the *Booker* sentence. And I would
21 agree with that. But it is our job to do this. In
22 New Mexico we have changed the forms of our presentence
23 report because of *Booker*. And we have done it to
24 assist our judges that have very high case loads so
25 that they if they choose to can impose a *Booker*

1 sentence without having to take recesses and try to do
2 what they can in order to consider all the 3553
3 factors.

4 And we did this because the guidelines are
5 only one factor that a judge must consider. And the
6 presentence report should not be limited to simply a
7 presentation of the guidelines. It's a lot of work for
8 our probation officers certainly, but we believe it is
9 the right thing to do.

10 The other thing that is difficult
11 post-Booker is simply deciding what is a reasonable
12 sentence. Some of us that have no experience prior to
13 the guidelines prior to mandatory minimums find that
14 it's not an easy thing to do, to decide what is a
15 reasonable sentence. Nancy [Gertner] has written some
16 very interesting articles about this dilemma. We have
17 been told what to do for so long we find it very
18 difficult to make those types of decisions. We have
19 not been judging, as she puts it. And now we are very
20 hesitant to do so.

21 I want to talk just a very little bit
22 about our incarcerated population. Twenty-five years
23 later, what about those people that have been in
24 custody all this time, especially those people that got
25 the high end of the sentencing guidelines or those

1 people that were sentenced under mandatory minimums?
2 Is it a coincidence that we are seeing now the
3 emergence of these so-called reentry programs? I think
4 not.

5 We have started such a pilot program in
6 New Mexico as well. Ours is an intensive supervision
7 program. The idea is to provide more assistance for
8 certain high-risk defendants. A number of these people
9 being released from custody now after being locked up
10 for almost 20 years or over 20 years require quite a
11 bit of our help. I have to tell you that to meet with
12 some of these people that have been in custody about
13 20-some years, it's remarkable. The assistant United
14 States attorney meets with them in my company as well.
15 And from the look on his face or her face, I can tell
16 you they find the experience pretty remarkable as well.

17 One size fits all conditions of supervised
18 release just don't seem to fit in a situation like
19 that. Individuals that are coming out of custody after
20 being locked up that many years are not our normal
21 supervised release defendants. What we have taken away
22 from them is not just their freedom. These individuals
23 that we are seeing coming out of prison after that long
24 have lost so much more than just their freedom. Many
25 of them have lost their health. Many of them have no

1 more families to go back to. At one point they had
2 children but they're gone.

3 In New Mexico we have a pretty good
4 extended family network, which is many times their only
5 saving grace. I have noticed that many of the
6 defendants that I have met with under our intensive
7 supervision program are afraid of crowds, sudden
8 movements. When we talk about what we expect of them,
9 I am reminded that they have not been able to make one
10 decision in terms of their personal life for all of the
11 years that they have been in custody and yet we are
12 expecting of them initiative.

13 So the transition is indeed a very
14 difficult one. We expect them to get a job. We expect
15 them to stay sober. We expect them to go to
16 counseling. And yet I have been told that their
17 community doesn't even look like it looked 15, 20 years
18 ago when they were incarcerated. Buildings that were
19 there are gone. They are having difficulty finding
20 their way around. They don't know what the price of
21 anything is.

22 Our defendants come out. They don't have
23 any references. They don't have a job. They don't
24 have an ID. They don't have any money. So all
25 communities that are receiving these defendants have to

1 have a strong program in an effort to be able to
2 protect the community, supervise these defendants and
3 be successful or else all we are doing is returning
4 them back to the Bureau of Prisons.

5 I have met with our regional Bureau of
6 Prisons director in an effort to get information,
7 something the Bureau of Prisons has never been done in
8 the past, in order to get information about these
9 individuals that have spent most of their life in
10 prison. Tell us what they did while they were in
11 custody. Tell us. Did they beat people up? Are they
12 dangerous? Are they a mental health risk? Were they
13 on heavy-duty medication? We need to know so their
14 transition is a smooth one. And we are working with
15 them in order to have them release that information to
16 us.

17 As our probation officers are already
18 spread thin, doing things like driving on Indian
19 Country, supervising those defendants that don't have
20 phones, this category of defendants presents a
21 challenge for us. I told you earlier that we are a
22 poor state. So resources are a problem in New Mexico
23 in an effort to provide assistance for these
24 defendants. We have quite a few of these defendants
25 because we are border districts in which we don't see a

1 small amount of drugs. We see truckloads of drugs. So
2 we have quite a few defendants that fit into this
3 category.

4 In addition to this intensive supervision
5 program, I have an employment program such as the one
6 I'm sure you are familiar with out of Saint Louis. And
7 our judges participate in trying to attract employers.
8 We have employer breakfasts. We have employer lunches.
9 And our judges go and talk to employers about why they
10 should hire our defendants. We also have suit banks
11 and clothes bank because our defendants that are
12 released from custody don't have the appropriate
13 clothes to wear for interviews.

14 Our probation department also assists our
15 defendants in providing training for them so that they
16 know how to behave appropriately during an interview.
17 We have a probation office that assists with those
18 defendants that want to go back to school and get some
19 training for jobs. A lot of effort has to be put into
20 this because our defendants are sometimes walking
21 vegetables. They are just totally unprepared to meet
22 the world that they haven't been a part of for so many
23 years. This is a consequence of our sentencing system
24 that we need to give some thought to.

25 Now, some of the great things I have seen

1 is that when they do complete the supervised release,
2 some of them have volunteered to come with us to
3 schools. And that is something I wish I had videotaped
4 so I could show you because when they talk to students
5 about what it was like in custody and what they regret,
6 it is better than anything we could think of as a
7 deterrent. When kids meet a person that has lost his
8 youth, his children, his health, his freedom, that's a
9 deterrent.

10 As you consider where we go from here as a
11 nation, as a legal system, as a system of criminal
12 justice, please consider that we have already sentenced
13 thousands upon thousands of our own people based on a
14 system we all thought was mandatory, only to be told it
15 was advisory. And those people are still sitting in
16 prison.

17 *Booker* and the cases that followed were
18 liberating for me and many of our colleagues, but we
19 must never forget the many fathers and sons and
20 brothers who are losing their freedom and their health
21 because, as you know, Bureau of Prisons' budget has
22 been slashed and people are not being well taken care
23 of. So we have many of our people in custody losing
24 their health, their youth, their families right now
25 while we figure out where we go from here. We must

1 never forget the high price we have paid to get this
2 right.

3 I thank you very much because I know you
4 have put a great deal of effort and thought and
5 listening to many opposing views all over the country
6 and I am truly appreciative. Thank you very much.

7 CHAIR SESSIONS: Thank you, Judge
8 Vazquez. Judge Huff.

9 JUDGE HUFF: Thank you for the opportunity
10 to give testimony before the Commission on the impact
11 of the advisory guideline system. I think it's
12 interesting that we have two border court – me a
13 former chief judge and Judge Vazquez, and yet I have a
14 very different view of the advisory guideline system
15 and the mandatory guideline system.

16 So today what I would like to do is update
17 you first on the benefits of a fast-track program and
18 perhaps try to persuade you that this does not result
19 in unwarranted sentencing disparities and then answer
20 any questions that you have about the impact of the
21 advisory guideline system because I am a fan of the
22 grid. I am a fan of certainty in sentencing. I am a
23 fan of a framework where under the law now, courts are
24 directed to first consider the advisory guideline
25 system and then they can consider the 3553(a) factors

1 and then provide a fair and just system under the law.

2 So I think it's interesting that Judge
3 Vazquez and I have two very contrasting views of what
4 is a fair and appropriate system. I think we are all
5 interested in a fair and just system of sentencing. So
6 let me get to the benefits of the fast-track program
7 that was authorized under the PROTECT Act. The most
8 recent published statistics 2008 using your own
9 Sentencing Commission report indicate that the judges
10 in the Southern District of California sentenced more
11 defendants in 2008, 3,757, than the judges in the
12 entire First Circuit, 1,735, the entire Third Circuit,
13 3,152, the Seventh Circuit, 3,041, or the D.C. Circuit,
14 276.

15 This high volume of criminal cases
16 justifies a fast-track or early disposition program.
17 Despite the high volume of cases, the federal court
18 mandate statistics indicate that in 2008 the Southern
19 District of California was the fastest court in the Ninth
20 Circuit for criminal dispositions and third in the
21 nation for criminal dispositions in criminal felony
22 cases.

23 To put this in perspective, let's compare
24 the courts in California as a baseline. Significantly
25 our court had 380 criminal felony cases per judge. In

1 comparison to the other districts in California, the
2 Northern District of California had 42 per judge. The
3 Central District had 63 per judge. And the Eastern
4 District had 140 per judge. In other words, a judge in
5 my district, in the Southern District of California,
6 handled more criminal felony cases in 2008 than all the
7 other federal district courts combined.

8 The fast disposition time in the Southern
9 District is due to a successful early disposition or
10 fast-track program in part as authorized by the
11 Attorney General. The medium time from filing to
12 disposition for a criminal felony case in the Southern
13 District of California in 2008 was 3.9 months compared
14 to 7.5 months in the Central District of California,
15 10.9 months in the Eastern District and 11.2 months in
16 the Northern District of California.

17 If anything, the Commission may wish to
18 persuade a legislative change to authorize fast-track
19 for everyone because it actually does work. It
20 promotes a speedy disposition of criminal cases. We
21 currently have four programs, a program for criminal
22 aliens, a program for alien smuggling, a program for
23 drug cases and a program for misuse of passports.
24 Those have all been approved and authorized. But its
25 interesting to note that the court did not begin or

1 start these fast-track programs. It came from the
2 prosecution side. And ever since 2003, these programs
3 have been authorized by the Attorney General.

4 Significantly, our court has six ports of
5 entry because of its proximity to the southwest border.
6 And because of this high volume unprecedented in other
7 courts, it does justify our court offering a fast-track
8 or early disposition program to help the criminal
9 justice system. So we, the judges in our court and the
10 participants, the U.S. Attorney and the panel attorneys
11 and the federal defenders, all believe that a
12 fast-track program does work.

13 Now, to address how is it working under
14 the advisory guideline system, it's working very well.
15 There could be some tweaks. And our probation officer,
16 Ken Young, will talk later today about some specifics
17 on calculations for 16 levels for aggravated felony and
18 immigration cases. I do think on role that could be
19 clarified to provide some more uniformity, particularly
20 with respect to drug cases versus alien smuggling cases
21 and to provide courts with more information, and
22 probation officers as well. And then my own thought is
23 that the safety valve could be offered in a greater
24 variety of cases.

25 And then finally, so I'll leave time for

1 some questioning, wherever you have high calculations
2 such as loss calculations for fraud cases, then that
3 can sometimes skew the guidelines. So we have all -
4 mandatory minimums is a separate issue, but that's a
5 congressional issue. As far as predictability in
6 sentencing, I think that's a good thing for our system.
7 Because what happened before? Before the guidelines
8 you could have one judge do probation and you could
9 have another judge do the statutory maximum.

10 And so while the guidelines are not
11 perfect and the advisory system is not perfect, and
12 sentencing is a difficult task in any event, I do think
13 that the advisory guideline system is working very
14 well. Thank you.

15 CHAIR SESSIONS: Thank you, Judge
16 Huff. And let's open it up for questions.

17 VICE CHAIR CARR: Judge Vazquez, could
18 you talk a little bit about your new presentence report
19 and what it requires of the probation officer and if
20 they are supposed to generate 3553(a) factors or
21 request them from the government and defense counsel?

22 JUDGE VAZQUEZ: It requires a pretty
23 thorough interview of the defendant. And when and if
24 they receive a brief from the parties, then they
25 supplement the presentence report. The difference

1 between our presentence report before *Booker* and after
2 *Booker* is that the body of the presentence report is
3 much more informative so that it addresses the 3553
4 factors. That's the difference. But it does not
5 require that the government file a brief if the
6 government or the defense attorney files a brief and
7 then supplements the information that it has.

8 VICE CHAIR CARR: And do you find that
9 more defendants are willing to submit to an extensive
10 interview with the probation officer than were willing
11 to before *Booker*?

12 JUDGE VAZQUEZ: You know, I don't know if
13 that's true. Our chief probation officer is going to
14 be testifying later and she can tell you. What we are
15 doing, though, is we have been for some time now
16 training probation officers and since – at one time
17 hired quite a few probation officers that came from the
18 state and new probation officers, some young probation
19 officers. We have trained probation officers so that
20 the style of training is different.

21 Probation officers are trained to gather
22 the 3553 information, not to wait until something is
23 filed because as you know, that is primarily what –
24 the information that we get. And not all of our
25 lawyers are fabulous. So we are not always going to

1 get the information that we need in order to do our
2 job.

3 We can't depend upon lawyers giving us the
4 information that we need. And our defendants are
5 primarily very poor, very poorly educated, not
6 articulate. So we have to depend upon the initiative
7 and the thoroughness of our probation officers to be
8 able to speak to our defendants and be able to say tell
9 me about this factor, tell me about this, and I would
10 like to talk to you about this.

11 And when the defense attorney is perhaps
12 not cooperative, then our probation officers are
13 supposed to take the initiative and say I'm considering
14 a variance with regard to this issue because there is
15 this factor that's come up in the presentence report,
16 all in an effort so that we don't have to in the middle
17 of the sentencing say there is this issue that I am
18 considering. We are going to have to continue this
19 matter so that I can give the probation officer an
20 opportunity to gather more information and the defense
21 attorney an opportunity.

22 Given our case load and the number of
23 sentencings that we do in a day, that's inconvenient.
24 It will be done if it has to be done. But that's how
25 we are training probation officers in order to get the

1 information in the first instance and include it in the
2 presentence report.

3 VICE CHAIR CARR: Thank you.

4 COMMISSIONER HOWELL: Judge Vazquez, one
5 of the – in preparation for the hearing today, our
6 staff put together some summaries of interesting cases
7 of both of you. And one of the cases I found
8 interesting that they summarized for you was one where
9 you granted a downward departure for collateral
10 consequences for an alien case. And you gave a
11 two-point downward departure because of collateral
12 consequences, the unwarranted increase and the severity
13 of this particular defendant's case because of his
14 status as a deportable alien.

15 This is a departure ground that's not
16 expressly provided for in the guidelines manual. Do
17 you think that's something we should consider
18 addressing in the guidelines manual as an explicit
19 basis for downward departure? And if so, should we
20 also provide some boundaries as to – if you gave a
21 two-level downward departure, do you think that we
22 should also provide some boundaries as to how much of a
23 downward departure should be granted if a judge
24 determines that there are these collateral
25 consequences?

1 JUDGE VAZQUEZ: I don't remember the
2 particular case you are talking about, but I do believe
3 that - I do believe that we need to consider those
4 types of consequences. I mean, the hard part about
5 putting a number on it is that - and that's the hard
6 thing about sentencing, is not everyone is in the same
7 position. Not all the consequences are as harsh for an
8 individual.

9 I was here this morning when a gentleman
10 that was sitting to my right was testifying about the
11 conditions of incarceration. We had a facility in
12 Albuquerque where civil detainees were being housed.
13 And I can tell you how harsh those conditions were.
14 And I can tell you that I visited that facility a
15 number of times because our federal detainees were
16 being housed in the same facility. And the conditions
17 were so deplorable that they closed it.

18 And ICE moved - by order of Homeland
19 Security, moved all the detainees out of there. The
20 conditions were so deplorable. And these are civil
21 detainees. There was no air-conditioning. These
22 people were never getting to be outdoors for any
23 recreation. There were so many bunks in the cell that
24 you couldn't even breathe when you walked in there. I
25 mean, some people were saying that they weren't getting

1 enough food, that they were fainting.

2 I have been in many jails in the 17 years
3 that I have been a judge and all the years I was a
4 public defender. I have been in many of our federal
5 prisons. And I have never seen such a facility. So
6 should we consider this when they are stuck in there
7 and they want to go home and they are not contesting
8 deportation but we're waiting for enough of those
9 people from that particular country in order for us to
10 be able to justify a plane or a bus? Yes, I think we
11 should consider. But is one level okay or is two?

12 How can we arbitrarily say that without
13 knowing what the specific circumstances are of that
14 particular person? I don't think - I as a judge can't
15 say in advance. I think that would be arbitrary. I
16 think - and that's why what we have now is
17 extraordinary, because the factors allowed me as the
18 judge to consider the person before me and his
19 particular circumstances.

20 So to answer your question, yes, we should
21 be able to consider that because that person does not
22 get to benefit from any of the programs in BOP but upon
23 release still has to sit in a facility, which is a dark
24 hole for all of us because we never know what the
25 conditions are or how long it takes. How many of us

1 see those facilities? The media is never in those
2 facilities to see it.

3 I happened to stumble upon that facility
4 in Albuquerque because our federal defendants are there
5 and I go to all of the facilities as chief judge where
6 we house federal defendants to make sure that their
7 rights aren't being violated. I do surprise visits.
8 And I just happened to stumble upon that. That's a
9 long-winded answer. I apologize.

10 COMMISSIONER HOWELL: That's helpful.
11 Judge Huff, one of the things that you talked about
12 was - I thought was quite interesting. And we have
13 heard this from other people who have talked to us
14 across the country, which is asking the Commission to
15 clarify some of the mitigating role adjustment
16 provisions. We are also going to hear later, either
17 today or tomorrow, from a federal public defender who
18 gave us some concrete examples of - with
19 recommendations of ways to clarify it.

20 And one of his recommendations was simply
21 to remove commentary in §3B1.2 that invites
22 courts to deny mitigating role adjustments when the
23 only evidence available on the defendant's role comes
24 from the defendant himself. Do you think that that's a
25 recommendation that merits further scrutiny by us?

1 JUDGE HUFF: I think it would merit
2 scrutiny along with all other factors. For example, if
3 a defendant gets safety valve, so somebody has already
4 said that that person is credible and believable, then
5 to say if the only evidence of his role comes from
6 himself and yet the government has already said but we
7 believe him and so he gets safety valve, that does seem
8 to be inconsistent. So I think it would be helpful to
9 study.

10 I personally have a problem with drug
11 courier cases routinely get minor role from the
12 government and yet alien smuggling, because of your
13 commentary on the mandatory minimums, often do not.
14 And I know that even within our district, that there
15 are wide variances in how the district judges treat
16 role adjustments. So I think clarification would be
17 helpful.

18 COMMISSIONER HOWELL: Thank you.

19 COMMISSIONER FRIEDRICH: Judge Huff, if I
20 could follow up with you on the role adjustment, the
21 application note that discusses multiple participants
22 and says if a defendant is the only defendant, it does
23 not get a role adjustment unless there are other
24 participants involved in the overall offense, is there
25 something we could do to tweak that that would address

1 the issue you are concerned about, the particular
2 application note? And if so, what would you suggest?

3 JUDGE HUFF: I think so because - so in
4 drug cases, typically there are growers and
5 transporters and couriers, especially on border
6 situations. In alien smuggling, there is the safe
7 houses. There is the people that handle payment. I
8 think that you could get input from the federal
9 defenders and U.S. attorneys, Department of Justice and
10 come up with some additional guidance that would be
11 helpful to both the probation office and to the judges
12 who are doing this.

13 CHAIR SESSIONS: We have heard from
14 Mr. Morton - this is to both of you since you both
15 have border cases - about alien smuggling and how the
16 nature of the conspiracies have changed, become more
17 sophisticated and they are much larger. Is that true
18 according to your own experience? And how do you feel
19 about either responding by way of increasing the base
20 offense level to reflect the seriousness of this
21 conduct or by perhaps having more additional increases
22 based upon numbers of aliens? And I guess briefly, do
23 you see cases in which there are more than 100 aliens
24 involved?

25 JUDGE VAZQUEZ: I don't, Judge Sessions,

1 no.

2 JUDGE HUFF: I don't think that in our
3 district – it's not the number of aliens. But so, for
4 example, if you have the smuggling of Chinese
5 nationals, they're probably paying \$90,000. It's a
6 very sophisticated, very dangerous organization. I had
7 a case yesterday I sentenced where the government
8 showed a picture of two individuals in a coffin, you
9 know, the factory compartments, non-factory
10 compartments, which are just horrendous.

11 So I'm not sure that the number of
12 aliens – I think that's more a Arizona issue than our
13 issue. But the holding for ransom equivalent of kind
14 of a kidnapping situation and danger, it's a big
15 problem. And it's kind of interesting. The more focus
16 you put on stopping people at the border, the more
17 lucrative it is to have people come to the country.
18 And the United States is a wonderful place to live and
19 there is this irresistible impulse to come here, and so
20 people are going to pay a lot of money.

21 We have a case just filed in our district
22 where two people died in a boat. We hadn't seen very
23 many boat smuggling cases in our district. Typically
24 they come through the border or – so the fence was
25 then put up. That kind of stopped that. But now we

1 are seeing more of the dangerous smuggling through the
2 water. So at least for our district, I don't think
3 that the adjustment for number of aliens would be the
4 factor.

5 I do think in the substantial risk, it's a
6 six-level increase. Maybe there could be some other
7 adjustments that you factor in. So, for example, if
8 you said non-factory compartment, that's a little bit
9 different than substantial risk. But those to me are
10 the cases where somebody really could get hurt. And it
11 is clearly a danger to those people that are being
12 smuggled.

13 CHAIR SESSIONS: Judge Vazquez, do
14 you see that level of complexity in alien smuggling
15 cases in New Mexico or not?

16 JUDGE VAZQUEZ: No, we don't. I don't. I
17 see dangerous practices. We see individuals that have
18 been involved in the pattern in a long-time practice of
19 alien smuggling but not the type of cases that Judge
20 Huff is talking about, no.

21 CHAIR SESSIONS: Can I just ask you
22 both again about the minimal minor role adjustment? I
23 guess according to your practice, Judge Huff, the
24 prosecutors recommend a two-level reduction for
25 couriers. Is that uniform? Is there a disparity in

1 terms of how the role adjustment is administered in
2 your court? And if so, what's the kind of guidance
3 that you think judges would need so that there is more
4 uniformity?

5 JUDGE HUFF: Well, for me, if we are
6 having somebody smuggled at the border, the fact that
7 it's drugs versus aliens, if their role is the driver,
8 then it has always – and I have this discussion on an
9 ongoing basis with the prosecutors in our district.
10 Why are you recommending it for meth or heroin or
11 cocaine for the driver but you are not recommending it
12 for somebody who admittedly is simply the driver, is
13 getting paid the same amount of money, but you say
14 because it's human cargo, we are not going to give you
15 a role reduction?

16 And I do understand that they then say
17 well, the commentary says because there could be a
18 mandatory minimum if there was payment. In alien
19 smuggling they are getting a deal by not having the
20 financial gain charged. So that's usually their
21 response. But sometimes their response is simply
22 humans are different than drugs. And yet the conduct
23 is the same conduct in the organization about getting
24 it staged in Tijuana and getting it ready to come over
25 the border and then sending it to somewhere else and

1 collecting the money. The conduct to me is exactly the
2 same.

3 So I think that would be fruitful to have
4 a discussion among the various participants and come up
5 with recommendations as to whether - to say no role
6 reduction, I don't think that that's appropriate. I
7 think that the situations to me are very similar.

8 COMMISSIONER WROBLEWSKI: Thank you,
9 Judge. And thank you both for being here and
10 testifying. I've got a couple questions. First, the
11 Commission voted last week to publish an issue for
12 comment relating to cultural assimilation, whether
13 there should possibly be a downward departure in
14 illegal reentry cases for cultural assimilation. And
15 there is a circuit conflict on that. And we have heard
16 a narrative as we have gone around the country, the
17 narrative of the person who has basically lived most of
18 their lives here, who has committed some felony, has
19 been convicted, and is now going to be deported to a
20 country that they don't know.

21 And it strikes me that that's a very
22 different - and the possibility of a departure doesn't
23 seem to me to address that problem. You have the
24 fundamental problem of they're going to be deported to
25 a place they don't know. And you can reduce the

1 sentence or raise the sentence. It doesn't matter.
2 You're not solving the problem. And so I'm curious
3 what you think about that.

4 And the second thing, Judge Vazquez, the
5 five issues I wrote down as you went through your very
6 eloquent testimony was severity, uniformity, case load,
7 reentry, deterrence. And I actually think I understand
8 most of where you are on most of these issues. The one
9 exception is uniformity because I seem to be hearing
10 two things.

11 On the one hand, you take issue with some
12 of the practices of prosecutors that are not uniform,
13 and I think legitimately so, at the same time
14 encouraging or speaking very positively about more
15 discretion for prosecutors. And we are struggling in
16 the Justice Department as we are developing our new
17 sentencing policy about whether there should be more
18 constraints or more guidelines for prosecutors and
19 whether we should support more guidance and more
20 constraints for judges.

21 Do you think there should be more
22 constraints for prosecutors or more guidelines in the
23 way they utilize 5K1.1 motions, for example, or
24 charging decisions? And secondly, do you think there
25 are parallels between judicial discretion and

1 prosecutorial discretion?

2 JUDGE VAZQUEZ: There are a lot of
3 questions there and I'm happy to answer all of them.
4 And if I forget one, let me know. With regard to my
5 comments about the U.S. attorneys, I mentioned those
6 not to indicate that I am critical of them but to point
7 out that that is a source of disparity and lack of
8 uniformity differences that seems to go unnoticed. No
9 one seems to be hot and bothered about them.

10 Not to say that they shouldn't exist
11 because the government has prosecutorial discretion,
12 and rightly so, but that results in disparities because
13 that's an area that the judge can do nothing about. It
14 starts out as an indictment perhaps with the mandatory
15 minimum and then it gets to the judge with a probation
16 sentence perhaps, or what's troubling for me as a judge
17 is it will get to a judge perhaps as an 11(c)(1)(C) or
18 it gets to me with a very limited PSR and I don't get
19 the whole story. And then maybe this person will go
20 out and commit another crime, and he says Judge Vazquez
21 sentenced this person to X, and I never knew the whole
22 story. So that's troubling to me.

23 But there is prosecution discretion for a
24 very good reason. All I'm saying is that when we talk
25 about the disparity, we are talking about unwarranted

1 disparity. And we all – all of us in the criminal
2 justice system have a role to play. And when we make a
3 distinction for the person in front of us, we need to
4 explain it so that we are subject to scrutiny, so that
5 the explanation of the sentence is out there for the
6 public, for Congress, for everyone to know.

7 Now, whether the prosecution should also
8 have to explain, I can't – I have never been a
9 prosecutor. I can't say that. All I'm saying is that
10 when we are talking as you are doing now and as you are
11 reflecting upon whether there should be some
12 disparities in sentencing that are explained and that
13 are warranted, we must be fair in this discussion
14 because disparities have always existed. It's just
15 that judges haven't had discretion to make disparities
16 in sentencing for a long, long time.

17 But they have existed and they have been
18 in the hands of police officers, who have never been
19 vetted to make those decisions. And they have been in
20 the hands of the government, who for very good reasons
21 may have prosecutorial discretions. We are the ones
22 that just haven't been able to make some of these
23 decisions.

24 Now, I didn't mean to give Judge Huff the
25 impression that I disagree with the fact that we have

1 sentencing guidelines now with the ability to consider
2 3553(a) factors. I just told you it's extraordinary.
3 I mean, I cannot even believe that I am here today
4 being able to sentence defendants individually. I,
5 quite frankly, thought I would die before this day
6 came.

7 To have discretion in federal court with a
8 defendant, I did not think this day would come. So
9 this is truly a great day for a federal judge to be
10 able to see. Uniformity in and of itself, no. A
11 fairness is what we strive for, not just uniformity. I
12 think that is to stress the wrong thing.

13 COMMISSIONER WROBLEWSKI: How about in the
14 way – we have this guideline called 5K1.1 and it says
15 substantial assistance. Of course there are a myriad
16 of different ways that comes before a prosecutor. You
17 mentioned the case where a state prosecutor comes in
18 and says this defendant has been extremely helpful in a
19 homicide case. In one district maybe that's okay.
20 That's enough, because they say well, it can be a state
21 or a federal prosecution. If there is substantial
22 assistance in either one, that's okay for us. In
23 another district, maybe New Mexico, they say no. It's
24 got to be a federal investigation. Should there be a
25 uniform policy on that question?

1 JUDGE VAZQUEZ: I believe so. I believe
2 there should be. You know, judges, we are the weakest
3 link there. We had no power. If the government didn't
4 file it, too bad. This guy made the conviction
5 according to the prosecutor, stuck his neck out, made
6 himself extremely vulnerable and there wasn't anything
7 that could be done. And yet there are some other
8 prosecutors that feel that even if there isn't an
9 indictment – and this is not a bad thing. I'm not
10 being critical here.

11 There are some prosecutors that believe
12 this defendant stuck his neck out too, made his family
13 extremely vulnerable, gave us correct information,
14 accurate, very helpful information, but for whatever
15 reason we can't make an indictment. We can't make it
16 now or we can't make it for other reasons. So we are
17 still going to file a 5K.

18 And what I try to do is I'll bring in the
19 officer, the agent, so that I can hear firsthand not
20 just a summary. I can hear firsthand from the agent
21 what did this person do? Why was it so helpful? And
22 who were these people? And that way I don't feel like
23 I'm just getting information that I can't really
24 assess, because remember, that was the only time we
25 ever had discretion is under 5K. It was rather

1 special.

2 COMMISSIONER WROBLEWSKI: Judge, do you
3 have any thoughts about the cultural assimilation?

4 JUDGE HUFF: I do. And I'm really pleased
5 to hear that you said that. We often hear some very
6 sad cases of a person whose family went through
7 naturalization but because a youthful person had some
8 relatively minor criminal matter, that person never got
9 naturalized but went to elementary, junior high, high
10 school in the United States. His whole family is here
11 legally but he is not here. That would be one where I
12 think you could justify it.

13 A common situation is somebody comes back.
14 They have been deported. They remained in Mexico but
15 their family is here and they got a call, which is
16 documented. My kid is in the hospital. So they come
17 back. And yet they had been raised here. They've got
18 all the indicia of being here. But they have been good
19 and have been remaining in Mexico but they came back
20 for a legitimate reason. Could you justify a cultural
21 assimilation in that instance? Yes.

22 I think there could be situations where of
23 course it's not going to change the result. The person
24 ultimately will be deported. But at least the time
25 that they spend here could be then reduced on a

1 fairness ground.

2 COMMISSIONER WROBLEWSKI: Do you feel that
3 you are able to distinguish between those two
4 circumstances, the circumstances where they are coming
5 back temporarily to deal with a family circumstance
6 versus a situation where they don't want to live in
7 that other country and they're coming back here to
8 live?

9 JUDGE HUFF: In a hundred percent of
10 cases, no, of course not. But -

11 COMMISSIONER WROBLEWSKI: But in most
12 cases?

13 JUDGE HUFF: But I think the judges have a
14 sense that with proper information, you could see those
15 people that really have - for all intents and purposes
16 have been raised here in the United States and now have
17 no place to go. And so I think you could factor that
18 in as a departure which then courts have to then
19 consider and then justify their reasoning. I think it
20 would actually make sense.

21 JUDGE VAZQUEZ: You are right about that.
22 Those cases, they're difficult because what we are
23 doing doesn't answer the problem. It gives them less
24 time in custody, but the fact is that the penalty is
25 extraordinarily harsh because that person should be

1 punished for their conduct, whatever that conduct was
2 originally. But, you know, I wish Congress would look
3 at that issue and figure out how else to address it
4 because there was a kid -

5 I'll never forget this kid from Peru who
6 had been in the United States his whole life. He was a
7 high school athlete, a star. I think he was from New
8 Jersey. It was just him and his little brother. He
9 got in trouble for some drug case. It was possession
10 of a joint or something. I don't remember what. There
11 was some trouble in high school. But the point is that
12 he ended up with - there was a public defender said
13 just plead guilty to this charge. Get probation. It's
14 no big deal.

15 In any event, I don't remember what ended
16 up being the problem with the underlying charge, but it
17 turns out he got stopped later on. A local police
18 officer saw that he had an underlying charge that was
19 subject to deportation and the kid gets deported. He
20 ends up getting caught in New Mexico trying to get back
21 in to see his family. Why? Because he got deported to
22 [Peru]. This kid spoke no Spanish. He doesn't know
23 anyone in Peru. He spoke no Spanish. He didn't last a
24 week in Peru. He found his way back, trying to find
25 his mother and father in New Jersey. He is a New

1 Jersey boy.

2 And what do we do with cases like that?

3 There are so many cases like that. Does that – this
4 is more – I mean, we used to just try to do the best
5 we can. Those are very sympathetic cases. But even
6 reducing a sentence because it's a sympathetic case
7 doesn't do anything. What is that kid going to do in
8 Juarez?

9 I mean, another case of ours, the guy got
10 deported. When we deport them, we deport them in
11 Juarez. Who wants to be in Juarez these days dodging
12 bullets? This guy got deported in Juarez. He didn't
13 speak any [Spanish]. He was a wrestler in one of our
14 high schools there in Las Cruces, a state wrestler. He
15 gets deported in Juarez and a gang gets a hold of him
16 and they're shooting at him. And they called him a
17 gringo. He said I'm not a gringo. I'm a Mexican
18 national. He goes yeah, well, sing the Mexican
19 national anthem. He didn't know the Mexican national
20 anthem. So what does he do? He comes right back into
21 the United States, subject to more time, another
22 charge.

23 You know, these cases just – we see these
24 cases all the time. You know, what do you do with
25 these cases? They are just – they are tough. And we

1 just send them back to prison. There's got to be a
2 better solution. Are these our terrorists that we are
3 so concerned about with national security? They have
4 clearly broken the law, but we are spending a lot of
5 money on these folks and there's got to be a better
6 solution for these guys.

7 CHAIR SESSIONS: Judge Hinojosa.

8 COMMISSIONER HINOJOSA: I think your
9 point, Judge Vazquez, is that no matter what we do
10 they're going to get deported and try to come back and
11 that this requires congressional action with regards to
12 immigration reform. I guess my next question is to
13 both of you. Coming from a border court, having been
14 on a border court for over 26 years, I know the issues
15 that you - familiar with some of the issues you
16 raised, including the one about the person who comes
17 because a parent becomes seriously ill and this may be
18 the last opportunity to see them or a child has become
19 seriously ill.

20 And I guess my question is have you not
21 found a present ground for departure under either the
22 mandatory system or the advisory system within the
23 present manual, whether it's family ties, and this is
24 an exceptional circumstance because it is totally out
25 of the ordinary with regards to the normal person who

1 comes back illegally? Wouldn't you find something in
2 the present manual that would allow a departure?

3 JUDGE HUFF: Certainly. There is – under
4 advisory guidelines you can do whatever you think is –

5 COMMISSIONER HINOJOSA: And under the
6 mandatory system, we had those same cases and –

7 JUDGE HUFF: We did. And as you know, I
8 think our district departed at a rate of 40 percent on
9 overall statistics. So to me we are sort of now where
10 we used to be before the PROTECT Act came in and people
11 said maybe we shouldn't be doing these things. We do
12 have available resources. But wouldn't it be – if
13 cultural assimilation is one more thing, would it hurt
14 to then specify that? I don't think it would hurt.

15 COMMISSIONER HINOJOSA: Or we could even
16 put it under family ties or something to that effect.

17 JUDGE HUFF: Sure.

18 JUDGE VAZQUEZ: Judge Hinojosa, as you
19 know, the Ninth Circuit was a little bit more
20 understanding than the Tenth. The Littman [phonetic] case,
21 after all, did come out of the Ninth Circuit. In the Tenth
22 Circuit departures weren't really as readily available,
23 shall we say? I did try them, as you know, but I did
24 get reversed a few times. So now variances are a
25 little bit easier in order to address the issues.

1 But you coming from a border state do
2 appreciate how many of these cases we have. So we are
3 talking about writing lots of opinions. Now it's a lot
4 easier. Now you can address these types of issues with
5 variances. Our chief probation officer is going to
6 speak to you in a little bit that it does take
7 gathering a lot of this information through the
8 interview process. But it is much easier to address
9 these issues now, yes.

10 COMMISSIONER HINOJOSA: I guess a comment
11 to Judge Vazquez. You and I have known each other, and
12 Judge Huff. We all have talked about our case loads
13 for many years now. I actually did sentencing under
14 the – before the guidelines came. And believe me,
15 that is not a system that one would call fair and just
16 from the standpoint as to – depending on even the
17 courthouse as to who the actual person was that drew
18 the case.

19 I also have to say that maybe it's because
20 I had that system that I never felt that I didn't have
21 discretion under the mandatory system. I had to make
22 all the fact finding. It required a lot of work to say
23 I don't believe this confidential source that says that
24 there were all these other loads and that it was this
25 amount even though it's been spoon fed to me by some

1 form from the prosecutor that was handed over to the
2 probation officer.

3 And it required a lot of work under the
4 mandatory system just like it does now, but I never
5 felt that I was constrained from departing in the
6 appropriate case, or maybe it just came because of
7 those four years, almost five years that I did with no
8 guidelines that I never felt this I'm constrained and I
9 am doing something unfairly here and I don't have the
10 right to in the appropriate case - because I don't
11 think the Sentencing Reform Act ever meant for us not
12 to have that opportunity for certain cases that were
13 out of the ordinary, to go ahead and do a certain [inaudible]
14 we felt was necessary in each case.

15 And maybe it just came from having had
16 those five years of that other system that I never felt
17 that constraint. And maybe it's differences in
18 circuits as to how they treated the discretion that we
19 had. But, you know, all those factors we had to decide
20 ourselves and whether we believed them or not and
21 putting people to the test. And it is probably - as
22 we all know, it's the most difficult thing we do, but
23 it's difficult under all three systems that we have
24 had. As far as I am concerned, it's never been harder
25 or easier under any one of those systems.

1 JUDGE VAZQUEZ: I agree. And I think that
2 the habit that we have all gotten into of considering
3 all of these factors in considering the guidelines is a
4 good one. I don't think – no matter what happens, we
5 never go back to the system that you had because we are
6 used to considering. Sentencing is for us – after all
7 these years is a process of considering all of these
8 factors in every case.

9 CHAIR SESSIONS: You remind me of
10 that off-sighted expression, occasionally reversed,
11 seldom wrong. One other question.

12 COMMISSIONER FRIEDRICH: Judge Huff, you
13 indicated that you are a fan of the guidelines and
14 consistency that they provide. I'm wondering whether
15 post-Booker, now that district court judges are
16 directed to consider the 3553(a) factors, I'm wondering
17 whether you perceive in your own district differences
18 in the way in which individual judges consider the
19 various factors under 3553(a) and specifically the
20 specific offender characteristics that many of which
21 have been typically being not ordinarily relevant under
22 the guidelines – I'm wondering whether you see in your
23 own court a difference in, for example, how one judge
24 perceives the age of the defendant or the drug
25 addiction of a defendant.

1 And secondly, this is an issue that the
2 Commission is considering and has published notice for
3 comment on whether the Commission should give
4 additional guidance, additional consideration to
5 specific offender characteristics in the guideline
6 manual. So the second question is whether you think
7 that would be a good thing and whether it would create
8 more consistency in the way in which judges consider
9 those factors.

10 JUDGE HUFF: On the first question, since
11 we are required to first consider the advisory
12 guidelines, I think we all have the same framework.
13 And then when we get to the 3553(a) factors, I think
14 there might be slight individual differences. You may
15 have someone who values military experience or somebody
16 who is more sympathetic to a youthful offender than
17 otherwise. But I don't see a system that you can
18 change. I don't see how you would change that. So I
19 don't think that the Commission would have to do more
20 work in that respect.

21 I am not seeing – because you still have
22 to start out with the same framework, a baseline, what
23 is the correct calculation of the advisory guidelines
24 before you go to the 3553(a) factors. At least that's
25 how we approach it. Then you have to articulate the

1 reasons why you are doing a variance if you are doing
2 it under the 3553(a) factors. So individual judicial
3 discretion, you are never going to have completely
4 uniformity. But I don't see that it's a bad thing or
5 that there are unfair differences among judges within
6 our district. That said, there is not complete
7 uniformity.

8 CHAIR SESSIONS: Can I just follow
9 up on that? The proposal out there is to review these
10 various factors in terms of departures, and with this
11 broader mandate perhaps of giving judges information
12 about what is the most recent research in regard to
13 application of these factors, what are the things that
14 you might want to consider when you consider these
15 particular factors, whether encourage or discourage,
16 et cetera, essentially to provide information, follow
17 up with one of our real central functions here, and
18 that is to inform people in the system about the status
19 of research, et cetera, how they're being applied
20 basically across the country. Do you see that as
21 particularly helpful?

22 JUDGE HUFF: That would be helpful at
23 least on giving some more information. So, for
24 example, on age, to me if somebody is a youthful
25 offender and has a drug offense at age 20, that's

1 different to me than somebody who has been in the
2 system and now they're 50 and they have a major
3 problem, and yet under the guidelines they just
4 ordinarily are not very relevant, and yet as a common
5 sense matter, age can be relevant, or do you see those
6 people who have now matured and have learned their
7 lesson. I would be interested in the research. So if
8 the Commission could provide the research to then
9 corroborate or disprove my anecdotal information that
10 it does make a difference whether you are doing it when
11 you are really young and you don't know any better or
12 you are just kind of experimenting or you're youthful
13 versus you are more mature and you expect people to
14 behave a little bit better, I would be interested in
15 the actual information out there from the research.

16 CHAIR SESSIONS: What if how that
17 information relates to risk of recidivism?

18 JUDGE HUFF: Exactly.

19 CHAIR SESSIONS: Okay. Any other?

20 Thank you very much for a very informative discussion.
21 We really appreciate you coming all the way and away
22 from your very busy schedules. Thank you very much.
23 All right. Let's take a recess for lunch.

24 (Whereupon, a recess was taken at 11:49 a.m.
25 until 1:23 p.m.)

1 CHAIR SESSIONS: Okay. I think
2 let's call the meeting to order. Welcome to the
3 probation officers. This is our third panel, "View from
4 the Probation Office." Let me introduce all three of
5 you. First, Mario Moreno has been chief U.S. probation
6 officer for the District of Arizona since June 2006.
7 Previously he served as a line officer, sentencing
8 guideline specialist, front line supervisor in the
9 presentence division and as an assistant deputy chief.
10 Mr. Moreno has a Master of Arts in organizational
11 management from University of Phoenix, a B.A. in
12 sociology from Arizona State University. Welcome. And
13 thank you for hosting us.

14 Next, Kenneth Young has served as chief
15 U.S. probation officer for the Southern District of
16 California since of 2001 and is also – was the deputy
17 chief there for two years. Previously he served as a
18 federal probation officer, supervisor, assistant deputy
19 chief in the Northern District of California. He holds
20 a master's degree in education and public
21 administration. Welcome, Mr. Young.

22 And finally, Anita Chavez is the chief
23 U.S. probation officer for the District of New Mexico.
24 She previously has served as a supervising U.S.
25 probation officer and is a national trainer for the

1 Federal Judicial Center. Ms. Chavez received her B.A.
2 degree in sociology from New Mexico State University
3 and her M.A. degree in public administration from the
4 University of New Mexico. And she just reminded me of
5 my time in New Mexico. Those are two of the most
6 impressionable weeks I have ever experienced as a
7 judge. And your staff treated me wonderfully and such
8 an extraordinary professional staff. So welcome.

9 MS. CHAVEZ: Thank you.

10 CHAIR SESSIONS: Well, first,
11 Mr. Moreno, are you ready to go forward or have the
12 three of you debated among yourselves? Mr. Young.

13 MR. YOUNG: Your Honor, I guess I will go
14 forward. First of all, I would like to thank the
15 Commission and express my appreciation for the
16 invitation to be here today. It's an honor for us to
17 be here. We thank you again for allowing us to provide
18 testimony.

19 In preparing for today, I reviewed the
20 prior testimony from my colleagues who appeared at
21 prior public hearings. They have already commented on
22 many of the same issues that are shared by my office.
23 Given this is the final public hearing, much has
24 already been said about the history and evolution of
25 the guidelines. So I will try not to be repetitive and

1 I will refer to the prior testimony of my colleagues in
2 some instances without a great deal of further comment.

3 My comments will focus on topics related
4 to sentencing in border districts. I will also convey
5 the desires of many probation officers that would like
6 to see further clarity and definition in certain
7 guidelines. The post-*Booker* advisory guidelines seem
8 to have brought a balance into the sentencing process
9 by introducing further judicial discretion which
10 appears to have occurred without undue compromise to
11 any further disparity in sentencing.

12 While no longer mandatory, the guidelines
13 do provide a mechanism for establishing equity for
14 similarly situated defendants who have committed like
15 offenses. The guidelines allow for individual cases to
16 initially start with the same benchmark. The absence
17 of such a benchmark, advisory or otherwise, would only
18 lead to further disparity and sentencing, which is
19 truly contrary to the intent of the guidelines and
20 those factors contained in 3553(a).

21 Many guideline practitioners that I am
22 aware of are very pleased to see the greater latitude
23 that is present in the advisory guidelines, which has
24 been brought to the advisory guidelines and into the
25 sentencing process. In a post-*Booker* era, the role of

1 a probation officer remains a critical one by
2 investigating a defendant's background and properly
3 evaluating all the substantive factors in assisting the
4 court to impose a sentence that reflects the totality
5 of circumstances analysis and that is sufficient but no
6 greater than necessary to accomplish the statutory
7 goals of sentencing.

8 Probation officers know that judges must
9 look well beyond the calculations of offense level or
10 criminal history scores in imposing a sentence in the
11 post-*Booker* environment. The work of the probation
12 officer is perhaps now more than ever guided by case
13 law which directs how judges must approach sentencing
14 decisions and what factors must be considered when
15 imposing a sentence that will sustain appellate review.
16 As a border district, the majority of our work load
17 consists of immigration and drug offenses. The most
18 burdensome of these border crimes are illegal reentry
19 cases, which frequently have extensive criminal
20 histories involving prior state prison commitments.

21 I will refer you to the testimony
22 previously given by Chief Probation Officer Becky Burks
23 from the Southern District of Texas who eloquently
24 articulated the laborious nature of these cases. Her
25 testimony illustrated the needs for further clarity on

1 what prior state convictions constitute aggravated
2 felonies and crimes of violence, which are special
3 given the potential impact these convictions have on
4 the immigration guideline at 2L1.2. Any further
5 assistance the Commission could give in this area
6 providing clarity would be helpful.

7 Chapter 3 role adjustments continues to be
8 a challenge for officers in my district. They would
9 like to see a more specific definition of what is an
10 average participant and guidance on how much more
11 information must be known about the scope of an offense
12 before determining a defendant's role. We frequently
13 see single defendant cases where drugs and aliens are
14 brought across the border. These offenders are
15 typically mules and do not have information about the
16 larger scope of the smuggling organization.

17 We often struggle with a multitude of
18 potential scenarios that might exist in determining
19 whether or not a role adjustment is warranted. There
20 are varying philosophies held by the government,
21 defense counsel and judges which adds even more
22 inconsistency to the application of the role adjustment
23 in our district. Again, any further guidance would be
24 helpful in this area.

25 Amendments to 4A1.2(c), Sentences Counted

1 and Excluded, regarding the threshold for a sentence to
2 score criminal history points were made presumably to
3 avoid criminal history points for certain minor
4 offenses. While changing the language from at least
5 one year to more than one year probation may have made
6 a difference in some jurisdictions, but it hasn't
7 always been the case in ours. In the state of
8 California it's not uncommon for courts to impose a
9 term of one year probation or more for minor
10 convictions such as driving on a suspended license.

11 This results not only scoring of the
12 conviction but also additional points for criminal
13 justice sentence and ultimately renders the defendant
14 ineligible for the safety valve. The defendant finds
15 themselves not only in Criminal History Category II but
16 also ineligible for a two-level reduction under the
17 drug guideline at 2D1.1(b)(11). Perhaps this guideline
18 should focus more on a custodial portion of the
19 sentence rather than the term of probation as the
20 threshold for scoring or possibly these listed offenses
21 should become ineligible for subsequent adjustments in
22 subsections (d) and (e) at 4A1.1.

23 Finally, many of colleagues have voiced
24 their opposition to the American Bar Association's
25 proposed amendment to Rule 32. I will simply state my

1 concurrence with their opposition for the same reasons
2 they have stated and will refer you to the prior
3 testimony of Chief Probation Officer Chris Hansen from
4 the District of Nevada. From the perspective of the
5 probation office, this proposed amendment is unduly
6 burdensome and unnecessary. We hope the Commission
7 will support a position opposing this proposed
8 amendment.

9 In closing, I really would like to thank
10 and compliment the Commission for its public outreach
11 efforts and the excellent training it routinely
12 provides to guideline practitioners and for its work
13 with probation offices throughout the country to
14 improve the accurate and timely collection of
15 sentencing data.

16 Over the last several years, my office has
17 worked closely with the Commission's information
18 technology staff to streamline the process of
19 electronically submitting sentencing documents. This
20 new process that we have developed is a feature that is
21 contained in our packs data system and eliminates the
22 need for the defendant information to be entered into
23 the Commission's server. It also allows the user to
24 select from a menu of specially configured sentencing
25 packets, each containing the requisite documents for

1 electronic submission to the Commission's database.

2 There are also features in this new
3 process that tracks missing documents as well as tracks
4 the dates documents must be submitted to the
5 Commission. We have both benefited from these system
6 enhancements which have greatly reduced data entry
7 errors, increasing the timeliness of submissions and
8 also has provided us an audit trail for when problems
9 do occur, we can resolve them quickly. This new
10 process has been piloted in several districts across
11 the country and will soon be available to all
12 districts, all probation offices throughout the nation.
13 We are very pleased to partner with the Commission on
14 this most important project.

15 Again, I want to thank the Commission for
16 the opportunity to be here. I know the issues that I
17 have raised are not new ones. And I want to thank the
18 Commission for its ongoing efforts to help the field in
19 applying the guidelines. Thank you again.

20 CHAIR SESSIONS: Thank you,
21 Mr. Young. Ms. Chavez, are you next or is Mr. Moreno
22 next?

23 MS. CHAVEZ: He wants to go next.

24 MR. MORENO: Good afternoon. And thank you
25 for this opportunity to offer some remarks to the

1 Commission. Welcome to the District of Arizona again.
2 We are honored in Arizona that the Commission chose
3 Phoenix for one of its regional hearings. And
4 testifying after so many of my colleagues have offered
5 remarks gives me the chance to reflect on their
6 statements, and I agree with many of them. However, I
7 would like to take time to illustrate why the District
8 of Arizona and some of the other border districts
9 present some unique challenges in the area of federal
10 sentencing.

11 About eight years ago in the *Federal*
12 *Sentencing Reporter*, the former chief submitted an
13 article on the reflections of a southwest border chief.
14 In that article she talked about the difficulty to the
15 probation office and the impact of the 1994 southwest
16 border initiative. At that time we found ourselves
17 overworked and undermanned and basically were
18 struggling through the growth. Well, today it's eight
19 years later and as you heard from the U.S. Attorney
20 here in this district, there is again significant
21 growth.

22 Over the past – about the past year, we
23 have seen somewhere upwards of 50 new prosecutors being
24 added to this district. Some of those were growth
25 positions. Many of those were vacancies. But

1 nevertheless it has driven the workload significantly
2 higher in this district. And as many of you know, the
3 funding structure for the probation office is such that
4 we perform the work before the allotments for growth
5 are included. And so our officers are now finding
6 themselves coping with this significant increase in
7 work. Much of it is related to drugs and immigration
8 cases.

9 Over – in fiscal year 2008, for example,
10 we prepared 3,869 guideline reports. Of those, 838
11 were drug trafficking cases. 2,239 were immigration
12 cases. Now, those drugs and immigration cases
13 represent 79 percent of our overall work product. And
14 as the U.S. Attorney was mentioning earlier today,
15 besides that 79 percent, we are also investigating
16 Indian Country crimes.

17 Many of those are violent offenses,
18 require significant investigation work by the officer,
19 significant amount of travel to make contact with
20 victims. So our officers find themselves stressed at
21 this point, but nonetheless they are dedicated to
22 conducting objective investigations and submitting
23 presentence reports with verified information.

24 In advance of this hearing, I looked over
25 some data elements and want to offer some observations.

1 Comparing 2008 with 1998, we find that drug
2 offenders – the sentences for drug offenders are about
3 47 percent higher in 2008 than they were in 1998.
4 Sentences for immigration offenders in 2008 are 25
5 percent higher than they were in 1998. Our use here in
6 this district of variances is pretty negligible.

7 In 1998 we had a significant number of
8 departures under the other category at 5K2.0. We don't
9 see as many departures now under that category, but we
10 see more under the 5K3.1 fast-track departures. So it
11 seems like one took the place of the other. In our
12 district case dispositions by plea agreements account
13 for 98.5 [percent] in fiscal year 2008. And in 1998 they
14 were about 99 percent. So almost all the cases are disposed
15 of by plea agreements here.

16 On the *Booker* impact on sentencing, it
17 seems to me that the *U.S. v. Booker* case has reinforced
18 the importance of a comprehensive sentencing system and
19 a need for the Sentencing Commission to continue to
20 promote the statutory goals of sentencing by analyzing
21 data, amending guidelines to resolve circuit conflicts.
22 In theory what we – in theory what we once had was a
23 guideline offense heartland of typical cases for
24 departure. And now we seem to have a guideline system
25 heartland of typical cases for variance. However, what

1 we are seeing in practice is that the advisory
2 guidelines has largely remained intact.

3 I mentioned earlier that the 5K2.0
4 departures in the District of Arizona were
5 significantly high. It seems that that number has now
6 been replaced with the 5K3.1 early disposition
7 programs, departures, and that came about in 2003. We
8 anticipate the guidelines have a solid statutory
9 foundation and that departures from the advisory
10 guideline range will be made in most cases while
11 variances from the guideline systems will be rare in
12 this district. And that's because most offenders here
13 are convicted with a plea agreement.

14 Now, the year before *Booker* came about,
15 and as a result of the *Blakely v. Washington*
16 opinion, we found ourselves preparing presentence
17 reports that computed the guidelines both ways. In one
18 column we had the guidelines computed under the
19 preponderance of evidence standard. And in the same
20 document just over in another column, we computed
21 guidelines under the concept of beyond a reasonable
22 doubt standard. So what we were attempting to do is
23 provide our judges with basically a comprehensive
24 system to help them make their sentencing decisions
25 under each scenario.

1 Now, although *Blakely v. Washington*
2 added some – this feature, I think we were still able
3 to provide the bench with the needed information for
4 them to impose sentencing and the impact to our office
5 overall was a minimal impact. But nonetheless officers
6 were pleased with the *Booker* decision in so far as we
7 returned back to a single calculation based on the
8 preponderance standard.

9 With respect to role of the guidelines,
10 after *Booker* we are still beginning with computing the
11 guidelines, determining the advisory sentencing range,
12 identifying factors that warranted either an upward or
13 a downward departure. And then we've also added a
14 section to the presentence report to identify any 3553
15 factors that may be relevant in the sentencing. And
16 while several questions remain[ed] – it was until the *Rita*,
17 *Kimbrough* and *Gall* decisions which ultimately resulted
18 in establishing a standard of review for sentencings
19 especially in this circuit.

20 And what's been made clear to us is that
21 we should correctly compute the guideline range and
22 make no presumptions of reasonableness regarding the
23 advisory guideline range. We still focus on the nature
24 and circumstances of the offense, the characteristics
25 of the defendant and provide the court with a

1 presentence report that represents the totality of
2 circumstances analysis that will hopefully provide for
3 a sentence that's sufficient but not greater than
4 necessary to accomplish the goals of sentencing.

5 In terms of the balance between discretion
6 and uniformity, I believe that the federal sentencing
7 practice here in this district does strike an
8 appropriate balance between judicial discretion and
9 uniformity. And I think what contributes to that
10 balance is the high percentage of cases involving
11 standardized offense-specific plea agreements with
12 waivers of appeal rights and stipulations to an
13 imprisonment range that's usually a departure from the
14 guideline range and usually under the fast-track
15 agreements.

16 And what we find is that this eliminates
17 or promotes uniformity in the types of sentencings that
18 take place. Judicial discretion is usually seen more
19 evidently in cases where – cases that go to trial or
20 in which defendants plead guilty without presentence
21 report, without any sort of sentencing agreement. And
22 we do find that those – in those cases we go through
23 the same process of computing guidelines, looking for
24 departure factors and then considering variances.

25 Now, 18 [U.S.C. §] 3553 requires that the court

1 consider the nature and circumstances of the offense
2 and the characteristics of the defendant in imposing a
3 sentence that's sufficient but not greater than
4 necessary. But what we find is that the – when we
5 look to the guidelines, the offender characteristic
6 sections are usually prefaced with this not ordinarily
7 relevant phrase.

8 And that sometimes for us creates a little
9 bit of a tension because you have this ordinarily
10 relevant standard under the guidelines and yet at 3553
11 there is – there seems to be no order in each of those
12 listed factors. One isn't necessarily stated as being
13 more important than the other. And so what we find
14 ourselves doing on an individual case is weighing out
15 whether that offender-specific characteristic – how
16 important is that? What relation did that
17 characteristic have in the offense? And how important
18 should it be? And so I think officers are challenged
19 to make that analysis. And I remember hearing earlier
20 that that may be an area where there is some guidance
21 to be offered.

22 Now, the impact – I would like to comment
23 on the impact of *Booker* on appeals. And it seems like
24 in this – in the Ninth Circuit, neither the 18 [U.S.C. §]
25 3553 factors standing alone nor the guidelines standing

1 alone meet the reasonableness standard for review. And
2 the effect that's had on an officer is that the officer
3 continues to go through the same process of computing
4 the guidelines, looking for departure factors,
5 analyzing 3553 factors and ultimately making a
6 recommendation. So the work of the officers remain
7 consistent in that area.

8 Now, with respect to proposed rules of
9 criminal procedure amendments, I too would like to join
10 Ken Young and the other chiefs in commenting on the
11 proposed – the proposal to Rule 32(h). The effect of
12 this on an officer would be – the officer receives
13 during the course of their investigation a significant
14 amount of information verbally from family members,
15 from case agents, documents from various agencies. In
16 our office, which handles a significant number of
17 cases, they have to summarize all these documents and
18 then also forward all these documents to counsel.

19 It seems to me to be a tremendous burden,
20 number one. Number two, I believe it would impact the
21 amount of information that's given to our office by
22 people offering comments or by in some cases law
23 enforcement agencies providing us documentation. In
24 many cases we receive police reports or investigation
25 material under – with an understanding that we are not

1 going to disclose that police report beyond what we
2 receive. Although we summarize it in the presentence
3 report.

4 It's the job of the probation officer to
5 collect all this information and make a professional
6 determination of what's relevant to the sentencing.
7 And officers are trained to do just that task. And
8 they do an excellent job with that task. It's rare in
9 this district that we see counsel wanting to see all –
10 or the totality of all of our documents that we
11 receive. Occasionally parties want to see judicially
12 noticeable facts.

13 And when we have obtained those and used
14 those in support of an enhancement and they are public
15 record documents, we make every effort to cooperate
16 with counsel to come to a resolution so that there is
17 understanding on all sides of what specific judicially
18 noticeable fact supports this proposed enhancement. So
19 I think we get along well in this district in obtaining
20 information and providing verified information in our
21 presentence reports.

22 I would like to commend the Commission in
23 continuing its effort to gather data and its work on
24 the predicate – on the predicate convictions,
25 especially at 2L1.2. This is a difficult task. And I

1 don't know of any one single item or recommendation
2 that could suddenly make the job of collecting all
3 these documents and finding whether a predicate
4 conviction is or is not an aggravated felony an easy
5 job. It's not an easy job. It's very difficult. It's
6 very labor intensive. But as the – as 1326 is
7 constructed, that's a necessary part of figuring out
8 what the proper maximum penalty is.

9 And so I recommend further efforts at
10 trying to offer commentary. The commentary that's been
11 offered with the crimes of violence, that's helped out.
12 But I do think that for us in this district, these
13 offenses represent a majority of cases that we see.
14 And it's very difficult and very time consuming. Often
15 what we find is that local jurisdictions are
16 experiencing financial difficulties and their ability
17 to produce and forward documents to us is limited as
18 well.

19 And so sometimes what we find is just the
20 inability to produce. The judicially noticeable facts
21 in one case may result in a different outcome when you
22 have that compared with the court, a lower court in
23 which you were easily able to get the documents because
24 they're on-line. And so that kind of results in – may
25 result in different sentences or defendant adjustments

1 just because we couldn't come up with the judicially
2 noticeable facts.

3 In closing, I would like to thank you
4 again for this opportunity to testify. And I too would
5 like to join in Ken's comments that the current system
6 for uploading all of our documents has made our jobs
7 much, much easier. We all as chiefs can recall the
8 letters of the missing documents. And for our
9 districts along the border, those were reams, numbers
10 of pages. And so this system has greatly improved and
11 my staff really appreciates it. Thank you again.

12 CHAIR SESSIONS: Thank you,
13 Mr. Moreno. Ms. Chavez.

14 MS. CHAVEZ. Good afternoon. I appreciate
15 the opportunity to provide my testimony before the
16 United States Sentencing Commission on the 25th
17 anniversary of the Sentencing Reform Act. I was
18 appointed United States probation officer February of
19 1985. So this is my 25th anniversary as well. I spent
20 the last eight years as chief. And prior to that
21 promotion, I was a supervisor for ten years, five years
22 in the presentence unit, five years in Indian Country.
23 And prior to that, my seven years as an officer, we did
24 pretrial work, presentence reports and
25 supervision all at the same time. We used to do it

1 all. That wouldn't be possible today.

2 I started in the system during the
3 nationwide implementation of the Baylor format. And I
4 was schooled under the original sentencing process.
5 During the implementation of the Sentencing Reform Act,
6 I was part of the first team of trainers that was sent
7 to Washington to train for my district and come back
8 and train U.S. attorneys and federal public defenders
9 and probation officers on the sentencing guidelines.

10 I recall my amazement the first time I saw
11 the guideline book and would think how could they have
12 come up with so many different sections? Who did all
13 this work? It was really amazing to me. And quite
14 frankly, it just really doesn't quite seem like it was
15 25 years ago. Time goes by very fast.

16 My esteemed colleagues have testified and
17 have captured many of my district's sentiments on the
18 broader sentencing issues. I will, therefore, focus
19 more on the day-to-day presentence report challenges in
20 my district. The challenges are a substantial increase
21 in workload in 2009, current lack of staff, our
22 inability to have face-to-face interviews with all our
23 defendants, and therefore not being able to fully
24 assess the factors contained in 18 U.S.C. 3553 and our
25 difficulty in obtaining criminal history records.

1 Now, some may think that these issues are
2 not really related directly to the Sentencing
3 Commission, but I think any of these factors that would
4 disrupt the Sentencing Commission's goals of avoiding
5 disparity would be of interest. So I know some of
6 these are more our administrative office issues of
7 stopping, but they really do affect the guidelines and
8 they do affect the writers that are doing the work in
9 presentence units.

10 In fiscal year 2009, the District of
11 New Mexico completed 3,458 presentence investigations
12 with approximately 35 full-time officers in our
13 presentencing unit. In looking at my assignment chart
14 this evening – or last evening, I saw officers like
15 Alex Aguilar completing 90 reports; Ben Aragon, 103;
16 Mindy Pirkovic, 94; and Arollo Garcia [phonetic], 103.
17 These are just common numbers for presentence writers
18 in our district, and they're high numbers. The
19 national average is 57 presentence reports per officer
20 per year, and we are well above that.

21 Since June 30 of 2009, we have grown 16
22 more positions just since June 30 for all of the
23 pretrial and presentence writing areas. This increase
24 has not, like Mario indicated, generated funding
25 immediately. We have to wait for the new fiscal year

1 to supply us 50 or 75 percent of the funding. So we
2 are consistently understaffed, but what you have is
3 officers that are very much burdened with the workload.
4 And still I think, like Becky Burks stated in her
5 statement, they're not just immigration cases. There
6 is just a lot of work in documentation that goes
7 through preparing a report.

8 Now, the large increase in workload for
9 New Mexico coupled with the fact that many of our
10 defendants are held in jail facilities up to three
11 hours away from our offices. We don't have a federal
12 detention center or big center near our Albuquerque or
13 Las Cruces offices. The majority are held two or three
14 hours away in small little jails, Lordsburg, Clovis,
15 Socorro, outside of the city. So it's very difficult
16 to drive just to do interviews.

17 We have set up videoconferencing but the
18 equipment in these older jails are not working as well.
19 We are only allowed one videoconferencing per jail
20 unit. And for this type of volume, you don't get much
21 done. So what we've turned to is phone interviews. My
22 concern this year in turning to phone interviews is
23 that they're impersonal.

24 It's difficult to see a defendant, to see
25 their face, to see how they're feeling, to see if they

1 look sick, to have them maybe really tell you why they
2 committed the crime, why they're here. Those are
3 important things to be able to sit across from somebody
4 when you are trying to do interviews. You're doing the
5 guideline application but you are trying to apply the
6 factors in 3553. And that's been a real struggle for
7 us.

8 And prior to 2009 and Operation
9 Streamline, we were able to do videoconferencing and
10 personal interviews, but that's one effect it's had on
11 us. And it concerns me. I notice that our variance
12 rate for 3553 has dropped a percent since 2007 to 2008
13 and I wonder if it's because we are not able to do the
14 face-to-face interviews that should be done in every
15 case. So our goal is with staffing that we be able to
16 get back to the face-to-face interviews.

17 Now, some of our cases, like Judge [Vazquez]
18 had mentioned before and was asked, we do do
19 assessments for *Booker* analysis within the presentence
20 reports. And the majority of those cases are our
21 district's cases that are non-immigration. They're -
22 we try to do them on all cases, but if we don't have
23 sufficient information like the fast-track cases, they
24 won't get a variance assessment. But our Indian
25 Country cases do, our bank robberies, the big drug

1 conspiracies, immigration cases of transporting. We
2 will do the best we can to provide analysis.

3 If I receive the funding sufficient, we
4 would be able to do interviews on all of these cases.
5 And it would be important. So my concern now is that
6 the immigration cases aren't getting the attention that
7 they need to get in terms of the 3553 factors and
8 therefore causing disparity with some of the other
9 cases.

10 Other challenges that Operation Streamline
11 has provided us is the prosecuting of first-time
12 offenders, which has given us a 21 percent increase in
13 workload from 2008 to 2009. Now, the majority of these
14 new cases require a 30-day turn-around time frame from
15 plea to sentencing. That's because they have a
16 guideline range from zero to six months. So on top of
17 the regular workload of the cases that are within our
18 district, we now have these fast-track cases that we
19 are moving through quickly.

20 And an officer with a case load could
21 easily be assigned 12 presentence reports in a month
22 and then have the additional three or four fast-track
23 cases that need to get done quickly and expeditiously,
24 and therefore their other cases may suffer some. So we
25 have seen the volume. And with fully staffed office,

1 it would be what we would be able to handle, but right
2 now my concern is that these cases are taking away the
3 type of investigation that needs to be done on the
4 larger cases.

5 Some of our non-immigration cases come
6 from our 24 Indian pueblos and reservations. And the
7 majority of criminal charges on the reservations, like
8 Mario indicated, are violent crime and rape charges.
9 Those cases do require mandatory face-to-face
10 interviews as well as mandatory personal visits for
11 written victim impact statements.

12 We have learned through the years that
13 Native Americans have a difficult time sharing their
14 pain and sorrow with outsiders. My Indian Country
15 supervision officers assist my presentence writers in
16 conducting the home visits and preparing the victim
17 impact statements. Officers have been trained in
18 cultural sensitivity and have become accustomed to meet
19 with large groups of family members who have been
20 grieving their loss or angry about sexual assault of a
21 child or murder.

22 The supervision officer's assistance in
23 this capacity has been critical. There is no way our
24 current presentence staff could do a sufficient job on
25 a victim impact statement with the workload that they

1 have now, but the supervision officers make that
2 possible. This is not a task that we can cut corners
3 on.

4 Further, during our recent judicial
5 security meeting that was held in Albuquerque November
6 2009 we learned New Mexico as well as California and
7 Illinois have a gang ratio of six gang members to every
8 one law enforcement officer, the highest in the nation.
9 We have seen an increase in the FBI Safe Streets
10 Program targeting gang members, which is also providing
11 our courts with new drug and gun charges on repeat
12 offenders. Several of these defendants are already
13 under our supervision. And these are complicated cases
14 as they – and we struggle to obtain their criminal
15 history records.

16 In September of this year in my Roswell,
17 New Mexico office, we had a gang threat of officers and
18 we had to evacuate the office. The marshals found it
19 to be a credible threat and we moved a staff of eight
20 out of the Roswell, New Mexico city until the marshals,
21 the FBI could come in and assure us it was safe to come
22 back. So New Mexico has a large gang problem and we
23 are seeing more of those defendants as well.

24 My final concern is regarding our
25 collateral process. U.S. probation offices nationwide

1 rely on the process called collateral requests to
2 obtain criminal history data for presentence reports.
3 The national workload credit for this assistance is
4 nominal compared to the amount of work that goes into
5 the investigation.

6 The nation's increase in immigration cases
7 has significantly increased the number of collateral
8 requests for all districts, not just the border
9 districts. Several districts unable to keep up with
10 the demand of these requests have established augmented
11 websites. These augmented websites are labor
12 intensive for our officers and they struggle to obtain
13 the documents that they need.

14 Today having the documents required by
15 *U.S. v. Taylor* and *U.S. v. Shepard* are crucial in the
16 sentencing process. If our officers are not able to
17 obtain these necessary documents due to lack of
18 assistance or lack of documentation, this could create
19 disparity in sentencing for cases and since the
20 application of the guidelines would not be accurate.
21 The new workload formulas being worked on now, and a
22 formula has been developed to evaluate credit for
23 collaterals as we speak.

24 And we hope it establishes sufficient
25 credit because that will make a big difference in all

1 these immigrations because as I would see, districts
2 that have not been able to keep up like Los Angeles, we
3 just killed them with the number of collateral requests
4 that we send out. San Diego, Chicago, the big cities
5 can't keep up with the requests that are coming in. So
6 it really helped them put the staff that they need into
7 the collaterals. And therefore it would help us in
8 that immigration process of getting the documentation
9 we need.

10 In closing, the District of New Mexico –
11 I just want to share this information. The District of
12 New Mexico recently, just in November, underwent a
13 national workload formula study wherein a team of ten
14 staff led by the Administrative Office's human resources
15 came to the district to assess the work that was being
16 performed. The work measurement study results for our
17 district found that for the staff of 168 who are
18 onboard in 2008 performed the work of 214 people.

19 And that's the study that comes from our
20 human resources department. I know Arizona's numbers
21 were well – over 50 officers needed as well. And I'm
22 sure the rest of the border courts are. So it's not
23 just immigration cases. And for New Mexico and
24 Arizona, we have Indian Country. And there is a lot of
25 challenges.

1 I believe that the guidelines have helped.
2 I was an officer prior to the guidelines. And I recall
3 having long discussions with judges and then saying do
4 you remember what we did before? Do you remember, did
5 judge so-and-so have a case? That's how we tried to
6 measure. And I see Judge Hinojosa kind of nodding his
7 head.

8 COMMISSIONER HINOJOSA: So much time
9 looking for old files.

10 MS. CHAVEZ: Yes, looking for what we did
11 before. So it has helped us to gauge what the
12 heartland cases are and what we can do to be fair. And
13 the transparency is important. Sure, there is a lot of
14 things we could do better and different. And just as
15 my colleagues have stated and all the colleagues before
16 me in reading their testimony, they offered a lot of
17 great suggestions.

18 But I thought in ending this, just give
19 you an insight into our district, the day-to-day. I
20 really see us as your staff as well. I know we're
21 federal probation officers and we work for the courts,
22 but we work for the Commission as well. We uphold -
23 and we have always said we hold the torts for the
24 sentencing guidelines. So with that I will end. And I
25 thank you very much.

1 CHAIR SESSIONS: We really
2 appreciate your support. All right. Let's open it up
3 for questions. Mr. Carr.

4 VICE CHAIR CARR: Ms. Chavez, the new
5 presentence report where you are trying to flesh out as
6 many of the 3553(a) factors as you can, how much of a
7 problem do you have in defense attorneys not wanting
8 their clients to talk?

9 MS. CHAVEZ: It has been difficult. We
10 recently had Bar Association training where I provided
11 testimony training and discussed how important it was
12 for us to work together. The trust factor is not
13 there, or wasn't as much. It's important that they
14 give us the information. We train our officers in the
15 very first meeting let's talk about it right up front.
16 Do you see anything we should start to work on right
17 away? Family contacts? Education? Is there anything
18 we could bring up? It's a culture change. It's a big
19 culture change.

20 And the other difference for the court on
21 the borders is that everything is so fast. I looked at
22 some of the numbers in courts all over the United
23 States and some districts have 300 PSIs they did a
24 year, 600. I think they probably do a much better job.
25 They have time. They sit there and they contemplate.

1 In the border courts you are constantly moving.

2 So it's a culture change not just for us
3 but for counsel because they've got a lot of cases
4 themselves. So they're just as much in a hurry as we
5 are. So we are trying very hard to spend the time, ask
6 the questions up front, ask the defendants questions in
7 a way that is open ended and to gather more
8 information, but it is more time consuming.

9 VICE CHAIR CASTILLO: Let me thank you.
10 I know we have three of the hardest working districts
11 in front of us given your proximity to the border. And
12 I can assure you that we support at the Commission full
13 and fair funding for each of your districts. When I
14 look out there, I also think in particular with regard
15 to Ms. Chavez and Mr. Moreno there is a lot of Indian
16 Country expertise.

17 One of the things I am familiar with given
18 my tenure on the Commission is at one point we did have
19 a Native American advisory committee. And I think it
20 was suggested during our hearing in Denver that we
21 create a permanent Native American advisory committee.
22 What would be your views on that?

23 MR. MORENO: I would support that
24 movement. What we are finding in all of our offices is
25 arriving at a guideline range and looking for departure

1 factors and variances, that gets us to the sentencing
2 phase, but what we are all also looking forward to is
3 many of these folks are coming out under supervised
4 release.

5 And all of us need to spend more research
6 and effort in identifying what are the risk factors out
7 there that help support recommendations as to
8 conditions of supervision? What help does the field
9 supervision officer need with respect to conditions?
10 And that begins with the presentence investigation and
11 identifying what the sentencing factors are. And so I
12 really support - I would support that movement.

13 MS. CHAVEZ: I would as well. We do have
14 a committee now that are the five - it's probably
15 seven districts that have the most Indian Country. And
16 we meet every three months. We have one national
17 conference. We bring our officers together. We have
18 done it for about two years now. It's very important.
19 It's a whole different world in dealing with that. I
20 don't know where the Dorgan bill is now. It's got some
21 significant changes in that that would affect us one
22 way or another. We are not sure. There is - we have
23 been keeping an eye on that. There would be some
24 definite concerns with us if that did pass.

25 COMMISSIONER WROBLEWSKI: Could you

1 explain those concerns? Then I've got a few other
2 questions.

3 MS. CHAVEZ: In the Dorgan bill as we read
4 it and understood it, it was putting more prosecutors
5 in Indian Country but would be, for lack of a better
6 word, deputized the Native attorneys that were working
7 in tribal courts now would be deputized and could
8 function as U.S. attorneys and that the courts could
9 sentence up to three years on a misdemeanor case, in
10 other words stack the cases, and that they would be
11 allowed to go to the Bureau of Prisons, sentenced
12 directly to the Bureau of Prisons.

13 Very little mention – they discussed
14 probation officer assistants being placed in Indian
15 Country but never indicated whether it would be federal
16 or who they would be, but we would wonder how the
17 Bureau of Prisons who needs presentence reports and how
18 they would guide the sentencing process, how that would
19 take place. There was a lot of concerns and issues.
20 And I wrote the letter on behalf of our Indian Country
21 committee. I know that a letter was written on behalf
22 of the federal public defenders because there was
23 actually no – I believe no statement in the bill about
24 public defenders being appointed, as well counsel. So
25 there was some issues.

1 What happened approximately a week ago, I
2 believe, is Department of Justice provided about 33
3 U.S. attorneys for Indian Country. There was a news
4 release. And I don't know if that's going to take
5 place now if Senator Dorgan steps down. So we have
6 just been keeping an eye on it. So Judge Castillo, we
7 are concerned and we do watch Indian Country. We have
8 a lot of – the Navajo Nation is very large and our
9 pueblos.

10 So I don't know the final status. And I
11 don't know if this last move with these new U.S.
12 attorneys appointed or given to all districts including
13 Southern California – I think Connecticut got one.
14 There was a long list – whether that's going to take
15 care of what was working with the bill or if the bill
16 is still in place. So that's as much as I know.

17 COMMISSIONER WROBLEWSKI: Here are my
18 other two questions. Thank you for that answer. First
19 of all, you indicated that you now have this section in
20 the presentence report called the *Booker* analysis. If
21 you could explain – I know you spoke a little bit ago.
22 What does that mean? Is that analysis really just
23 about offender characteristics or is it more than that?

24 And my second question has to do with
25 reentry cases. And this is for all of you. We have

1 heard over and over again as we've gone around the country
2 the difficulties with the *Shepard/Taylor* approach and
3 with aggravated felony. And we are going to hear from
4 defenders about the 2L1.2. In fact we just met with an
5 AUSA who said 2L1.2 was the bane for existence. We
6 have heard it over and over and over again.

7 And I believe the purpose of 2L1.2 –
8 because of course the crime is coming across the
9 border. But then the idea of this guideline is to sort
10 the people who are convicted under this into the people
11 who are more dangerous and the people who are less
12 dangerous. The way we do it now is apparently very,
13 very complicated. And you all have discussed a little
14 bit about the difficulties you have in getting the
15 information and all the rest.

16 From seeing these people close up, is
17 there a way, a better way, a simpler way, a more
18 accurate way to sort the people who are convicted for
19 coming back into the country after being convicted for
20 a felony into more dangerous, less dangerous, medium
21 dangerous?

22 MR. MORENO: I would like to comment on
23 simpler. And I would like to offer that simpler
24 doesn't always mean that it's better. I remember a few
25 years ago our chief judge offered some remarks with a

1 movement that would have created a structure where the
2 sentence imposed would be the driver on measuring the
3 seriousness of the predicate offense. And what we find
4 here is that's not always the case. That's not always
5 the case because various lower courts find themselves
6 challenged to house inmates who they know are going to
7 be deported.

8 And so sentences – if a system were in
9 place where the primary driver is sentence length, sort
10 of like Chapter Four, then there would be the potential
11 for those prior offenses to be underrepresented. So
12 there is a drawback to going with a simpler approach.
13 It may not lead to making an accurate distinction on
14 who the more serious re-entrants are.

15 COMMISSIONER WROBLEWSKI: Right. We have
16 heard many, many times the current system isn't
17 perfect. We've heard many, many times that proposal
18 isn't perfect. Do you have one that's a little bit
19 better than what we've got now or should we just say –
20 because we have heard over and over again that this is
21 a problem, but we have heard from no one about what the
22 solution is. And maybe there is no solution and maybe
23 this is as good as we've got.

24 MR. YOUNG: I would offer it may well be
25 that what we have is what we need to make work for us

1 in some fashion. I don't know what the solution would
2 be as well, maybe along the lines of some sort of a
3 risk assessment tool that would be at the front end of
4 the sentencing process. I don't know. It is a tough
5 task to make those divides. And I can't offer you any
6 suggestions other than the fact that it could be that
7 if we utilized what we have now and try to exercise
8 more in-depth analysis, maybe that's what we are left
9 with at this moment in time.

10 COMMISSIONER FRIEDRICH: I do want to
11 commend all three of you for the extraordinary amount
12 of work that you must do in your districts and we
13 appreciate it both from you and your colleagues.
14 Mr. Moreno, I want to explore a little bit more with
15 you the nature of Arizona's docket. And I don't in any
16 way want you to perceive my questions as minimizing the
17 workload on the probation officers. But I don't know
18 if you were here this morning when I was talking to
19 Mr. Burke, the U.S. attorney for Arizona, about what
20 seems to be a high rate of fast-track cases in
21 comparison to the number of cases prosecuted in
22 Arizona.

23 And when you look at other border
24 districts, and in particular Southern District of Texas
25 and Western District of Texas, their numbers are almost

1 double Arizona's. They're above 6 and 7,000. And
2 their fast-track percentages are – I think the Western
3 District is two percent and the Southern District is 17
4 percent, while your district is 51 percent. The
5 justification that's been given over and over here
6 today from the U.S. Attorney and AUSAs from Arizona in
7 our lunch is that these decisions are driven mainly on
8 the numbers. And that to me just doesn't add up.

9 I know you are limited in being able to
10 address that question, but I'm wondering does the large
11 number of fast-track cases in your district, which I
12 think is close to 2,000, does that translate into
13 substantially less work for the POs or not really in
14 terms of the length of the presentence report, the kind
15 of analysis you do for those cases? Is it – I know
16 when I was an AUSA in San Diego, they were
17 significantly truncated reports. Is that the case now
18 or not so much?

19 MR. MORENO: No. The ultimate effect on
20 the officer completing the investigation really is
21 negligible because before the early disposition program
22 departures were in place, officers spent lots of time
23 obtaining documents to support whether the predicate
24 crime was an aggravated felony or just a felony. We do
25 see many, many plea agreements that are the stipulated

1 agreements.

2 And in each one of those, yes, there are
3 the three-level departures, but still the officer has
4 to figure out whether the underlying offense is worth a
5 four-level enhancement, an eight-level enhancement, a
6 12-level enhancement or a 16-level enhancement because
7 ultimately that's what the departure is going to be
8 subtracted from. And so basically the burden is still
9 on the probation officer to produce that document and
10 to verify that conviction.

11 Before the departures for early
12 disposition program, we used to see departures for
13 other reasons, whether they were other – based on the
14 plea agreement, the same work was produced by officers
15 under that environment. It's – the beginning task is
16 to obtain those documents to figure out what the total
17 offense level is before the reduction under the other
18 departures or the fast-track departures can take place.
19 So it's the same amount of work.

20 COMMISSIONER FRIEDRICH: The cases I am
21 familiar with in San Diego were the ones where they
22 just pled to 1326(a) and said that reports were not as
23 extensive.

24 MR. YOUNG: I can comment from San Diego.
25 I would say that the work of the probation office is

1 drastically reduced. In the cases we are talking
2 about, these fast-track cases, there is a entry of
3 plea. They're all driven by plea agreement of course.
4 And there is one appearance for the entry of the plea
5 and the sentencing. The sentence is imposed. We
6 receive the referral that the sentence has been
7 imposed. And the probation office does what is called
8 a supplemental report to the Bureau of Prisons. It is
9 a truncated report.

10 We like that process. It really helps our
11 process because it is not driven by time lines per se
12 that a presentence report might be. There is no
13 further court time involved at all. Our officers do
14 the reports. And in many cases the time – there is no
15 time line. They might get stacked up, but we do
16 them – on any case that there is a commitment of nine
17 months or more, we do what we call a post-sentence
18 report.

19 So I can say very, very clearly in
20 southern California, the probation office in these
21 types of cases is really given a great deal – a pass
22 in terms of the workload. We do the post-sentence
23 reports. And we get – we receive half credit for
24 them. But in my view the whole fast-track program is
25 just an essential component along the southwest border.

1 Particularly we have seen that. You heard Judge Huff
2 this morning speak eloquently to that.

3 CHAIR SESSIONS: Can I just follow
4 up with that? Do you call it a presentence report if
5 in fact the judge never sees -

6 MR. YOUNG: We, do not.

7 CHAIR SESSIONS: It's called a
8 post-sentence report?

9 MR. YOUNG: Internally within the district
10 or within the probation office, we call it a
11 post-sentence report. Officially what it's termed is a
12 supplemental report to the Bureau of Prisons. And one
13 is required in any case that is sentenced without a
14 presentence report where there is nine months or more
15 of custody to be served.

16 CHAIR SESSIONS: That's submitted
17 to the Commission as well?

18 MR. YOUNG: I don't know if they are or
19 not. I can check and find that out. And I will do
20 that. I will say, though, that there are a number of
21 cases particularly in the southern district where there
22 is such an immediate - that is an immediate sentence.
23 And the amount of time that's left on the case, there
24 is no report. And it's less than nine months. So they
25 receive their pretrial custody confinement credits as

1 well as whatever is left. And many occasions it
2 amounts to less than the nine months. So no report
3 gets done.

4 CHAIR SESSIONS: Mr. Moreno, I have
5 one question about defender characteristics and how you
6 consider them because you made a comment that in the
7 process of comparing departures to variances, you were
8 in a state of confusion, I guess is the word. The
9 process obviously is go through the guideline
10 calculation, go through the departure determinations
11 then go to 3553(a) and you've got those factors not
12 ordinarily relevant.

13 I'm interested - you sort of suggested
14 that what the probation officers do is just look at the
15 not ordinarily relevant and then look at 3553(a) and
16 they conflict. And as a result, you just sort of make
17 a determination as to how those factors are relevant in
18 this case? Is that the way it works?

19 MR. MORENO: You know, in essence, yes.
20 The officer uses their professional judgment. And on
21 each individual case, they will look at the offender
22 characteristics and analyze whether a particular
23 offender characteristic is - rises to a level
24 sufficient that should warrant a variance, knowing what
25 the guideline departure factor related to that topic

1 has said.

2 CHAIR SESSIONS: So what happens to
3 the departure analysis? Do you go through the
4 departure analysis and say forget the departure because
5 it's not ordinarily relevant then go to 3553(a) and say
6 yes, this offender characteristic seems to be relevant?

7 MR. MORENO: That's the best the officer
8 can do. There is – there is really no guidance on how
9 to assess the 3553 factors in relation to the
10 discouraged factors under the guidelines.

11 CHAIR SESSIONS: One of the topics
12 that we publish on now is essentially to explore those
13 not ordinarily relevant perhaps with the idea of giving
14 you information, updated information about the
15 relevance of those offender characteristics, risks of
16 recidivism related to offender characteristics,
17 et cetera. I guess it probably goes without saying.
18 That would be helpful?

19 MR. MORENO: The guidance would be
20 helpful.

21 VICE CHAIR CASTILLO: We have learned
22 that there is a disconnect between Chapter Five and 3553.
23 So we are trying to work on that. We also published an
24 amendment making it clear that departure analysis is
25 not obsolete as some judges have said and that the

1 three-part analysis for sentencing – that is
2 calculating the advisory sentencing guideline then
3 doing departure analysis and then thirdly and finally
4 doing variance to get to a sufficient but no greater
5 than necessary sentence – is appropriate methodology.
6 So hopefully that's going to help. And it remains to
7 be seen if we can get all this work done in the next
8 couple of months, but hopefully with your help.

9 MR. MORENO: We would be happy to.

10 CHAIR SESSIONS: Thank you for a
11 wonderful conversation. And we are at 2:30, so we will
12 terminate at this point. But thank you very much
13 for –

14 MR. MORENO: Thank you.

15 MS. CHAVEZ: Thank you.

16 (Whereupon, a recess was taken at 2:31 p.m.
17 until 2:45 p.m.)

18 CHAIR SESSIONS: We are ready to
19 start. It's a quarter of, and saving best for last.
20 This is the "View from the District of Arizona." We are
21 going to introduce Judge Roll and Judge Guerin. Judge
22 M. – the Honorable John M. Roll – is it pronounced
23 Roll or Roll?

24 JUDGE ROLL: Roll.

25 CHAIR SESSIONS: – has been a

1 district court judge in the District of Arizona since
2 1991, served as chief judge since 2006, previously
3 served on the Pima County Superior Court and on the
4 Court of Appeals for the State of Arizona. He also
5 served as an assistant U.S. attorney in the district,
6 as a deputy county attorney in the criminal division in
7 Pima County and as an assistant city attorney for
8 Tucson, Arizona. Judge Roll has received his B.A. from
9 the University of Arizona, J.D. also from the
10 University of Arizona and L.L.M. from the University of
11 Virginia. I welcome you today.

12 Next, the Honorable Jennifer Guerin has
13 served as a U.S. magistrate judge in the District of
14 Arizona since 2005. She's previously served as an
15 assistant U.S. attorney in Tucson and was also in
16 private practice. Judge Guerin has served as a law
17 clerk with Judge William Canby of the Ninth Circuit U.S.
18 Court of Appeals, who is coming to dinner as I
19 understand it tonight. She received her B.A. from the
20 University of Arizona and her J.D. from Georgetown Law
21 Center. So welcome. So who is first? Judge Roll or
22 Judge Guerin?

23 JUDGE ROLL: Judge Guerin has nominated me
24 to go first.

25 CHAIR SESSIONS: Is this a return?

1 JUDGE ROLL: Chief Judge Sessions and
2 members of the Commission, it's an honor to be invited
3 to speak to you. We are very honored to have you come
4 to Arizona. I understand this is the seventh hearing
5 that you have held since February. And I know you have
6 held those throughout the country. You have heard from
7 circuit judges and district judges, magistrate judges,
8 federal public defenders, CJA attorneys, U.S.
9 attorneys, probation chiefs. And I know that you have
10 to try to distill a lot of information and I am certain
11 conflicting recommendations that you have heard. So we
12 are very grateful to have the opportunity to visit with
13 you.

14 CHAIR SESSIONS: Should I tell you
15 that you will be the last judges to speak before the
16 Commission in our regional hearings. And of course the
17 last is ordinarily the most important.

18 JUDGE ROLL: I did note and I took apart
19 in the materials I received – you asked for comments
20 of about ten minutes in length and then the opportunity
21 to answer questions. So I have tried to follow that.
22 And I have submitted written testimony.

23 I would like to start in an area that
24 Chief Judge Hinojosa is already very, very conversant
25 with, and that is the role of the southwest border

1 courts. The five southwest border districts hear
2 one-third of the federal felony cases in the United
3 States. And I think that it is – it's important to
4 recognize the enormous burden that's placed on the
5 districts. We welcome it. That's what we are asked to
6 address. But it is an enormous portion of the overall
7 felony case load in the country.

8 In looking over the last several years,
9 those five southwest border districts are typically
10 always in the top six or seven districts in the United
11 States in criminal case load. Oftentimes we are one
12 through five as far as criminal case load. And Chief
13 Judge Hinojosa's district is always one or two,
14 changing places with the Western District of Texas from
15 time to time, and then the Southern District of
16 California and the District of Arizona and the District
17 of New Mexico.

18 The District of Arizona is all one
19 district, but our case loads tend to be very different.
20 In the Phoenix division, about 80 percent of the
21 Phoenix division case load is civil – or rather 80
22 percent of the district's civil case load is heard in
23 Phoenix. Two-thirds of the district's criminal case
24 load is heard in Tucson. We have most of the border in
25 the Tucson division, although Yuma is in the Phoenix

1 division.

2 Judge – or Chief Probation Officer Mario
3 Moreno provided you some information in his written
4 materials and in his testimony about the District of
5 Arizona. We had a very unusual case load aberration in
6 fiscal year 2008. And in talking about the statistics
7 that I quote in my written testimony and also in my
8 oral testimony, I am really relying on Jim Duff's 2008
9 report on statistics. The 2009 report isn't out yet.

10 But in 2008 Arizona sustained a 1,200 case
11 load reduction from the year before, which was really
12 extraordinary. It was, as Mario Moreno has described
13 to you, a result of the U.S. Attorney's Office being
14 extremely short-handed. They have added between 40 and
15 50 assistant U.S. attorneys since those 2008 statistics
16 were compiled. And a lot of those were new positions.
17 Many were just filling in spaces created by attrition.
18 But since the beginning of 2009, most of those U.S.
19 attorney slots have been filled.

20 We have felt in fiscal year 2009 by our
21 statistics about a 28 percent increase in criminal
22 cases over the year before. But for the calendar year
23 which just ended, we have had a 50 percent increase in
24 criminal cases and defendants. And so we are very much
25 at the center of things. And even when we had that

1 short-handed number of assistant U.S. attorneys and
2 that 1,200 case drop, we were still fifth in the
3 country in cases and fourth in criminal defendants. So
4 I suspect we will just be changing places perhaps with
5 one of the other southwest border districts, but we
6 will be at least fourth or fifth in the new statistics.

7 In looking at the *Booker* impact, I want to
8 suggest something to you. And this is a subject that's
9 very – a very great concern to me. And I know Chief
10 Judge Hinojosa is familiar with this as well. In 2004
11 the Federal Judicial Center used its new case waiting
12 system and it severely downgraded the weight assigned
13 to immigration and drug cases. That is what we do on
14 the southwest border, immigration and drug cases.

15 Eighty percent of our criminal case load
16 in the District of Arizona is drugs, drug trafficking
17 or immigration cases. We are the low member of the
18 five southwest border districts. The other four have a
19 higher percentage of their criminal case load in
20 immigration and drugs. And so when the Federal
21 Judicial Center with the idea of perhaps leveling the
22 field so that the other 89 districts could be competing
23 for judicial resources decided to downgrade the weight
24 assigned to those, it didn't help our case load.

25 Our case load wasn't diminished. But it

1 greatly impacted our ability to obtain the resources
2 that we need including new district judges. And I had
3 heard in the past that the Federal Judicial Center – I
4 understood every five years they would revisit this.
5 And now the latest word I hear is the plans do not call
6 for the Federal Judicial Center to do another case
7 reweigh analysis.

8 As a result of *Booker*, I think that the
9 illegal reentry cases, which are about half of our
10 criminal case load in the District of Arizona, are much
11 more involved. You have heard the reasons that were
12 discussed as far as the work that's involved in this.
13 You've heard it from the chief probation officer from
14 San Diego and from the District of Arizona. Suddenly
15 as a result of post-*Booker* sentencing schemes that now
16 exist, we have to look at everything in deciding what
17 the appropriate sentence is.

18 And there are issues that arise repeatedly
19 in illegal reentry cases as far as what is a crime of
20 violence, what is an aggravated felony. And we need to
21 look at these and to analyze and give the parties an
22 opportunity to litigate these matters. And aside from
23 that of course, we have all the other issues dealing
24 with departures and variances because if in any circuit
25 the guidelines are discretionary, they are most

1 certainly discretionary in the Ninth Circuit.

2 I have cited some of the cases to you.

3 And of course you are very familiar with the 2008 Ninth
4 Circuit case that reversed the district judge from the
5 Southern District of California for imposing a
6 guideline sentence in an illegal reentry case. There
7 were seven circuit judges in that case that wanted to
8 have the matter heard en banc. They did not have the
9 votes to obtain a rehearing en banc.

10 But it is an indication of exactly where
11 we are as far as our sentencings and the work that all
12 these cases call for including drug trafficking and
13 immigration cases. And it's why I think it is very
14 important that the Federal Judicial Center revisit the
15 case *Re: Wayne* and reconsider the notion that there's
16 something easier about illegal reentry and drug
17 trafficking cases that just don't warrant a full
18 treatment. And of course when I'm talking about these
19 numbers, I'm not using the weighted. I'm just talking
20 about raw numbers as far as the number of felony cases.

21 I would also like to put in a word for the
22 early disposition program. You have heard this over
23 and over again. It is very, very helpful in districts
24 where there is a very large volume of cases such as
25 illegal reentry cases. Our circuit recently in

1 *Gonzalez-Zotelo* found that it did not constitute
2 impermissible sentencing disparity for the district
3 court to apply the early disposition program.

4 I want to make another pitch for a point.

5 And I know that Judge Castillo, you and Chief Judge
6 Hinojosa have heard me talk about this in the past, so
7 this won't come as any surprise to you. It has to do
8 with predicate prior convictions and why I feel very
9 strongly that the proposal – that in deciding what the
10 sentencing enhancement should be for prior convictions,
11 that we should not just look to what the state sentence
12 was, but rather what the nature of the prior conviction
13 was.

14 I know that this proposal that – and I
15 have heard the Justice Department in the past describe
16 this as a great solution to getting away from all the
17 documentation that's required and all the need to
18 produce papers and just at what the sentence was in
19 state court and apply that. I don't think it is wise.
20 I don't think it's judicious. I think it overlooks the
21 nature of the prior convictions.

22 And the fact that I have seen in many
23 transcripts when transcripts of sentencings have been
24 provided to me, the state judges describe the fact that
25 the person is going to be deported and there is no need

1 to worry about a lengthy sentence. And I have had
2 child molesters and other individuals with various
3 serious charges who were sentenced in state court
4 receive probation for ten years and references to the
5 fact that if they ever come back, if they violate the
6 deportation order, they will be back before that judge
7 for sentencing.

8 I think to just focus on what the sentence
9 is for deportable aliens, the sentences that were
10 imposed in state court, it overlooks the obvious
11 short-handed nature of state resources and the idea
12 that state judges are sensitive to the notion that why
13 should some defendants who are going to be deported be
14 housed in state facilities with a burden on the tax
15 payers as compared to just be deported. And that is a
16 very serious shortcoming.

17 Really of even greater concern is the fact
18 that what judges should be doing I think is looking to
19 the nature and the quality of the prior convictions,
20 not just the length of sentences imposed. I hope that
21 the Sentencing Commission will reject any proposal that
22 would just focus on that versus the nature of the prior
23 convictions.

24 I want to join with our probation chief,
25 Mario Moreno, and with the chief from San Diego, Ken

1 Young, as well as any number of other individuals who
2 have expressed to you their concern about Rule 32(h)
3 and the idea that the probation department should have
4 to provide written summaries of information and
5 disclose all documentary information in connection with
6 presentence reports.

7 I talked a little bit about the southwest
8 border case load before. In our district in fiscal
9 year 2008, we had about 1,700 illegal reentry cases.
10 And Chief Judge Hinojosa, that's poultry compared to
11 what you have in the Southern District of Texas and the
12 Western District too. Both of those districts I think
13 had over 3,000 illegal reentry sentences.

14 This proposal would require all of that
15 paperwork concerning all of the criminal history be
16 provided to both sides when most of the time that's not
17 even an issue. Any time there was an issue concerning
18 a prior conviction, those materials are obtained.
19 They're provided to the attorneys. But to just make
20 everything blanket to be produced for the attorneys is
21 an enormous waste of time and resources.

22 Also the rule is very clear in our
23 circuit. And I think it was followed before it was
24 articulated by our Ninth Circuit, that anything that we
25 learn has to be contained in the presentence report or

1 disclosed to the attorneys in open court. There just
2 isn't anything that somehow is being missed, at least
3 in the District of Arizona. And I suspect this is true
4 of the other southwest border districts as well.

5 This is not a one size fits all solution
6 that because in maybe a couple districts or in
7 anecdotal cases, there have been situations that have
8 arisen where something wasn't provided that would -
9 the idea that in the border districts where we are
10 doing a third of the criminal cases, all this paperwork
11 has to be assembled and provided and probably never
12 read or reviewed by anyone just doesn't make any sense.
13 So I really strongly oppose that.

14 Also I would like to glom on to the
15 testimony of Ninth Circuit Judge Dick Tallman who
16 testified before you in California regarding the Fifth
17 Circuit common sense approach in connection with crimes
18 of violence. I know that in some respects the Supreme
19 Court has already spoken on this. So it's not as
20 though anyone can write on a clean slate on this, but I
21 think the Fifth Circuit common sense approach to the
22 extent that it's not foreclosed by the Supreme Court
23 has much to commend it. And I don't have anything else
24 to add in that regard.

25 You have already heard from Chief Judge

1 Sessions about our magistrate judge, Jennifer Guerin,
2 who along with the six other magistrate judges in
3 Tucson have an enormous case load. In our district our
4 magistrate judges hear almost all of the felony changes
5 of plea in addition to the Operation Streamline cases
6 and the bond hearings and the initial appearances and
7 reports and recommendations in civil cases. And the
8 court is very grateful for all of their work.

9 And Judge Guerin is just a shining example
10 of an outstanding magistrate judge in our district.
11 And I know she has been invited to describe to you a
12 little bit about our Operation Streamline. So if I may
13 before offering myself up for any questions you might
14 have, perhaps I could turn the podium over to Judge
15 Guerin.

16 CHAIR SESSIONS: Okay. Thank you,
17 Judge. Judge Guerin.

18 JUDGE GUERIN: Good afternoon. And thank
19 you for the opportunity to testify here this afternoon.
20 The Arizona Denial Prosecution Initiative was
21 implemented in Arizona in January of 2008. And the
22 initiative was structured with input from the Marshals
23 Service, the Federal Public Defender and our [CJA]
24 attorneys as well as border patrol AUSAs to permit the
25 magistrate judge to conduct a single proceeding where

1 there would be an initial appearance, change of plea
2 for those who decided to plead guilty and sentencing.

3 Since it has been implemented, over 30,000
4 people have been prosecuted under this initiative. And
5 the way it works is that in the morning the defendants
6 are brought to court and there is an opportunity for
7 defendants to meet with their attorneys in our large
8 ceremonial courtroom most of the morning, from 9:00 to
9 approximately 11:30 or 12:00. At this time the
10 defendants can review the charges against them. They
11 are advised of their options with respect to those
12 charges. And in those cases where a plea agreement is
13 offered, they can review that plea agreement with their
14 attorney as well.

15 Usually each defense attorney represents
16 between four to six defendants. And the defendants
17 that are prosecuted are typically from Mexico or
18 Central America. At the same time that the attorneys
19 are meeting with their clients, the magistrate judge is
20 given a copy of the complaints to review for probable
21 cause and also provided with information regarding the
22 defendant's background, prior immigration history,
23 prior criminal history and sometimes the circumstances
24 of the arrest.

25 After lunch the defendants are brought

1 back into the courtroom for the single proceeding and
2 they are advised of their rights by the magistrate
3 judge. And those defendants who wish to plead guilty
4 are put through a change of plea procedure. Almost all
5 the defendants who are prosecuted under this initiative
6 choose to plead guilty. Recently the Ninth Circuit ruled
7 that the magistrate judges need to make more
8 individualized inquiries as to the defendants to ensure
9 that their pleas were voluntary. And the magistrate
10 judges have made changes to ensure that they are in
11 compliance with that mandate.

12 The majority of the defendants that are
13 prosecuted through this initiative, and this is almost
14 70 percent, are charged – at least in the past have
15 been charged solely with the petty offense of illegal
16 entry. And in most of those cases, the defendants have
17 no prior criminal history and receive a sentence of
18 time served. And the other 30 percent of the cases
19 prosecuted so far, the defendants are charged with the
20 felony and the petty offense of illegal entry and
21 choose to plead guilty to the petty offense under a
22 plea agreement in which they agree to waive their right
23 to appeal in exchange for a specific sentence and they
24 dismiss the felony charge.

25 Based on my observations, the stipulated

1 sentence in that plea agreement is fairly consistent.
2 For example, when I see a sentence of 30 days, I can
3 pretty much tell that when I look at that defendant's
4 immigration history and criminal history, they're going
5 to have either a prior deportation removal or a prior
6 conviction. When the sentence is 60 days, they usually
7 have both. So the sentences seem to be pretty
8 consistent with what's being offered in those plea
9 agreements. In addition, those defendants are advised
10 that after their sentence, then they're likely going to
11 be deported or removed, which does require some
12 additional time.

13 When we started the implementation of this
14 initiative in Arizona, 30 persons were presented for
15 prosecution each day to make sure that we could ensure
16 that we had adequate procedures in place, if there was
17 adequate security and that there was staffing.
18 Currently 70 persons a day are being prosecuted under
19 this initiative. As I indicated in my testimony,
20 Border Patrol is requesting that that number be brought
21 to a hundred. I don't know when and if that would
22 happen if we had the resources to do it.

23 But I would add in closing that this is a
24 large number of people, but it's evident to me that the
25 judges who conduct these proceedings, the AUSAs who

1 are responsible for prosecuting and the defense
2 attorneys who are defending the defendants in these
3 proceedings I think all do their best to ensure that
4 the proceedings are conducted in accordance with the
5 law and that the defendants' rights are protected and
6 that the sentences are appropriate for the
7 circumstances. Thank you.

8 CHAIR SESSIONS: Before I open up
9 for questioning, can I just follow up? About the
10 timing of this process, the defendant is picked up. Is
11 this really at the initial appearance when the
12 defendant is presented an information plus a potential
13 plea agreement or is there some period of imprisonment
14 before that defendant comes to court?

15 JUDGE GUERIN: There is - my
16 understanding of the way that the Border Patrol
17 presents the defendants for prosecution, if there would
18 be more than a 24-hour delay such as a weekend, an
19 intervening weekend, Border Patrol calls in the cases
20 to the magistrate judge for determination of probable
21 cause. I understand that because of detention space,
22 often people that are arrested and considered for
23 prosecution are ultimately just released, but others
24 are presented within days of their arrest. It's not
25 always the next day because sometimes the arrests occur

1 at - near the border. There are the transportation
2 and processing issues and identification issues that
3 have to be resolved prior to that, but at least the
4 probable cause determination is made.

5 CHAIR SESSIONS: It's the initial
6 appearance. So within a very short period of time, you
7 have already been able to work out a system by which
8 there is an information filed by the U.S. Attorney.
9 There is a proposed plea agreement. You've already got
10 lawyers set up. And then by that afternoon the
11 defendant is processed, pleads guilty, is sentenced and
12 then released.

13 JUDGE GUERIN: For the time served,
14 released to immigration, yes.

15 CHAIR SESSIONS: Okay. Questions?
16 I think -

17 VICE CHAIR CARR: That was my question.

18 CHAIR SESSIONS: Will doesn't want
19 to ask any further questions. Okay.

20 COMMISSIONER HOWELL: We heard this
21 morning from the head of ICE about the possibility
22 of - or suggesting that we recommend any of the
23 guidelines, at one point downward departure for
24 those - for alien defendants who agree to - what was
25 it called? Stipulated order of removal. Right,

1 something like that, so with some exceptions for
2 certain types of cases, like perhaps illegal reentry
3 cases. But do these – do any of these plea agreements
4 that you are seeing in the Operation Streamline, do
5 they have any kind of credit or requirement of the
6 stipulation of an order for removal? Is that part of
7 this process?

8 JUDGE GUERIN: It is not part of the plea
9 agreement. From speaking with the [inaudible]
10 last week, he told me that most of the defendants are
11 eligible for the expedited removal based on the place
12 of their arrest and that that paperwork is actually
13 processed before the defendants are brought into court
14 and will be completed upon their removal from the
15 United States.

16 COMMISSIONER HOWELL: So this wouldn't
17 even be an issue in these types of cases?

18 JUDGE GUERIN: In these types of cases,
19 correct.

20 COMMISSIONER HINOJOSA: Judge Guerin,
21 these are not even Class A misdemeanors, right?

22 JUDGE GUERIN: Correct. They're Class Bs.

23 COMMISSIONER HINOJOSA: They're Class Bs.
24 So they're not even under the guidelines?

25 JUDGE GUERIN: Correct.

1 COMMISSIONER HINOJOSA: And these are
2 people that would have normally not been prosecuted
3 were it not for Operation Streamline because of the
4 view being that by the time somebody is charged with a
5 felony, they have been picked up so many times and
6 voluntarily returned and the strong push from some that
7 people need to be arrested at the start?

8 JUDGE GUERIN: I would say that that's
9 true for part of the defendants that are prosecuted
10 through the initiative. There are others who do
11 have -

12 COMMISSIONER HINOJOSA: Priors.

13 JUDGE GUERIN: - prior criminal history
14 and who are put into the program because of the number
15 of cases.

16 COMMISSIONER HINOJOSA: Is there - have
17 the U.S. attorneys in your district made a decision
18 that after so many of these convictions, it would
19 finally become a felony? Is there a number as to three
20 of these convictions or two of these convictions before
21 somebody is actually prosecuted for a felony for an
22 illegal reentry?

23 JUDGE GUERIN: To my knowledge there is
24 not a threshold level.

25 CHAIR SESSIONS: Mr. Morton

1 testified about this one-level adjustment down but made
2 an exception for cases in which there was a removal
3 order on the person's record. If a person had gone
4 through this particular process and had been removed
5 after the plea, would that constitute an order of
6 removal so that therefore they would not receive the
7 benefit of that one-level reduction if ever we adopted
8 that?

9 JUDGE GUERIN: It sounds to me as that
10 would be the case.

11 COMMISSIONER HINOJOSA: Is there a formal
12 order of removal when you agree to be removed without
13 an order?

14 JUDGE GUERIN: I don't know.

15 COMMISSIONER HINOJOSA: Does an expedited
16 removal actually have a record of an order of removal
17 like when you actually [are] not volunteering to be
18 removed; do you know?

19 JUDGE GUERIN: I don't know that for sure,
20 but I know that it's certainly something that counts on
21 the immigration history that shows up as a separate
22 category on those immigration reports that we consider
23 at sentencing. There is a category for voluntary
24 returns and then there is a separate category for the
25 removals and deportations which would lead me to

1 conclude, although I do not know the law for sure, that
2 it is more in the order of a formal order as opposed to
3 voluntary.

4 JUDGE ROLL: May I mention something about
5 the background concerning the Operation Streamline
6 about – obviously it was a Border Patrol initiative.
7 And they notified us of their plans to do this. And we
8 held a meeting with all of the court and with the
9 federal public defenders, with the CJA panel, with the
10 U.S. Attorney's Office and with other – I hate
11 cliches. I avoid them all like the plague – but all
12 the other stakeholders that are involved in this. And
13 we had a large meeting and we discussed implementing
14 this just because we knew that it was going to happen.
15 And it's difficult to wonder why they picked Tucson
16 division.

17 We have had over the last few years
18 between a quarter of a million and almost 400,000
19 people arrested every year in Tucson division. And
20 that's about half the people along the entire southwest
21 border who are apprehended. And that coupled with the
22 marijuana that this year went over one million – I
23 think it was 1.3 million pounds of marijuana that
24 Border Patrol seized in the last fiscal year, which was
25 about half of the marijuana seized along the southwest

1 border.

2 If anyone looked at the border and thought
3 where is the problem, it would be hard not to conclude
4 it was in the District of Arizona and specifically in
5 the Tucson sector. And so I suspect that was the
6 motivating factor behind Border Patrol deciding to put
7 this in place in Tucson. And having been notified of
8 that, we just recognize our duty to the extent we are
9 able to to hear the cases that are brought to us and so
10 we try to address it. It wasn't as though we were
11 trying to somehow side – pick a side in connection
12 with this, but it's our responsibility as the court to
13 hear cases that are presented and to anticipate that.

14 CHAIR SESSIONS: Commissioner
15 Wroblewski.

16 COMMISSIONER WROBLEWSKI: Thank you,
17 Judge. A couple of questions, Judge Roll. You said
18 that – I'm just a little confused about the fast-track
19 program here in Arizona. We heard testimony earlier
20 today that most of the fast-track cases under 1326 are
21 handled under an 11(c)(1)(C) plea. At the same time,
22 you testified just before that the 1326 cases are still
23 very involved and there needs to be a full presentence
24 report and all the rest. Is that to decide whether to
25 accept or reject the (c)(1)(C) plea? Because obviously

1 the (c)(1)(C) plea as I understand it has a particular
2 sentence associated with it.

3 JUDGE ROLL: It does, except our (c)(1)(C)
4 pleas have alternative sentences depending upon what
5 the offense levels are. And so the plea agreement is
6 if there is a 16-level enhancement, the sentence will
7 be within a certain range if the criminal history is a
8 certain criminal history. But if there is an
9 eight-level enhancement or a 12-level enhancement or a
10 four-level enhancement – and so there is litigation as
11 to exactly how many offense levels apply.

12 Sometimes there is not much of an issue
13 concerning that because it's clear concerning the prior
14 conviction. Other times there is considerable
15 litigation concerning that. And in any event, even
16 within the plea agreement, the judges sometimes choose
17 to – and indicate that we feel that a sentence outside
18 of the range provided for by the agreement and
19 sometimes the parties agree to that, sometimes they
20 don't. But part of being a judge is to look and try to
21 determine what the appropriate sentence is.

22 I'm sure that this is true for Chief Judge
23 Hinojosa. We see things along the border that I'm sure
24 other districts never – the types of cases that never
25 even arise. We have had a number of cases in Tucson

1 where individuals have been apprehended with large
2 quantities of drugs of minimal purity value, triggering
3 in our mind the notion these were decoy loads that were
4 being sent through in order to have other loads sent
5 through at the time, such as cocaine with a purity of
6 three or four percent or heroin of an extremely low
7 purity but bundled in large bundles that when it comes
8 through the port of entry, it creates a stir and all
9 the attention is directed toward them.

10 And one has to believe – and it usually
11 is a result of a tip telling them in advance that there
12 will be a load coming through. And so these are the
13 types of cases just that – one sample of the types of
14 cases we see along the border that I don't suspect
15 other districts ever see.

16 COMMISSIONER WROBLEWSKI: That actually
17 clarifies that situation for me. But taking to the
18 second question, which is the *Shepard/Taylor* approach,
19 and I know we have had discussions back and forth for
20 years with you, Judge Roll, and you indicated – you
21 said we can't write on a clean slate. Has your court
22 ever considered the fact that perhaps now that the
23 guidelines are advisory, maybe we can write on a clean
24 slate? The guidelines now don't have any binding
25 impact.

1 Have you ever considered the idea that
2 maybe the Commission could on its own say you know
3 what, maybe we don't have to do the *Shepard/Taylor*
4 approach? That was a constitutional ruling of the
5 Supreme Court in a different era when the guidelines
6 were mandatory and that maybe we could – the
7 Commission could take a more common sense approach and
8 allow you to – I think you talked about getting the
9 full nature and quality of the prior conviction. Do
10 you think that's possible or do you think that's just
11 an enormous stretch?

12 JUDGE ROLL: No, I don't think it's an
13 enormous stretch, but I think there are some
14 limitations as far as doing that. For instance, what I
15 was thinking of is the situation that's presented when
16 the prior conviction as an aggravated assault and the
17 crime involved a vehicular – a drunk driving involving
18 a vehicle and issues arise concerning the *mens rea*.

19 And we have the Supreme Court case law
20 dealing with whether that type of a *mens rea* can
21 trigger the 16-level enhancement. And so I guess
22 that's what I was – that's what I was referring to.
23 Sometimes our options may be limited because the
24 Supreme Court has said for some types of enhancements.

25 COMMISSIONER WROBLEWSKI: Haven't they

1 done that – post-*Booker*, haven't they only done that
2 with respect to the Armed Career Criminal Act which
3 triggers a mandatory 15-year sentence as opposed to the
4 guidelines which are now advice?

5 JUDGE ROLL: Of course we have Ninth Circuit
6 case law in addition that has similarly interpreted or
7 at least applied that to some of our sentencing cases
8 and in applying the *mens rea* that is required for the
9 larger enhancement. So I'm not just looking at the
10 Supreme Court precedent but Ninth Circuit precedent as
11 well that limits this. And I'm not sure the impact of
12 the – that would have on the Sentencing Commission,
13 but I know what it would have on the court that grades
14 my papers.

15 CHAIR SESSIONS: You are bound
16 right now to the *Taylor* analysis. Even though it's an
17 advisory assistant, it's an advisory. After you get
18 through the whole process, you still have to apply the
19 law that's defined for you by the guidelines and also
20 by your circuit case load. So I would assume that you
21 would be restricted in that kind of way but then could
22 use the flexibility later on when you get to 3553(a).
23 Anyway, that's –

24 COMMISSIONER WROBLEWSKI: Do think that –

25 CHAIR SESSIONS: Okay, Jonathan.

1 COMMISSIONER WROBLEWSKI: Do you think the
2 Commission could amend the guidelines and say for
3 purposes of the advisory guidelines, the *Shepard/*
4 *Taylor* approach doesn't apply? You get all the
5 documents you want and -

6 CHAIR SESSIONS: No. I think that
7 we would have the power to do that. I'm not so sure
8 that a district court judge as the district court judge
9 is applying precedent from us and also Supreme Court
10 case law could do that, sure. I think we could
11 approach this with common sense.

12 COMMISSIONER HINOJOSA: You can't ignore
13 the circuit case law. And the circuits are taking
14 their lead from the Supreme Court with regards to - I
15 don't know that this is a public meeting of the
16 Commission. But Judge Roll brought up the common sense
17 approach to the Fifth Circuit. And that is limited to
18 the enumerated offenses that the Commission actually
19 enumerates.

20 And if you want to propose something,
21 maybe you should go in that direction so there could be
22 a Commission meeting discussion about it as to - we
23 would still have to go through does it fit the normal
24 restatement as to what the elements of the offense are,
25 but we wouldn't have to do the *Shepard/Taylor* test

1 other than – and then you could probably look at
2 circuit conflicts with the common sense approach.

3 VICE CHAIR CARR: If we were alone right
4 now, our tongues would be much more hostile, towards
5 me.

6 CHAIR SESSIONS: Perhaps I should
7 ask would you like to ask any other commissioners about
8 any –

9 COMMISSIONER HINOJOSA: Apparently we
10 started something new at the last session.

11 CHAIR SESSIONS: All right. So
12 let's return to the questions. Are there any further
13 questions? Well, thank you very much for your
14 contribution and –

15 COMMISSIONER HINOJOSA: I have one more
16 question for Chief Judge Roll. Are you looking for a
17 downsizing of the U.S. Attorney's Office again?
18 Perhaps change your occupant numbers. That was not
19 really a question.

20 CHAIR SESSIONS: If you go down –
21 that means that your funding for probation officers
22 goes down the following year, which then means in the
23 following year you are back up when you have less
24 personnel. Is that the dramatic problem that you are
25 facing?

1 JUDGE ROLL: It is. And with the biannual
2 survey which was based on those numbers in the
3 aberrational year, we dropped from five district judges
4 to two district judges that were being recommended.
5 And now we would be back up if you use the latest
6 numbers. So we tried to argue that, but of course it's
7 difficult to – and I understand why that committee
8 feels bound by what the current statistics are rather
9 than what they might be, but we knew this was going to
10 change, but I couldn't get them to change that.

11 VICE CHAIR CARR: That's just more work
12 you can dump on the magistrate judges.

13 CHAIR SESSIONS: Well, I think we
14 on the Commission are very sensitive to the incredible
15 work that you do along the border and particularly
16 Arizona with all of the responsibilities that you have.
17 And we just really appreciate you taking time out to
18 come and speak with us.

19 JUDGE ROLL: Thank you for the privilege
20 of being here.

21 CHAIR SESSIONS: And we hope to see
22 you both tonight.

23 JUDGE GUERIN: Thank you.

24 CHAIR SESSIONS: Okay. I think we
25 are adjourned.

1 (Whereupon, proceedings adjourned at 3:30 p.m.)

2 -ooOoo-

3 STATE OF ARIZONA)

) ss.

4 COUNTY OF MARICOPA)

5
6 BE IT KNOWN that the foregoing United States
7 Sentencing Commission Public Hearing was taken before
8 me, that I was then and there a Certified Reporter
9 #50253 in and for the State of Arizona, and by virtue
10 thereof authorized to administer an oath; that the
11 proceedings were taken down by me in shorthand and
12 thereafter transcribed under my direction, and that the
13 foregoing pages are a full, true and accurate
14 transcript of all proceedings had and adduced upon the
15 taking of said hearing, all done to the best of my
16 skill and ability.

17 I FURTHER CERTIFY that I am not related to nor
18 employed by any of the parties thereto, and have no
19 interest in the outcome hereof.

20 DATED at Phoenix, Arizona, this 13th day of
21 February, 2010.

22
23
24
25 JOANNE WILLIAMS, RPR

Certified Reporter #50253

1 UNITED STATES SENTENCING COMMISSION

2 PUBLIC HEARING

3 Phoenix, Arizona

January 21, 2010

4 9:00 a.m.

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10
11 COMMISSIONERS PRESENT:

12 Chair: Chief Judge William K. Sessions III

13 Vice Chairs: William B. Carr, Jr.

14 Judge Ruben Castillo

15 Commissioners: Dabney Friedrich

16 Chief Judge Ricardo H. Hinojosa

17 Beryl A. Howell

18 Jonathan J. Wroblewski

19 STAFF PRESENT:

20 Judith W. Sheon, Staff Director

21 Brent Newton, Deputy Staff Director

22
23 Reported by: MERILYN SANCHEZ, RPR

24 Federal Reporter

25 JOANNE WILLIAMS, RPR

26 CR # 50253

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1 Phoenix, Arizona

January 21, 2010

2 9:00 a.m.

3
4 CHAIR SESSIONS: All right. I

5 think we are ready to call the hearing to order. Good
6 morning. Welcome. This is the last day of the last of
7 our seven regional hearings.

8 On behalf of the Commission, I welcome you
9 all in attendance at this regional hearing. I should
10 say, we, on the Commission, have found these hearings
11 to be extraordinarily valuable. We just had breakfast
12 with local federal defenders, and I think it's fair to
13 say engaged in a really interesting conversation about
14 how the process works in Arizona.

15 So this fifth panel is a "View from the
16 Defense Bar." Let me introduce its members. First
17 Henry Bemporad has served as the Federal Public
18 Defender for the Western District of Texas since 2007,
19 having previously served in an office as the deputy
20 defender and also the appellate section chief.
21 Mr. Bemporad has earned his degree, his B.A. degree from
22 the University of Texas in Austin, his J.D. from
23 Stanford.

24 You didn't by chance know Commissioner
25 Wroblewski at law school did you?

1 MR. BEMPORAD: I was a 1L when he was a
2 3L. He wouldn't pay attention to anybody like me.

3 CHAIR SESSIONS: All right. Well,
4 hopefully –

5 VICE CHAIR CARR: He hasn't changed.

6 CHAIR SESSIONS: Hopefully your
7 luck has improved.

8 Next, Heather Williams is first assistant
9 federal public defender in the District of Arizona.
10 Previously served as assistant public defender in Pima
11 County and an associate of Michael Meaney in San Diego.
12 Ms. Williams received a Bachelor of General Studies
13 degree from Pittsburg State University, Kansas, that's
14 in Pittsburg, Kansas, her J.D. from the University of
15 San Diego Law School. Most importantly, her father was
16 born in Vermont.

17 Next, Brian Anthony Pori has engaged in
18 the private practice of law focusing on criminal
19 defense since 2003 through his professional
20 corporation, Inocente, P.C. Previously he was with the
21 Albuquerque, New Mexico – he was with an Albuquerque,
22 New Mexico law firm. He worked in the county public
23 defender's office in New Mexico and California.
24 Mr. Pori received his B.A. in American studies from
25 Claremont McKenna College and his J.D. from Yale Law

1 School.

2 So welcome to you all. I appreciate
3 beginning relatively on time. We have sort of
4 shortened the sessions today because of climate
5 concerns, that is bad weather. And so we are trying to
6 shorten a little bit the hearings. But with that,
7 Mr. Bemporad, are you going first?

8 MR. BEMPORAD: Your Honor, we will go in
9 the order of the agenda. So it will be me, then
10 Heather, then Brian.

11 Thank you Chief Sessions, commissioners.
12 I very much appreciate the opportunity to speak to you
13 again. I couldn't decide in starting which cliché to
14 go with. I was thinking that sticking out like a sore
15 thumb might be the right cliché since I'm the only
16 person at this hearing testifying from the Western
17 District of Texas.

18 However, I think the better cliché is
19 having two bites at the apple. That's because you
20 heard from probation officers and judges from my
21 district when you were in Austin. You again heard from
22 my defenders and myself at a lunch in Austin along the
23 lines of the breakfast that you all had this morning.

24 I very much appreciate and recognize the
25 interest and concerns the Commission has for the border

1 districts, particularly the Texas border
2 districts. I know Judge Hinojosa, being from the
3 Southern District, understands the situation that we
4 face in our day-to-day practice.

5 And I would like to comment on that
6 briefly and then talk specifically about a couple of
7 questions I heard from the commissioners yesterday that
8 touched upon some of the things from my written
9 testimony. I'm going to try to shorten my oral
10 presentation and save more room for questions given
11 that there are time constraints that we are all facing
12 today.

13 I think the big thing that I want to start
14 with, I think it is an important point because people
15 ask me about this a lot. The Western District of Texas
16 is a guideline district. Before *Booker*, eight out of
17 ten sentences in the Western District of Texas were
18 guideline sentences. After *Booker*, eight out of ten
19 sentences in the Western District are guideline cases.
20 There has not been a tremendous effect as vis-a-vis
21 within versus outside the guideline range.

22 And people ask me why. Don't the judges
23 understand that they are no longer mandatory
24 guidelines? Don't they understand they have greater
25 authority to vary from the guidelines and impose

1 non-guideline sentences?

2 And I think the answer is yes, they
3 absolutely do understand that. And I think there's two
4 reasons why we are looking at what we look at in the
5 Western District of Texas. One is a small point, an
6 important one. And one is a big one.

7 The small point is that I think we have
8 much greater transparency as to what's really going on
9 in sentencing now under the *Booker* system. And I think
10 the statistics bear this out. If you look at what we
11 were doing before *Booker*, there was a greater number of
12 5K1.1 departures in our district and
13 government-sponsored departures. And since *Booker*,
14 there's fewer of those.

15 I don't think there's less cooperation. I
16 don't think there are less grounds for those. I think
17 the grounds are the same. I think in the past,
18 prosecutors were more open to giving 5K1s as a way to
19 deal with the fact that some people needed a sentence
20 below the guideline range and that departures were not
21 as ready available in the minds of the judges.

22 Now, those have gone down. *Booker*
23 sentencing has gone up. But the balance remains the
24 same. So now when you see a statement of reasons, and
25 it doesn't just say 5K1.1 cooperation, it gives the

1 real reasons for the sentence. I think that's greater
2 transparency. I think that's much better for the
3 Commission as it tries to figure out what we need to do
4 about the guidelines.

5 That's the small point, where I think
6 there's been a change. This is the larger one. I've
7 heard from many of my judges, I think all of them, they
8 are very comfortable with the guidelines. And they are
9 comfortable with them because they are expecting and
10 trusting the Commission to get the guidelines right in
11 the mine-run case, that you are going to do the job of
12 balancing fairness and certainty of avoiding more
13 disparities, but allowing for flexibility.

14 They are trusting you guys to do that.
15 And they expect that the Commission will do that. And
16 the reason they do that is, and you've heard this from
17 the other people who have testified before you at this
18 hearing, but I want to echo it and emphasize it, they
19 are very – the judges, all of us, the judges are very
20 busy in our district. I read the numbers last night to
21 make sure I was right. According to the Sentencing
22 Commission in – for the fiscal year '09, 8,278
23 defender sentencings – defendants sentenced. That's
24 12 judges did that. There's 13 slots, one is empty.
25 One of those judges is a senior status judge in El Paso

1 who takes on a full docket. So that's 690 sentencings
2 each judge.

3 They do – I know, this is one of the
4 comments I heard yesterday I thought was an interesting
5 one from Judge Hinojosa that he, you know, does the
6 hard work. When the guidelines were mandatory, he does
7 the hard work now to fix the right sentence. You can
8 do that. But it's very hard to do that if you have 690
9 cases you have to sentence. That's a tremendous number
10 of cases.

11 So in the mine-run case, and we have a lot
12 of repetitive common cases, they count on the
13 Commission to get those basic ideas right. I think
14 this has tremendous consequences for what the
15 Commission does. Because, and I'll be very frank about
16 this, if the Commission gets the guidelines wrong, in
17 my district, it's going to affect a lot of people.
18 It's going to have a tremendous negative effect. If
19 it's too high, a lot more people in jail than need to
20 be. If it's not clear enough, a lot of guideline
21 disparity, guideline application disparity that's very
22 hard to deal with. If it's too complex, a lot of
23 arbitrariness, a lot of unfairness, a lot of difficulty
24 for the guidelines used.

25 Unfortunately there are two instances in

1 my mind, very common offenses, where you have those
2 sorts of problems. One is in drug offenses and
3 particularly the drug offenses we see on the border.
4 And the other is one that the Commissioners and other
5 people who have been testifying have talked about, and
6 that's the illegal reentry cases.

7 I adopt the testimony that I provided you
8 in writing. I'm not going to repeat all of that
9 testimony, but I do want to talk about a couple of the
10 points that are in that testimony responding
11 particularly to some of the questions I heard yesterday
12 when I was attending the hearings on those two types of
13 offenses.

14 The big issue, and I think you heard this
15 from Judge Vasquez, you heard from another number of
16 other people who testified, the big issue is that for
17 the border, we have a large amount of cases with very
18 small players, people caught at the border with a
19 truck, the truck could have ten pounds of marijuana,
20 10,000 pounds of marijuana, and the person who is
21 driving isn't being paid in accordance with how much
22 marijuana is in the car, doesn't know how much
23 marijuana is in the truck. They don't worry about
24 those things. They are paid a single amount for a
25 specific trip.

1 So in those cases, you have the danger
2 that the amount is going to drive the sentence
3 tremendously and the role in the offense is going to
4 have a smaller role. Even so, that's an issue that
5 you've heard about before, we should have more of a
6 role for role in the offense.

7 The big problem that I wanted to address
8 is the question of disparity, unfairness and treatment
9 in role of the offense and disparity in application of
10 the role in the offense. The question I heard
11 yesterday, which I thought was a very good one, was –
12 and I think Judge Huff mentioned this in her testimony,
13 it seems unfair that the judge will credit a
14 defendant's statement for safety valve and say, "I find
15 this statement reliable," but then not credit his
16 testimony in determining whether he has a role.

17 I think even greater unfairness is when a
18 guy gets caught, and this is a very common scenario,
19 caught with one load and asked, "Have you ever done
20 this before?"

21 "Yes, I've driven this truck" or "I've
22 driven other trucks or other cars across border three
23 times before." They will credit that testimony and
24 extrapolate an amount from that testimony. In other
25 words, you've got a hundred pounds this time, you've

1 done it three times before, that's automatically 400
2 pounds. But they won't credit the testimony when
3 he's - the same testimony to say, "I had a minor role."

4 I think there's two things going on there,
5 one of which I think is in the commentary to the
6 guidelines, and one of which is a general viewpoint
7 that I think we as litigators have that we have to kind
8 of overcome. In trial, it makes perfect sense that the
9 statements the defendant makes are used against them
10 but not for them. We have that all the time.

11 Judge Sessions, I know you know this, that
12 when we are in court, if your client makes an
13 admission, that admission is coming in. But if it's a
14 helpful statement, that's hearsay. And that's because
15 we are in a litigating adversarial kind of game-type
16 system where when you make a statement where we're
17 going to use it against but not use it for you.

18 That's not what the guidelines is about.
19 That's not what sentencing process is about. If it's
20 reliable for one side, it should be reliable for both
21 sides. And I fear that the commentary in the
22 guidelines that you have now that you do not have to
23 consider the self-serving statement of a defendant in
24 determining role in the offense tends to feel more like
25 the gaming system and less like the fair system where

1 if it was reliable for one purpose, it's reliable for
2 another purpose.

3 So that's one of the things that I
4 proposed in my written testimony that the Commission
5 might consider removing is that language. I think the
6 Commission should also focus very much on courier
7 cases, because I think the courier cases have the
8 greatest danger of the guidelines being skewed in the
9 mine-run case. The small player with a big amount on
10 order is a situation where that person gets a very
11 large sentence where he doesn't or she doesn't really
12 deserve it under the guidelines.

13 The judges will depart in those cases.
14 They will vary. They will look at the circumstances.
15 But there's a lot of variation in the way that roles in
16 the offense apply. And I think the judges in my
17 district who want to just follow the guidelines, want
18 to start at least with the guidelines and are trusting
19 the Commission to get the guidelines right, they could
20 be – they will get tremendous help if there would be
21 some clarity there.

22 And if I can, I'll end that part of my
23 testimony with a very common example. As the defender
24 and also when I was an appellate chief, I would get a
25 lot of calls from judges – from lawyers coming into my

1 district. I mean, coming into the Western District,
2 coming into San Antonio. And this was before *Booker*
3 and equally as much after *Booker* and they would be
4 calling say: Hey, I have a case in your court. I want
5 to know how the sentencing is going to go.

6 They never, even now, they don't ask me,
7 is the judge good on variances? Does the judge depart
8 on these grounds? Does the judge question the
9 empirical basis of the guidelines? That's never a
10 question.

11 Here's the question: How's that judge on
12 minor role? Is he - how is he on role in the conduct?
13 What does he do with five point - safety valve? What
14 kinds of savings do I have to prove. Is he going to be
15 hard on sentencing if I fight on relevant conduct?

16 Those are the questions they ask. That
17 indicates to me that there's tremendous disparity in
18 the application of these guidelines. And that means
19 one judge handles things one way. One judge handles
20 things otherwise. In my district, it's very common for
21 the exact same fact pattern to have a huge difference
22 in the sentence. Some people get minimal role or minor
23 role, some get no role. Some get extrapolation of drug
24 amounts, some get no extrapolation. Some who, if they
25 challenge relevant conduct, don't get safety valve.

1 Some might still get safety valve. Some don't get
2 acceptance, some might get acceptance.

3 And I think that sort of that exact same
4 application, same facts, very different application is
5 a troubling situation. And I would say in my district,
6 that's the most important thing the Commission could be
7 doing is trying to work on those issues.

8 I want to turn now to - I'm trying to
9 make this as brief as possible. But I want to turn now
10 to the illegal reentry guideline. And that was
11 something that was the subject of some comment
12 yesterday from the people who were testifying and also
13 from among the commissioners.

14 I want to applaud the Commission for some
15 of the things that they are looking at in their new
16 proposal which I reviewed last night a little bit more.
17 It appears that the Commission is considering a
18 departure ground based on what is called, for
19 shorthand, cultural assimilation. I applaud that. I
20 think that is a great idea. I don't think cultural
21 assimilation actually captures the idea fully, but I
22 think it's getting there.

23 The thing that I think Commissioner
24 Wroblewski asked yesterday was a very good point was,
25 you know, this doesn't, even if you give a downward

1 variance, or downward departure, this doesn't get at
2 the point that the punishment, the thing that is really
3 hard for people who have lived here all their lives is
4 the deportation itself and what do you do about that.
5 I think that's true.

6 However, I think the Commission, by
7 saying – looking at a departure here could recognize
8 that when you've lived here all your life, it's not the
9 deportation, but the reentry. The motive for that
10 reentry is a benign motive. It is very different than
11 somebody who's coming across the border to commit
12 crimes. Someone who is coming across the border to
13 see a sick child, or to be with their siblings, or to
14 take care of their parents is a very common
15 circumstance, but a very different circumstance than, I
16 think, the kind of cases that the guideline was aimed
17 at.

18 And so I think it doesn't go to
19 deportation, it goes more to the nature of the reentry
20 and whether there is an argument that that reentry, the
21 circumstances of that offense are less serious.

22 I also want to applaud the Commission for
23 considering removing the double counting for recency
24 and the counting for prior convictions that happens in
25 2L1.2 or maybe also 2K2.1. In those circumstances, in

1 the proposals that the Commission has put out, they
2 mention that the same conviction can be counted
3 numerous times, points under 4A1.1(b), points under
4 4A1.1(d) because the person is on supervised release,
5 points under 4A1.1(e) because it's within two years and
6 levels under 2L1.2. That's a lot of counting for
7 one - one conviction, and it tends to skew guidelines
8 in situations where people are not really as bad as the
9 guidelines would say.

10 I want to add one comment on that point,
11 and that is that I think the Commission should look at
12 the imposition of supervised release in these cases.
13 Supervised release in illegal reentry cases is an
14 oxymoron. There is no supervision at all. In fact, in
15 my district it's called unsupervised release. The only
16 condition they have to obey is not to come back into
17 the country. They are given no job training, no
18 benefits, no psychological treatment, no halfway house,
19 no regular meetings with a probation officer to see how
20 they are doing, no counseling, no medical help, no
21 mental health help, nothing. They are put across the
22 boarder and said: Don't return.

23 Often they are put across the border in a
24 country that they never have lived in and they can't
25 speak the language. But in any case, that's not what

1 supervised release is about. Unlike the prison system,
2 supervised release is about rehabilitation. And they
3 are given no rehabilitation whatsoever.

4 Given that, I think revocation – the
5 imposition of supervised release is a mistake in these
6 cases. I think that the Commission should consider
7 having a addendum to its supervised release guideline,
8 I think that's 5D, saying, "Don't impose supervised
9 release when there's going to be no supervision." For
10 example, someone who is going to be deported.

11 I think the only purpose in that
12 circumstance would be to warn them, deter them from
13 coming back. And deterrence and punishment, I don't
14 think, is what supervised release is about. Also,
15 2L1.2 has plenty of room for that deterrence. You come
16 back after an illegal reentry conviction or other
17 felony convictions which you get supervised release
18 for, you are going to get a four-level increase and
19 statutory max goes up to at least ten years. It
20 increases five fold, if not ten fold. Under those
21 circumstances, I don't think supervised release is
22 necessary, I don't think it's appropriate for
23 deterrence purposes.

24 The last thing I want to say about 2L1.2,
25 and this is – I don't mean to in any way take back

1 what I applauded the Commission for considering, these
2 issues, the departure for cultural assimilation dealing
3 with recency, and double counting 2L1.2, those are
4 important, but they really are going around the edges
5 of that guideline. I would urge the Commission, I know
6 not in this cycle, but maybe in the next cycle to
7 really consider restructuring this title.

8 Now I heard yesterday, and I think it's a
9 fair question, how do you do that. And I think you
10 hear through the history of the guidelines, a tension
11 in the guideline between a need for simplicity. And
12 let me tell you, when you are doing 690 sentencings a
13 year, you need simplicity. You cannot have a complex
14 guideline that requires you to look at 50 states to
15 figure out what the guideline means, 50 state laws to
16 look up the guideline or to go into documents from ten
17 years ago to figure out what the guidelines mean.

18 You need some sort of simplicity. But as
19 Judge Roll, who was sitting here yesterday said, you
20 have to worry about the severity of the crime because
21 there are going to be some situations where the
22 sentence imposed does not reflect the nature of the
23 crime.

24 I have not included in my testimony – I
25 have talked about it but I haven't given the Sentencing

1 Commission staff a proposal that kind of tries to split
2 the baby between those two, to take some nature of the
3 offense issues into account and sentence likely into
4 account.

5 The main thing I would suggest is what
6 would make it simpler is if you use calculations that
7 are already being made in other parts of sentencing to
8 affect, to figure out what the 2L1.2 guideline
9 sentence – offense level increase should be.

10 We already have to figure out if someone
11 has an aggravated felony. You have to figure that out
12 to find out whether the person is facing two years or
13 ten years or 20 years so you can advise them if it's a
14 guilty plea. And you can determine the statutory
15 maximum for the sentence. So you have to do that
16 irrespective of what the guideline says. You also have
17 to figure out what someone's criminal history is
18 irrespective of what the offense guideline says.

19 I would suggest and my proposal suggests
20 using those two factors, taking some narrow subset of
21 aggravated felonies, there is – and the ones that are
22 listed in 1101(a)(43). I've listed them there. There
23 are some that are worse than others. Take the most
24 serious aggravated felonies, see if that person has a
25 sentence imposed of 13 months or more for 4A1.1(a)

1 counting sentences. If they have both, that should
2 have the highest enhancement. If it's not, if there
3 wasn't a sentence like that imposed, a lesser
4 enhancement. And if there wasn't - it isn't one of
5 these serious aggravated felonies, a lesser sentence.
6 So you would still have enhancements, but they would be
7 graduated based on something that they are already
8 doing.

9 I feel the Commission is stuck with the
10 complexity of the guideline because you're stuck with a
11 complex statute. 1326(b)(2) is a complex statute
12 because it incorporates the aggravated felony
13 definition. But the Commission should shy away from
14 adding confusion. Going through this analysis once is
15 enough. Having to go through that analysis and then
16 the guideline crimes of violence analysis is too much
17 work.

18 And the judges, we are claiming the judges
19 often get it wrong. That's why we have lots of
20 reverses in the Fifth Circuit. We often get it wrong
21 and make the wrong arguments. That's why we have a lot
22 of plain error problems in our cases in the Fifth
23 Circuit.

24 And then, more importantly, it leads to
25 arbitrary sentences: two cellmates who were convicted

1 of the same thing but it was a different year or a
2 slightly different documentation or a different judge's
3 ruling, and they get a completely different sentence.
4 And it is very hard to explain to them how that
5 arbitrary – why that arbitrariness happens or how the
6 situation came about.

7 I had more things to say. I want to
8 reduce, like I said, minimize my comments if I can move
9 things forward. I would be very happy to answer any
10 questions about what I testified to here or what's in
11 my written testimony.

12 I do want to end though by thanking the
13 Commission for its work on the issues that really do
14 matter so much to our district. I'm very happy that
15 you heard from my judges and probation officers and
16 myself as well. We are one of your biggest customers.
17 Ten percent of the guideline sentences in the country
18 are imposed in my district. And given that
19 circumstance, you know, what you do really, really
20 matters to us. And I'm very, very appreciative of your
21 works in regards to the common offenses that we face
22 today, thank you.

23 CHAIR SESSIONS: Thank you for your
24 comments. Ms. Williams?

25 MS. WILLIAMS: Thank you. Yesterday I got

1 notice that my W-2 is ready. And that reminded me that
2 I need to go out and buy that computer program that
3 will allow me to go ahead and compute my income taxes
4 in time to file them in April. And it got me thinking
5 and maybe this already exists that there could be a
6 computer program out there to help somebody calculate
7 the guidelines.

8 And how would it start out? I mean, like
9 the tax program, it would take you through every single
10 step. It would take you through the income. It would
11 take you through additional income which are like
12 enhancements or upward departures. It would take you
13 through deductions which are like downward departures
14 or variances.

15 You would put in the statute number first,
16 say Title 21 § 841. And then you get what would
17 come up with is 2D1.1. You would put in the drug type
18 and you would put in the amount, and it would take you
19 through a series of questions so that the program can
20 decide how the guidelines are going to apply to this
21 particular situation.

22 But inevitably, you're going to get to a
23 question that says "other." Because as time goes on,
24 as technology changes, as society changes and people
25 get creative or they get desperate, you are going to

1 have the next tunnel or the next submarine or the next
2 person who is going to be hiding heroin in her baby's
3 diaper that could be aggravators. Or you're going to
4 get something like what Judge Roll mentioned and that
5 is reports that there are decoy loads coming through
6 that have very, very low purity and maybe that's a
7 mitigating factor that should be considered.

8 Well, criminal history is going to be easy
9 to figure out in this computer program. No big deal
10 there. What about for acceptance? Well, did they
11 enter a change of plea? And when was the change of
12 plea? Did the government have to prepare motions,
13 prepare for trial? But then there's going to be
14 another - the "other" category. Was there - did they
15 testify about an imperfect duress defense? Did the
16 1326 defendant finally want to get his day in court and
17 just explain why it was that he crossed the border?

18 Is that going to be enough? Is the
19 computer program going to be able to tell? And what
20 about obstruction? I mean, obstruction obviously
21 includes lying, lying to the probation officer, lying
22 to the court, maybe lying to law enforcement, hiding of
23 assets and so on like that.

24 But what is the next act that's going to
25 be considered to be obstruction of justice that hasn't

1 been considered yet? How is the computer program going
2 to deal with that? And then, boy, there's the big
3 other category, the absolute offender characteristics
4 that have to be placed in. And, again, as we become
5 more informed about psychological conditions, about
6 physical conditions, about the effect of age and
7 employment and so on like that, how are – how's the
8 computer going to deal with that?

9 And so a computer program is not ever
10 going to be enough to go ahead and figure out what the
11 guidelines mean to a particular case or a particular
12 defendant. And the reason that we don't have the
13 computers is because we have judges. It's because that
14 no person should be defined by the worst thing they did
15 ever, by the crime that they committed.

16 The fact is stranger than fiction, and
17 you're supposed to sentence an individual, and people
18 can change. And that's why we have judges. And to
19 quote a "West Wing" episode about the sentencing
20 guidelines, judges who the President and Congress have
21 spent a great deal of time vetting to make sure that
22 they are appropriate to go ahead and make those tough
23 decisions, to balance the offense and look at not just
24 the defendant's participation in the offense and their
25 criminal history, but them as an individual, to look at

1 whether or not there was a victim who has to be
2 regarded, and then to look and see whether or not we
3 need to be concerned about the community's safety
4 because of this person or are we depriving in the
5 community of somebody, a defendant who can actually get
6 some benefit by education, by devotion to family, by
7 employment. These are all things that judges have to
8 consider in that very delicate balance to impose a
9 sentence that is fair, that is safe, and that is just.

10 And the guidelines can be a starting
11 point, and in some cases, they are certainly at the
12 ending point. There's no more questions that have to
13 be asked. And the difficulty, obviously, that the
14 Commission is trying to answer is what are they
15 missing. What are you missing? And what should be
16 provided by judges to assist them in making those
17 decisions?

18 I wanted to add and not regurgitate my
19 very lengthy recent testimony. And I apologize, it was
20 my first time testifying in front of the Commission,
21 and I wasn't sure quite what was expected. But I
22 wanted to update a few things. One is with regard to
23 child pornography. There was another article yesterday
24 in the *Wall Street Journal*. And that article said, I
25 quote, "Nearly half of the federal judges gave

1 sentences to child porn viewers that were before the
2 sentencing guideline range." And this is something
3 that you are hearing quite frequently.

4 What the statistics show is that ever
5 increasingly and up to last year, those – half of the
6 federal judges varied or departed below the applicable
7 guideline range in almost up to a third of the child
8 pornography cases. And the article only cites the
9 position of judges that child pornographer viewers are
10 not, for the most part, actual hands-on molesters. But
11 I suspect that there's more and that's what I've
12 included in my testimony.

13 I think that also we are going to be
14 seeing an evolution in child pornography cases as the
15 technology changes. I read an article just a couple of
16 days ago that the Third Circuit is considering whether
17 or not teenagers sexting on their cell phones is
18 considered child pornography under the Wyoming child
19 pornography statutes.

20 It's only a matter of time before the
21 federal courts start dealing with issues of juveniles
22 who are sexting to each other. And how is the
23 Commission going to be able to anticipate that? So
24 this is something that I wanted to make the Commission
25 aware of.

1 Yesterday, I think it was you, Judge
2 Sessions, who asked Jennifer Guerin, or Magistrate
3 Guerin about the timing of Operation Streamline and why
4 did it happen in Tucson starting in January of 2008.

5 I was part of the meetings with Border
6 Patrol and the court and the panel about implementing
7 Operation Streamline in Tucson. It was basically a
8 Bermuda triangle that brought it about. As Judge Roll
9 mentioned, the U.S. Attorney's Office had not been
10 given approval to backfill many positions within their
11 office. And by the end of September 2008, because
12 they didn't have the personnel to prosecute cases,
13 white collar cases were on the back burner. They weren't
14 prosecuting most marijuana cases under 500 pounds.
15 Those were being sent to the counties. And they
16 stopped prosecuting illegal entries.

17 Many illegally reentries were being
18 prosecuted as what we call flip flops. They are
19 charged with the illegal reentry as well as the petty
20 illegal entry and given the opportunity to plead, in a
21 very short time period, to the petty offense, the
22 felony gets dismissed, there's a stipulated sentence of
23 anywhere from 30 days to six months. They waive
24 appeal, they waive the PSR, and they are able to move
25 those cases out.

1 By the end of September also in 2008, the
2 U.S. Attorney's Office was faced with losing five
3 additional lawyers. Two were going into private
4 practice. Two were becoming immigration judges. And
5 one was going to the civil division.

6 They were now forced with cutting back
7 even more the kinds of cases they were prosecuting. If
8 one has to give in a system like we have in Arizona,
9 it's going to be the immigration cases, the reentry
10 cases. The Border Patrol clearly was quite upset that
11 most of their arrests were no longer being prosecuted.

12 And they brought the proposal of Operation
13 Streamline and made the offer of adding on to the U.S.
14 Attorney's staff specially deputized assistant U.S.
15 attorneys who work within Homeland Security to
16 prosecute these cases as well as offering up Border
17 Patrol agents to supplement the U.S. Marshal's Service
18 in standing guard in the courtrooms when these massive
19 hearings occurred. And so that's what brought
20 Operation Streamline about in the District of Arizona.

21 I testified in front of a House judiciary
22 subcommittee [about] Operation Streamline in June of 2008.
23 And while that doesn't seem relevant here, one of the
24 questions they asked me does lead me to something that
25 was in my written testimony and that is, what can we do

1 to fix immigration? Well, just like any problem that
2 we have, drugs, gangs, you have to educate people. You
3 have to make it so that in the first place that they
4 don't even want to do drugs, be in a gang or come to
5 the United States. I mean, it's one thing to build up
6 the law enforcement to keep them out and subdue them,
7 but another to make sure that it just is not even
8 crossing somebody's mind.

9 When we have people sentenced on illegal
10 reentry cases, when we have people who are legally here
11 and convicted of other crimes and we send them to the
12 Bureau of Prisons where they are low persons on the
13 totem pole for being included in any kind of
14 educational program, any kind of vocational program,
15 any kind of training at all, we are sending back
16 uneducated, untrained unrehabilitated people to their
17 native countries where life hasn't changed for them at
18 all. And if anything, their family situations have
19 become much more desperate because they've been gone
20 for a long period of time.

21 What instead, if the Bureau of Prisons was
22 able to go ahead and educate these people, and train
23 these people so that when they got back home, they had
24 actually more education, these little kernels, these
25 little seeds of people who had improved their lives and

1 gotten training would be inspiration to others within
2 their native countries to go ahead and improve their
3 lives, and everybody's situation would improve.

4 But it doesn't happen here and it doesn't
5 happen for many reasons, and one of those is certainly
6 funding. But this is something, the quality of the
7 sentence that are – people with immigration detainees
8 serve is much different from the kind of sentences that
9 anybody else serves in the Bureau of Prisons.

10 Now, speaking also of immigration, I
11 understand that when ICE Chief Morton testified, that
12 he had made a proposal about giving a level reduction
13 for those people who stipulated to a removal or a
14 deportation from the United States and that that would
15 be applicable not to drug cases and not to reentry
16 cases, but any other kind of cases involving an
17 immigrant.

18 Judge Hinojosa yesterday was concerned
19 whether or not if there was a stipulation like that in
20 a plea agreement, or assuming somebody actually filed
21 for it relevant to their sentencing, whether or not
22 there would be an actual order of removal. So I want
23 to give a little immigration 101 so that everybody
24 knows.

25 We are all familiar with the standard

1 deportation or removal proceeding that happens in front
2 of an immigration judge. There are actually two other
3 kinds of removal proceedings. One of those is a
4 judicial removal proceeding which is not – used very
5 often. But it allows a district court judge to enter
6 an order of removal. And that can be done on a
7 stipulation of the prosecutor as part of the plea
8 agreement, of the defendant and the defense lawyer, and
9 including a member of ICE to come before the court at
10 sentencing, enter the stipulation, satisfy all the
11 requirements of the judicial deportation, and it is the
12 U.S. district court judge who then issues a formal
13 order of removal.

14 The concern I'm sure that Judge Hinojosa
15 and any judge, any prosecutor would have is there would
16 have to be an order of removal in case the person
17 re-entered, because merely they have to prove up that
18 there was a valid removal previously to a reentry case.

19 The other form is an expedited removal.
20 And expedited removals are generally used when
21 somebody's been convicted of an aggravated felony.
22 Because there is no possibility now for any
23 cancellation or suspension of removal, the – the
24 statute allows for immigration agents, either with ICE
25 or with Border Patrol, one agent reviews the history,

1 verifies that it indeed is a conviction for an
2 aggravated felony. The paperwork then gets reviewed by
3 a second ICE agent who validates that and enters the
4 order of removal. So we are dealing with two expedited
5 processes.

6 I've let the Commission know that about
7 ten to eight years ago in Tucson, in our standard
8 reentry plea agreements, there was always an agreement
9 that the defendant would not in any way fight any
10 reinstatement of removal and that there was benefit in
11 the plea agreement as a result of that. Well, we only
12 got that in the reentry cases.

13 The concern that we have, though, with the
14 proposal that's being made is the people who would be
15 generally pleading to the quality of offenses that
16 would be eligible for this one level down for the
17 agreement to be deported, that many defense lawyers
18 don't have the experience in immigration law.

19 There's a quote in a appellate court case
20 that says that immigration law is second in complexity
21 only to our IRS laws. And it's absolutely true. And
22 either those defense lawyers would need to get an
23 expert immigration lawyer to consult in the case and to
24 advise whether or not the person actually would have
25 the ability to fight deportation, or if ordered

1 removed, whether or not they would be able to apply for
2 cancellation of removal. And these are very, very
3 complicated issues.

4 And so the concern would be is that even
5 if somebody agreed in a plea agreement to a removal,
6 was removed, if they did reenter, I foresee many
7 attacks on that removal, simply because so many defense
8 attorneys don't have the experience in immigration law.

9 And lastly, I want to talk a little bit
10 about what I did speak of in my written testimony and
11 something that is near and dear to my heart, and that
12 has to do with the ever increasing numbers of military
13 that we are going to be seeing in our system and are
14 already being seen certainly in the state system, and
15 we have numbers of it in Tucson.

16 Our justice system saw so many Vietnam War
17 veterans who came through the justice system and we
18 were ill prepared to go ahead and figure out how to
19 help these people, how to keep them out of the system,
20 how to keep them from becoming felons, which would
21 clearly affect them for the rest of their lives.

22 And I would like to think that we have
23 learned so much about the effects of combat, the effect
24 of long tours, about post-traumatic stress disorder,
25 persons and their abilities to function within society

1 and the kind of help we need to give those people that
2 we will be better prepared this time around for when
3 our Iraqi and Afghani war veterans come back and
4 reenter society.

5 I ask the Commission to go ahead and take
6 a crystal ball, look to what may be happening to these
7 people in the future, and anticipate how we are going
8 to be able to go ahead and help these people through
9 alternatives to sentencing, to considerations for
10 downward departures, for variances based upon the
11 experiences that these men and women have had, and we
12 really owe it to them since they are giving so much to
13 us and to our country.

14 I want to thank you again for inviting me
15 here. I'm going to apologize for the lengthy written
16 testimony that I provided, but I hope it was useful to
17 you and thank you for giving me a chance to talk with
18 you.

19 CHAIR SESSIONS: I want to say it
20 was very useful, and both submissions have been
21 extraordinarily useful.

22 Thank you. Mr. Pori?

23 MR. PORI: Thank you, Chief Judge
24 Sessions, members of the Commission, good morning. It
25 truly is for me an honor and a privilege to speak with

1 you this morning on a singular issue, the urgent need
2 to revise the guidelines for illegal reentry after
3 deportation.

4 I myself am the grandson of an immigrant
5 in a nation of immigrants. One of the greatest days of
6 my life was standing with my children in Ellis Island
7 and discovering the manifest for my grandfather. And
8 you could imagine how difficult it is for a grandson of
9 immigrants to sit in a holding cell and use his broken
10 Spanish to explain to an individual, who has less than
11 two years of education, the complex and ultimately
12 irrational and unreasonable guidelines for illegal
13 reentry after deportation.

14 I get questions that I can't answer, maybe
15 because my Spanish isn't that good or maybe because the
16 questions are unanswerable.

17 Why am I being sentenced again for a crime
18 that I already committed? I already served my sentence
19 for that. Why am I being sentenced to four years for
20 illegal reentry after deportation for a crime which
21 resulted in a nine-month sentence?

22 Why am I being sentenced more than anyone
23 else in this courtroom today? And yet that happens
24 over and over and over again in my court, the District
25 of New Mexico, and throughout the Southwest. And being

1 the grandson of an immigrant in a nation of immigrants,
2 I have to say it is shameful. And maybe it's by
3 accident. Certainly it's from the best of intentions.
4 But it is a system which is broken and which needs to
5 be fixed.

6 I'm sure you've heard, and I'm not going
7 to repeat either in my written statements or the
8 statements of others, but some of the reasons why this
9 happens. Perhaps the greatest reason is that a
10 16-level increase for, quote, a crime of violence. And
11 I've had clients whose crime of violence was a bar
12 fight. And I've had clients whose crime of violence
13 was throwing a match into an ex-girlfriend's car. And
14 I've had clients whose crime of violence was a
15 non-serious drug offense and bringing in a backpack
16 full of marijuana. And those people are treated under
17 the guidelines in precisely the same way as a murderer.
18 And that's not right.

19 Another case that I've had was an
20 individual who, with his brother, was a passenger in a
21 car that contained marijuana. They were arrested. My
22 client pled to a sentence of time served and returned
23 to Mexico and did not try to reenter this country for
24 15 years until the situation in Mexico and the economic
25 concerns of his own family forced him back here. And

1 he received a four-year sentence. And he asked me,
2 "But that was 15 years ago?"

3 Now, one thing I can share with the
4 Commission that you may not know, is that you've heard
5 that hell hath no fury like a woman scorned. Actually
6 it's hell hath no fury like a jailhouse lawyer. So
7 when someone gives my client 4A1.1 and says, "Ah, you
8 can't use a conviction that's more than 15 years old or
9 ten years old," or they put it in front of me, "Gotcha,
10 you dump truck junk nothing lawyer." And, again, from
11 what I affectionately have come to be known as my
12 "Hee-Haw" standards, I have to explain to them: Oh, no,
13 that's only for that section.

14 And they'll ask me is it because of the
15 color of my eyes, the color of my hair, the color of my
16 skin? And I can tell the Commission the easiest answer
17 that I can give to someone in Spanish is racista, it's
18 racist. It's not meant to be racist. It's not
19 intended to racist. If anything, what we can all agree
20 on is it may have the appearance, an appearance that
21 racism and national origin is adversely affecting the
22 sentences that are in fact one of the largest
23 percentage of cases we handle in the District of New
24 Mexico.

25 And so to correct this system, I've urged

1 the Commission, as others have, to look at a few
2 things: Number one, try to limit in whatever way you
3 think in your judgment is best double, triple,
4 quadruple counting so the same offense is not used to
5 first raise the mandatory sentence and then raise the
6 base offense level, and then calculated in the criminal
7 history and then to add two more points because the
8 person has come back after two years.

9 That - that's almost a match for prior
10 conviction and that kind of double, triple, quadruple
11 counting needs to be addressed.

12 Another change the Commission can consider
13 is to do something about that 16-level enhancement. I
14 don't think there's anyone in this room who doesn't
15 think someone who is convicted of murder and deported
16 from this country and come back is not deserving of a
17 16-level enhancement. Keep it for those most serious
18 violent crimes. But for the bar fighters and the
19 disaffected lovers, and all the others for whom we pull
20 our hairs out analyzing a categorical approach, maybe
21 we can start to distinguish between crimes of violence
22 that are less serious than the most serious violent
23 crimes.

24 And the final request is to limit the age
25 of the prior convictions some way, somehow. Certainly

1 anyone who returns under an order of deportation is
2 subject to prosecution. But if they've abided by the
3 laws, but something has changed and if you've lived in
4 the border states, you know it's changed along the
5 border of Mexico.

6 You know picking up your paper that
7 citizens in Juarez or Tijuana awake to decapitated
8 relatives. That creates an incredible urge for people
9 to come to this country, no matter what the order of
10 deportation says. And the Commission needs to be
11 sensitive to that, particularly so that the – what
12 I've described as the cookie cutter approach is not
13 unreasonably applied given the innate circumstances of
14 each case.

15 I greatly appreciate your patience in
16 hearing today and would be happy to answers any
17 questions.

18 CHAIR SESSIONS: Thank you,
19 Mr. Pori. Before I actually ask others for questions,
20 Ms. Williams, I just want to make sure I understand the
21 federal defender's position in regard to the proposal
22 from ICE for a one-level reduction based upon voluntary
23 agreement to be removed. Is – I understand the
24 complexity of immigration law. I also understand that
25 a one-level decrease across the board to all

1 defendants, not just – we are not talking necessarily
2 reentry, obviously ICE wishes an exception for that.
3 But the impact upon sentences of noncitizens would be
4 fairly dramatic. Is the federal defender's position
5 that we not consider that one-level reduction?

6 MS. WILLIAMS: No.

7 CHAIR SESSIONS: Or we consider
8 that or what exactly is your position?

9 MS. WILLIAMS: Well, the federal
10 defender's position probably doesn't exist yet, because
11 this is a new proposal. And I'm sure that once it is
12 formally made, then our guideline committee will go
13 ahead and more thoroughly present to the Commission the
14 information it needs to make a decision.

15 Obviously it's going to be a – what I was
16 hoping to do, though, was to educate the Commission
17 about the various concerns that we have – can see from
18 a defense lawyer vantage point, but also – there was
19 something else I was going to say and it just went out
20 of my head – oh, about what the previous practice has
21 been with regard to benefits. Also I forgot to mention
22 there already is a Ninth Circuit case that says a
23 defendant's stipulation to removal as part of their
24 sentencing is something that a court can consider in
25 imposing sentence and in reducing the sentence.

1 I'm not touting an official position. I
2 want to educate the Commission about what the various
3 positions would be.

4 COMMISSIONER HOWELL: Can I follow up on
5 that because I also was interested in making sure I
6 understood whether the Federal Public Defenders were
7 cautioning us against considering the proposal because
8 as I understood in what you said under your immigration
9 101 course, which I appreciate, that such a stipulation
10 to removal in the context of a criminal proceeding
11 might be subject to attack subsequently because of the
12 lack of effective assistance of immigration counsel.
13 So I thought when you then mentioned that it had been a
14 practice before, you were going to tell us that that in
15 fact had occurred or had not occurred. So in the prior
16 practice ten years ago when stipulations to removal
17 occurred, I guess, more frequently or regularly as part
18 of a plea negotiation, did you see those kinds of -
19 the caution that you were raising with us, that you -
20 were there attacks on the stipulation and removal in
21 subsequent proceedings?

22 MS. WILLIAMS: No. And the reason I say
23 that is first of all, those offers were being made only
24 in reentry cases. And it was as to a reinstatement of
25 the earlier deportation order, not a new from whole

1 cloth deportation order. And because it's a
2 reinstatement of a previous one, the lawyer has
3 presumably already reviewed the earlier removal or
4 deportation proceeding and made a determination about
5 whether or not it was lawful or not, attacked it if
6 necessary, but the agreement then to go ahead and
7 reinstate that is not necessarily attackable, because
8 the person has already exhausted their abilities in
9 immigration court by virtue of the earlier official
10 deportation proceeding.

11 That's the confusion is when somebody
12 comes back having already been removed, it's a very
13 quick processes to go ahead and just reinstate that
14 earlier order of removal. You don't see a judge and a
15 immigration officer does it.

16 COMMISSIONER HOWELL: So the practice that
17 you were talking about that happened regularly ten
18 years ago was the reinstatement of removal. It wasn't
19 a stipulation to removal, an original stipulation to
20 removal?

21 MS. WILLIAMS: Exactly.

22 MR. BEMPORAD: If I could add to that,
23 that's exactly what we had in the Western District of
24 Texas. This was some years ago. We would stipulate --
25 we would agree not to contest the reinstatement of

1 removal. And in those cases the reason why you could
2 do it very easily is all criminal defense lawyers are
3 immigration lawyers to some extent. We all have to
4 look at whether the Government can prove up the prior
5 deportation under a case called Mendoza-Lopez, whether
6 it doesn't violate due process, whether they presented
7 a citizenship claim or other way to get around the
8 deportation that would now be reopened. So we all have
9 done that work, and once we made the analysis and say,
10 yes, you should plead guilty and there's no challenge
11 here, we were ready at that point to say it's okay to
12 reinstate that deportation.

13 We did it all the time. I did not know
14 that ICE needed these anymore. I thought they
15 streamlined the process to where it wasn't necessary.
16 If it is something that is necessary, certainly we
17 would consider it. The danger would be in the
18 circumstances where there hadn't been a deportation
19 before.

20 One very other quick comment on this, it
21 does show how much – how integrated the question of
22 deportation is to the question of punishment. Even ICE
23 sees that deportation is connected to punishment, and
24 that's why the Commission's consideration of
25 understanding that deportation is a significant

1 punishment in and of itself or a sanction in and of
2 itself that could be grounds for departure in these
3 cases whether or not we have stipulated to it. I think
4 these two things are connected.

5 COMMISSIONER HOWELL: If I could just ask
6 one more question. I also want to echo the Chairman's
7 remarks about the Federal Public Defender, this one in
8 particular at each of our hearings has just been
9 enormously helpful and given us great food for thought.

10 There are a number of things about your
11 testimony that I could talk to you about and we
12 probably will over the course of different amendment
13 cycles, but one thing I was particularly interested in
14 in your testimony was your comments on supervised
15 release.

16 The Commission is in the process right now
17 of examining supervised release statistics and in the
18 process of putting together a report that might - I'm
19 not sure exactly when it is going to come out, but in a
20 shorter time period rather than in a longer time
21 period. And one of the things we are also looking at
22 in the context of that report is the fact that the
23 guidelines require mandatory minimum supervised release
24 terms even when there is no statutory requirement for
25 that.

1 You didn't actually address that
2 particular point. You were looking at a much more
3 limited supervised release relief proposal. But I was
4 wondering if you had any thoughts about whether in this
5 environment where Congress has talked a lot more about
6 reentry programs and there's more focus, I think,
7 gladly on reentry programs, whether the Commission
8 reducing the requirement of three-year supervised
9 release terms on so many felonies where it's not
10 statutorily required is something that goes against the
11 grain of the focus on reentry programs or is something
12 that you think is worthy of us looking at.

13 MR. BEMPORAD: Well, I think in the
14 general case, if you put aside the narrow area I was
15 looking at, I don't think there's a problem with
16 imposing supervised release terms even when they are
17 not required by statute. They can be very, very
18 useful.

19 The point that I would suggest the
20 Commission look at is the termination of supervised
21 release. There's some people who really need a lengthy
22 term of supervised release and a lot of help to be able
23 to get reintegrated into society. There's other people
24 who walk out and are ready. I was working with a
25 client last year, earlier, I guess, last year, 2009,

1 who was ready to go, got his truck driver's license and
2 his CDL, and he was moving on. And we terminated it
3 early.

4 There's not in my memory – you should
5 correct me because I haven't looked at it recently. I
6 don't think the guidelines go into the termination
7 question very much. Though the statute does, the
8 statute says after a year you can move for termination.
9 I think it would be a good idea for the Commission to
10 look at some of the things that would be a good grounds
11 for termination. It's not so much the imposition of
12 those cases as it is too long and what are the
13 conditions.

14 The thing I'm most concerned about is when
15 you are not getting any supervision under supervised
16 release. I think that's a mistake and that's the
17 illegal reentry cases.

18 COMMISSIONER HOWELL: Do you think it
19 would be helpful for the Commission in the supervised
20 release provisions to talk about some of the factors
21 that a court might consider in setting a term of
22 supervised release rather than just giving a blanket
23 minimum three years?

24 MR. BEMPORAD: I absolutely think that's
25 appropriate. I think they go hand in hand whether to

1 impose and what the condition should be should be tied
2 together. I think one of the problems you have in
3 these illegal reentry cases, they now have to impose
4 the guidelines of the supervised release term because
5 the guidelines say so. But they know that there aren't
6 going to be any actual conditions, so they just impose
7 this, you know, this fake supervised release to, you
8 know, basically try to comply with the guidelines.
9 That's not what supervised release is about.

10 COMMISSIONER HOWELL: Well, if not in this
11 amendment cycle but the next one, I'm hoping that we
12 take on this issue in a much more comprehensive way. I
13 look forward to your further engagement in this
14 discussion.

15 MR. BEMPORAD: I think the defenders would
16 have better and much more extensive comments than I can
17 make at this time.

18 VICE CHAIR CASTILLO: Yes, Mr. Bemporad,
19 I had a couple questions about a proposal you've
20 advanced, one in your written testimony and one in your
21 written as well as oral.

22 The first is your proposal to amend 1B1.8
23 which you discussed in your written testimony to
24 basically protect the statement that the defendant
25 makes at the time of arrest prior to the time the

1 defendant enters a cooperation agreement. And your
2 proposal is similar to some we have heard but I think
3 narrower and that if I am reading it correctly, you are
4 suggesting that that be broadened to include statements
5 at the time of arrest when the parties agree, in other
6 words the prosecutor has to agree as well. Is what
7 you're suggesting?

8 MR. BEMPORAD: By its terms now, 1B1.8 is
9 a situation where the prosecutor has to agree. The
10 only time that you don't include that stuff in the
11 guidelines is where there's been some sort of
12 cooperation agreement. There doesn't have to be
13 successful 5K cooperation, but it's meant to not punish
14 somebody who's trying to cooperate.

15 So I think you are always going to have
16 some agreement with one exception and this is something
17 I tried to address in my testimony, but maybe didn't
18 capture completely.

19 There are lots of times where for one
20 reason or the other the cooperation agreement doesn't
21 go through. The very common situation in my district
22 is because there are gangs across the border or in jail
23 who will kill a guy if he cooperates. And he's willing
24 to give up everything at the time of arrest, but once
25 he gets into a jail, he realizes he can't sign

1 anything, and it doesn't matter that that's not going
2 to filed, it's going to be sealed. He is scared to
3 death for his family, for himself to sign anything. So
4 sometimes cooperation doesn't go through in those
5 cases.

6 Other times you have people who don't have
7 anything to give up so the Government says: Yeah,
8 thank you for the information, but there's no reason to
9 pursue a 5K here because we can't make anything. You
10 don't know enough.

11 In those circumstances, I would call those
12 incomplete negotiations for cooperation, the Rules of
13 Evidence, Rule 410 and the Rules of Criminal Procedure
14 like 11(f) say you don't consider those things, they
15 are not to be considered as evidence.

16 The Commission refers to those rules in
17 its commentary. I think it should strengthen them that
18 so that even if you have cooperation, everyone has made
19 a good faith effort to cooperate but it doesn't ever
20 end up in a full agreement that's signed as a plea
21 bargain agreement, there can be some mechanism for not
22 considering that evidence.

23 VICE CHAIR CASTILLO: So in those cases,
24 that conduct is counted against the defendant, at least
25 in the Western District of Texas?

1 MR. BEMPORAD: Oh, absolutely. In our
2 cases, the cases we are talking about even if there is
3 a full cooperation agreement. If he made the statement
4 but I think narrower the agreement was in place, that's
5 considered.

6 I know there are some other places where
7 the parties agree to try to keep that out.

8 I will tell you, and I put this in my
9 written testimony, we don't have a lot of plea
10 bargaining in our district. More than half of our
11 cases plead guilty without a plea bargain. We are a
12 low 5K district because of these dangers and because we
13 have limited information. So we get the guidelines
14 just as they're written. We don't do a lot of
15 guideline fact bargaining. That's almost unheard of.

16 VICE CHAIR CASTILLO: The other question
17 related to your proposed departure 2L1.2 for cultural
18 assimilation, but a little bit broader than that, and
19 you are looking at the motives of the defendant in
20 reentering the United States, are you not proposing
21 that we consider a departure for the collateral
22 consequences relating to the deportation? You
23 mentioned in footnote DOJ's 1991 position which argued
24 for that. Are you suggesting that we consider that as
25 well or the narrower?

1 MR. BEMPORAD: I saw that right after I
2 finished or right as I was finishing my testimony in
3 written testimony. I saw that that was included as a
4 proposal in the current cycle. And I would think that
5 is something that the court – that you should
6 consider.

7 VICE CHAIR CASTILLO: Because to date,
8 so far as I'm aware, no court has considered that
9 departure, accepted it in a case involving deportation,
10 you know, illegal reentry because the idea being that
11 the Commission considered that when it set the
12 guidelines.

13 MR. BEMPORAD: I agree, Commissioner. I
14 think that is correct. They have and they said you all
15 did consider it. I would say that I'm not sure that
16 that's true. You are going to know better by looking
17 at the history whether it was considered.

18 Again I want to make the larger point,
19 each one of these considerations, when it comes to
20 illegal reentry, is playing around the outside of the
21 issue which is this guideline is too high. I want to
22 echo what Mr. Pori said about that. If you reduce the
23 guidelines across the board, you might not have to
24 worry about these sorts of issues. I think that would
25 be a starting point.

1 CHAIR SESSIONS: I appreciate very
2 much your testimony. We all appreciate very much your
3 testimony. And I'll call it to an end. Thank you very
4 much. And call the next panel to come forward.

5 Good morning. Thank you very much for
6 coming today. Let me introduce our next panel. First,
7 Kevin K. Washburn is dean of the University of New
8 Mexico School of Law. His teaching career has included
9 appointments at the University of Arizona James E.
10 Rogers College of Law, Harvard Law School and the
11 University of Minnesota Law School.

12 Previously Mr. Washburn served as trial
13 attorney in the Environment and Natural Resources
14 Division-Indian Resources Section of the Department of
15 Justice, as an assistant U.S. attorney in the District
16 of New Mexico, as general counsel to the Indian -
17 National Indian Gaming Commission. Mr. Washburn
18 received a Bachelor of Arts degree from the University
19 of Oklahoma and a J.D. from Yale. Welcome.

20 MR. WASHBURN: Thank you.

21 CHAIR SESSIONS: Next, Alison
22 Siegler is the director of the federal criminal justice
23 project and assistant clinical professor at the
24 University of Chicago Law School where she teaches
25 courses in criminal procedure and federal sentencing.

1 Previously Ms. Siegler was a staff attorney with the
2 Federal Defender Program in Chicago and an E. Barrett
3 Prettyman Fellow at the Georgetown Criminal Justice
4 Clinic. She received a Bachelor of Arts degree from
5 Yale, a J.D. degree from Yale Law School as well and a
6 Master's of Law from Georgetown Law Center.

7 It seems to me a fairly significant
8 contribution from Yale Law School both on this panel
9 and the previous one. At least I'm sure to the
10 commissioner on my left, that must be a real thrill.
11 So with that, have you decided between yourselves who
12 wishes to go first?

13 MR. WASHBURN: Professor Siegler has
14 offered - allowed me to go first. And I will be short
15 because I know that you guys are trying to speed things
16 up. And my written comments have been distributed.
17 I'm sort of Johnny One Note here.

18 CHAIR SESSIONS: Johnny One Note?

19 MR. WASHBURN: I'm not going to talk about
20 anything in your current cycle of proposals. What I'm
21 going to talk about is tribal courts. A brilliant
22 young scholar about six or seven years ago wrote an
23 article called "Tribal Courts and Federal Sentencing."
24 And he is not so young anymore. The article didn't
25 generate much -

1 CHAIR SESSIONS: He wouldn't happen
2 to be a dean of a law school?

3 MR. WASHBURN: Currently he is, yes. I'm
4 not sure anyone read that original article. But I am
5 the person who wrote that article. And honestly I'm
6 not as – it was my very first article as an academic
7 and I think I would have come at it a little bit
8 differently if I would have written it today.

9 But my concern is that the guidelines are
10 not very respectful to American Indian tribal courts.
11 They don't count tribal court convictions for purposes
12 of criminal history. And I think that's a real loss
13 because you all are part of the very important public
14 safety and criminal justice regime or apparatus of the
15 United States. And tribal courts ought to be your
16 partners in that effort.

17 We have a serious problem in Indian
18 Country, as Eric Holder has recently addressed very
19 aggressively. President Obama recently had a historic
20 meeting with seven cabinet officials and American
21 Indian tribes. And one of the issues addressed was
22 public safety.

23 And there is a very important bill before
24 Congress called the Tribal Law and Order Act. And
25 President Obama supports that bill. And I think it's

1 going to pass. I think it will pass probably in this
2 Congress. And I think that that is a time when you
3 probably should reconsider your position on tribal
4 courts. Your position on tribal courts has been the
5 same since the guidelines were first written. During
6 that time tribal courts have grown dramatically.

7 And we are sitting here in the Sandra Day
8 O'Connor Courthouse. So let me quote Sandra Day
9 O'Connor from about 15 years ago, "tribal courts, while
10 relatively young, are developing in leaps and bounds."
11 Tribal courts have really developed a lot. They are
12 young. Most of them are young. Some tribal courts are
13 older than the Arizona state courts because many tribes
14 had court systems before even Arizona became a state.
15 Most tribal courts, however, are young and have
16 developed within the last 20 or 30, 40 years.

17 They are now functioning in very formal
18 ways, very much like American courts. You would be
19 very comfortable if you sat in the back of a tribal
20 courtroom and saw what happened and generally you would
21 recognize what's going on in there. And many of the
22 people who practice in tribal courts are now people who
23 also practice in the state and federal courts.

24 I feel like it's probably come a time that
25 you could be comfortable with counting tribal court

1 convictions when you were computing criminal history
2 for federal sentencing purposes. And I would encourage
3 you to consider doing so. I am going – I say – I
4 encourage you to consider doing so. The reason I stop
5 short of saying you should do so is because the United
6 States has a very strong policy throughout federal
7 government of consulting with Indian tribes before
8 doing something that dramatically affects them like
9 this.

10 And I honestly don't know how tribes would
11 come out on this for sure, but I think the question
12 should be raised. With the new administration having
13 come in, there has been a lot of consulting of tribal
14 leaders and tribal governments about how should we move
15 forward. You are now thinking how to move forward for
16 the next 25 years. And I think it might be an
17 appropriate time for you to engage in the same type of
18 consultation that most other federal agencies are
19 undergoing right now, that is convening tribes and
20 asking them about policies that affect them. This is
21 one of the policies that affects them most.

22 Some of your guidelines have principal
23 application in Indian Country because particularly some
24 of the violent crimes generally only arise in Indian
25 Country jurisdictions. And so your guidelines have

1 inordinate impact in those places. And you have
2 considered them over the years. About ten years ago, I
3 served on an advisory group to the Commission that
4 worked on how to change the guidelines for second
5 degree murder, for example.

6 So you have been looking at those now and
7 then, but I would love to see a much more robust focus
8 on Indian tribes. We have a perennial crisis. About
9 every five years or so, the media discovers that there
10 is a crisis in criminal justice in Indian Country and
11 there is a lot of media play and not that much gets
12 done about it. It's hard to call it a crisis because
13 it's an existing crisis and it seems to only get worse.

14 The Tribal Law and Order Act pending
15 before Congress is trying to do something about it.
16 And what that act will do will extend tribal
17 jurisdiction. Tribal courts since 1968 have only had
18 misdemeanor jurisdiction. They were for the most part
19 young courts. And Congress was uncomfortable with them
20 exercising full jurisdiction in a forum that often
21 didn't even have attorneys. It was often lay advocates
22 and untrained, not law-trained tribal judges that were
23 ruling in these forums.

24 That's not so true any longer. Most of
25 the advocates in tribal courts are now law-trained

1 attorneys. And so I think one of the things that the
2 Tribal Law and Order Act is going to do if it passes is
3 give tribes jurisdiction for felonies up to three years
4 in duration as long as the tribes provide attorneys,
5 indigent counsel for indigent defendants in other
6 words.

7 And if that bill passes and some tribes
8 take this jurisdiction and agree that they do want to
9 move forward with the felonies and hire indigent
10 defense counsel, my thinking is you ought to look at
11 those convictions and count them in criminal history or
12 you at least ought to consider doing so after
13 consulting with tribal courts.

14 So that's what I'm here to talk about.
15 This is sort of a heads-up going forward because the
16 Tribal Law and Order Act has not passed Congress yet.
17 I believe it will. It's got quite a bit of support.
18 There have been hearings held on both the Senate side
19 and the House side and it has passed out of the Senate
20 Indian Affairs Committee. So going forward if it does
21 pass, I think that would be an appropriate time for you
22 to take a look at your treatment of tribal court
23 convictions and consider whether you want to grant them
24 more respect. Thank you.

25 CHAIR SESSIONS: Thank you, Dean

1 Washburn. Ms. Siegler.

2 MS. SIEGLER: Thank you very much for
3 inviting me to speak here today. I am very honored to
4 be able to participate in these hearings. Now that
5 judges have a lot of freedom to sentence outside the
6 guidelines, it's more important than ever that this
7 Commission heed judges' concerns about those guidelines
8 and make sure that the guidelines comply with
9 3553(a)(2) and make sure the guidelines are based of
10 course on empirical data. Otherwise the concern is
11 that the Commission is going to risk the judges simply
12 ignoring the guidelines, a situation that then may lead
13 to the very disparities that this Commission is
14 supposed to be attempting to avoid.

15 I should mention that I am interested in
16 these issues not just from an academic perspective but
17 also from a practical perspective because I run a legal
18 clinic at the University of Chicago Law School. And so
19 my students and I litigate federal criminal cases both
20 in the district court and in the Seventh Circuit. And we
21 of course have a lot of clients. Most of our clients
22 end up at sentencing. And so we see a lot of
23 sentencing issues and we do a lot of sentencing
24 litigation.

25 I'm going to discuss two topics which were

1 in my written testimony. First I'm going to explain
2 why I believe that the illegal reentry guidelines
3 should be revised and actually lowered. And secondly,
4 I will briefly touch on why I believe the Commission
5 should incorporate offender characteristics into the
6 guidelines.

7 So first guideline 2L1.2. This guideline
8 is currently creating very significant sentencing
9 disparities. Fast-track disparities are proliferating.
10 And those disparities are unwarranted because they are
11 based solely on an accident of geography. No matter
12 how useful they may be, they are unwarranted
13 disparities.

14 Judges are also going below the range in a
15 lot of cases because they are concerned that the
16 guidelines call for sentences that are simply too
17 harsh. And that's creating more disparities. Now,
18 those second disparities are not necessarily
19 unwarranted because many of them are based on
20 differences amongst offenders or differences in
21 offender conduct. But if the Commission wants even the
22 appearance of uniformity, it's going to have to modify
23 the guideline to take that into consideration.

24 So first I want to lay out the disparities
25 I see in this guideline and then I want to discuss four

1 aspects of the guideline that frequently result in
2 judges giving below-range sentences and propose how the
3 Commission might modify the guidelines to address
4 judges' concerns in those areas.

5 So first the disparities in the
6 statistics. It's very important to recognize – I
7 think this is very important, and I don't see it
8 discussed that much, that the vast majority of illegal
9 reentry sentences in this country, the vast majority of
10 those defendants are receiving sentences below the
11 guidelines range. So recent data show that fully 79
12 percent of the immigration cases in the United States
13 are prosecuted in districts with fast-track programs.

14 What that means is that – what that
15 appears to suggest is that illegal reentry defendants
16 are receiving for the most part very low fast-track
17 sentences and that there is this very small handful of
18 defendants who are actually receiving the within-range
19 sentences that the guideline contemplates. At the same
20 time we have what's happening in – we have something
21 happening in a lot of non-fast-track districts which is
22 we have judges reducing sentences in those districts to
23 take into consideration the fast-track disparity that
24 they see or to take into consideration or account for
25 other perceived problems in 2L1.2.

1 And so the numbers show – I think it's
2 very striking the numbers from 2008 which show that
3 fully a quarter to a third of all immigration sentences
4 in the Second Circuit and Seventh Circuit are below the
5 guidelines range and nearly 50 percent of all illegal
6 reentry sentences in Chicago and New York are below the
7 guidelines range. Those numbers are very significant.

8 And it's notable that those districts
9 don't have fast-track programs, right? So that the
10 vast majority of those departures by mere statistics
11 are not government-sponsored departures – I'm sorry –
12 reductions. The numbers – I think these numbers make
13 it clear that judges think this guideline is too high.
14 So examining the case law elucidates some of the
15 reasons why judges have problems with the guideline.

16 And of course most of our sentences don't
17 result in written opinion. So it is somewhat hard to
18 know what exactly judges are basing these below-range
19 sentences on but we do have a number of written
20 opinions which can give us some information. And so
21 I'm just going to discuss sort of four aspects of why
22 judges seem to be going below the range briefly and
23 then propose what the Commission might do in an attempt
24 to eliminate or reduce some of those below-range
25 sentences.

1 So one reason judges go below the range is
2 out of a concern about the 16-level enhancement,
3 various concerns about this enhancement, so the concern
4 that it overstates the prior conviction either because
5 of the circumstances of the prior or the way that the
6 state court treated the prior or the age of the prior.
7 And both the Ninth and Tenth Circuits as you know have
8 reversed judges for failing to consider this fact and
9 failing to consider or reduce defendant sentences on
10 those grounds.

11 I think the Commission should take the
12 relevant cases to heart and should conduct empirical
13 research about whether the enhancement – the 16-level
14 enhancement and maybe even the other enhancements sweep
15 too broadly in a way that both overstates the
16 seriousness of the offense under (a)(2) and creates
17 unwarranted similarities under (a)(6) and in violation
18 of *Gall*. The Commission should consider lowering the
19 enhancements I believe and also making them more
20 incremental. This is something [inaudible] and I
21 discussed also.

22 I think four specific things to consider
23 in this regard which are in my testimony. Number one,
24 when there are offenses that technically qualify as
25 crimes of violence but don't actually involve any

1 violence [they] should be treated differently. Number two,
2 whether prior convictions that don't count for criminal
3 history purposes should also – because of their age,
4 should also either not count or be given less weight in
5 the 2L context.

6 Third, whether enhancements – whether the
7 enhancements are simply too high to meet the (a)(2)
8 purposes of punishment, in light of the conduct a
9 defendant would have to commit under other guidelines
10 in order to get a similarly significant enhancement.
11 And number four, whether the time imposed for the prior
12 conviction should be considered and relevant to the
13 level of the enhancement, especially when that time
14 imposed is something like probation, a very low prior
15 sentence.

16 As an aside on that point, I know that
17 Chief Judge Roll objects to some degree to that notion.
18 I read in his testimony he believes that state court
19 judges are giving these low sentences because they
20 think people are about to be deported. It's hard to
21 say why state courts' judges are giving those sentences.

22 It's also very possible that those
23 sentences reflect the state court judges' own
24 evaluation of the underlying conduct of that
25 original – of that original conviction and that the

1 state court judge is giving a low sentence because he
2 or she is the person who gets to see and hear all the
3 evidence and knows what happened in that case. That
4 judge is going to be more familiar with the evidence
5 than any future court could ever be. And so I believe
6 that the guidelines should take into account both the
7 time imposed and also of course continue to consider
8 the seriousness of that prior offense.

9 A second rationale judges give for
10 below-guideline sentences, something this Commission
11 knows very well, is the double counting concern. I
12 understand the Commission is revisiting this issue. I
13 think that's wonderful. I think it's really important
14 that the Commission conduct its research to determine
15 whether double counting overstates the degree to which
16 criminal history is – the degree to which this
17 guideline is resulting in sentences that overstate risk
18 of recidivism or overstate – or overpunishing
19 basically. I also support the changes the Commission
20 is considering to 4A1.1(d) and (e) that – especially in
21 the 2L context. Those guidelines do seem to have some
22 really problematic applications that we have actually
23 seen in a number of our cases.

24 A third reason judges sentence below the
25 guideline range in illegal reentry cases is out of this

1 belief that the Commission wasn't acting in its
2 characteristic institutional role in the creation of
3 that guideline. There is some basis for applying that
4 sort of *Kimbrough* type critique to this guideline.
5 Judge Castillo has said in the past I noticed that the
6 Commission never articulated a justification for
7 setting the enhancement level at level 16 in the first
8 place.

9 The Commission could address this critique
10 by determining whether that Level 16 – whether that
11 16-level enhancement is actually supported by empirical
12 evidence and by examining whether higher illegal
13 reentry sentences are actually successful at deterring
14 either future illegal reentries or future criminal
15 conduct in general. I think that's a really important
16 question. If it turns out that 16 levels are necessary
17 to do that, then that can give the Commission a basis
18 for continuing on with such a high enhancement. On the
19 other hand, if that turns out not to be the fact, I
20 think it needs to be revisited.

21 And if the Commission revises any of the
22 enhancements in a way that better reflects empirical
23 evidence, I think it's very important for the
24 Commission to explain exactly what it's done and
25 exactly what the evidence shows in a way that makes any

1 future revisions very transparent to defendants and to
2 judges.

3 A fourth and final reason that judges
4 appear to be sentencing below this guideline range is
5 to account for the fast-track disparity, but not
6 necessarily – judges are not necessarily articulating
7 that as the reason for their reductions. I have some
8 anecdotal evidence on this issue that I didn't include
9 in what I wrote. But my students and I litigated or
10 helped to litigate eight illegal reentry cases last
11 year. In each case we asked the judge to grant a
12 reduction based on the fast-track disparity.

13 The Seventh Circuit's current law on this
14 prohibits a judge from doing so. I believe that law is
15 wrong in light of *Kimbrough*. Only one judge agreed
16 with us outright and actually gave a reduction in two
17 of our cases based on the fast-track disparity. He
18 said he thought the Seventh Circuit's law was wrong and
19 that *Kimbrough* changed the territory. Another judge
20 said I think that this disparity is absolutely
21 unwarranted and unfair but I don't think I have the
22 power to give a lower sentence given the Seventh Circuit's
23 ruling. And so that case is now up on appeal and we
24 are actually just waiting for an opinion. It's been
25 fully briefed and argued.

1 The remaining five judges granted
2 significantly below-guideline sentences for other
3 reasons, not stating that their sentences were based on
4 the fast-track disparities. Several of those judges
5 actually cut the guideline range in half. One of them
6 going all the way down to time served. The bottom line
7 is that not a single one of the judges in those eight
8 cases was comfortable imposing a sentence within the
9 guideline range.

10 And this shows the fundamental problem I
11 think with retaining a guideline scheme that judges
12 think is unfair. Judges are going to use their new
13 discretion to reduce sentences below the range and
14 they're not even necessarily going to do so in a way
15 that's completely honest and transparent if they're
16 concerned about being reversed. So this inevitably is
17 going to inject into federal sentences the very
18 disparity and opacity that the Commission is attempting
19 to avoid.

20 My proposal for how to solve this
21 fast-track disparity problem is very simple, which is
22 simply lower illegal reentry sentences
23 across the board. I know this is something the
24 Commission has heard in other context. The statistics
25 I mentioned at the beginning show that nearly all of

1 the illegal reentry defendants in this country are
2 actually in fact receiving below-guideline sentences.

3 So lowering illegal reentry sentences
4 across the board would reduce the fast-track disparity
5 without eliminating fast-track programs. The
6 Commission doesn't have to tangle with that concern.
7 Lower sentences in this way would also ensure that the
8 guidelines are meeting the (a)(2) purposes of
9 punishment. And lower sentences I believe would reduce
10 these other judicial variances that I have discussed
11 which would in turn reduce any problematic disparities
12 that are being created by those variances.

13 Finally, I just want to say that I believe
14 that Henry Bemporad's proposals for revision would go
15 very far in rectifying many of the problems I have
16 identified. Before I close, I want to very briefly for
17 just one minute touch on the offender characteristics
18 issue. So for five years now, Chapters 5H and 5K2 have
19 restricted judges from considering offender
20 characteristics in a way that seems to me to clearly
21 violate the Supreme Court's mandates and Congress's
22 mandates in 3553(a) and 3661.

23 I know one of the questions on which the
24 Commission is seeking public comment is the diminished
25 capacity departure. In that regard I want to note that

1 that departure is simply too narrow. It doesn't let
2 judges account for characteristics that are relevant to
3 all the (a)(2) factors, things like just punishment,
4 deterrence of others, protection to the public,
5 rehabilitation. Judges can't fully account for all the
6 ways in which mental illness affects those purposes in
7 the narrow restrictions of this diminished capacity
8 departure.

9 The Seventh Circuit actually makes this point
10 very well in a case I didn't cite but I want to call to
11 your attention, *U.S. v. Miranda*. It's a 2007 case,
12 505 F.3d 785. This is the only case in which they
13 have ever reversed within a guideline sentence that I
14 am aware of. And they did it based on a concern that
15 the person's diminished capacity really wasn't being
16 accounted for and that the judge hadn't taken that
17 fully into consideration.

18 In addition, many of the restrictions in
19 Chapter Five are inconsistent with the empirical research
20 that this Commission itself conducted in 2004. That
21 evidence showed that numerous offender characteristics
22 correlate positively with risk of recidivism, as this
23 Commission knows. And so as a result, we end up with
24 guidelines which lead to sentences that are greater
25 than necessary to protect the public under (a)(2)(C)

1 and which create unwarranted similarities amongst very
2 different offenders in violation of (a)(6).

3 I think the Commission should rectify
4 these problems by incorporating offender
5 characteristics into the guidelines. More broadly, I
6 think the Commission should either eliminate or
7 significantly rewrite Chapters 5H and 5K to bring into
8 mind the Supreme Court precedent and with the
9 sentencing statutes. And I think that every one of the
10 offender characteristics on which the Commission is
11 seeking public comment is indeed relevant at sentencing
12 and should be relevant and the guidelines should
13 reflect this. Thank you very much for giving me the
14 opportunity to address you today. I would welcome any
15 questions you have.

16 CHAIR SESSIONS: Thank you,
17 Ms. Siegler.

18 COMMISSIONER HOWELL: I have some
19 questions. Professor Siegler, thank you very much for
20 your very thoughtful testimony, both of you actually.
21 And your suggestion for simply doing an
22 across-the-board reduction of all illegal reentry,
23 reducing the guidelines for all illegal re-entry cases
24 is an interesting one. And I think it would, as you
25 say, perhaps address the perceived disparity with

1 fast-track programs. On the other hand, do you have
2 any concern that it would also undermine some of the
3 law enforcement objectives that underline the
4 fast-track programs at the outset?

5 The fast-track programs are there to help
6 move along expeditiously this massive volume of cases
7 in those jurisdictions where the fast-track program has
8 been approved by the attorney general. Would you – is
9 this just a chicken and egg issue? If we followed your
10 proposal, wouldn't the fast-track program thereby just
11 have to have further reductions and then we lead to the
12 same kind of unwarranted disparity? And how does your
13 proposal really help the situation?

14 MS. SIEGLER: I don't think that the
15 current fast-track programs – that the success of the
16 current fast-track programs depends on this small
17 minority of defendants getting extremely high
18 sentences. So I think that if the sentences are
19 lowered across-the-board, then perhaps 5K3.1 might also
20 have to be tweaked. The fast-track guideline might
21 also have to be changed slightly.

22 I think as long as these defendants in
23 fast-track jurisdictions are getting something below
24 the guidelines, something below what they would
25 otherwise be getting and as long as they are getting

1 this very – this fast disposition – I think a lot of
2 defendants are interested in – the fast disposition is
3 actually something that appeals to them and something
4 that if they're given even a slight reduction, they are
5 going to be interested in taking.

6 So I guess what I would envision is
7 that – I mean, is that – because the problem is –
8 truly the problem is fast-track programs create
9 disparities and they are going to continue creating
10 disparities as long as they exist, but then there are
11 these countervailing reasons we want them.

12 If you are going to have disparities no
13 matter what because of fast-track programs, at least it
14 seems to me that if you lower the guidelines
15 significantly, perhaps the difference between what
16 other people are getting, what people without
17 fast-track are getting and what people with fast-track
18 are getting could be lessened without reducing the
19 attractiveness of fast-track programs to the defendants
20 in fast-track jurisdictions.

21 It seems to me those folks are still going
22 to want the reductions. Even if they're getting a
23 two-level reduction, not a four-level reduction, if
24 it's a two-level reduction [or] something even lower,
25 they are going to be fine with it, I think. And sure,

1 you will still have disparities but they won't be as
2 really significant as they are now where people in
3 Chicago are getting 77 to 96 months and people in
4 Oregon are getting 30 months.

5 CHAIR SESSIONS: All right.

6 Mr. Wroblewski.

7 COMMISSIONER WROBLEWSKI: Thank you,
8 Mr. Chairman. Ms. Siegler, I have one question. You
9 said that you would like the Commission to look at
10 empirical data. And you cite concerns about the
11 illegal reentry guideline based on the eight cases that
12 your class litigated last year. Your colleague who
13 testified no more than a half hour ago said that in his
14 district where there are 7,000 cases litigated every
15 year, that roughly eight in ten get a within-guideline
16 sentence. Doesn't that suggest something completely
17 opposite from what you are suggesting? And doesn't the
18 numbers and our interest in empirical data suggest we
19 shouldn't change the guidelines you are suggesting?

20 MS. SIEGLER: I think the statistics in
21 the Western District of Texas actually show one of the
22 real problems with the fast-track program and the way
23 fast-track operates. My read of the statistics is that
24 the Western District of Texas has the third highest
25 number of illegal reentry cases in the entire country

1 of all the 94 districts. So if the Western District of
2 Texas doesn't have a fast-track program, I don't
3 understand what fast-track is for. I don't
4 understand – that doesn't make any sense to me.

5 And so it seems to me that the Western
6 District of Texas is in a lot of ways an anomaly that
7 shows some problems, but I don't think the Western
8 District of Texas sort of disproves the point I am
9 making because I think that for the most part, if you
10 look at the circuits and the districts without illegal
11 reentry – I'm sorry – without fast-track programs,
12 you are going to see below-range sentences in illegal
13 reentry cases.

14 COMMISSIONER WROBLEWSKI: Let me just cite
15 your statistics, the most recent statistics that were
16 put in front of me just yesterday. Nationwide for all
17 cases, non-government-sponsored, below-range sentences
18 occurred in 16.4 percent of the cases. In immigration
19 cases, and admittedly that includes more than just
20 2L1.2 cases, they occurred in only ten percent. So
21 it's significantly lower than the national average.

22 MS. SIEGLER: I still think that – it
23 seems to me that if you are seeing things like in
24 Chicago and New York with 50 percent of the sentences
25 being below the range, you have judges – there are a

1 lot of judges who simply aren't following these
2 guidelines. And I think part of the problem also is
3 that there are some judges in some districts who take
4 *Booker* seriously and some judges who don't take *Booker*
5 as seriously and who simply continue to follow
6 guidelines regardless of whether they believe that
7 those – without actually thinking about the question
8 of are these guidelines really fair and are these
9 guidelines really furthering the purposes of punishment
10 as we want them to be doing.

11 COMMISSIONER WROBLEWSKI: That's quite an
12 indictment of a whole host of judges, whether they're
13 from Western Texas or other places. Let me suggest
14 maybe a different – and get your reaction to a
15 different interpretation, that there are differences in
16 the way human beings look at these sentencing issues.
17 And with greater discretion, there will be greater
18 variation. Is that a possible – an interpretation –
19 do you think that's a good one or bad one?

20 MS. SIEGLER: You are saying – I'm sorry.

21 COMMISSIONER WROBLEWSKI: That with
22 greater discretion – *Booker* created greater
23 discretion. That with greater discretion, there will
24 be greater variation. There will be more judges –
25 some judges who continue to follow the guidelines.

1 Maybe they disproportionately live in Western Texas.
2 And there will be some judges who don't follow the
3 guidelines quite as much and maybe they
4 disproportionately live in Brooklyn and Chicago.

5 MS. SIEGLER: That's a fair point. I
6 still think that part of the Commission's mandate is to
7 take into consideration – I mean, back in the old days
8 they were called downward departures – but take into
9 consideration when judges are departing, when judges
10 are giving lower sentences and to actually pay
11 attention to the groundswell of what they're hearing in
12 that regard. And I do think there is – there is a lot
13 of critique out there by judges, and you know this as
14 well as I do, of this guideline.

15 I think there are a lot of judges with
16 concerns. And so I think the fact that some judges
17 don't have as many concerns should not prevent this
18 commission from looking at it and revisiting it,
19 especially this issue of empirical data. What was that
20 16 levels originally based on? What was the double
21 count originally based on? Those things are important
22 now to judges. Sure, some judges may not deviate out
23 of those concerns, but other judges will. And I think
24 that should be considered.

25 VICE CHAIR CARR: Maybe you would like

1 to suggest to us that we lower the guidelines and then
2 see that in the Western District of Texas the judges
3 don't go up.

4 CHAIR SESSIONS: I have questions
5 for both, and first Dean Washburn. Of course you
6 weren't at dinner last night, but one of the issues
7 that was raised with the judges in Phoenix and others,
8 use of convictions in tribal courts. And what was
9 expressed at least in part by some was that there is a
10 wide variety of the kinds of tribal courts. Some
11 include due process rights. And of course that's a
12 fundamental prerequisite in regard to criminal history.
13 And the due process rights, in fact uncounseled
14 convictions for felonies obviously cannot be included,
15 just as an example.

16 While there are some - according to the
17 local practitioners and judges, there is this disparity
18 where some tribal courts do not have those basic
19 functions. And I guess my question is do you think
20 that perhaps this is an issue that should be studied?
21 And in fact there is a proposal to have a permanent
22 Native American advisory group to the Commission to
23 actually address this particular issue so that it can
24 be explored and get the input of the Native American
25 populations. That's my question for you.

1 And Professor Siegler, in regard to
2 offender characteristics, traditionally the guidelines
3 have been used in a way to direct practitioners and
4 judges as to how to assess particular factors. One of
5 the proposals that we have now may in fact change that
6 focus just a little bit. You're an academician as well
7 as a practitioner. And I guess I would ask for your
8 general response. Offender characteristics under 5H
9 are of course ordinarily not relevant.

10 And we had many responses from the
11 defenders, et cetera that we should not be directing
12 judges to discourage them from departing downward by
13 using offender characteristics. In fact if you start
14 looking at offender characteristics within the
15 guidelines not by way of directives from the Commission
16 but rather a vehicle by which the Commission can then
17 just explore the empirical basis of uses of these
18 factors so that judges know how they are relevant, age,
19 recidivism, just as an example, age - culpability is
20 another example.

21 Without saying necessarily that you shall
22 or shall not do X, Y or Z, but you just provide
23 expertise to practitioners and judges in a sense
24 without much value judgment, do you find that different
25 approach to the Commission's function to be valuable or

1 not? So perhaps I can ask Dean Washburn first.

2 MR. WASHBURN: Mr. Chairman, thank you for
3 your questions. Tribal courts are – they do range
4 across a lot of variety. Congress has imposed on them
5 basic civil rights and due process requirements in the
6 Indian Civil Rights Act of 1968. There is a habeas
7 remedy in federal courts if they don't follow it. So
8 there is a base level of due process that's very
9 similar to what states are required to follow under the
10 14th Amendment.

11 The interesting thing is it took states
12 more than a hundred years to develop this full panoply
13 of due process through the incorporation debate. You
14 recall that originally the Fourteenth Amendment did not
15 apply to states. And under *Barron v. Baltimore*, it was
16 deemed that the first ten amendments didn't apply to
17 states. So the Fourteenth Amendment – the debate that
18 we had for more than a hundred years was should the
19 first ten amendments get incorporated through the
20 Fourteenth Amendment if due process applies to states.

21 It took a hundred and some years to work
22 that out. In 1968 Congress plops the Indian Civil
23 Rights Act down and said all of these apply to tribes,
24 following basically that the Fourteenth Amendment
25 incorporation clause is applied to states through the

1 Supreme Court over the course of a hundred years. So
2 there are basic due process rights to apply.

3 Now, I do think that tribes would benefit
4 from the kind of scrutiny that they would go under,
5 that they would undergo by people asking those kinds of
6 questions. And I think this would be a good forum to
7 be asking those kinds of questions. And I think that
8 we would find the tribes apply the due process rights
9 in different ways. I think there has been – they have
10 been moving towards the center. I think that tribal
11 courts are starting to look kind of identical across
12 the country.

13 If you like the idea of a 50-state
14 laboratories approach, it's kind of a shame because the
15 tribes aren't really experimenting that much with
16 different ways. They're kind of moving towards the
17 center, towards the mean. But again, you would be
18 comfortable with what most of the tribal courts are
19 doing. They do still vary. But a lot of the people
20 you were talking to last night were probably people
21 over the age of 50 that developed their first views on
22 these things decades ago and haven't really necessarily
23 paid attention to how they've changed. And I think
24 they have been growing. I think tribal courts have
25 been growing.

1 explaining here are our empirical studies, here's our
2 2004 study, in some sort of very reduced way. Here's
3 what we found. We found correlations between age and
4 recidivism, between gender and recidivism, between
5 employment and recidivism, et cetera, et cetera. And
6 then I think in addition to saying that, you would also
7 want to say therefore this is relevant to an (a)(2)(C)
8 analysis.

9 It seems to me that once you are talking
10 risk of recidivism, you are clearly talking protecting
11 the public from this particular person. And I think it
12 would be useful to courts if the Commission actually
13 made that leap and said okay, here are all the things
14 that correlate with recidivism. That means this is
15 relevant under (a)(2)(C).

16 The second way of doing it, which is to
17 have more value judgments, would be to say okay, we are
18 going to put in a downward departure if you are over
19 the age of 50. We are going to put in a downward
20 departure if you were employed within two years of the
21 offense, things like that. As between those two
22 choices, I like the former one, which is I think
23 essentially the proposal that you are making where
24 there is no value judgments but full information given
25 to courts.

1 I think the most important thing is to
2 remove the negative value judgments that are currently
3 there and that are not in line with current Supreme
4 Court law and to remove the current restrictions on
5 things like diminished capacity where there are so many
6 internal restrictions in that downward departure ground
7 that no longer are necessarily appropriate in light of
8 the law. So I actually like this proposal that you are
9 making of sort of no value judgments with full
10 information.

11 CHAIR SESSIONS: I think actually
12 one of the areas that we asked for comment was in
13 mental and emotional condition under 5H1.3, which of
14 course relates in some ways to diminished capacity
15 under 5K but is obviously much broader. I think that's
16 what you are asking for.

17 MS. SIEGLER: Yes. If 5H1.3 were
18 different, you wouldn't even need the 5K2.13. I mean,
19 it seems like that almost isn't necessary anymore.

20 CHAIR SESSIONS: Well, thank you
21 very much for the conversation and your testimony.
22 Let's take just a brief recess. We can start at 11:00.
23 Thank you.

24 (Whereupon, a recess was taken at 10:53 a.m.
25 until 11:00 a.m.)

1 CHAIR SESSIONS: So let's call the
2 meeting to order. I really appreciate, by the way, the
3 witnesses' willingness to move their testimony forward.
4 Of course we have somewhat of a transportation
5 emergency. That is we were told the airport will be
6 closed relatively soon and we have flights that have
7 been moved up accordingly. So I really appreciate your
8 willingness to come forward just a bit early. So this
9 is the seventh panel. We do need to end by 11:30 I am
10 told by the powers that be. So I think that gives us
11 plenty of time.

12 Let me introduce our panelists. First,
13 Doris Marie Provine is a professor in the school of
14 justice and social inquiry and a senior research
15 faculty member at the immigration research project at
16 the School of Criminology and Criminal Justice.
17 Previously she served at Syracuse University and as
18 director of the Law and Social Sciences Program at the
19 National Science Foundation. Dr. Provine is currently
20 a Fulbright Fellow in North American studies studying
21 immigration policy and cross-national perspective. She
22 earned a B.A. from the University of Chicago and her
23 law degree and Ph.D. from Cornell. Welcome.

24 DR. PROVINE: Thank you.

25 CHAIR SESSIONS: Next, Malcolm

1 Lewis is assistant chief of police of the Tohono
2 O'odham Nation. Ha has over 28 years of law
3 enforcement experience, both with the Bureau of Indian
4 Affairs and with the tribal police. His experience is
5 primarily throughout the southwest region, including
6 Nevada, Utah and Arizona. He has worked with several
7 tribes, including the Mohave-Apache tribe of Fort
8 McDowell, Arizona and the Ute Nation in Fort - is it
9 Duchesne - Duchesne, Utah. He is certified with the
10 states of Utah and Arizona and is a member of the
11 Tohono O'odham Nation. Welcome. And thank you very
12 much for moving up your testimony today. So first,
13 unless the two of you have decided between yourselves
14 who wishes to go first -

15 DR. PROVINE: Malcolm offered to go first.

16 CHAIR SESSIONS: Okay. Do you want
17 to go first, Mr. Lewis?

18 MR. LEWIS: Yes, sir.

19 CHAIR SESSIONS: Thank you.

20 MR. LEWIS: Yes, ma'am. Yes, sir. It's a
21 pleasure to be here and be invited to express our
22 concerns and admirations for the systems that do exist
23 because they do have an impact on our nation's members
24 or persons that are convicted on our nation. First of
25 all, Tohono O'odham Nation, 2.8 million acres. It's

1 the size of Connecticut, 28,000 population, which about
2 15,000 live on the Indian nation itself. We have 75
3 miles of international Mexico border, U.S.-Mexico
4 border which we deal with and a lot of situations where
5 internationally it affects indirectly or directly the
6 nation and its members.

7 First of all, crime is at its highest. We
8 have gangs. We have international situations with
9 undocumented aliens. We have drug trafficking
10 transport. If there is a drug in the state, whether it
11 be Chicago, New York, Phoenix, Los Angeles, it's come
12 through our neighborhood. It's come through our
13 territory. We also have other issues that
14 internationally affect us. We have cattle wrestling,
15 which is a big ordeal with the international border
16 where members of the nation have incidents where cattle
17 is being wrestled and taken across back to Mexico.

18 We have a variety of incidents at the
19 casinos which we have which also market - it's been a
20 good thing for us financially, economically, making us
21 independent, taking care of our own business. But it
22 also attracts the crime that consists with those deals.
23 So we have a lot of different areas that would be
24 coming to your courts, whether it be an issue with the
25 environment where we have our own violations, which is

1 our Environmental Protection Act where we have
2 international stuff that we would be bringing before
3 you or we have our own issues with charging our members
4 for violations of federal crimes. So we have a vast
5 majority of things that we bring to your court.

6 The thing that we focused on when we were
7 called to do this was what Mr. Washburn had been
8 talking about, not using the tribal systems, the tribal
9 sentencings and structure on the backgrounds for those
10 people that have to take it to the next level. So I
11 mimic his responses and his concerns there. Our tribal
12 court is similar to this. The lighting is maybe not
13 as -

14 DR. PROVINE: Not as large perhaps.

15 CHAIR SESSIONS: How about the
16 catwalk where people can walk around?

17 VICE CHAIR CARR: Those they have in the
18 casinos.

19 MR. LEWIS: Yeah, you're right. We do
20 have the casinos. But that would be our point, is that
21 you would look at in your sentencing structure as
22 being - looking at what the tribal courts have to
23 offer. I know they're not a court of record. I do
24 know that they substantially have come to the standards
25 of the courts of Arizona. They use a lot of what they

1 have structured as far as civil and criminal matters
2 and procedures. And so I do mirror that challenge that
3 that would work, that you could use that as a basis of
4 which – for presentencing and using the tribal court
5 system.

6 One incident that we have that I would
7 like to give you some information on is we had one
8 victim, a victim of a minor child, 14 years old, that
9 was abused sexually by two members of her family. One
10 member was fondling and the other one actually
11 impregnated the lady, the young girl. We had two
12 different sentencings to those incidents, which was
13 inconsistent with what we felt was just and to assure
14 that those people be held accountable for what they are
15 doing. And we found that there was inconsistencies
16 with that particular case where the fondling was of
17 more of a – given more time for what he did there,
18 where the other person who impregnated the young lady
19 was given less sentence.

20 So of all the cases that we have had, and
21 we have had some successes with you folks and we
22 appreciate what's been done, but also some of the
23 inconsistencies that happen out there. I didn't
24 research that particular case itself of why those
25 things were done. But in that case you would certainly

1 look at that and see that there was certainly
2 significant difference in the type of crime that was
3 committed and then the sentencing that was given to
4 those two situations in the same victim.

5 We appreciate – we filed approximately
6 over a hundred cases through your courts and have
7 successfully prosecuted and sentenced those cases. And
8 we appreciate that. So we do have some good rapport
9 and good feedback from what's being done presently. We
10 have other agencies that do a lot of work on our
11 nation, the VA, ATF, FBI, of course U.S. Border Patrol.
12 We have three sectors of the Border Patrol within our
13 nation.

14 And so we have all these factors that are
15 concentrating on immigration issues and border crimes
16 issues that affect not only our domestic – our
17 domestic villages, our neighborhoods. We have enjoyed
18 the fact that we have our brothers in green or whatever
19 color they are helping us. And so we appreciate the
20 fact that the job is getting done, but there is a lot
21 more that needs to be done also. And that is all I
22 have. Thank you.

23 CHAIR SESSIONS: Thank you,
24 Mr. Lewis. Dr. Provine.

25 DR. PROVINE: This is a funny position, to

1 be the last person before you catch your planes and you
2 are worried about it, and I don't blame you. I'm kind
3 of a deep background for you. My focus is on how local
4 law enforcement is engaging with unauthorized
5 immigration. I was a little surprised to be asked to
6 testify but I am definitely pleased to be here.

7 And as I was listening this morning to the
8 previous two panels before Malcolm and me, it became
9 clear that one of the connections for you is with this
10 issue of penalties for unauthorized entry and to an
11 extent the issue of offender characteristics. So
12 perhaps we can kind of think of it in that light.

13 My basic message today is that what we are
14 seeing now represents a real patchwork of local law
15 enforcement as it feeds into the federal system. I'm
16 going to tell you a little bit about some research my
17 three colleagues and I are conducting on what local
18 police are doing. We have done a national survey. So
19 we have a sense that's wide but not as comprehensive as
20 it will be about what's going on.

21 But let me just first say that right here
22 in Arizona there has been a massive change just in the
23 period that I have lived here, which is about nine
24 years. In the old days, until four or five years ago,
25 local law enforcement really didn't get engaged much in

1 immigration control. It was a federal matter. The
2 states and city governments had not gotten involved in
3 it. This all is a very recent phenomenon that we are
4 talking about here and kind of a recent conflict.

5 There was certainly cooperation between
6 local and federal immigration authorities on particular
7 raids and on particular individuals when they were
8 caught for serious crimes that would generally be
9 reported to immigration authorities, but basically it
10 was kind of an implicit agreement that allowed
11 employers to hire unauthorized immigrants and allowed
12 families to be intact. Very few federal resources were
13 involved in interior enforcement. And you could really
14 see that in Arizona.

15 The response that immigration is a federal
16 matter actually did kind of fly at what was the radical
17 element at the state level that wanted to criminalize
18 immigration. And then when Congress failed to come up
19 with comprehensive immigration reform in 2006, which
20 was the same year that there were massive immigration
21 marches, everything changed here and in some other
22 places as well. It was very clear here in Arizona.
23 And the answer that Congress will take care of it no
24 longer held back the rush to legislate at the local
25 level, which ultimately can feed into the work you do

1 through unauthorized reentry.

2 And so we have criminalized working
3 without legal – the legal right to be here. We have
4 criminalized being smuggled here. You are a
5 coconspirator if you are smuggled in. You don't have
6 to be the smuggler. You can be the smugglee. We deny
7 a bail. We don't let people vote. We have cut off all
8 sorts of public benefits to undocumented immigrants.
9 So we have set out a pretty strong stand at that level.
10 And of course encouraging the police to become more
11 involved in immigration enforcement is part of this
12 general trend toward the state and local level trying
13 to kind of push the issue toward more aggressive
14 enforcement.

15 What's interesting, as you notice, that
16 states and some counties are much more interested in
17 this than big cities. Well, we became involved in
18 this. This becomes a really interesting and difficult
19 issue for police departments because most of them are
20 very committed to community policing ideals which
21 involve gaining the trust of all members of a
22 community. I'm sure Malcolm could address that as
23 well, that it's important no matter what somebody's
24 legal status any or other kind of status, that
25 everybody feel they can call the police if they're a

1 witness to a crime or a victim and that the
2 relationships be good. And it goes so far as a lot of
3 proactive activities that we discovered as we did our
4 survey.

5 So we also were watching another kind of
6 movement that was going on, and that is a sheriff who
7 became very interested in immigration enforcement. So
8 we have kind of a contrasting approach is occurring in
9 the same place. In many parts of the country and
10 probably where you all come from, county sheriffs run
11 jails and they deal with the incorporated parts of a
12 county and then they leave to city police the city
13 parts, but we don't do it that way. Our county sheriff
14 goes everywhere. So we have a built-in imbroglio with
15 enforcement because of differences in enforcement
16 ideology and paradigms. And this is replicated at the
17 national level as well. We've got a lot of differences
18 going on.

19 So what my colleagues and I did was to
20 decide to inquire from police executives how are you
21 handling this situation? So we designed three surveys,
22 one of which has been in the field and analyzed that we
23 did in 2007, 2008 and one of which is in the field now.
24 The first one that is analyzed is the one I will talk
25 about, and that's the medium and large size city

1 chiefs. These are cities 60,000 or more and with a
2 certain percentage of immigrants in the states. And
3 it's about 500 police chiefs we sent this to and we got
4 over half of them responding to us.

5 The second survey which is in the field
6 now is going to be very interesting to you as well, and
7 that's of sheriffs around the United States, all of the
8 county sheriffs in states - in counties with any
9 significant amount of immigrants. And the third survey
10 which may be of less interest to you is in the near
11 delivery stage, about to go out in the field, and
12 that's of small cities and towns. We believe that each
13 of these levels has kind of different issues and
14 concerns.

15 So what we find in this survey - and we
16 asked a number of questions. One whole area was how do
17 police chiefs look at these issues or police
18 departments look at these issues as opposed to people
19 in the community? And of course we are asking chiefs.
20 So we are asking their perspective on this. And they
21 reported to us that within police departments, there is
22 more of an idea that these - that all members of the
23 community are relevant to their work and that trust in
24 the police is important and kind of a professional
25 refusal to kind of treat this as a controversial issue.

1 They see outside of the department much
2 more readiness to be in conflict over this, definitely
3 less concern about these issues of trust, definitely
4 less concern about the possibility that an undocumented
5 immigrant might be a victim of a crime. And so there
6 is a kind of isolation there in terms of the sense of
7 the community truly understanding their work.

8 We found also that the city governments
9 weren't terribly involved with this issue. We hear all
10 the time about cities passing this ordinance or that
11 ordinance. In fact that's still very much a minority
12 activity when you know the number of city governments
13 that are out there. We know states are passing laws
14 and some of those are relevant as well, but some of
15 them are positive and some of them are negative toward
16 immigrants. But then when you get to the level of
17 local police departments, there is kind of a tendency
18 to trust the police to do policing and not to try to
19 micromanage their work.

20 So two-thirds of our respondents said that
21 they believed their cities were generally satisfied
22 with their work. The local governments, about half of
23 them have no policy at all according to these big city
24 chiefs. Twelve percent said the department was being
25 asked to be more proactive. More – about 15 percent

1 reported that their community would really prefer not
2 to know, don't ask, don't tell. Four percent of the
3 respondents said that their community was a sanctuary
4 city. It kind of gives you a sense.

5 One of the things we found was that not
6 only is there not a lot of guidance coming from city
7 governments, but within police departments themselves,
8 there is not a lot of policy being made. Over half of
9 the police departments, and these are chiefs, so they
10 know, had no policy at all, written, unwritten.
11 Thirty-nine percent do have written policies. And less
12 than half provide any training at all for their
13 officers, which of course means that police officers
14 are kind of on their own about when to report an
15 encounter with a suspected unauthorized immigrant to
16 immigration authorities.

17 We asked a question about how do we – how
18 do chiefs think their officers are handling these
19 situations where they're kind of trying to figure out I
20 suppose their own norms. And we found a clear pattern.
21 We asked kind of the scenarios of enforcement and we
22 found a clear pattern in which the most serious cases
23 were the ones that were most likely to result in a
24 report to the federal immigration authorities, to ICE,
25 and the least serious were the least likely. It did

1 surprise us a bit that in that least serious category,
2 we put victims and witnesses to crimes and 13 percent
3 said yeah, we would still report a person to ICE even
4 though they're trying to help us enforce the law but
5 they might be undocumented and so ICE would want to
6 know.

7 Overall – we asked other questions. I
8 can't really go into details – I know we are pressed
9 for time – that suggested there is quite a complicated
10 relationship between police departments and
11 undocumented – this undocumented immigrant community
12 within our communities. About three-fourths of them
13 accept Mexican consular IDs, which are strictly
14 controversial outside of police departments but treated
15 as valid ID by most police departments.

16 There are benefits in most departments for
17 officers who learn foreign languages. Obviously that
18 doesn't just appeal to undocumented immigrants.
19 Seventeen percent provide a confidential telephone line
20 to report possible criminal activity and not have to
21 worry about immigration status. That definitely is
22 responsive to that. And there is a very strong
23 commitment to community policing among big city chiefs.
24 Over half of them have bicycle patrols. They meet with
25 churches, community organizations. They work with

1 non-governmental organizations. And they have officers
2 who do speak foreign languages.

3 But I mentioned earlier that there is a
4 patchwork approach to enforcement. Some of this is
5 because immigrants themselves are not everywhere.
6 They're in their own patterns of settlement. But it's
7 also because there is a highly variable level of
8 interest in enforcement of this sort. And I suppose
9 you would say there would be differences in the
10 resolution of this issue of community policing. Very
11 few departments have formal agreements with the federal
12 government. So there is not really guidance coming
13 from that source.

14 We found that four percent of these chiefs
15 had any 287(g) agreement for arrest issues. And three
16 percent had arrangements with jails. Eight percent
17 have ICE officers embedded in one or more of their
18 units. So that means that in terms of day-to-day
19 either advisories or people there, it's quite
20 infrequent. Yet most of them if they do arrest someone
21 who is charged with a serious crime who they believe to
22 be undocumented, three-fourths of them said that they
23 would call federal immigration authorities. Fourteen
24 percent said they never do and wouldn't.

25 So I would suggest that there are four

1 crucial kind of points, four major points, and then one
2 thing I would like to address with you in particular.
3 There is certainly differences between departments and
4 communities in terms of this whole hot button issue.
5 It's also clear that police officers, individual
6 officers lack much guidance of any sort, either from
7 their community or from their department about what to
8 do when they encounter immigrants. It's also true that
9 local governments are not in general pushing police
10 toward greater levels of enforcement. Some are, but
11 many aren't. And it's also clear that the level of
12 formal agreements with federal authorities is very low,
13 even with all the attention that's been drawn to this.

14 The issue that I wanted to bring home
15 besides this one of extraordinary variability of a true
16 patchwork of enforcement both at the level of
17 departments but also at the level of individual
18 officers, the other issue is really the question of
19 jails because what we are seeing now is more and more
20 federal effort to connect with local – with local
21 jails and create communication about who might be
22 having a warrant of some sort for an immigration
23 violation and to exchange data. And it will probably
24 be done electronically. I think the goal is to connect
25 all local jails with federal immigration authorities

1 within – I don't know – the next few years.

2 And the problem is that the jail ID
3 situation if it's done without any kind of regulation
4 means that essentially the federal government is
5 sucking into a large vacuum cleaner people who have
6 been arrested for very minor violations, sometimes
7 pretextual stops, sometimes because of racial
8 profiling. There can be some very inappropriate
9 behavior that ends up with people in a booking
10 situation. And unless the federal government puts some
11 controls on what it will accept from this source, then
12 essentially its part of the issue.

13 And where it comes into connection with
14 you folks on the Sentencing Commission is people
15 generally will be – will accept a voluntary departure
16 in this situation where they are confronted with
17 deportation rather than challenging it. They know
18 they're in the country without authorization. So they,
19 quote, unquote, voluntarily depart. It's voluntary
20 within kind of a coercive situation. But then they
21 often – because they have strong roots here, they come
22 back to be with their families or come back to their
23 jobs and then they get caught for illegal reentry and
24 the process of the escalation of their criminality then
25 begins.

1 It's - I think it's really good of you to
2 kind of want to push this back to the very kind of
3 first stages in which this occurs. And I think what
4 you see if you look at it empirically is it's quite a
5 problematical situation in terms of how cases are
6 getting into the system, which of course makes it
7 extremely difficult for people sitting in your seats
8 and trying to determine how to handle issues of
9 sentence variability and sentence severity when cases
10 have gone to the level that you are seeing them. So I
11 am grateful to you for your interest. And I am
12 certainly grateful to you for your time, given the
13 situation especially. So thanks.

14 CHAIR SESSIONS: Appreciate that.

15 VICE CHAIR CARR: Mr. Lewis, what are
16 the newer added crimes that the casinos bring?

17 MR. LEWIS: To give you an example, we had
18 a situation where we had a group coming out of
19 California and had credit card listings and credit card
20 numbers and were actually duplicating numbers to the
21 cards. So that group has actually taken us back to the
22 Ukraine, Russia. So we are getting those type of
23 situations. We are lucky that our casino didn't lose
24 any money in that particular situation. Those kinds of
25 crimes are - we have the biker - Hell's Angels coming

1 through, negotiating having that spot as a place to
2 meet or spend their money. Spending the money is not
3 the problem. It's just what they engage in is what
4 causes us some issues and some safety problems there at
5 the casino.

6 CHAIR SESSIONS: Thank you very
7 much. Oh, my goodness, the telephone call has just
8 told me it's 11:30. So I appreciate very much your
9 testimony and also coming early. And so thank you.

10 (Whereupon, proceedings concluded at 11:30 a.m.)

11 -ooOoo-

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1 STATE OF ARIZONA)
) ss.

2 COUNTY OF MARICOPA)
3

4 BE IT KNOWN that the foregoing United States
5 Sentencing Commission Public Hearing was taken before
6 us, that we were then and there a Certified Reporter
7 #50253 and ^ #NUMBER in and for the State of Arizona,
8 and by virtue thereof authorized to administer an oath;
9 that the proceedings were taken down by us in shorthand
10 and thereafter transcribed under our direction, and
11 that the foregoing pages are a full, true and accurate
12 transcript of all proceedings had and adduced upon the
13 taking of said hearing, all done to the best of our
14 skill and ability.

15 WE FURTHER CERTIFY that we are not related to
16 nor employed by any of the parties thereto, and have no
17 interest in the outcome hereof.

18 DATED at Phoenix, Arizona, this 18th day of
19 February, 2010.
20
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MERILYN SANCHEZ, RPR

Federal Reporter

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25
JOANNE WILLIAMS, RPR

Certified Reporter #50253