



March 21, 2016

U.S. Sentencing Commission
One Columbus Circle N.E.
Suite 2-500
Washington, DC 20002-8002

Re: U.S. Sentencing Commission Proposed Amendments to the Sentencing Guidelines

Dear Sir or Madam,

The American Immigration Council (the Council) is a non-profit organization which for over 25 years has been dedicated to increasing public understanding of immigration law and policy and the role of immigration in American society. We appreciate this opportunity to provide comments regarding the Sentencing Commission's (USSC) proposed amendments to Guidelines §§2L1.1 – 2L1.2, "Smuggling, Transporting, or Harboring an Unlawful Alien" and "Unlawfully Entering or Remaining in the United States" respectively.

The Council has written extensively on how recently DHS has relied increasingly on tools such as expedited removal, and reinstatement of removal—known as "summary removal procedures"—to streamline the deportation process. These procedures create significant due process concerns and deprive people of both the right to appear before a judge and the right to apply for status in the United States. This is particularly important in our current environment with so many refugees fleeing extreme levels of violence in Central America.

We write to share our serious concerns about increasing the base-offense level for immigration-related crimes and the other proposed amendments to the Guidelines. As an initial matter, the Council is deeply troubled that at a time of national attention to criminal-justice reform and deincarceration, the USSC's proposed amendments would increase sentences for most offenders. Rather than implement the proposed changes, the Council urges the USSC and other implicated government agencies to reexamine—and reduce—the deleterious impacts of border-crossing prosecutions and sentences. In support of our recommendation below, we provide background on the reasons why people are entering the country unlawfully, the severely flawed process through which they often are removed, and discuss how refugees are processed at our Southern border.

- I. Prosecutions for illegal reentry are extremely costly and have not been shown to deter illegal immigration.

The Council strongly disagrees with policy choices that have led to mass incarceration and prosecution of border-crossers who do not fall under any of the Department of Justice's stated prosecutorial interests—namely national security and violent crime—but instead are vulnerable

individuals deserving of our country's utmost protections.¹ The USSC's April 2015 report, *Illegal Reentry Offenses*, and other data make clear that the number of people sentenced under this Guideline has increased significantly since 2007, constituting a major proportion of the overall federal district-court caseload (26% in fiscal year 2013) and is especially pronounced in southwest-border districts.² The current number of individuals prosecuted and sentenced for illegal reentry comes with staggering costs to the criminal justice system.³ This large number of prosecutions also diverts prosecutorial and court resources away from serious offenses and adds to prison overcrowding.⁴

The Department of Homeland Security's (DHS) Office of Inspector General issued a critical report last year which concluded that "Border Patrol is not fully and accurately measuring [the border-prosecution initiative's] effect on deterring aliens from entering and reentering the country illegally.... [C]urrent metrics limit its ability to fully analyze illegal re-entry trends over time."⁵ In addition to DHS's inability to determine whether or not migrants are deterred by Operation Streamline, an initiative by DHS to refer recent border crossers for prosecution under 8 U.S.C. § 1325 and 1326, it is nearly impossible to measure the multiple factors that inform a migrant's decision to cross into the U.S. As discussed below, the fear of being persecuted in your home country, desire to reunite with family, or economic need often outweighs any fear of prosecution.⁶ Significant taxpayer dollars are spent each year maintaining these prosecutions that have not been proven to deter border crossings or reduce recidivism.⁷

Therefore, we urge the USSC not to increase the base-offense level from 8 to 10 for persons with no prior illegal-reentry convictions, and to adjust other gradations down accordingly.

A. Many prior deportations occurred without due process.

We believe it is unjust for the USSC to allow for a possible upward departure for someone who was "previously deported (voluntarily or involuntarily) on multiple occasions not reflected in prior convictions under 8 U.S.C. §§ 1253, 1325(a), or 1326." The number of deportations does not directly translate into level of culpability. Since 1996, when Congress vastly expanded the executive branch's power to use summary removal procedures, legacy INS and DHS have

¹ U.S. Department of Justice, "Smart On Crime" (August 2013), <http://www.justice.gov/ag/smart-on-crime.pdf>; see generally ACLU, "Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing" (2015), https://www.aclu.org/sites/default/files/field_document/15_12_14_aclu_1325_1326_recommendations_final2.pdf.

² U.S. Sentencing Commission, *Illegal Reentry Offenses*, (April 2015), p. 25-26, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

³ ACLU, *Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing*, (December 2015), https://www.aclu.org/sites/default/files/field_document/15_12_14_aclu_1325_1326_recommendations_final2.pdf; TRAC, "Immigration Prosecutions for December 2015," (February 2016), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlydec15/fil/>.

⁴ Id.

⁵ DHS Office of Inspector General, *Streamline: Measuring Its Effect on Illegal Border Crossing*, (May 2015), p. 0, 2, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.

⁶ Ted Robbins, "Is Operation Streamline Worth Its Budget Being Tripled?" National Public Radio (September 2013), <http://www.npr.org/2013/09/05/219177459/is-operation-streamline-worth-its-budget-being-tripled>; see also Jeremy Slack et al., "In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border." *Journal on Migration and Human Security* (2015), <http://jmhs.cmsny.org/index.php/jmhs/article/view/46>.

⁷ ACLU, *Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing*, (December 2015), https://www.aclu.org/sites/default/files/field_document/15_12_14_aclu_1325_1326_recommendations_final2.pdf.

increasingly relied on tools such as expedited removal, and reinstatement of removal to streamline the deportation process. As a result, in 2013 more than 70% of all people DHS deported were subjected to summary removal procedures that bypass immigration courts entirely and lack fundamental due process protections.⁸

Many summary removals stem from apprehensions in border regions. In case after case, CBP officers or Border Patrol agents have failed to ask about or completely ignored a person's fear of persecution in his or her home country.⁹ Deportation decisions are made hastily—generally without sufficient time to adequately consider whether a person merits discretion, needs protection, or has an available form of relief.¹⁰ Although the executing officer can generally choose to opt out of such accelerated proceedings and place an immigrant into immigration court proceedings, the default for most officers is to use a summary process. This reality has led to uneven and unequal treatment among individuals with similar situations, raising concerns about the system's arbitrariness and even calling into question its constitutionality.¹¹

A significant number of the individuals who are deported under summary removal procedures despite having valid claims to asylum are women or young adults with domestic violence claims or individuals with sexual-orientation-based claims.¹² DHS's failure to properly screen these individuals can be fatal, sending individuals back to environments where they are targeted with extreme violence. When individuals who receive expedited removal orders are forced to return to the United States to seek safety—sometimes immediately, sometimes after enduring additional persecution abroad—they risk automatic removal anew and have limited opportunities for protection.¹³ Therefore, under the USSC's suggested new change, sentencing courts will not only have a limited picture of an individual's deportation history—basing their culpability determination solely on the number of deportations, not whether they have compelling equities in favor of leniency, such as if they have fled violence and sought asylum)—but judges would be considering deportations that occurred without due process when determining an individual's sentence for a conviction under 8 U.S.C. § 1326.

The USSC currently excludes voluntary returns from a possible upward departure based on immigration history. It is unclear, when reading the USSC's possible addition of "Departure Based on Multiple Prior Deportations not Reflected in Prior Convictions," whether voluntary returns would continue to be excluded. We would oppose this addition.

II. The Sentencing Guidelines Do Not Take into Account the Refugee Crisis On Our Southern Border.

The proposed changes to the alien smuggling guidelines and to the base offense level for illegal re-entry occur amidst significant changes to migration patterns at the U.S. Southern border. Previously, the overwhelming majority of individuals who crossed the Southern border came

⁸ American Immigration Council, "Removal Without Recourse: The Growth of Summary Deportations from the United States," (April 2014), <http://www.americanimmigrationcouncil.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states>.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Inadequate U.S. Customs and Border Protection Screening Practices Block Individuals Fleeing Persecution From Access to the Asylum Process, DHS Civil Rights and Civil Liberties Complaint, November 2014, available at, <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/Right%20to%20Asylum%20-%20CRCL%20Complaint%20Cover%20Letter%20-%2011.13.14%20FINAL%20PUBLIC.pdf>

¹³ Id.

from Mexico. However, since 2012, we have seen a large influx of unaccompanied minors and family units who have arrived in the U.S. fleeing violence in three Central American countries known collectively as the Northern Triangle: El Salvador, Guatemala, and Honduras. The rates of violence in these three countries are approaching unprecedented levels as the region grapples with growing instability.

Honduras has endured a steadily growing homicide rate. Since 2006, the total number of murders in Honduras more than doubled, increasing from 3,118 to 7,172 in 2012. In August 2015, El Salvador recorded 911 homicides, the deadliest month on record for Salvadorans since the end of their civil war in 1992.¹⁴ As a result of these increases, the murder rates in the Northern Triangle are currently among the highest in the world.¹⁵ Mothers and children fleeing these circumstances are desperate, as are the parents and other family members who are sending them. In their desperation, they turn to smuggling organizations to make the long journey to the United States. With this significant upturn in violence, now is not the time to increase penalties for smugglers that aid individuals with legitimate asylum claims.

Available data strongly suggests that the vast majority of recently apprehended individuals from Northern Triangle countries have bona fide claims for protection under U.S. law. U.S. Citizenship and Immigration Services (USCIS) data shows that nearly 88 percent of the mothers and children detained in the three family detention centers in Pennsylvania and Texas are proving to the government that they are likely to be found eligible for asylum and other forms of humanitarian relief by a U.S. Immigration Judge.¹⁶ Moreover, “[s]ince 2008, UNHCR has recorded a nearly fivefold increase in asylum-seekers arriving to the United States from the Northern Triangle region of El Salvador, Guatemala, and Honduras. Over the same period, we have seen a thirteen-fold increase in the number of requests for asylum from within Central America and Mexico—a staggering indicator of the surging violence shaking the region.”¹⁷

That is why the Council opposes both of the proposed options for increasing the base offense level of §2L1.1 “Smuggling, Transporting, or Harboring an Unlawful Alien.” Both options sweep too broadly by increasing guideline sentences for low-level “foot guides,” many of whom are minors. Neither of the two options for increasing the base offense level would advance the Department of Justice’s interest in deterring participation in organized smuggling rings and cartels. Both Option 1 and Option 2 are premised on the assumption that increasing guideline sentences would help deter participation in alien smuggling operations; however, there is no evidence indicating that increasing the base offense level for the lowest-level offenders would achieve this goal. In fact, as discussed the mothers and children fleeing these circumstances are desperate to leave their home countries, and in their desperation, they turn to smuggling organizations.

The Council also opposes the addition of an upward departure provision for offenses involving six or more minors. Smuggling operations rarely specialize in one type of clientele; a smuggler may have a group of minors one day and a group of adult men the next. The person charged

¹⁴ Three Myths about Central American Migration to the United States, Washington Office on Latin America (Jun. 17, 2014), available at http://www.wola.org/commentary/3_myths_about_central_american_migration_to_the_us.

¹⁵ Id.

¹⁶ U.S. Citizenship and Immigration Services, Asylum Division (2015), *Family Facilities Reasonable Fear Statistics for FY2015 2nd Quarter*, available at <https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-family-facilities-FY2015Q2.pdf>.

¹⁷ United Nation’s High Commission for Refugees, “Women on the Run,” (October 2015), <http://www.unhcr.org/5630f24c6.html>.

with actually bringing the migrants over the border may have little control over his or her clients. We believe that an upward departure for having six minors is arbitrary and would not reliably increase sentences for trafficking organizations but would instead increase sentences for low-level smuggling operatives.

For these reasons, the USSC should reject the proposed amendments to Guidelines §§2L1.1 – 2L1.2, “Smuggling, Transporting, or Harboring an Unlawful Alien)” and “Unlawfully Entering or Remaining in the United States” respectively.

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Thank you for the opportunity to comment on the Department’s regulatory review process and for your attention to these issues. Should you have any questions regarding our comments, please do not hesitate to contact me at 202-507-7522 or bwerlin@immcouncil.org.

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