UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

Phoenix, Arizona

January 20, 2010

9:11 a.m.

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COMMISSIONERS PRESENT:

Chair: Chief Judge William K. Sessions III

Vice Chairs: William B. Carr, Jr.

Judge Ruben Castillo

Commissioners: Dabney Friedrich

Chief Judge Ricardo H. Hinojosa

Beryl A. Howell

Jonathan J. Wroblewski

STAFF PRESENT:

Judith W. Sheon, Staff Director

Brent Newton, Deputy Staff Director

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

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

So as a result, you have essentially three branches of government concerned in the vital ways of the sentencing policy and how it should reflect their own perspective. And the Sentencing Commission is right in the middle of those competing interests. What we have attempted to do is circumvent the globe, at least the North American globe, and to hear from both — or among various groups, practitioners in
particular, prosecutors and defense lawyers and
probation officers, but representatives of the various
branches of government to make sure that we understand
all of those interests to help us respond to future
changes and demands upon the system.

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

This is also an extraordinary time to be on the Commission. And I have had the privilege along with Vice Chair Castillo of serving on the Commission for ten years. This is clearly one of the most exciting times that I have experienced being a member of the Commission. My colleagues and I are energized by the commitment that everyone appears to be making in the criminal justice community to review sentencing policy. And we are ready to take a very active leadership role in shaping policy that meets the purposes of sentencing set forth in the Sentencing Reform Act.
A system that remains fair and certain protects and promotes public safety and ensures equal justice for everyone involved in the process. Just last week, for example, the Commission voted to publish for public comment a comprehensive package of proposals on a range of topics, including alternatives to incarceration, the relevance of certain offender characteristics in the sentencing process, calculation of criminal history, and other important topics that reflect in large measure the comments we have heard from the criminal justice community at our regional hearings.

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

I must also note that the Commission continues to use all of its resources to end the
current disparity between crack and powder cocaine penalties. For over a decade, the Commission has called upon policymakers to act in this area. The Commission is pleased that its data and reports are informing the debate. And we stand ready to act the moment Congress does act on this very critical issue. We hope that Congress acts quickly in these areas, as the longer the disparity continues, the more fairness and sense of justice in the system is questioned.

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

Judge Ruben Castillo has served as vice chair of the Commission since 1999. He has served as a U.S. district court judge in the Northern District of Illinois from 1994, as I recall. His experience includes being a partner in a Chicago law firm, regional counsel for the Mexican American Legal Defense and Education Fund, also an assistant U.S. attorney in
the Northern District of Illinois. He received his
degree from Loyola and Northwestern University School
of Law. He actually is a professor, adjunct professor
at Northwestern at this time.

William Carr has served as vice chair of
the Commission since December of 2008. He has been an
assistant U.S. attorney in the Eastern District of
He in fact is retired. He has served as an adjunct
professor at Widener Law School in Wilmington, Delaware
and was a litigation associate in private practice. He
attended Swarthmore, graduated from Swarthmore,
graduated from Swarthmore and also has a degree from
Cornell Law School.

Judge Ricardo Hinojosa served as chair of
the Commission, subsequently as acting chair from 2004
to 2009. This month he has become a chief judge of the
U.S. District Court for the Southern District of Texas,
one of the largest districts in the United States,
having served on that court since 1983, previously
served as an adjunct professor at the University of
Texas Law School where he taught a course on
sentencing. He was also an attorney and partner in a
private firm in McAllen, Texas. He graduated from
University of Texas and Harvard Law School.
Beryl Howell has served on the Commission since 2004. She served as executive managing director and general counsel for an international consulting and technical services firm, former general counsel of the Senate Committee on the Judiciary and also as assistant U.S. attorney, deputy chief of the narcotics section of the U.S. Attorney's Office in the Eastern District of New York. She graduated from Bryn Mawr and also Columbia Law School.

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

And Jonathan Wroblewski was recently designated ex-officio member of the U.S. Sentencing Commission representing the Attorney General. He serves as director of the Office of Policy and Legislation in the Criminal Division of the Department of Justice. Mr. Wroblewski served as trial attorney
with the Civil Rights Division, deputy general counsel

and director of legislative and public affairs for the
Commission. Mr. Wroblewski served — or graduated from
Duke and also has a law degree from Stanford.

Now, welcome to the first panel. Let me
introduce the two panelists. First, John T. Morton is
the assistant secretary of Homeland Security for the
U.S. Immigration and Customs Enforcement, ICE.

Mr. Morton began his federal service as a trial
attorney in the honors program in 1994, has since held
a variety of positions with the Department of Justice,
including as a special assistant to the general counsel
and in the former Immigration and Naturalization
Service and as counsel to the deputy attorney general.

He is a graduate of the University of Virginia School
of Law.

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

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

MR. MORTON: Thank you very much.

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

Let me also say by way of introduction, I very much appreciate the role of the Commission and I completely agree with the Chairman's comments about sentencing. It's a balance of competing interests and quite legitimate competing interests. And I take the role of the Commission quite seriously having spent much of my life living by its words in court and trying to come up with the right result in terms of sentences. I appreciate the work and thought that goes into it and
it's not an easy calculation. So let me start from
that point.

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

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

And we have a particular focus on border
crime, namely the smuggling of people, drugs,
contraband, money and firearms, but we also spend a
tremendous amount of time investigating international child exploitation, intellectual property violations and export control offenses. In my written remarks I explained in some detail some of ICE's recent achievements and successes in carrying out this enforcement mission.

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

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

The guideline does provide for two higher
base levels but in very, very narrow context, namely aiding or assisting in the entry of aliens [inaudible] inadmissible on national security grounds or aiding or assisting the entry of aggravated felons. I would suggest to you that the alien smuggling organizations are — that we encounter are far more complex than the guidelines could have ever anticipated and actually contemplate now. Alien smuggling today is international in scope. It is organized. It's highly lucrative. And it is dangerous to all involved.

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

So to step back for a second, we are facing dedicated international organized criminal syndicates trying to bring people into the United States on a large scale for enormous sums of money
every day. And from our perspective, the guidelines
don't capture that facet of alien smuggling well. As a
result of this structure, it's become increasingly
difficult for us to apply base-level enhancements based
on the number of aliens smuggled. The relatively low
guidelines create little incentive for major defendants
even when charged to cooperate with law enforcement to
further the investigation of a criminal organization.

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

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

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

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

In many instances we are dealing with cases where we have — it's not just 150 more people. It's what do you do with a case which involves the smuggling of 900 or a thousand aliens or document fraud of 2 or 3,000 instances? What is the appropriate
calculus when the guideline has three levels and stops
at a hundred and then just says that an upward
departure may be appropriate?

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

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

Finally, and in the interest of time, let
me recommend as well a change to §2S1.1. And
there is a sort of similar concern for 2S1.3, which
deals with money laundering and bulk cash smuggling.
Again, the basic theme being that in practice we
encounter a great number of defendants for whom it's very clear that serious money laundering or serious bulk cash smuggling is occurring. We can't always bring forward evidence that relates to the specific offense characteristics that would otherwise raise the penalty.

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

Particularly when we look at the range of crime across the border, the common denominator in most of them is a significant finance of cash that goes with it, that money laundering is present in almost all of the major organized criminal activities that we are investigating and trying to prosecute. So it's very important for us to spend an enormous amount of time investigating money laundering, investigating bulk cash smuggling. And frankly, it's one of the major
challenges that exists now that confronts federal law enforcement along the border.

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

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

And it is something that Congress clearly has intended to encourage. It's something that we
think is quite important from the perspective of the federal government. And we don't think that there is anything inappropriate in recognizing that encouragement in the form of a reduced sentence for those defendants who are immigrants and would agree to a stipulated order of removal. And I don't restrict that in any way to immigration cases.

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

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

CHAIR SESSIONS: Thank you,

Mr. Morton.

MR. BURKE: Chairman Sessions, vice
chairs, distinguished members of the Commission, my
Justice Department colleague on the far right, my
former judiciary committee colleague Commissioner
Howell, it's good to see you. I thank all the members
for being here. I just want to report that the
torrential rain last night was an aberration. Today's
weather is a little more indicative of what we expect
here.

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

As my written testimony points out in
extensive detail, the District of Arizona is one of the
most unique, dynamic and busiest districts in the
country. We have 6.5 million people who reside in our
district. Seventy percent of our land in Arizona is
federally owned or controlled. Forty percent of that
land is held by 21 federally recognized Indian tribes. We have the largest Native American population in the country. The Navajo Nation in the northeastern part of our state is roughly the size of West Virginia. The Tohono O'odham Nation straddles 75 miles of the United States, Mexico border, in fact transcends it. The T.O. Nation is also in Mexico. The entire land is the size of Connecticut. We have over 15 military facilities, including the largest F16-trained base in the country. And we have diverse industries so, we see it all in this district.

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

Over the past five years, our district has ranked highly in the number of non-immigration prosecutions as well as immigration prosecutions. The
case load in our district is as diverse as the many communities we serve. We handle cases ranging from firearms trafficking, as Assistant Secretary Morton referenced, to fraud relating to tribal gaming, from an incredible increase in bank robberies in the Phoenix area, to theft of artifacts, protected plants, wildlife and cultural resources.

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

We filed nearly 3,200 felony immigration cases in fiscal year 2009 alone and over 22,000 misdemeanor cases. Of the 3,200 felony immigration cases, 2,272 were reentry cases under Title 8, § 1326. This represents a substantial increase over FY 2008, largely as a result of the increase in resources we did receive from the Justice Department. That said, we prosecuted but a small fraction of the number of people actually arrested by the Border Patrol in FY 2008 and 2009.
As I know you have heard from the department in the past, we continue to bear a difficult burden in obtaining judicially noticeable documents to satisfy our burden of proving that applicability of the guideline enhancements in §2L1.2 as required by the Supreme Court's decisions in Taylor and Shepard. And as our case load continues to grow in this area, so does our need to gather those records, litigate the immigration guideline issues in district court and then litigate them again on appeal.

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

Regarding Booker in Arizona, our experience in the wake of that case has been very largely positive. Our fast-track plea agreements generally provide for downward departures in the context of binding plea agreements under Rule 11(c)(1)(C). Variance in departures have occurred outside the ranges provided in our fast-track plea agreements, but such instances have been rare and we do
not view them as significant enough to warrant specific attention at this time.

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

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

The final aspect of our district that I would like to point out in my oral comments is the large number of Class A misdemeanors and petty offenses
that our office prosecutes and the statistic I referenced earlier. Our Tucson office in 2009 prosecuted over 1,200 Class A misdemeanors and over 16,000 petty offenses. Of course the sentencing guidelines apply to the Class A [mis]demeanors but do not apply to the petty offenses.

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

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

CHAIR SESSIONS: Thank you, Mr. Burke. And I appreciate the fact that you brought better weather. So, Mr. Morton, do you have until
10:00 or 10:15? I promise to get you out by 10:15.

That would be —

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

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

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

And I have read Former Deputy Attorney General Ogden's latest authorization for certain early disposition programs. I see that there have been a number of changes, including — I see that the Southern District of Texas and the Western District of Texas no
longer have early disposition programs for transportation or harboring of alien cases. I also see that your district I think has more fast-track programs than any other. I think I counted seven or eight.

And I was particularly surprised by a fast-track program for alien baby smuggling cases, which I think your district is the only one in the country that has that, as well as bringing in, which I understand is a three-year mandatory minimum penalty.

So I was wondering, aside from the basic directive in Deputy Attorney General Ogden's memorandum which makes clear that districts have to show that they can prosecute a substantially larger number of cases by having these programs, can you shed any additional light on the authorization process and how it is that there is these distinctions across the country?

MR. BURKE: Commissioner, the fast-track authority we currently have in the particular provisions which you referenced have been in place for some time in our district. And actually we recently received a reauthorization from the deputy attorney general. Those from our application to the department from our perspective were driven predominantly by the numbers in our district. So I can speak to our application in the practice in our district. I can't
speak to the more general issue as to, as you
indicated, other districts along the southwest border
as to how they receive approval or not.

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

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

COMMISSIONER FRIEDRICH: Is it not unusual
to have a fast-track program for offenses that have min
criminal penalties? Is that — just looking at the
list, it seems that you are unique in that respect.

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

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

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

CHAIR SESSIONS: Okay.

Commissioner Howell.

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

I think — and at least in your written testimony you talked about the child pornography area
and a child pornography case where there was a significant variance, which is consistent also with today's Wall Street Journal article headline, "Judges trim jail time for child porn." And so variances in the child porn arenas and downward departures are an issue in many districts, not just the District of Arizona.

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

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

What — you know, many of these variances are happening with defendants who are looking at child pornography images or downloading child pornography images and judges are saying that there is no — finding no actual physical contact with children and finding that the penalties therefore warrant a
variance. So what recommendations do you have for what
the Commission can do in this area to address the
variances that not just your district is seeing in the
child pornography area but across the country?

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

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

I can't for myself as a official in the
Justice Department in this district provide an overall solution to that beyond what we grapple with in the Ninth Circuit. But I assume – my guess – considering your background and my background in this particular area and the attention it's gathering, I assume in the very near future the cases of Autery and what's happened in this district and what you are hearing from other districts will garner attention from Congress.

CHAIR SESSIONS: Mr. Wroblewski.

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

A couple of questions. We have heard from judges as we have gone across the country about concerns about aliens actually serving more jail time than non-aliens who were sentenced to a similar sentence. John, could you describe what actually happens when an alien finishes his Bureau of Prisons
sentence, actually what — the process, how long it takes? And if we took up your suggestion about a one-level reduction for stipulated order of removal, how would that process change?

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

And that's particularly true in the federal system where we have quite good coverage and increasingly true in the state system, so that the problem doesn't arise at all. It's just a question of making sure that the person has travel documents and is removed from the country. It doesn't always work well. The size of the criminal justice system is such the number of criminal defendants going through the criminal justice system each year means that a large number of criminal offenders do come to our civil
custody without a final order of removal.

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

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

And that's why — that's a motivating
factor behind our recommendation for a one-level
reduction, is we think as a matter of public policy, we — the system should encourage final order of — stipulated final orders of removal as much as it possibly can so that people don't spend an extra three or four months in civil immigration detention before they're ultimately removed from the country based on their criminal offense.

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

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

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

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

I won't say – I think in practice that is almost always the case. I haven't seen many instances at all of people rushing to a snap judgment on stipulated removal to save themselves two or three months worth of detention time. But I recognize the
tension in the system. The beauty of the guideline approach would be that it would require as part of a criminal sentencing process that has the constitutional right to representation that doesn't exist in the immigration context.

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

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

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

COMMISSIONER HINOJOSA: I don't mean in the federal criminal system. I mean as far as — many
of these defendants get placed in prisons that are close to centers where they are going to be eventually put through the removal or deportation process. And they are limited as to where they are placed because of that. But of those that get put into the administrative process, how many automatically stipulate to the removal?

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

COMMISSIONER HINOJOSA: But it is true that that delay is going to occur regardless of whether they stipulate to it or not because depending on what country they are from and how close they are to the Mexican border if it's Mexico that they are citizens of.
MR. MORTON: It's true that in some instances there will continue to be some delay. It's always much less delay if you've stipulated to your order because all that's left is the arrangement of the travel documents and removal. But you are correct in suggesting that it's not—it doesn't remove all the way. There are still the mechanics of removal. But if you are engaged in a removal proceeding even if you ultimately decide that you're going to contest to it, you have to have a hearing. You have to come before the immigration judge. It takes several months in the entire time you are in our detention, at taxpayer expense.

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

MR. MORTON: Yeah.

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

MR. MORTON: That would be a large number of cases particularly for Dennis. The basic point being that I can envision some criminal offenses for
which a reduction of this sort would be inappropriate. I don't — but generally speaking I would think that an alien —

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

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

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

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

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

MR. BURKE: There was a policy in the Tucson office that was from I think about 2002 to 2008
where the office was declining cases that were brought to us by agents that — where the amount in question was below 500 pounds of marijuana.

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

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

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

MR. BURKE: I will do so.

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

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

MR. MORTON: Your first question, Mr. Chairman, I am proposing both. And I think you can
tackle the alien smuggling guideline either way. In my prior testimony to the Commission, I did recommend exactly that, that we should increase the — provide for an additional level in the table, both in 2L1.1(a) and 2.1, for those cases that we now regularly see that are substantially in excess of a hundred. That's one way to do that.

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

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

But to your basic question, I have no
objection — in fact we would advocate one way of
dealing with the issue through adding an additional
structured layer in the table beyond a hundred. With
regard to your second question, I think the world would
be greatly improved for several reasons. First, I
regularly hear — I heard it as a prosecutor and now we
hear it all the time as the immigration enforcement arm
from criminal defendants who say, “I have done my time.
I want to go home.” And I am having to spend another
four or five months in what from the defendant's
perspective is a jail.

That it's civil in nature as opposed to
criminal in nature, obviously that subtlety is lost
upon them, and rightly so. Often we detain people in
these circumstances in a jail. We use excess jail
capacity to carry out our detention function. And from
our perspective, the law already recognizes this issue,
already encourages in the form of stipulated judicial
orders of removals, finality at the end of the
sentencing process so that criminal defendants for whom
there is no immigration relief don't have to spend any
additional time in immigration detention. And then the
government in turn doesn't have to spend time on
detention space, trial attorneys, immigration judges
for those cases in which there is no relief available.
The provision in Title 8 is used but is not used uniformly. Practice varies tremendously from district to district. I think—and that's true both with regard to the district courts and the U.S. Attorney's Office. And from our perspective, the best way to encourage what I think most people when they look at it on the merits makes a lot of sense both for the government and for defendants—the greatest way to encourage more uniformity in the stipulated orders is to provide some benefit to the defendants who are willing to engage in it where then the defendant receives a reduced sentence.

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

This is—if a particular defendant feels that notwithstanding their criminal conviction they have an avenue of relief, more power to them. Come to immigration custody. Go through immigration proceedings and seek relief. For most individuals who
have a felony conviction, the law is such that that's quite unlikely, particularly if you are also here unlawfully. The only exception to that is lawful permanent residence. If you have a serious criminal conviction, there are some avenues of relief generally for those individuals.

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

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

MR. MORTON: Thank you.

MR. BURKE: Thank you for the opportunity.

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

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

CHAIR SESSIONS: Good morning and
welcome. This is one of my favorite parts of the
hearings, is to listen to judges speak about their own
experiences, their sense of how the guidelines are
currently working and also their thoughts about the
guideline system should that change. So let me
introduce — I have known Martha Vazquez for many
years.

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

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

JUDGE HUFF: It's heart breaking.

CHAIR SESSIONS: A city of
mourning.

JUDGE HUFF: That's what you get when you
are a Charger fan. We are used to it.

CHAIR SESSIONS: She served as

chief judge of the Southern District of California from

1998 until 2005. She previously worked in private

practice. She received her B.A. from Calvin College

and J.D. degree from the University of Michigan. So I

welcome both of you. Have you decided among yourselves

who wishes to go first or — I guess Judge Vazquez.

Thank you.

JUDGE VAZQUEZ: First of all, I learned

this morning that this is your — the end of your road

trip. And I am — I have to tell you that I am very

impressed that you have taken so much time to listen to

so many voices about such an important topic. I want

to thank you very much for letting me be a part of

that.

For the most — for the past 25 years, our

federal system has sentenced its people under mandatory

scheme. We must look at what we have done. We must

look back before we go forward and ask ourselves

whether we have acted fairly. We are Americans and we

cherish our freedom. I am a first-generation American.

And I still remember my father walking around our home

trying to recite and remember, memorize the preamble to

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

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

Looking back after almost 17 years that I have been sentencing defendants, I can say this: The goal to eliminate sentencing disparity is a laudable one and one that is definitely worth pursuing. But Members of the Commission, we have incarcerated our people for too long. The numbers on the grid are too
harsh, especially in the context of drug cases. Today we can achieve this noble goal with the discretion the Supreme Court has finally given us without the heavy price we have paid as a society.

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

It is difficult to acknowledge a mistake when our mistake has so profoundly impacted people's lives and curtailed their liberty, but it is precisely because people's lives are involved that we must fix this now. The goal of uniformity and fairness in sentence — sentencing was a laudable one, but for 25 years we have used a process that has resulted in as Justice Kennedy described in 2007 a system wherein our
resources are being misspent. Our punishments are too severe. And our sentences are too long.

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

Twenty-four percent — I'm sorry.

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

A great many of our defendants in Indian
Country do not have telephones. They do not have electricity. They do not have running water. They have no transportation and no way to get to communities in which very vital services are necessary such as drug counseling, sex offender counseling and mental health services. Despite our best efforts, we have not been able to get BOP to place a halfway house in Indian Country.

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

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

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

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

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

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

We talk to students about mandatory
minimum laws, about firearm enhancements, about the
sentencing guidelines, and very importantly, about our
conspiracy laws, so that they know how easily a person
can get in trouble for the acts of others, the acts of
their friends. We take the guideline charge and we
show them the type — how the type and the amount of
drug controls the sentences under our system. Kids,
even the toughest kids, are stunned.

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

Now, much has been said in your hearings
that you have had all over the country about the
disparity that has been created by us, us judges, in
sentencing outside of the guidelines, but your
statistics seem to indicate that those disparities are
quite modest. And in any event, those disparities do
not appear to be unwarranted. It is the unwarranted
disparities that one is concerned about. The judges
sentencing outside of the guidelines consider the
guidelines as one factor. They are persuaded that a
guideline sentence is not appropriate based upon factors. And they are required to explain their
decision based upon these factors.

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

When a drug case is referred to the state for prosecution instead of the federal government because of some local police officer or even a federal agent made a deal with the defendant, as we all know the difference can be a mandatory minimum sentence or straight probation. Then there are cases in which the government dismisses an indictment and brings in information and a cooperating defendant pleads to a lesser non-mandatory sentence. Sometimes these cases are filed with the judge who does not have any of the other related cases and then it's assigned to a probation officer who doesn't have any other co-defendants. And therefore the judge that gets the case gets a very limited view of what that defendant
The judge may go along with the recommendation that both lawyers provide that judge when in fact the guidelines may have been totally manipulated in that case by both counsel in that the uncharged conduct was never included in the presentence report. Therefore the true extent of that defendant's actions and role was never disclosed to the judge or reported to anyone that keeps track of these sentencing statistics.

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

In other cases 5K motions seem to be filed freely, in some cases even when the defendant's cooperation does not lead to an indictment. We have all seen pleas where parties stipulate to concessions
for which there is no factual basis in an effort to get out from under the harshness of the guidelines. This disparity does not seem to be the subject of concern, yet it results in negotiated dispositions where too often the judge is given only whatever information the parties believe that the judge needs in order to accept the agreement. It often puts the court in a very difficult position.

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

And yes, I know that you have heard from a number of judges that it's difficult and time consuming to do and to impose the Booker sentence. And I would agree with that. But it is our job to do this. In New Mexico we have changed the forms of our presentence report because of Booker. And we have done it to assist our judges that have very high case loads so that they if they choose to can impose a Booker
sentence without having to take recesses and try to do
what they can in order to consider all the 3553
factors.

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

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

I want to talk just a very little bit
about our incarcerated population. Twenty-five years
later, what about those people that have been in
custody all this time, especially those people that got
the high end of the sentencing guidelines or those
people that were sentenced under mandatory minimums?

Is it a coincidence that we are seeing now the
emergence of these so-called reentry programs? I think
not.

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

One size fits all conditions of supervised
release just don't seem to fit in a situation like
that. Individuals that are coming out of custody after
being locked up that many years are not our normal
supervised release defendants. What we have taken away
from them is not just their freedom. These individuals
that we are seeing coming out of prison after that long
have lost so much more than just their freedom. Many
of them have lost their health. Many of them have no
more families to go back to. At one point they had children but they're gone.

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

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

Our defendants come out. They don't have any references. They don't have a job. They don't have an ID. They don't have any money. So all communities that are receiving these defendants have to
have a strong program in an effort to be able to
protect the community, supervise these defendants and
be successful or else all we are doing is returning
them back to the Bureau of Prisons.

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

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

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

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

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

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

Booker and the cases that followed were
liberating for me and many of our colleagues, but we
must never forget the many fathers and sons and
brothers who are losing their freedom and their health
because, as you know, Bureau of Prisons' budget has
been slashed and people are not being well taken care
of. So we have many of our people in custody losing
their health, their youth, their families right now
while we figure out where we go from here. We must
never forget the high price we have paid to get this right.

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

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

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

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

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

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

To put this in perspective, let's compare the courts in California as a baseline. Significantly our court had 380 criminal felony cases per judge.
comparison to the other districts in California, the Northern District of California had 42 per judge. The Central District had 63 per judge. And the Eastern District had 140 per judge. In other words, a judge in my district, in the Southern District of California, handled more criminal felony cases in 2008 than all the other federal district courts combined.

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

If anything, the Commission may wish to persuade a legislative change to authorize fast-track for everyone because it actually does work. It promotes a speedy disposition of criminal cases. We currently have four programs, a program for criminal aliens, a program for alien smuggling, a program for drug cases and a program for misuse of passports. Those have all been approved and authorized. But its interesting to note that the court did not begin or
start these fast-track programs. It came from the
prosecution side. And ever since 2003, these programs
have been authorized by the Attorney General.

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

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

And then finally, so I'll leave time for
some questioning, wherever you have high calculations such as loss calculations for fraud cases, then that can sometimes skew the guidelines. So we have all—mandatory minimums is a separate issue, but that's a congressional issue. As far as predictability in sentencing, I think that's a good thing for our system. Because what happened before? Before the guidelines you could have one judge do probation and you could have another judge do the statutory maximum.

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

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

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

JUDGE VAZQUEZ: It requires a pretty thorough interview of the defendant. And when and if they receive a brief from the parties, then they supplement the presentence report. The difference
between our presentence report before *Booker* and after *Booker* is that the body of the presentence report is much more informative so that it addresses the 3553 factors. That's the difference. But it does not require that the government file a brief if the government or the defense attorney files a brief and then supplements the information that it has.

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

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

Probation officers are trained to gather the 3553 information, not to wait until something is filed because as you know, that is primarily what — the information that we get. And not all of our lawyers are fabulous. So we are not always going to
get the information that we need in order to do our
job.

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

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

Given our case load and the number of
sentencings that we do in a day, that's inconvenient.
It will be done if it has to be done. But that's how
we are training probation officers in order to get the
information in the first instance and include it in the
presentence report.

VICE CHAIR CARR: Thank you.

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

This is a departure ground that's not
expressly provided for in the guidelines manual. Do
you think that's something we should consider
addressing in the guidelines manual as an explicit
basis for downward departure? And if so, should we
also provide some boundaries as to — if you gave a
two-level downward departure, do you think that we
should also provide some boundaries as to how much of a
downward departure should be granted if a judge
determines that there are these collateral
consequences?
JUDGE VAZQUEZ: I don't remember the particular case you are talking about, but I do believe that — I do believe that we need to consider those types of consequences. I mean, the hard part about putting a number on it is that — and that's the hard thing about sentencing, is not everyone is in the same position. Not all the consequences are as harsh for an individual.

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

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

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

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

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

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

COMMISSIONER HOWELL: That's helpful.

Judge Huff, one of the things that you talked about
was — I thought was quite interesting. And we have
heard this from other people who have talked to us
across the country, which is asking the Commission to
clarify some of the mitigating role adjustment
provisions. We are also going to hear later, either
today or tomorrow, from a federal public defender who
gave us some concrete examples of — with
recommendations of ways to clarify it.

And one of his recommendations was simply
to remove commentary in §3B1.2 that invites
courts to deny mitigating role adjustments when the
only evidence available on the defendant's role comes
from the defendant himself. Do you think that that's a
recommendation that merits further scrutiny by us?
JUDGE HUFF: I think it would merit scrutiny along with all other factors. For example, if a defendant gets safety valve, so somebody has already said that that person is credible and believable, then to say if the only evidence of his role comes from himself and yet the government has already said but we believe him and so he gets safety valve, that does seem to be inconsistent. So I think it would be helpful to study.

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

COMMISSIONER HOWELL: Thank you.

COMMISSIONER FRIEDRICH: Judge Huff, if I could follow up with you on the role adjustment, the application note that discusses multiple participants and says if a defendant is the only defendant, it does not get a role adjustment unless there are other participants involved in the overall offense, is there something we could do to tweak that that would address
the issue you are concerned about, the particular
application note? And if so, what would you suggest?

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

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

    JUDGE VAZQUEZ: I don't, Judge Sessions,
no.

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

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

We have a case just filed in our district where two people died in a boat. We hadn't seen very many boat smuggling cases in our district. Typically they come through the border or — so the fence was then put up. That kind of stopped that. But now we
are seeing more of the dangerous smuggling through the water. So at least for our district, I don't think that the adjustment for number of aliens would be the factor.

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

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

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

CHAIR SESSIONS: Can I just ask you both again about the minimal minor role adjustment? I guess according to your practice, Judge Huff, the prosecutors recommend a two-level reduction for couriers. Is that uniform? Is there a disparity in
terms of how the role adjustment is administered in your court? And if so, what's the kind of guidance that you think judges would need so that there is more uniformity?

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

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

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

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

And it strikes me that that's a very different — and the possibility of a departure doesn't seem to me to address that problem. You have the fundamental problem of they're going to be deported to a place they don't know. And you can reduce the
sentence or raise the sentence. It doesn't matter. You're not solving the problem. And so I'm curious what you think about that.

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

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

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

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

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

But there is prosecution discretion for a very good reason. All I'm saying is that when we talk about the disparity, we are talking about unwarranted
disparity. And we all — all of us in the criminal justice system have a role to play. And when we make a distinction for the person in front of us, we need to explain it so that we are subject to scrutiny, so that the explanation of the sentence is out there for the public, for Congress, for everyone to know.

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

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

Now, I didn't mean to give Judge Huff the impression that I disagree with the fact that we have
sentencing guidelines now with the ability to consider 3553(a) factors. I just told you it's extraordinary. I mean, I cannot even believe that I am here today being able to sentence defendants individually. I, quite frankly, thought I would die before this day came.

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

COMMISSIONER WROBLEWSKI: How about in the way — we have this guideline called 5K1.1 and it says substantial assistance. Of course there are a myriad of different ways that comes before a prosecutor. You mentioned the case where a state prosecutor comes in and says this defendant has been extremely helpful in a homicide case. In one district maybe that's okay. That's enough, because they say well, it can be a state or a federal prosecution. If there is substantial assistance in either one, that's okay for us. In another district, maybe New Mexico, they say no. It's got to be a federal investigation. Should there be a uniform policy on that question?
JUDGE VAZQUEZ: I believe so. I believe there should be. You know, judges, we are the weakest link there. We had no power. If the government didn't file it, too bad. This guy made the conviction according to the prosecutor, stuck his neck out, made himself extremely vulnerable and there wasn't anything that could be done. And yet there are some other prosecutors that feel that even if there isn't an indictment — and this is not a bad thing. I'm not being critical here.

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

And what I try to do is I'll bring in the officer, the agent, so that I can hear firsthand not just a summary. I can hear firsthand from the agent what did this person do? Why was it so helpful? And who were these people? And that way I don't feel like I'm just getting information that I can't really assess, because remember, that was the only time we ever had discretion is under 5K. It was rather
COMMISSIONER WROBLEWSKI: Judge, do you have any thoughts about the cultural assimilation?

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

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

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

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

JUDGE HUFF: In a hundred percent of cases, no, of course not. But —

COMMISSIONER WROBLEWSKI: But in most cases?

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

JUDGE VAZQUEZ: You are right about that. Those cases, they're difficult because what we are doing doesn't answer the problem. It gives them less time in custody, but the fact is that the penalty is extraordinarily harsh because that person should be
punished for their conduct, whatever that conduct was originally. But, you know, I wish Congress would look at that issue and figure out how else to address it because there was a kid—

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

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

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

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

You know, these cases just — we see these cases all the time. You know, what do you do with these cases? They are just — they are tough. And we
just send them back to prison. There's got to be a better solution. Are these our terrorists that we are so concerned about with national security? They have clearly broken the law, but we are spending a lot of money on these folks and there's got to be a better solution for these guys.

CHAIR SESSIONS: Judge Hinojosa.

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

And I guess my question is have you not found a present ground for departure under either the mandatory system or the advisory system within the present manual, whether it's family ties, and this is an exceptional circumstance because it is totally out of the ordinary with regards to the normal person who
comes back illegally? Wouldn't you find something in
the present manual that would allow a departure?

JUDGE HUFF: Certainly. There is — under
advisory guidelines you can do whatever you think is —

COMMISSIONER HINOJOSA: And under the
mandatory system, we had those same cases and —

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

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

JUDGE HUFF: Sure.

JUDGE VAZQUEZ: Judge Hinojosa, as you
know, the Ninth Circuit was a little bit more
understanding than the Tenth. The Littman [phonetic] case,
after all, did come out of the Ninth Circuit. In the Tenth
Circuit departures weren't really as readily available,
shall we say? I did try them, as you know, but I did
get reversed a few times. So now variances are a
little bit easier in order to address the issues.
But you coming from a border state do appreciate how many of these cases we have. So we are talking about writing lots of opinions. Now it's a lot easier. Now you can address these types of issues with variances. Our chief probation officer is going to speak to you in a little bit that it does take gathering a lot of this information through the interview process. But it is much easier to address these issues now, yes.

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

I also have to say that maybe it's because I had that system that I never felt that I didn't have discretion under the mandatory system. I had to make all the fact finding. It required a lot of work to say I don't believe this confidential source that says that there were all these other loads and that it was this amount even though it's been spoon fed to me by some
form from the prosecutor that was handed over to the
probation officer.

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

And maybe it just came from having had
those five years of that other system that I never felt
that constraint. And maybe it's differences in
circuits as to how they treated the discretion that we
had. But, you know, all those factors we had to decide
ourselves and whether we believed them or not and
putting people to the test. And it is probably — as
we all know, it's the most difficult thing we do, but
it's difficult under all three systems that we have
had. As far as I am concerned, it's never been harder
or easier under any one of those systems.
JUDGE VAZQUEZ: I agree. And I think that
the habit that we have all gotten into of considering
all of these factors in considering the guidelines is a
good one. I don't think — no matter what happens, we
never go back to the system that you had because we are
used to considering. Sentencing is for us — after all
these years is a process of considering all of these
factors in every case.

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

COMMISSIONER FRIEDRICH: Judge Huff, you
indicated that you are a fan of the guidelines and
consistency that they provide. I'm wondering whether
post-Booker, now that district court judges are
directed to consider the 3553(a) factors, I'm wondering
whether you perceive in your own district differences
in the way in which individual judges consider the
various factors under 3553(a) and specifically the
specific offender characteristics that many of which
have been typically being not ordinarily relevant under
the guidelines — I'm wondering whether you see in your
own court a difference in, for example, how one judge
perceives the age of the defendant or the drug
addiction of a defendant.
And secondly, this is an issue that the Commission is considering and has published notice for comment on whether the Commission should give additional guidance, additional consideration to specific offender characteristics in the guideline manual. So the second question is whether you think that would be a good thing and whether it would create more consistency in the way in which judges consider those factors.

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

I am not seeing – because you still have to start out with the same framework, a baseline, what is the correct calculation of the advisory guidelines before you go to the 3553(a) factors. At least that's how we approach it. Then you have to articulate the
reasons why you are doing a variance if you are doing it under the 3553(a) factors. So individual judicial discretion, you are never going to have completely uniformity. But I don't see that it's a bad thing or that there are unfair differences among judges within our district. That said, there is not complete uniformity.

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

JUDGE HUFF: That would be helpful at least on giving some more information. So, for example, on age, to me if somebody is a youthful offender and has a drug offense at age 20, that's
different to me than somebody who has been in the system and now they're 50 and they have a major problem, and yet under the guidelines they just ordinarily are not very relevant, and yet as a common sense matter, age can be relevant, or do you see those people who have now matured and have learned their lesson. I would be interested in the research. So if the Commission could provide the research to then corroborate or disprove my anecdotal information that it does make a difference whether you are doing it when you are really young and you don't know any better or you are just kind of experimenting or you're youthful versus you are more mature and you expect people to behave a little bit better, I would be interested in the actual information out there from the research.

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

JUDGE HUFF: Exactly.

CHAIR SESSIONS: Okay. Any other?

Thank you very much for a very informative discussion. We really appreciate you coming all the way and away from your very busy schedules. Thank you very much.

All right. Let's take a recess for lunch.

(Whereupon, a recess was taken at 11:49 a.m. until 1:23 p.m.)
CHAIR SESSIONS: Okay. I think let's call the meeting to order. Welcome to the probation officers. This is our third panel, "View from the Probation Office." Let me introduce all three of you. First, Mario Moreno has been chief U.S. probation officer for the District of Arizona since June 2006. Previously he served as a line officer, sentencing guideline specialist, front line supervisor in the presentence division and as an assistant deputy chief. Mr. Moreno has a Master of Arts in organizational management from University of Phoenix, a B.A. in sociology from Arizona State University. Welcome. And thank you for hosting us.

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

And finally, Anita Chavez is the chief U.S. probation officer for the District of New Mexico. She previously has served as a supervising U.S. probation officer and is a national trainer for the
Federal Judicial Center. Ms. Chavez received her B.A.
degree in sociology from New Mexico State University
and her M.A. degree in public administration from the
University of New Mexico. And she just reminded me of
my time in New Mexico. Those are two of the most
impressionable weeks I have ever experienced as a
judge. And your staff treated me wonderfully and such
an extraordinary professional staff. So welcome.

MS. CHAVEZ: Thank you.

CHAIR SESSIONS: Well, first,

Mr. Moreno, are you ready to go forward or have the
three of you debated among yourselves? Mr. Young.

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

In preparing for today, I reviewed the
prior testimony from my colleagues who appeared at
prior public hearings. They have already commented on
many of the same issues that are shared by my office.
Given this is the final public hearing, much has
already been said about the history and evolution of
the guidelines. So I will try not to be repetitive and
I will refer to the prior testimony of my colleagues in some instances without a great deal of further comment. My comments will focus on topics related to sentencing in border districts. I will also convey the desires of many probation officers that would like to see further clarity and definition in certain guidelines. The post-Booker advisory guidelines seem to have brought a balance into the sentencing process by introducing further judicial discretion which appears to have occurred without undue compromise to any further disparity in sentencing.

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

Many guideline practitioners that I am aware of are very pleased to see the greater latitude that is present in the advisory guidelines, which has been brought to the advisory guidelines and into the sentencing process. In a post-Booker era, the role of
a probation officer remains a critical one by investigating a defendant's background and properly evaluating all the substantive factors in assisting the court to impose a sentence that reflects the totality of circumstances analysis and that is sufficient but no greater than necessary to accomplish the statutory goals of sentencing.

Probation officers know that judges must look well beyond the calculations of offense level or criminal history scores in imposing a sentence in the post-Booker environment. The work of the probation officer is perhaps now more than ever guided by case law which directs how judges must approach sentencing decisions and what factors must be considered when imposing a sentence that will sustain appellate review.

As a border district, the majority of our work load consists of immigration and drug offenses. The most burdensome of these border crimes are illegal reentry cases, which frequently have extensive criminal histories involving prior state prison commitments.

I will refer you to the testimony previously given by Chief Probation Officer Becky Burks from the Southern District of Texas who eloquently articulated the laborious nature of these cases. Her testimony illustrated the needs for further clarity on
what prior state convictions constitute aggravated
felonies and crimes of violence, which are special
given the potential impact these convictions have on
the immigration guideline at 2L1.2. Any further
assistance the Commission could give in this area
providing clarity would be helpful.

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

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

Amendments to 4A1.2(c), Sentences Counted
and Excluded, regarding the threshold for a sentence to score criminal history points were made presumably to avoid criminal history points for certain minor offenses. While changing the language from at least one year to more than one year probation may have made a difference in some jurisdictions, but it hasn't always been the case in ours. In the state of California it's not uncommon for courts to impose a term of one year probation or more for minor convictions such as driving on a suspended license. This results not only scoring of the conviction but also additional points for criminal justice sentence and ultimately renders the defendant ineligible for the safety valve. The defendant finds themselves not only in Criminal History Category II but also ineligible for a two-level reduction under the drug guideline at 2D1.1(b)(11). Perhaps this guideline should focus more on a custodial portion of the sentence rather than the term of probation as the threshold for scoring or possibly these listed offenses should become ineligible for subsequent adjustments in subsections (d) and (e) at 4A1.1.

Finally, many of colleagues have voiced their opposition to the American Bar Association's proposed amendment to Rule 32. I will simply state my
concurrence with their opposition for the same reasons they have stated and will refer you to the prior testimony of Chief Probation Officer Chris Hansen from the District of Nevada. From the perspective of the probation office, this proposed amendment is unduly burdensome and unnecessary. We hope the Commission will support a position opposing this proposed amendment.

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

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

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

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

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

MS. CHAVEZ: He wants to go next.

MR. MORENO: Good afternoon. And thank you for this opportunity to offer some remarks to the
Commission. Welcome to the District of Arizona again. We are honored in Arizona that the Commission chose Phoenix for one of its regional hearings. And testifying after so many of my colleagues have offered remarks gives me the chance to reflect on their statements, and I agree with many of them. However, I would like to take time to illustrate why the District of Arizona and some of the other border districts present some unique challenges in the area of federal sentencing.

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

Over the past — about the past year, we have seen somewhere upwards of 50 new prosecutors being added to this district. Some of those were growth positions. Many of those were vacancies. But
nevertheless it has driven the workload significantly higher in this district. And as many of you know, the funding structure for the probation office is such that we perform the work before the allotments for growth are included. And so our officers are now finding themselves coping with this significant increase in work. Much of it is related to drugs and immigration cases.

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

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

In advance of this hearing, I looked over some data elements and want to offer some observations.
Comparing 2008 with 1998, we find that drug offenders — the sentences for drug offenders are about 47 percent higher in 2008 than they were in 1998. Sentences for immigration offenders in 2008 are 25 percent higher than they were in 1998. Our use here in this district of variances is pretty negligible.

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

On the Booker impact on sentencing, it seems to me that the *U.S. v. Booker* case has reinforced the importance of a comprehensive sentencing system and a need for the Sentencing Commission to continue to promote the statutory goals of sentencing by analyzing data, amending guidelines to resolve circuit conflicts. In theory what we — in theory what we once had was a guideline offense heartland of typical cases for departure. And now we seem to have a guideline system heartland of typical cases for variance. However, what
we are seeing in practice is that the advisory guidelines has largely remained intact.

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

Now, the year before Booker came about, and as a result of the Blakely v. Washington opinion, we found ourselves preparing presentence reports that computed the guidelines both ways. In one column we had the guidelines computed under the preponderance of evidence standard. And in the same document just over in another column, we computed guidelines under the concept of beyond a reasonable doubt standard. So what we were attempting to do is provide our judges with basically a comprehensive system to help them make their sentencing decisions under each scenario.
Now, although Blakely v. Washington added some — this feature, I think we were still able to provide the bench with the needed information for them to impose sentencing and the impact to our office overall was a minimal impact. But nonetheless officers were pleased with the Booker decision in so far as we returned back to a single calculation based on the preponderance standard.

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

And what's been made clear to us is that we should correctly compute the guideline range and make no presumptions of reasonableness regarding the advisory guideline range. We still focus on the nature and circumstances of the offense, the characteristics of the defendant and provide the court with a
presentence report that represents the totality of circumstances analysis that will hopefully provide for a sentence that's sufficient but not greater than necessary to accomplish the goals of sentencing.

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

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

Now, 18 [U.S.C. §] 3553 requires that the court
consider the nature and circumstances of the offense and the characteristics of the defendant in imposing a sentence that's sufficient but not greater than necessary. But what we find is that the — when we look to the guidelines, the offender characteristic sections are usually prefaced with this not ordinarily relevant phrase.

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

Now, the impact — I would like to comment on the impact of Booker on appeals. And it seems like in this — in the Ninth Circuit, neither the 18 [U.S.C. S] 3553 factors standing alone nor the guidelines standing
alone meet the reasonableness standard for review. And
the effect that's had on an officer is that the officer
continues to go through the same process of computing
the guidelines, looking for departure factors,
analyzing 3553 factors and ultimately making a
recommendation. So the work of the officers remain
consistent in that area.

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

It seems to me to be a tremendous burden,
number one. Number two, I believe it would impact the
amount of information that's given to our office by
people offering comments or by in some cases law
enforcement agencies providing us documentation. In
many cases we receive police reports or investigation
material under — with an understanding that we are not
going to disclose that police report beyond what we receive. Although we summarize it in the presentence report.

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

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

I would like to commend the Commission in continuing its effort to gather data and its work on the predicate — on the predicate convictions, especially at 2L1.2. This is a difficult task. And I
don't know of any one single item or recommendation
that could suddenly make the job of collecting all
these documents and finding whether a predicate
conviction is or is not an aggravated felony an easy
job. It's not an easy job. It's very difficult. It's
very labor intensive. But as the — as 1326 is
constructed, that's a necessary part of figuring out
what the proper maximum penalty is.

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

And so sometimes what we find is just the
inability to produce. The judicially noticeable facts
in one case may result in a different outcome when you
have that compared with the court, a lower court in
which you were easily able to get the documents because
they're on-line. And so that kind of results in — may
result in different sentences or defendant adjustments
just because we couldn't come up with the judicially noticeable facts.

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

CHAIR SESSIONS: Thank you,

Mr. Moreno. Ms. Chavez.

MS. CHAVEZ. Good afternoon. I appreciate the opportunity to provide my testimony before the United States Sentencing Commission on the 25th anniversary of the Sentencing Reform Act. I was appointed United States probation officer February of 1985. So this is my 25th anniversary as well. I spent the last eight years as chief. And prior to that promotion, I was a supervisor for ten years, five years in the presentence unit, five years in Indian Country. And prior to that, my seven years as an officer, we did pretrial work, presentence reports and supervision all at the same time. We used to do it
all. That wouldn't be possible today.

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

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

My esteemed colleagues have testified and have captured many of my district's sentiments on the broader sentencing issues. I will, therefore, focus more on the day-to-day presentence report challenges in my district. The challenges are a substantial increase in workload in 2009, current lack of staff, our inability to have face-to-face interviews with all our defendants, and therefore not being able to fully assess the factors contained in 18 U.S.C. 3553 and our difficulty in obtaining criminal history records.
Now, some may think that these issues are not really related directly to the Sentencing Commission, but I think any of these factors that would disrupt the Sentencing Commission's goals of avoiding disparity would be of interest. So I know some of these are more our administrative office issues of stopping, but they really do affect the guidelines and they do affect the writers that are doing the work in presentence units.

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

Since June 30 of 2009, we have grown 16 more positions just since June 30 for all of the pretrial and presentence writing areas. This increase has not, like Mario indicated, generated funding immediately. We have to wait for the new fiscal year
to supply us 50 or 75 percent of the funding. So we
are consistently understaffed, but what you have is
officers that are very much burdened with the workload.
And still I think, like Becky Burks stated in her
statement, they're not just immigration cases. There
is just a lot of work in documentation that goes
through preparing a report.

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

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

It's difficult to see a defendant, to see
their face, to see how they're feeling, to see if they
look sick, to have them maybe really tell you why they
committed the crime, why they're here. Those are
important things to be able to sit across from somebody
when you are trying to do interviews. You're doing the
guideline application but you are trying to apply the
factors in 3553. And that's been a real struggle for
us.

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

Now, some of our cases, like Judge [Vazquez]
had mentioned before and was asked, we do do
assessments for Booker analysis within the presentence
reports. And the majority of those cases are our
district's cases that are non-immigration. They're —
we try to do them on all cases, but if we don't have
sufficient information like the fast-track cases, they
won't get a variance assessment. But our Indian
Country cases do, our bank robberies, the big drug
conspiracies, immigration cases of transporting. We will do the best we can to provide analysis.

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

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

And an officer with a case load could easily be assigned 12 presentence reports in a month and then have the additional three or four fast-track cases that need to get done quickly and expeditiously, and therefore their other cases may suffer some. So we have seen the volume. And with fully staffed office,
it would be what we would be able to handle, but right
now my concern is that these cases are taking away the
type of investigation that needs to be done on the
larger cases.

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

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

The supervision officer's assistance in
this capacity has been critical. There is no way our
current presentence staff could do a sufficient job on
a victim impact statement with the workload that they
have now, but the supervision officers make that possible. This is not a task that we can cut corners on.

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

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

My final concern is regarding our collateral process. U.S. probation offices nationwide
rely on the process called collateral requests to obtain criminal history data for presentence reports. The national workload credit for this assistance is nominal compared to the amount of work that goes into the investigation.

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

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

And we hope it establishes sufficient credit because that will make a big difference in all
these immigrations because as I would see, districts
that have not been able to keep up like Los Angeles, we
just killed them with the number of collateral requests
that we send out. San Diego, Chicago, the big cities
can't keep up with the requests that are coming in. So
it really helped them put the staff that they need into
the collaterals. And therefore it would help us in
that immigration process of getting the documentation
we need.

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

And that's the study that comes from our
human resources department. I know Arizona's numbers
were well — over 50 officers needed as well. And I'm
sure the rest of the border courts are. So it's not
just immigration cases. And for New Mexico and
Arizona, we have Indian Country. And there is a lot of
challenges.
I believe that the guidelines have helped. I was an officer prior to the guidelines. And I recall having long discussions with judges and then saying do you remember what we did before? Do you remember, did judge so-and-so have a case? That's how we tried to measure. And I see Judge Hinojosa kind of nodding his head.

COMMISSIONER HINOJOSA: So much time looking for old files.

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

But I thought in ending this, just give you an insight into our district, the day-to-day. I really see us as your staff as well. I know we're federal probation officers and we work for the courts, but we work for the Commission as well. We uphold — and we have always said we hold the torts for the sentencing guidelines. So with that I will end. And I thank you very much.
CHAIR SESSIONS: We really appreciate your support. All right. Let's open it up for questions. Mr. Carr.

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

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

And the other difference for the court on the borders is that everything is so fast. I looked at some of the numbers in courts all over the United States and some districts have 300 PSIs they did a year, 600. I think they probably do a much better job. They have time. They sit there and they contemplate.
In the border courts you are constantly moving. So it's a culture change not just for us but for counsel because they've got a lot of cases themselves. So they're just as much in a hurry as we are. So we are trying very hard to spend the time, ask the questions up front, ask the defendants questions in a way that is open ended and to gather more information, but it is more time consuming.

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

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

MR. MORENO: I would support that movement. What we are finding in all of our offices is arriving at a guideline range and looking for departure
factors and variances, that gets us to the sentencing phase, but what we are all also looking forward to is many of these folks are coming out under supervised release.

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

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

COMMISSIONER WROBLEWSKI: Could you
explain those concerns? Then I've got a few other
questions.

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

Very little mention – they discussed
probation officer assistants being placed in Indian
Country but never indicated whether it would be federal
or who they would be, but we would wonder how the
Bureau of Prisons who needs presentence reports and how
they would guide the sentencing process, how that would
take place. There was a lot of concerns and issues.
And I wrote the letter on behalf of our Indian Country
committee. I know that a letter was written on behalf
of the federal public defenders because there was
actually no – I believe no statement in the bill about
public defenders being appointed, as well counsel. So
there was some issues.
What happened approximately a week ago, I believe, is Department of Justice provided about 33 U.S. attorneys for Indian Country. There was a news release. And I don't know if that's going to take place now if Senator Dorgan steps down. So we have just been keeping an eye on it. So Judge Castillo, we are concerned and we do watch Indian Country. We have a lot of – the Navajo Nation is very large and our pueblos.

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

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

And my second question has to do with reentry cases. And this is for all of you. We have
heard over and over again as we’ve gone around the country
the difficulties with the Shepard/Taylor approach and
with aggravated felony. And we are going to hear from
defenders about the 2L1.2. In fact we just met with an
AUSA who said 2L1.2 was the bane for existence. We
have heard it over and over and over again.

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

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

MR. MORENO: I would like to comment on
simpler. And I would like to offer that simpler
doesn't always mean that it's better. I remember a few
years ago our chief judge offered some remarks with a
movement that would have created a structure where the sentence imposed would be the driver on measuring the seriousness of the predicate offense. And what we find here is that's not always the case. That's not always the case because various lower courts find themselves challenged to house inmates who they know are going to be deported.

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

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

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

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

And when you look at other border
districts, and in particular Southern District of Texas
and Western District of Texas, their numbers are almost
double Arizona's. They're above 6 and 7,000. And their fast-track percentages are — I think the Western District is two percent and the Southern District is 17 percent, while your district is 51 percent. The justification that's been given over and over here today from the U.S. Attorney and AUSAs from Arizona in our lunch is that these decisions are driven mainly on the numbers. And that to me just doesn't add up.

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

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

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

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

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

MR. YOUNG: I can comment from San Diego. I would say that the work of the probation office is
drastically reduced. In the cases we are talking about, these fast-track cases, there is an entry of plea. They're all driven by plea agreement of course. And there is one appearance for the entry of the plea and the sentencing. The sentence is imposed. We receive the referral that the sentence has been imposed. And the probation office does what is called a supplemental report to the Bureau of Prisons. It is a truncated report.

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

So I can say very, very clearly in southern California, the probation office in these types of cases is really given a great deal — a pass in terms of the workload. We do the post-sentence reports. And we get — we receive half credit for them. But in my view the whole fast-track program is just an essential component along the southwest border.
Particularly we have seen that. You heard Judge Huff this morning speak eloquently to that.

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

MR. YOUNG: We, do not.

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

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

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

MR. YOUNG: I don't know if they are or not. I can check and find that out. And I will do that. I will say, though, that there are a number of cases particularly in the southern district where there is such an immediate — that is an immediate sentence. And the amount of time that's left on the case, there is no report. And it's less than nine months. So they receive their pretrial custody confinement credits as
well as whatever is left. And many occasions it
amounts to less than the nine months. So no report
gets done.

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

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

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

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

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

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

MR. MORENO: The guidance would be helpful.

VICE CHAIR CASTILLO: We have learned that there is a disconnect between Chapter Five and 3553. So we are trying to work on that. We also published an amendment making it clear that departure analysis is not obsolete as some judges have said and that the
three-part analysis for sentencing — that is
calculating the advisory sentencing guideline then
doing departure analysis and then thirdly and finally
doing variance to get to a sufficient but no greater
than necessary sentence — is appropriate methodology.
So hopefully that's going to help. And it remains to
be seen if we can get all this work done in the next
couple of months, but hopefully with your help.

   MR. MORENO: We would be happy to.

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

   MR. MORENO: Thank you.

   MS. CHAVEZ: Thank you.

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

   CHAIR SESSIONS: We are ready to
start. It's a quarter of, and saving best for last.
This is the “View from the District of Arizona.” We are
going to introduce Judge Roll and Judge Guerin. Judge
M. — the Honorable John M. Roll — is it pronounced
Roll or Roll?

   JUDGE ROLL: Roll.

   CHAIR SESSIONS: — has been a
district court judge in the District of Arizona since 1991, served as chief judge since 2006, previously served on the Pima County Superior Court and on the Court of Appeals for the State of Arizona. He also served as an assistant U.S. attorney in the district, as a deputy county attorney in the criminal division in Pima County and as an assistant city attorney for Tucson, Arizona. Judge Roll has received his B.A. from the University of Arizona, J.D. also from the University of Arizona and L.L.M. from the University of Virginia. I welcome you today.

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

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

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

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

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

I would like to start in an area that Chief Judge Hinojosa is already very, very conversant with, and that is the role of the southwest border
courts. The five southwest border districts hear one-third of the federal felony cases in the United States. And I think that it is — it's important to recognize the enormous burden that's placed on the districts. We welcome it. That's what we are asked to address. But it is an enormous portion of the overall felony case load in the country.

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

The District of Arizona is all one district, but our case loads tend to be very different. In the Phoenix division, about 80 percent of the Phoenix division case load is civil — or rather 80 percent of the district's civil case load is heard in Phoenix. Two-thirds of the district's criminal case load is heard in Tucson. We have most of the border in the Tucson division, although Yuma is in the Phoenix
Judge – or Chief Probation Officer Mario Moreno provided you some information in his written materials and in his testimony about the District of Arizona. We had a very unusual case load aberration in fiscal year 2008. And in talking about the statistics that I quote in my written testimony and also in my oral testimony, I am really relying on Jim Duff's 2008 report on statistics. The 2009 report isn't out yet.

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

We have felt in fiscal year 2009 by our statistics about a 28 percent increase in criminal cases over the year before. But for the calendar year which just ended, we have had a 50 percent increase in criminal cases and defendants. And so we are very much at the center of things. And even when we had that
short-handed number of assistant U.S. attorneys and that 1,200 case drop, we were still fifth in the country in cases and fourth in criminal defendants. So I suspect we will just be changing places perhaps with one of the other southwest border districts, but we will be at least fourth or fifth in the new statistics.

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

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

Our case load wasn't diminished. But it
greatly impacted our ability to obtain the resources that we need including new district judges. And I had heard in the past that the Federal Judicial Center — I understood every five years they would revisit this. And now the latest word I hear is the plans do not call for the Federal Judicial Center to do another case reweigh analysis.

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

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

I have cited some of the cases to you.

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

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

I would also like to put in a word for the early disposition program. You have heard this over and over again. It is very, very helpful in districts where there is a very large volume of cases such as illegal reentry cases. Our circuit recently in
Gonzalez-Zotelo found that it did not constitute impermissible sentencing disparity for the district court to apply the early disposition program.

I want to make another pitch for a point. And I know that Judge Castillo, you and Chief Judge Hinojosa have heard me talk about this in the past, so this won't come as any surprise to you. It has to do with predicate prior convictions and why I feel very strongly that the proposal — that in deciding what the sentencing enhancement should be for prior convictions, that we should not just look to what the state sentence was, but rather what the nature of the prior conviction was.

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

And the fact that I have seen in many transcripts when transcripts of sentencings have been provided to me, the state judges describe the fact that the person is going to be deported and there is no need
to worry about a lengthy sentence. And I have had
child molesters and other individuals with various
serious charges who were sentenced in state court
receive probation for ten years and references to the
fact that if they ever come back, if they violate the
departation order, they will be back before that judge
for sentencing.

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

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

I want to join with our probation chief,
Mario Moreno, and with the chief from San Diego, Ken
Young, as well as any number of other individuals who have expressed to you their concern about Rule 32(h) and the idea that the probation department should have to provide written summaries of information and disclose all documentary information in connection with presentence reports.

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

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

Also the rule is very clear in our circuit. And I think it was followed before it was articulated by our Ninth Circuit, that anything that we learn has to be contained in the presentence report or
disclosed to the attorneys in open court. There just
isn't anything that somehow is being missed, at least
in the District of Arizona. And I suspect this is true
of the other southwest border districts as well.

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

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

You have already heard from Chief Judge
Sessions about our magistrate judge, Jennifer Guerin, who along with the six other magistrate judges in Tucson have an enormous case load. In our district our magistrate judges hear almost all of the felony changes of plea in addition to the Operation Streamline cases and the bond hearings and the initial appearances and reports and recommendations in civil cases. And the court is very grateful for all of their work.

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


JUDGE GUERIN: Good afternoon. And thank you for the opportunity to testify here this afternoon. The Arizona Denial Prosecution Initiative was implemented in Arizona in January of 2008. And the initiative was structured with input from the Marshals Service, the Federal Public Defender and our [CJA] attorneys as well as border patrol AUSAs to permit the magistrate judge to conduct a single proceeding where
there would be an initial appearance, change of plea for those who decided to plead guilty and sentencing.

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

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

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

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

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

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

But I would add in closing that this is a large number of people, but it's evident to me that the judges who conduct these proceedings, the AUSAs who
are responsible for prosecuting and the defense attorneys who are defending the defendants in these proceedings I think all do their best to ensure that the proceedings are conducted in accordance with the law and that the defendants' rights are protected and that the sentences are appropriate for the circumstances. Thank you.

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

JUDGE GUERIN: There is — my understanding of the way that the Border Patrol presents the defendants for prosecution, if there would be more than a 24-hour delay such as a weekend, an intervening weekend, Border Patrol calls in the cases to the magistrate judge for determination of probable cause. I understand that because of detention space, often people that are arrested and considered for prosecution are ultimately just released, but others are presented within days of their arrest. It's not always the next day because sometimes the arrests occur
at — near the border. There are the transportation and processing issues and identification issues that have to be resolved prior to that, but at least the probable cause determination is made.

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

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

CHAIR SESSIONS: Okay. Questions?

I think —

VICE CHAIR CARR: That was my question.

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

COMMISSIONER HOWELL: We heard this morning from the head of ICE about the possibility of — or suggesting that we recommend any of the guidelines, at one point downward departure for those — for alien defendants who agree to — what was it called? Stipulated order of removal. Right,
something like that, so with some exceptions for
certain types of cases, like perhaps illegal reentry
cases. But do these—do any of these plea agreements
that you are seeing in the Operation Streamline, do
they have any kind of credit or requirement of the
stipulation of an order for removal? Is that part of
this process?

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

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

JUDGE GUERIN: In these types of cases,
correct.

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

JUDGE GUERIN: Correct. They're Class Bs.

COMMISSIONER HINOJOSA: They're Class Bs.

So they're not even under the guidelines?

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

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

COMMISSIONER HINOJOSA: Priors.

JUDGE GUERIN: — prior criminal history and who are put into the program because of the number of cases.

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

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

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

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

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

JUDGE GUERIN: I don't know.

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

JUDGE GUERIN: I don't know that for sure,
but I know that it's certainly something that counts on
the immigration history that shows up as a separate
category on those immigration reports that we consider
at sentencing. There is a category for voluntary
returns and then there is a separate category for the
removals and deportations which would lead me to
conclude, although I do not know the law for sure, that it is more in the order of a formal order as opposed to voluntary.

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

We have had over the last few years between a quarter of a million and almost 400,000 people arrested every year in Tucson division. And that's about half the people along the entire southwest border who are apprehended. And that coupled with the marijuana that this year went over one million — I think it was 1.3 million pounds of marijuana that Border Patrol seized in the last fiscal year, which was about half of the marijuana seized along the southwest
If anyone looked at the border and thought where is the problem, it would be hard not to conclude it was in the District of Arizona and specifically in the Tucson sector. And so I suspect that was the motivating factor behind Border Patrol deciding to put this in place in Tucson. And having been notified of that, we just recognize our duty to the extent we are able to to hear the cases that are brought to us and so we try to address it. It wasn't as though we were trying to somehow side — pick a side in connection with this, but it's our responsibility as the court to hear cases that are presented and to anticipate that.

CHAIR SESSIONS: Commissioner Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you, Judge. A couple of questions, Judge Roll. You said that — I'm just a little confused about the fast-track program here in Arizona. We heard testimony earlier today that most of the fast-track cases under 1326 are handled under an 11(c)(1)(C) plea. At the same time, you testified just before that the 1326 cases are still very involved and there needs to be a full presentence report and all the rest. Is that to decide whether to accept or reject the (c)(1)(C) plea? Because obviously
the (c)(1)(C) plea as I understand it has a particular sentence associated with it.

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

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

    I'm sure that this is true for Chief Judge Hinojosa. We see things along the border that I'm sure other districts never — the types of cases that never even arise. We have had a number of cases in Tucson
where individuals have been apprehended with large quantities of drugs of minimal purity value, triggering in our mind the notion these were decoy loads that were being sent through in order to have other loads sent through at the time, such as cocaine with a purity of three or four percent or heroin of an extremely low purity but bundled in large bundles that when it comes through the port of entry, it creates a stir and all the attention is directed toward them.

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

COMMISSIONER WROBLEWSKI: That actually clarifies that situation for me. But taking to the second question, which is the Shepard/Taylor approach, and I know we have had discussions back and forth for years with you, Judge Roll, and you indicated — you said we can't write on a clean slate. Has your court ever considered the fact that perhaps now that the guidelines are advisory, maybe we can write on a clean slate? The guidelines now don't have any binding impact.
Have you ever considered the idea that maybe the Commission could on its own say you know what, maybe we don't have to do the Shepard/Taylor approach? That was a constitutional ruling of the Supreme Court in a different era when the guidelines were mandatory and that maybe we could — the Commission could take a more common sense approach and allow you to — I think you talked about getting the full nature and quality of the prior conviction. Do you think that's possible or do you think that's just an enormous stretch?

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

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

COMMISSIONER WROBLEWSKI: Haven't they
done that — post-Booker, haven't they only done that with respect to the Armed Career Criminal Act which triggers a mandatory 15-year sentence as opposed to the guidelines which are now advice?

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

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

COMMISSIONER WROBLEWSKI: Do think that —

CHAIR SESSIONS: Okay, Jonathan.
COMMISSIONER WROBLEWSKI: Do you think the Commission could amend the guidelines and say for purposes of the advisory guidelines, the Shepard/Taylor approach doesn't apply? You get all the documents you want and—

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

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

And if you want to propose something, maybe you should go in that direction so there could be a Commission meeting discussion about it as to—we would still have to go through does it fit the normal restatement as to what the elements of the offense are, but we wouldn't have to do the Shepard/Taylor test.
other than — and then you could probably look at
circuit conflicts with the common sense approach.

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

CHAIR SESSIONS: Perhaps I should
ask would you like to ask any other commissioners about
any —

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

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

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

CHAIR SESSIONS: If you go down —
that means that your funding for probation officers
goes down the following year, which then means in the
following year you are back up when you have less
personnel. Is that the dramatic problem that you are
facing?
JUDGE ROLL: It is. And with the biannual survey which was based on those numbers in the aberrational year, we dropped from five district judges to two district judges that were being recommended. And now we would be back up if you use the latest numbers. So we tried to argue that, but of course it's difficult to — and I understand why that committee feels bound by what the current statistics are rather than what they might be, but we knew this was going to change, but I couldn't get them to change that.

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

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

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

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

JUDGE GUERIN: Thank you.

CHAIR SESSIONS: Okay. I think we are adjourned.
(Whereupon, proceedings adjourned at 3:30 p.m.)

-ooOoo-

STATE OF ARIZONA
COUNTY OF MARICOPA

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

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

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

JOANNE WILLIAMS, RPR
Certified Reporter #50253
UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING
Phoenix, Arizona
January 21, 2010
9:00 a.m.

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COMMISSIONERS PRESENT:
Chair: Chief Judge William K. Sessions III
Vice Chairs: William B. Carr, Jr.
Judge Ruben Castillo
Commissioners: Dabney Friedrich
Chief Judge Ricardo H. Hinojosa
Beryl A. Howell
Jonathan J. Wroblewski

STAFF PRESENT:
Judith W. Sheon, Staff Director
Brent Newton, Deputy Staff Director

Reported by: MERILYN SANCHEZ, RPR
Federal Reporter
JOANNE WILLIAMS, RPR
CR # 50253
COPPERSTATE REPORTING SERVICE - (602) 795-5515
Phoenix, Arizona
January 21, 2010
9:00 a.m.

CHAIR SESSIONS: All right. I think we are ready to call the hearing to order. Good morning. Welcome. This is the last day of the last of our seven regional hearings.

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

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

You didn't by chance know Commissioner Wroblewski at law school did you?
MR. BEMPORAD: I was a 1L when he was a 3L. He wouldn't pay attention to anybody like me.

CHAIR SESSIONS: All right. Well, hopefully —

VICE CHAIR CARR: He hasn't changed.

CHAIR SESSIONS: Hopefully your luck has improved.

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

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

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

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

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

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

I very much appreciate and recognize the interest and concerns the Commission has for the border
districts, particularly the Texas border districts. I know Judge Hinojosa, being from the Southern District, understands the situation that we face in our day-to-day practice.

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

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

And people ask me why. Don't the judges understand that they are no longer mandatory guidelines? Don't they understand they have greater authority to vary from the guidelines and impose
non-guideline sentences?

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

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

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

Now, those have gone down. Booker sentencing has gone up. But the balance remains the same. So now when you see a statement of reasons, and it doesn't just say 5K1.1 cooperation, it gives the
real reasons for the sentence. I think that's greater transparency. I think that's much better for the Commission as it tries to figure out what we need to do about the guidelines.

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

They are trusting you guys to do that. And they expect that the Commission will do that. And the reason they do that is, and you've heard this from the other people who have testified before you at this hearing, but I want to echo it and emphasize it, they are very — the judges, all of us, the judges are very busy in our district. I read the numbers last night to make sure I was right. According to the Sentencing Commission in — for the fiscal year '09, 8,278 defender sentencings — defendants sentenced. That's 12 judges did that. There's 13 slots, one is empty. One of those judges is a senior status judge in El Paso
who takes on a full docket. So that's 690 sentencings each judge.

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

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

Unfortunately there are two instances in
my mind, very common offenses, where you have those sorts of problems. One is in drug offenses and particularly the drug offenses we see on the border. And the other is one that the Commissioners and other people who have been testifying have talked about, and that's the illegal reentry cases.

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

The big issue, and I think you heard this from Judge Vasquez, you heard from another number of other people who testified, the big issue is that for the border, we have a large amount of cases with very small players, people caught at the border with a truck, the truck could have ten pounds of marijuana, 10,000 pounds of marijuana, and the person who is driving isn't being paid in accordance with how much marijuana is in the car, doesn't know how much marijuana is in the truck. They don't worry about those things. They are paid a single amount for a specific trip.
So in those cases, you have the danger that the amount is going to drive the sentence tremendously and the role in the offense is going to have a smaller role. Even so, that's an issue that you've heard about before, we should have more of a role for role in the offense.

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

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

"Yes, I've driven this truck" or "I've driven other trucks or other cars across border three times before." They will credit that testimony and extrapolate an amount from that testimony. In other words, you've got a hundred pounds this time, you've
done it three times before, that's automatically 400 pounds. But they won't credit the testimony when he's — the same testimony to say, "I had a minor role."

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

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

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

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

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

And if I can, I'll end that part of my testimony with a very common example. As the defender and also when I was an appellate chief, I would get a lot of calls from judges — from lawyers coming into my
district. I mean, coming into the Western District, coming into San Antonio. And this was before Booker and equally as much after Booker and they would be calling say: Hey, I have a case in your court. I want to know how the sentencing is going to go.

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

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

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

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

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

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

The thing that I think Commissioner Wroblewski asked yesterday was a very good point was, you know, this doesn't, even if you give a downward
variance, or downward departure, this doesn't get at
the point that the punishment, the thing that is really
hard for people who have lived here all their lives is
the deportation itself and what do you do about that.
I think that's true.

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

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

I also want to applaud the Commission for
considering removing the double counting for recency
and the counting for prior convictions that happens in
2L1.2 or maybe also 2K2.1. In those circumstances, in
the proposals that the Commission has put out, they mention that the same conviction can be counted numerous times, points under 4A1.1(b), points under 4A1.1(d) because the person is on supervised release, points under 4A1.1(e) because it's within two years and levels under 2L1.2. That's a lot of counting for one — one conviction, and it tends to skew guidelines in situations where people are not really as bad as the guidelines would say.

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

Often they are put across the border in a country that they never have lived in and they can't speak the language. But in any case, that's not what
supervised release is about. Unlike the prison system, supervised release is about rehabilitation. And they are given no rehabilitation whatsoever.

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

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

The last thing I want to say about 2L1.2, and this is — I don't mean to in any way take back
what I applauded the Commission for considering, these
issues, the departure for cultural assimilation dealing
with recency, and double counting 2L1.2, those are
important, but they really are going around the edges
of that guideline. I would urge the Commission, I know
not in this cycle, but maybe in the next cycle to
really consider restructuring this title.

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

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

I have not included in my testimony — I
have talked about it but I haven't given the Sentencing
Commission staff a proposal that kind of tries to split
the baby between those two, to take some nature of the
offense issues into account and sentence likely into
account.

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

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

I would suggest and my proposal suggests
using those two factors, taking some narrow subset of
aggravated felonies, there is — and the ones that are
listed in 1101(a)(43). I've listed them there. There
are some that are worse than others. Take the most
serious aggravated felonies, see if that person has a
sentence imposed of 13 months or more for 4A1.1(a)
counting sentences. If they have both, that should have the highest enhancement. If it's not, if there wasn't a sentence like that imposed, a lesser enhancement. And if there wasn't — it isn't one of these serious aggravated felonies, a lesser sentence. So you would still have enhancements, but they would be graduated based on something that they are already doing.

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

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

And then, more importantly, it leads to arbitrary sentences: two cellmates who were convicted
of the same thing but it was a different year or a slightly different documentation or a different judge's ruling, and they get a completely different sentence. And it is very hard to explain to them how that arbitrary - why that arbitrariness happens or how the situation came about.

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

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

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

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

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

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

But inevitably, you're going to get to a question that says "other." Because as time goes on, as technology changes, as society changes and people get creative or they get desperate, you are going to
have the next tunnel or the next submarine or the next
person who is going to be hiding heroin in her baby's
diaper that could be aggravators. Or you're going to
get something like what Judge Roll mentioned and that
is reports that there are decoy loads coming through
that have very, very low purity and maybe that's a
mitigating factor that should be considered.

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

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

But what is the next act that's going to
be considered to be obstruction of justice that hasn't
been considered yet? How is the computer program going to deal with that? And then, boy, there's the big other category, the absolute offender characteristics that have to be placed in. And, again, as we become more informed about psychological conditions, about physical conditions, about the effect of age and employment and so on like that, how are — how's the computer going to deal with that?

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

The fact is stranger than fiction, and you're supposed to sentence an individual, and people can change. And that's why we have judges. And to quote a “West Wing” episode about the sentencing guidelines, judges who the President and Congress have spent a great deal of time vetting to make sure that they are appropriate to go ahead and make those tough decisions, to balance the offense and look at not just the defendant's participation in the offense and their criminal history, but them as an individual, to look at
whether or not there was a victim who has to be
regarded, and then to look and see whether or not we
need to be concerned about the community's safety
because of this person or are we depriving in the
community of somebody, a defendant who can actually get
some benefit by education, by devotion to family, by
employment. These are all things that judges have to
consider in that very delicate balance to impose a
sentence that is fair, that is safe, and that is just.

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

I wanted to add and not regurgitate my
very lengthy recent testimony. And I apologize, it was
my first time testifying in front of the Commission,
and I wasn't sure quite what was expected. But I
wanted to update a few things. One is with regard to
child pornography. There was another article yesterday
in the Wall Street Journal. And that article said, I
quote, "Nearly half of the federal judges gave
sentences to child porn viewers that were before the sentencing guideline range." And this is something that you are hearing quite frequently.

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

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

It's only a matter of time before the federal courts start dealing with issues of juveniles who are sexting to each other. And how is the Commission going to be able to anticipate that? So this is something that I wanted to make the Commission aware of.
Yesterday, I think it was you, Judge Sessions, who asked Jennifer Guerin, or Magistrate Guerin about the timing of Operation Streamline and why did it happen in Tucson starting in January of 2008. I was part of the meetings with Border Patrol and the court and the panel about implementing Operation Streamline in Tucson. It was basically a Bermuda triangle that brought it about. As Judge Roll mentioned, the U.S. Attorney's Office had not been given approval to backfill many positions within their office. And by the end of September 2008, because they didn't have the personnel to prosecute cases, white collar cases were on the back burner. They weren't prosecuting most marijuana cases under 500 pounds. Those were being sent to the counties. And they stopped prosecuting illegal entries.

Many illegally reentries were being prosecuted as what we call flip flops. They are charged with the illegal reentry as well as the petty illegal entry and given the opportunity to plead, in a very short time period, to the petty offense, the felony gets dismissed, there's a stipulated sentence of anywhere from 30 days to six months. They waive appeal, they waive the PSR, and they are able to move those cases out.
By the end of September also in 2008, the U.S. Attorney's Office was faced with losing five additional lawyers. Two were going into private practice. Two were becoming immigration judges. And one was going to the civil division.

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

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

I testified in front of a House judiciary subcommittee [about] Operation Streamline in June of 2008. And while that doesn't seem relevant here, one of the questions they asked me does lead me to something that was in my written testimony and that is, what can we do
to fix immigration? Well, just like any problem that we have, drugs, gangs, you have to educate people. You have to make it so that in the first place that they don’t even want to do drugs, be in a gang or come to the United States. I mean, it's one thing to build up the law enforcement to keep them out and subdue them, but another to make sure that it just is not even crossing somebody's mind.

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

What instead, if the Bureau of Prisons was able to go ahead and educate these people, and train these people so that when they got back home, they had actually more education, these little kernels, these little seeds of people who had improved their lives and
gotten training would be inspiration to others within their native countries to go ahead and improve their lives, and everybody's situation would improve.

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

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

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

We are all familiar with the standard
deportation or removal proceeding that happens in front of an immigration judge. There are actually two other kinds of removal proceedings. One of those is a judicial removal proceeding which is not used very often. But it allows a district court judge to enter an order of removal. And that can be done on a stipulation of the prosecutor as part of the plea agreement, of the defendant and the defense lawyer, and including a member of ICE to come before the court at sentencing, enter the stipulation, satisfy all the requirements of the judicial deportation, and it is the U.S. district court judge who then issues a formal order of removal.

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

The other form is an expedited removal. And expedited removals are generally used when somebody's been convicted of an aggravated felony. Because there is no possibility now for any cancellation or suspension of removal, the statute allows for immigration agents, either with ICE or with Border Patrol, one agent reviews the history,
verifies that it indeed is a conviction for an
aggravated felony. The paperwork then gets reviewed by
a second ICE agent who validates that and enters the
order of removal. So we are dealing with two expedited
processes.

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

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

There's a quote in a appellate court case
that says that immigration law is second in complexity
only to our IRS laws. And it's absolutely true. And
either those defense lawyers would need to get an
expert immigration lawyer to consult in the case and to
advise whether or not the person actually would have
the ability to fight deportation, or if ordered
removed, whether or not they would be able to apply for cancellation of removal. And these are very, very complicated issues.

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

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

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

And I would like to think that we have learned so much about the effects of combat, the effect of long tours, about post-traumatic stress disorder, persons and their abilities to function within society
and the kind of help we need to give those people that
we will be better prepared this time around for when
our Iraqi and Afghani war veterans come back and
reenter society.

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

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

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

Thank you. Mr. Pori?

MR. PORI: Thank you, Chief Judge

Sessions, members of the Commission, good morning. It
truly is for me an honor and a privilege to speak with
you this morning on a singular issue, the urgent need
to revise the guidelines for illegal reentry after
departure.

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

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

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

Why am I being sentenced more than anyone
else in this courtroom today? And yet that happens
over and over and over again in my court, the District
of New Mexico, and throughout the Southwest. And being
the grandson of an immigrant in a nation of immigrants, I have to say it is shameful. And maybe it's by accident. Certainly it's from the best of intentions. But it is a system which is broken and which needs to be fixed.

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

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

"But that was 15 years ago?"

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

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

And so to correct this system, I've urged
the Commission, as others have, to look at a few things: Number one, try to limit in whatever way you think in your judgment is best double, triple, quadruple counting so the same offense is not used to first raise the mandatory sentence and then raise the base offense level, and then calculated in the criminal history and then to add two more points because the person has come back after two years.

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

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

And the final request is to limit the age of the prior convictions some way, somehow. Certainly
anyone who returns under an order of deportation is subject to prosecution. But if they've abided by the laws, but something has changed and if you've lived in the border states, you know it's changed along the border of Mexico.

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

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

CHAIR SESSIONS: Thank you, Mr. Pori. Before I actually ask others for questions, Ms. Williams, I just want to make sure I understand the federal defender's position in regard to the proposal from ICE for a one-level reduction based upon voluntary agreement to be removed. Is — I understand the complexity of immigration law. I also understand that a one-level decrease across the board to all
defendants, not just — we are not talking necessarily reentry, obviously ICE wishes an exception for that. But the impact upon sentences of noncitizens would be fairly dramatic. Is the federal defender's position that we not consider that one-level reduction?

MS. WILLIAMS: No.

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

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

Obviously it's going to be a — what I was hoping to do, though, was to educate the Commission about the various concerns that we have — can see from a defense lawyer vantage point, but also — there was something else I was going to say and it just went out of my head — oh, about what the previous practice has been with regard to benefits. Also I forgot to mention there already is a Ninth Circuit case that says a defendant's stipulation to removal as part of their sentencing is something that a court can consider in imposing sentence and in reducing the sentence.
I'm not touting an official position. I want to educate the Commission about what the various positions would be.

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

MS. WILLIAMS: No. And the reason I say that is first of all, those offers were being made only in reentry cases. And it was as to a reinstatement of the earlier deportation order, not a new from whole
cloth deportation order. And because it's a reinstatement of a previous one, the lawyer has presumably already reviewed the earlier removal or deportation proceeding and made a determination about whether or not it was lawful or not, attacked it if necessary, but the agreement then to go ahead and reinstate that is not necessarily attackable, because the person has already exhausted their abilities in immigration court by virtue of the earlier official deportation proceeding.

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

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

MS. WILLIAMS: Exactly.

MR. BEMPORAD: If I could add to that, that's exactly what we had in the Western District of Texas. This was some years ago. We would stipulate—we would agree not to contest the reinstatement of
removal. And in those cases the reason why you could
do it very easily is all criminal defense lawyers are
immigration lawyers to some extent. We all have to
look at whether the Government can prove up the prior
departation under a case called Mendoza-Lopez, whether
it doesn't violate due process, whether they presented
a citizenship claim or other way to get around the
departation that would now be reopened. So we all have
done that work, and once we made the analysis and say,
yes, you should plead guilty and there's no challenge
here, we were ready at that point to say it's okay to
reinstate that deportation.

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

One very other quick comment on this, it
does show how much — how integrated the question of
departation is to the question of punishment. Even ICE
sees that deportation is connected to punishment, and
that's why the Commission's consideration of
understanding that deportation is a significant
punishment in and of itself or a sanction in and of itself that could be grounds for departure in these cases whether or not we have stipulated to it. I think these two things are connected.

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

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

The Commission is in the process right now of examining supervised release statistics and in the process of putting together a report that might — I'm not sure exactly when it is going to come out, but in a shorter time period rather than in a longer time period. And one of the things we are also looking at in the context of that report is the fact that the guidelines require mandatory minimum supervised release terms even when there is no statutory requirement for that.
You didn't actually address that particular point. You were looking at a much more limited supervised release relief proposal. But I was wondering if you had any thoughts about whether in this environment where Congress has talked a lot more about reentry programs and there's more focus, I think, gladly on reentry programs, whether the Commission reducing the requirement of three-year supervised release terms on so many felonies where it's not statutorily required is something that goes against the grain of the focus on reentry programs or is something that you think is worthy of us looking at.

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

The point that I would suggest the Commission look at is the termination of supervised release. There's some people who really need a lengthy term of supervised release and a lot of help to be able to get reintegrated into society. There's other people who walk out and are ready. I was working with a client last year, earlier, I guess, last year, 2009,
who was ready to go, got his truck driver's license and
his CDL, and he was moving on. And we terminated it
early.

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

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

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

MR. BEMPORAD: I absolutely think that's
appropriate. I think they go hand in hand whether to
impose and what the condition should be should be tied
together. I think one of the problems you have in
these illegal reentry cases, they now have to impose
the guidelines of the supervised release term because
the guidelines say so. But they know that there aren't
going to be any actual conditions, so they just impose
this, you know, this fake supervised release to, you
know, basically try to comply with the guidelines.
That's not what supervised release is about.

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

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

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

The first is your proposal to amend 1B1.8
which you discussed in your written testimony to
basically protect the statement that the defendant
makes at the time of arrest prior to the time the
defendant enters a cooperation agreement. And your proposal is similar to some we have heard but I think narrower and that if I am reading it correctly, you are suggesting that that be broadened to include statements at the time of arrest when the parties agree, in other words the prosecutor has to agree as well. Is what you're suggesting?

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

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

There are lots of times where for one reason or the other the cooperation agreement doesn't go through. The very common situation in my district is because there are gangs across the border or in jail who will kill a guy if he cooperates. And he's willing to give up everything at the time of arrest, but once he gets into a jail, he realizes he can't sign
anything, and it doesn't matter that that's not going
to filed, it's going to be sealed. He is scared to
death for his family, for himself to sign anything. So
sometimes cooperation doesn't go through in those
cases.

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

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

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

VICE CHAIR CASTILLO: So in those cases,
that conduct is counted against the defendant, at least
in the Western District of Texas?
MR. BEMPORAD: Oh, absolutely. In our cases, the cases we are talking about even if there is a full cooperation agreement. If he made the statement but I think narrower the agreement was in place, that's considered.

I know there are some other places where the parties agree to try to keep that out.

I will tell you, and I put this in my written testimony, we don't have a lot of plea bargaining in our district. More than half of our cases plead guilty without a plea bargain. We are a low 5K district because of these dangers and because we have limited information. So we get the guidelines just as they're written. We don't do a lot of guideline fact bargaining. That's almost unheard of.

VICE CHAIR CASTILLO: The other question related to your proposed departure 2L1.2 for cultural assimilation, but a little bit broader than that, and you are looking at the motives of the defendant in reentering the United States, are you not proposing that we consider a departure for the collateral consequences relating to the deportation? You mentioned in footnote DOJ's 1991 position which argued for that. Are you suggesting that we consider that as well or the narrower?
MR. BEMPORAD: I saw that right after I finished or right as I was finishing my testimony in written testimony. I saw that that was included as a proposal in the current cycle. And I would think that is something that the court — that you should consider.

VICE CHAIR CASTILLO: Because to date, so far as I'm aware, no court has considered that departure, accepted it in a case involving deportation, you know, illegal reentry because the idea being that the Commission considered that when it set the guidelines.

MR. BEMPORAD: I agree, Commissioner. I think that is correct. They have and they said you all did consider it. I would say that I'm not sure that that's true. You are going to know better by looking at the history whether it was considered.

Again I want to make the larger point, each one of these considerations, when it comes to illegal reentry, is playing around the outside of the issue which is this guideline is too high. I want to echo what Mr. Pori said about that. If you reduce the guidelines across the board, you might not have to worry about these sorts of issues. I think that would be a starting point.
CHAIR SESSIONS: I appreciate very much your testimony. We all appreciate very much your testimony. And I'll call it to an end. Thank you very much. And call the next panel to come forward.

Good morning. Thank you very much for coming today. Let me introduce our next panel. First, Kevin K. Washburn is dean of the University of New Mexico School of Law. His teaching career has included appointments at the University of Arizona James E. Rogers College of Law, Harvard Law School and the University of Minnesota Law School.

Previously Mr. Washburn served as trial attorney in the Environment and Natural Resources Division—Indian Resources Section of the Department of Justice, as an assistant U.S. attorney in the District of New Mexico, as general counsel to the Indian—National Indian Gaming Commission. Mr. Washburn received a Bachelor of Arts degree from the University of Oklahoma and a J.D. from Yale. Welcome.

MR. WASHBURN: Thank you.

CHAIR SESSIONS: Next, Alison Siegler is the director of the federal criminal justice project and assistant clinical professor at the University of Chicago Law School where she teaches courses in criminal procedure and federal sentencing.
Previously Ms. Siegler was a staff attorney with the Federal Defender Program in Chicago and an E. Barrett Prettyman Fellow at the Georgetown Criminal Justice Clinic. She received a Bachelor of Arts degree from Yale, a J.D. degree from Yale Law School as well and a Master's of Law from Georgetown Law Center.

It seems to me a fairly significant contribution from Yale Law School both on this panel and the previous one. At least I'm sure to the commissioner on my left, that must be a real thrill. So with that, have you decided between yourselves who wishes to go first?

MR. WASHBURN: Professor Siegler has offered — allowed me to go first. And I will be short because I know that you guys are trying to speed things up. And my written comments have been distributed. I'm sort of Johnny One Note here.

CHAIR SESSIONS: Johnny One Note?

MR. WASHBURN: I'm not going to talk about anything in your current cycle of proposals. What I'm going to talk about is tribal courts. A brilliant young scholar about six or seven years ago wrote an article called “Tribal Courts and Federal Sentencing.” And he is not so young anymore. The article didn't generate much —
CHAIR SESSIONS: He wouldn't happen to be a dean of a law school?

MR. WASHBURN: Currently he is, yes. I'm not sure anyone read that original article. But I am the person who wrote that article. And honestly I'm not as — it was my very first article as an academic and I think I would have come at it a little bit differently if I would have written it today.

But my concern is that the guidelines are not very respectful to American Indian tribal courts. They don't count tribal court convictions for purposes of criminal history. And I think that's a real loss because you all are part of the very important public safety and criminal justice regime or apparatus of the United States. And tribal courts ought to be your partners in that effort.

We have a serious problem in Indian Country, as Eric Holder has recently addressed very aggressively. President Obama recently had a historic meeting with seven cabinet officials and American Indian tribes. And one of the issues addressed was public safety.

And there is a very important bill before Congress called the Tribal Law and Order Act. And President Obama supports that bill. And I think it's
going to pass. I think it will pass probably in this Congress. And I think that that is a time when you probably should reconsider your position on tribal courts. Your position on tribal courts has been the same since the guidelines were first written. During that time tribal courts have grown dramatically.

And we are sitting here in the Sandra Day O'Connor Courthouse. So let me quote Sandra Day O'Connor from about 15 years ago, “tribal courts, while relatively young, are developing in leaps and bounds.” Tribal courts have really developed a lot. They are young. Most of them are young. Some tribal courts are older than the Arizona state courts because many tribes had court systems before even Arizona became a state. Most tribal courts, however, are young and have developed within the last 20 or 30, 40 years.

They are now functioning in very formal ways, very much like American courts. You would be very comfortable if you sat in the back of a tribal courtroom and saw what happened and generally you would recognize what's going on in there. And many of the people who practice in tribal courts are now people who also practice in the state and federal courts.

I feel like it's probably come a time that you could be comfortable with counting tribal court
convictions when you were computing criminal history for federal sentencing purposes. And I would encourage you to consider doing so. I am going — I say — I encourage you to consider doing so. The reason I stop short of saying you should do so is because the United States has a very strong policy throughout federal government of consulting with Indian tribes before doing something that dramatically affects them like this.

And I honestly don't know how tribes would come out on this for sure, but I think the question should be raised. With the new administration having come in, there has been a lot of consulting of tribal leaders and tribal governments about how should we move forward. You are now thinking how to move forward for the next 25 years. And I think it might be an appropriate time for you to engage in the same type of consultation that most other federal agencies are undergoing right now, that is convening tribes and asking them about policies that affect them. This is one of the policies that affects them most.

Some of your guidelines have principal application in Indian Country because particularly some of the violent crimes generally only arise in Indian Country jurisdictions. And so your guidelines have
inordinate impact in those places. And you have
considered them over the years. About ten years ago, I
served on an advisory group to the Commission that
worked on how to change the guidelines for second
degree murder, for example.

So you have been looking at those now and
then, but I would love to see a much more robust focus
on Indian tribes. We have a perennial crisis. About
every five years or so, the media discovers that there
is a crisis in criminal justice in Indian Country and
there is a lot of media play and not that much gets
done about it. It's hard to call it a crisis because
it's an existing crisis and it seems to only get worse.

The Tribal Law and Order Act pending
before Congress is trying to do something about it.
And what that act will do will extend tribal
jurisdiction. Tribal courts since 1968 have only had
misdemeanor jurisdiction. They were for the most part
young courts. And Congress was uncomfortable with them
exercising full jurisdiction in a forum that often
didn't even have attorneys. It was often lay advocates
and untrained, not law-trained tribal judges that were
ruling in these forums.

That's not so true any longer. Most of
the advocates in tribal courts are now law-trained
attorneys. And so I think one of the things that the Tribal Law and Order Act is going to do if it passes is give tribes jurisdiction for felonies up to three years in duration as long as the tribes provide attorneys, indigent counsel for indigent defendants in other words.

And if that bill passes and some tribes take this jurisdiction and agree that they do want to move forward with the felonies and hire indigent defense counsel, my thinking is you ought to look at those convictions and count them in criminal history or you at least ought to consider doing so after consulting with tribal courts.

So that's what I'm here to talk about. This is sort of a heads-up going forward because the Tribal Law and Order Act has not passed Congress yet. I believe it will. It's got quite a bit of support. There have been hearings held on both the Senate side and the House side and it has passed out of the Senate Indian Affairs Committee. So going forward if it does pass, I think that would be an appropriate time for you to take a look at your treatment of tribal court convictions and consider whether you want to grant them more respect. Thank you.

CHAIR SESSIONS: Thank you, Dean
Washburn. Ms. Siegler.

MS. SIEGLER: Thank you very much for inviting me to speak here today. I am very honored to be able to participate in these hearings. Now that judges have a lot of freedom to sentence outside the guidelines, it's more important than ever that this Commission heed judges' concerns about those guidelines and make sure that the guidelines comply with 3553(a)(2) and make sure the guidelines are based on empirical data. Otherwise the concern is that the Commission is going to risk the judges simply ignoring the guidelines, a situation that then may lead to the very disparities that this Commission is supposed to be attempting to avoid.

I should mention that I am interested in these issues not just from an academic perspective but also from a practical perspective because I run a legal clinic at the University of Chicago Law School. And so my students and I litigate federal criminal cases both in the district court and in the Seventh Circuit. And we of course have a lot of clients. Most of our clients end up at sentencing. And so we see a lot of sentencing issues and we do a lot of sentencing litigation.

I'm going to discuss two topics which were
in my written testimony. First I'm going to explain why I believe that the illegal reentry guidelines should be revised and actually lowered. And secondly, I will briefly touch on why I believe the Commission should incorporate offender characteristics into the guidelines.

So first guideline 2L1.2. This guideline is currently creating very significant sentencing disparities. Fast-track disparities are proliferating. And those disparities are unwarranted because they are based solely on an accident of geography. No matter how useful they may be, they are unwarranted disparities.

Judges are also going below the range in a lot of cases because they are concerned that the guidelines call for sentences that are simply too harsh. And that's creating more disparities. Now, those second disparities are not necessarily unwarranted because many of them are based on differences amongst offenders or differences in offender conduct. But if the Commission wants even the appearance of uniformity, it's going to have to modify the guideline to take that into consideration.

So first I want to lay out the disparities I see in this guideline and then I want to discuss four
aspects of the guideline that frequently result in judges giving below-range sentences and propose how the Commission might modify the guidelines to address judges' concerns in those areas.

So first the disparities in the statistics. It's very important to recognize — I think this is very important, and I don't see it discussed that much, that the vast majority of illegal reentry sentences in this country, the vast majority of those defendants are receiving sentences below the guidelines range. So recent data show that fully 79 percent of the immigration cases in the United States are prosecuted in districts with fast-track programs.

What that means is that — what that appears to suggest is that illegal reentry defendants are receiving for the most part very low fast-track sentences and that there is this very small handful of defendants who are actually receiving the within-range sentences that the guideline contemplates. At the same time we have what's happening in — we have something happening in a lot of non-fast-track districts which is we have judges reducing sentences in those districts to take into consideration the fast-track disparity that they see or to take into consideration or account for other perceived problems in 2L1.2.
And so the numbers show — I think it's very striking the numbers from 2008 which show that fully a quarter to a third of all immigration sentences in the Second Circuit and Seventh Circuit are below the guidelines range and nearly 50 percent of all illegal reentry sentences in Chicago and New York are below the guidelines range. Those numbers are very significant.

And it's notable that those districts don't have fast-track programs, right? So that the vast majority of those departures by mere statistics are not government-sponsored departures — I'm sorry — reductions. The numbers — I think these numbers make it clear that judges think this guideline is too high. So examining the case law elucidates some of the reasons why judges have problems with the guideline.

And of course most of our sentences don't result in written opinion. So it is somewhat hard to know what exactly judges are basing these below-range sentences on but we do have a number of written opinions which can give us some information. And so I'm just going to discuss sort of four aspects of why judges seem to be going below the range briefly and then propose what the Commission might do in an attempt to eliminate or reduce some of those below-range sentences.
So one reason judges go below the range is out of a concern about the 16-level enhancement, various concerns about this enhancement, so the concern that it overstates the prior conviction either because of the circumstances of the prior or the way that the state court treated the prior or the age of the prior. And both the Ninth and Tenth Circuits as you know have reversed judges for failing to consider this fact and failing to consider or reduce defendant sentences on those grounds.

I think the Commission should take the relevant cases to heart and should conduct empirical research about whether the enhancement — the 16-level enhancement and maybe even the other enhancements sweep too broadly in a way that both overstates the seriousness of the offense under (a)(2) and creates unwarranted similarities under (a)(6) and in violation of Gall. The Commission should consider lowering the enhancements I believe and also making them more incremental. This is something [inaudible] and I discussed also.

I think four specific things to consider in this regard which are in my testimony. Number one, when there are offenses that technically qualify as crimes of violence but don't actually involve any
violence [they] should be treated differently. Number two, whether prior convictions that don't count for criminal history purposes should also — because of their age, should also either not count or be given less weight in the 2L context.

Third, whether enhancements — whether the enhancements are simply too high to meet the (a)(2) purposes of punishment, in light of the conduct a defendant would have to commit under other guidelines in order to get a similarly significant enhancement. And number four, whether the time imposed for the prior conviction should be considered and relevant to the level of the enhancement, especially when that time imposed is something like probation, a very low prior sentence.

As an aside on that point, I know that Chief Judge Roll objects to some degree to that notion. I read in his testimony he believes that state court judges are giving these low sentences because they think people are about to be deported. It's hard to say why state courts’ judges are giving those sentences. It's also very possible that those sentences reflect the state court judges' own evaluation of the underlying conduct of that original — of that original conviction and that the
state court judge is giving a low sentence because he or she is the person who gets to see and hear all the evidence and knows what happened in that case. That judge is going to be more familiar with the evidence than any future court could ever be. And so I believe that the guidelines should take into account both the time imposed and also of course continue to consider the seriousness of that prior offense.

A second rationale judges give for below-guideline sentences, something this Commission knows very well, is the double counting concern. I understand the Commission is revisiting this issue. I think that's wonderful. I think it's really important that the Commission conduct its research to determine whether double counting overstates the degree to which criminal history is — the degree to which this guideline is resulting in sentences that overstate risk of recidivism or overstate — or overpunishing basically. I also support the changes the Commission is considering to 4A1.1(d) and (e) that — especially in the 2L context. Those guidelines do seem to have some really problematic applications that we have actually seen in a number of our cases.

A third reason judges sentence below the guideline range in illegal reentry cases is out of this
belief that the Commission wasn't acting in its characteristic institutional role in the creation of that guideline. There is some basis for applying that sort of Kimbrough type critique to this guideline. Judge Castillo has said in the past I noticed that the Commission never articulated a justification for setting the enhancement level at level 16 in the first place.

The Commission could address this critique by determining whether that Level 16 — whether that 16-level enhancement is actually supported by empirical evidence and by examining whether higher illegal reentry sentences are actually successful at deterring either future illegal reentries or future criminal conduct in general. I think that's a really important question. If it turns out that 16 levels are necessary to do that, then that can give the Commission a basis for continuing on with such a high enhancement. On the other hand, if that turns out not to be the fact, I think it needs to be revisited.

And if the Commission revises any of the enhancements in a way that better reflects empirical evidence, I think it's very important for the Commission to explain exactly what it's done and exactly what the evidence shows in a way that makes any
future revisions very transparent to defendants and to judges.

A fourth and final reason that judges appear to be sentencing below this guideline range is to account for the fast-track disparity, but not necessarily — judges are not necessarily articulating that as the reason for their reductions. I have some anecdotal evidence on this issue that I didn't include in what I wrote. But my students and I litigated or helped to litigate eight illegal reentry cases last year. In each case we asked the judge to grant a reduction based on the fast-track disparity.

The Seventh Circuit's current law on this prohibits a judge from doing so. I believe that law is wrong in light of Kimbrough. Only one judge agreed with us outright and actually gave a reduction in two of our cases based on the fast-track disparity. He said he thought the Seventh Circuit's law was wrong and that Kimbrough changed the territory. Another judge said I think that this disparity is absolutely unwarranted and unfair but I don't think I have the power to give a lower sentence given the Seventh Circuit's ruling. And so that case is now up on appeal and we are actually just waiting for an opinion. It's been fully briefed and argued.
The remaining five judges granted significantly below-guideline sentences for other reasons, not stating that their sentences were based on the fast-track disparities. Several of those judges actually cut the guideline range in half. One of them going all the way down to time served. The bottom line is that not a single one of the judges in those eight cases was comfortable imposing a sentence within the guideline range.

And this shows the fundamental problem I think with retaining a guideline scheme that judges think is unfair. Judges are going to use their new discretion to reduce sentences below the range and they're not even necessarily going to do so in a way that's completely honest and transparent if they're concerned about being reversed. So this inevitably is going to inject into federal sentences the very disparity and opacity that the Commission is attempting to avoid.

My proposal for how to solve this fast-track disparity problem is very simple, which is simply lower illegal reentry sentences across the board. I know this is something the Commission has heard in other context. The statistics I mentioned at the beginning show that nearly all of
the illegal reentry defendants in this country are
actually in fact receiving below-guideline sentences.

So lowering illegal reentry sentences
across the board would reduce the fast-track disparity
without eliminating fast-track programs. The
Commission doesn't have to tangle with that concern.
Lower sentences in this way would also ensure that the
guidelines are meeting the (a)(2) purposes of
punishment. And lower sentences I believe would reduce
these other judicial variances that I have discussed
which would in turn reduce any problematic disparities
that are being created by those variances.

Finally, I just want to say that I believe
that Henry Bemporad's proposals for revision would go
very far in rectifying many of the problems I have
identified. Before I close, I want to very briefly for
just one minute touch on the offender characteristics
issue. So for five years now, Chapters 5H and 5K2 have
restricted judges from considering offender
characteristics in a way that seems to me to clearly
violate the Supreme Court's mandates and Congress's
mandates in 3553(a) and 3661.

I know one of the questions on which the
Commission is seeking public comment is the diminished
capacity departure. In that regard I want to note that
that departure is simply too narrow. It doesn't let judges account for characteristics that are relevant to all the (a)(2) factors, things like just punishment, deterrence of others, protection to the public, rehabilitation. Judges can't fully account for all the ways in which mental illness affects those purposes in the narrow restrictions of this diminished capacity departure.

The Seventh Circuit actually makes this point very well in a case I didn't cite but I want to call to your attention, *U.S. v. Miranda*. It's a 2007 case, 505 F.3d 785. This is the only case in which they have ever reversed within a guideline sentence that I am aware of. And they did it based on a concern that the person's diminished capacity really wasn't being accounted for and that the judge hadn't taken that fully into consideration.

In addition, many of the restrictions in Chapter Five are inconsistent with the empirical research that this Commission itself conducted in 2004. That evidence showed that numerous offender characteristics correlate positively with risk of recidivism, as this Commission knows. And so as a result, we end up with guidelines which lead to sentences that are greater than necessary to protect the public under (a)(2)(C)
and which create unwarranted similarities amongst very
different offenders in violation of (a)(6).

I think the Commission should rectify
these problems by incorporating offender
characteristics into the guidelines. More broadly, I
think the Commission should either eliminate or
significantly rewrite Chapters 5H and 5K to bring into
mind the Supreme Court precedent and with the
sentencing statutes. And I think that every one of the
defender characteristics on which the Commission is
seeking public comment is indeed relevant at sentencing
and should be relevant and the guidelines should
reflect this. Thank you very much for giving me the
opportunity to address you today. I would welcome any
questions you have.

CHAIR SESSIONS: Thank you,
Ms. Siegler.

COMMISSIONER HOWELL: I have some
questions. Professor Siegler, thank you very much for
your very thoughtful testimony, both of you actually.
And your suggestion for simply doing an
across-the-board reduction of all illegal reentry,
reducing the guidelines for all illegal re-entry cases
is an interesting one. And I think it would, as you
say, perhaps address the perceived disparity with
fast-track programs. On the other hand, do you have any concern that it would also undermine some of the law enforcement objectives that underline the fast-track programs at the outset?

The fast-track programs are there to help move along expeditiously this massive volume of cases in those jurisdictions where the fast-track program has been approved by the attorney general. Would you — is this just a chicken and egg issue? If we followed your proposal, wouldn't the fast-track program thereby just have to have further reductions and then we lead to the same kind of unwarranted disparity? And how does your proposal really help the situation?

MS. SIEGLER: I don't think that the current fast-track programs — that the success of the current fast-track programs depends on this small minority of defendants getting extremely high sentences. So I think that if the sentences are lowered across-the-board, then perhaps 5K3.1 might also have to be tweaked. The fast-track guideline might also have to be changed slightly.

I think as long as these defendants in fast-track jurisdictions are getting something below the guidelines, something below what they would otherwise be getting and as long as they are getting
the fast disposition — I think a lot of defendants are interested in — the fast disposition is actually something that appeals to them and something that if they're given even a slight reduction, they are going to be interested in taking.

So I guess what I would envision is truly the problem is fast-track programs create disparities and they are going to continue creating disparities as long as they exist, but then there are these countervailing reasons we want them.

If you are going to have disparities no matter what because of fast-track programs, at least it seems to me that if you lower the guidelines significantly, perhaps the difference between what other people are getting, what people without fast-track are getting and what people with fast-track are getting could be lessened without reducing the attractiveness of fast-track programs to the defendants in fast-track jurisdictions.

It seems to me those folks are still going to want the reductions. Even if they're getting a two-level reduction, not a four-level reduction, if it's a two-level reduction [or] something even lower, they are going to be fine with it, I think. And sure,
you will still have disparities but they won't be as really significant as they are now where people in Chicago are getting 77 to 96 months and people in Oregon are getting 30 months.

CHAIR SESSIONS: All right.

Mr. Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you, Mr. Chairman. Ms. Siegler, I have one question. You said that you would like the Commission to look at empirical data. And you cite concerns about the illegal reentry guideline based on the eight cases that your class litigated last year. Your colleague who testified no more than a half hour ago said that in his district where there are 7,000 cases litigated every year, that roughly eight in ten get a within-guideline sentence. Doesn't that suggest something completely opposite from what you are suggesting? And doesn't the numbers and our interest in empirical data suggest we shouldn't change the guidelines you are suggesting?

MS. SIEGLER: I think the statistics in the Western District of Texas actually show one of the real problems with the fast-track program and the way fast-track operates. My read of the statistics is that the Western District of Texas has the third highest number of illegal reentry cases in the entire country
of all the 94 districts. So if the Western District of Texas doesn't have a fast-track program, I don't understand what fast-track is for. I don't understand — that doesn't make any sense to me.

And so it seems to me that the Western District of Texas is in a lot of ways an anomaly that shows some problems, but I don't think the Western District of Texas sort of disproves the point I am making because I think that for the most part, if you look at the circuits and the districts without illegal reentry — I'm sorry — without fast-track programs, you are going to see below-range sentences in illegal reentry cases.

COMMISSIONER WROBLEWSKI: Let me just cite your statistics, the most recent statistics that were put in front of me just yesterday. Nationwide for all cases, non-government-sponsored, below-range sentences occurred in 16.4 percent of the cases. In immigration cases, and admittedly that includes more than just 2L1.2 cases, they occurred in only ten percent. So it's significantly lower than the national average.

MS. SIEGLER: I still think that — it seems to me that if you are seeing things like in Chicago and New York with 50 percent of the sentences being below the range, you have judges — there are a
lot of judges who simply aren't following these
guidelines. And I think part of the problem also is
that there are some judges in some districts who take
Booker seriously and some judges who don't take Booker
as seriously and who simply continue to follow
guidelines regardless of whether they believe that
those — without actually thinking about the question
of are these guidelines really fair and are these
guidelines really furthering the purposes of punishment
as we want them to be doing.

COMMISSIONER WROBLEWSKI: That's quite an
indictment of a whole host of judges, whether they're
from Western Texas or other places. Let me suggest
maybe a different — and get your reaction to a
different interpretation, that there are differences in
the way human beings look at these sentencing issues.
And with greater discretion, there will be greater
variation. Is that a possible — an interpretation —
do you think that's a good one or bad one?

MS. SIEGLER: You are saying — I'm sorry.

COMMISSIONER WROBLEWSKI: That with
greater discretion — Booker created greater
discretion. That with greater discretion, there will
be greater variation. There will be more judges —
some judges who continue to follow the guidelines.
Maybe they disproportionately live in Western Texas.
And there will be some judges who don't follow the
guidelines quite as much and maybe they
disproportionately live in Brooklyn and Chicago.

    MS. SIEGLER: That's a fair point. I
still think that part of the Commission's mandate is to
take into consideration — I mean, back in the old days
they were called downward departures — but take into
consideration when judges are departing, when judges
are giving lower sentences and to actually pay
attention to the groundswell of what they're hearing in
that regard. And I do think there is — there is a lot
of critique out there by judges, and you know this as
well as I do, of this guideline.

    I think there are a lot of judges with
concerns. And so I think the fact that some judges
don't have as many concerns should not prevent this
commission from looking at it and revisiting it,
especially this issue of empirical data. What was that
16 levels originally based on? What was the double
count originally based on? Those things are important
now to judges. Sure, some judges may not deviate out
of those concerns, but other judges will. And I think
that should be considered.

    VICE CHAIR CARR: Maybe you would like
to suggest to us that we lower the guidelines and then see that in the Western District of Texas the judges don't go up.

CHAIR SESSIONS: I have questions for both, and first Dean Washburn. Of course you weren't at dinner last night, but one of the issues that was raised with the judges in Phoenix and others, use of convictions in tribal courts. And what was expressed at least in part by some was that there is a wide variety of the kinds of tribal courts. Some include due process rights. And of course that's a fundamental prerequisite in regard to criminal history. And the due process rights, in fact uncounseled convictions for felonies obviously cannot be included, just as an example.

While there are some — according to the local practitioners and judges, there is this disparity where some tribal courts do not have those basic functions. And I guess my question is do you think that perhaps this is an issue that should be studied? And in fact there is a proposal to have a permanent Native American advisory group to the Commission to actually address this particular issue so that it can be explored and get the input of the Native American populations. That's my question for you.
And Professor Siegler, in regard to offender characteristics, traditionally the guidelines have been used in a way to direct practitioners and judges as to how to assess particular factors. One of the proposals that we have now may in fact change that focus just a little bit. You're an academician as well as a practitioner. And I guess I would ask for your general response. Offender characteristics under 5H are of course ordinarily not relevant.

And we had many responses from the defenders, et cetera that we should not be directing judges to discourage them from departing downward by using offender characteristics. In fact if you start looking at offender characteristics within the guidelines not by way of directives from the Commission but rather a vehicle by which the Commission can then just explore the empirical basis of uses of these factors so that judges know how they are relevant, age, recidivism, just as an example, age — culpability is another example.

Without saying necessarily that you shall or shall not do X, Y or Z, but you just provide expertise to practitioners and judges in a sense without much value judgment, do you find that different approach to the Commission's function to be valuable or
not? So perhaps I can ask Dean Washburn first.

MR. WASHBURN: Mr. Chairman, thank you for your questions. Tribal courts are — they do range across a lot of variety. Congress has imposed on them basic civil rights and due process requirements in the Indian Civil Rights Act of 1968. There is a habeas remedy in federal courts if they don't follow it. So there is a base level of due process that's very similar to what states are required to follow under the 14th Amendment.

The interesting thing is it took states more than a hundred years to develop this full panoply of due process through the incorporation debate. You recall that originally the Fourteenth Amendment did not apply to states. And under Barron v. Baltimore, it was deemed that the first ten amendments didn't apply to states. So the Fourteenth Amendment — the debate that we had for more than a hundred years was should the first ten amendments get incorporated through the Fourteenth Amendment if due process applies to states.

It took a hundred and some years to work that out. In 1968 Congress plops the Indian Civil Rights Act down and said all of these apply to tribes, following basically that the Fourteenth Amendment incorporation clause is applied to states through the
Supreme Court over the course of a hundred years. So there are basic due process rights to apply. Now, I do think that tribes would benefit from the kind of scrutiny that they would go under, that they would undergo by people asking those kinds of questions. And I think this would be a good forum to be asking those kinds of questions. And I think that we would find the tribes apply the due process rights in different ways. I think there has been — they have been moving towards the center. I think that tribal courts are starting to look kind of identical across the country.

If you like the idea of a 50-state laboratories approach, it's kind of a shame because the tribes aren't really experimenting that much with different ways. They're kind of moving towards the center, towards the mean. But again, you would be comfortable with what most of the tribal courts are doing. They do still vary. But a lot of the people you were talking to last night were probably people over the age of 50 that developed their first views on these things decades ago and haven't really necessarily paid attention to how they've changed. And I think they have been growing. I think tribal courts have been growing.
Now, you asked whether we should have a permanent advisory group to advise the Sentencing Commission on these issues. I am an academic. So studying things is exactly what we should be doing, I think. I think it's a really good idea. The problem — I have been in this place before. And largely what you have before you are prosecutors and defense attorneys. And that's a limited group.

We don't do this work for prosecutors and defense attorneys. We do it for the society as a whole, the whole community. And I think an advisory group like that that consults with tribal tribes, tribal communities could be very helpful to giving you a broader perspective on these issues. And I think that would be a very good improvement. Thank you.

CHAIR SESSIONS: Ms. Siegler.

MS. SIEGLER: Thank you, Chairman Sessions. I think that there — it seems to me there are two ways that the Commission could — two broad ways the Commission could revise these offender characteristics guidelines and policy statements. The first way would be to list — to do essentially what you are talking about, which is list the Commission's recidivism findings in the guideline itself.

I really like the idea of the Commission
explaining here are our empirical studies, here's our 2004 study, in some sort of very reduced way. Here's what we found. We found correlations between age and recidivism, between gender and recidivism, between employment and recidivism, et cetera, et cetera. And then I think in addition to saying that, you would also want to say therefore this is relevant to an (a)(2)(C) analysis.

It seems to me that once you are talking risk of recidivism, you are clearly talking protecting the public from this particular person. And I think it would be useful to courts if the Commission actually made that leap and said okay, here are all the things that correlate with recidivism. That means this is relevant under (a)(2)(C).

The second way of doing it, which is to have more value judgments, would be to say okay, we are going to put in a downward departure if you are over the age of 50. We are going to put in a downward departure if you were employed within two years of the offense, things like that. As between those two choices, I like the former one, which is I think essentially the proposal that you are making where there is no value judgments but full information given to courts.
I think the most important thing is to remove the negative value judgments that are currently there and that are not in line with current Supreme Court law and to remove the current restrictions on things like diminished capacity where there are so many internal restrictions in that downward departure ground that no longer are necessarily appropriate in light of the law. So I actually like this proposal that you are making of sort of no value judgments with full information.

CHAIR SESSIONS: I think actually one of the areas that we asked for comment was in mental and emotional condition under 5H1.3, which of course relates in some ways to diminished capacity under 5K but is obviously much broader. I think that's what you are asking for.

MS. SIEGLER: Yes. If 5H1.3 were different, you wouldn't even need the 5K2.13. I mean, it seems like that almost isn't necessary anymore.

CHAIR SESSIONS: Well, thank you very much for the conversation and your testimony. Let's take just a brief recess. We can start at 11:00. Thank you.

(Whereupon, a recess was taken at 10:53 a.m. until 11:00 a.m.)
CHAIR SESSIONS: So let's call the meeting to order. I really appreciate, by the way, the witnesses' willingness to move their testimony forward. Of course we have somewhat of a transportation emergency. That is we were told the airport will be closed relatively soon and we have flights that have been moved up accordingly. So I really appreciate your willingness to come forward just a bit early. So this is the seventh panel. We do need to end by 11:30 I am told by the powers that be. So I think that gives us plenty of time.

Let me introduce our panelists. First, Doris Marie Provine is a professor in the school of justice and social inquiry and a senior research faculty member at the immigration research project at the School of Criminology and Criminal Justice. Previously she served at Syracuse University and as director of the Law and Social Sciences Program at the National Science Foundation. Dr. Provine is currently a Fulbright Fellow in North American studies studying immigration policy and cross-national perspective. She earned a B.A. from the University of Chicago and her law degree and Ph.D. from Cornell. Welcome.

DR. PROVINE: Thank you.

CHAIR SESSIONS: Next, Malcolm
Lewis is assistant chief of police of the Tohono O'odham Nation. He has over 28 years of law enforcement experience, both with the Bureau of Indian Affairs and with the tribal police. His experience is primarily throughout the southwest region, including Nevada, Utah and Arizona. He has worked with several tribes, including the Mohave-Apache tribe of Fort McDowell, Arizona and the Ute Nation in Fort — is it Duchesne — Duchesne, Utah. He is certified with the states of Utah and Arizona and is a member of the Tohono O'odham Nation. Welcome. And thank you very much for moving up your testimony today. So first, unless the two of you have decided between yourselves who wishes to go first —

DR. PROVINE: Malcolm offered to go first.

CHAIR SESSIONS: Okay. Do you want to go first, Mr. Lewis?

MR. LEWIS: Yes, sir.

CHAIR SESSIONS: Thank you.

MR. LEWIS: Yes, ma'am. Yes, sir. It's a pleasure to be here and be invited to express our concerns and admirations for the systems that do exist because they do have an impact on our nation's members or persons that are convicted on our nation. First of all, Tohono O'odham Nation, 2.8 million acres. It's
the size of Connecticut, 28,000 population, which about
15,000 live on the Indian nation itself. We have 75
miles of international Mexico border, U.S.-Mexico
border which we deal with and a lot of situations where
internationally it affects indirectly or directly the
nation and its members.

First of all, crime is at its highest. We
have gangs. We have international situations with
undocumented aliens. We have drug trafficking
transport. If there is a drug in the state, whether it
be Chicago, New York, Phoenix, Los Angeles, it's come
through our neighborhood. It's come through our
territory. We also have other issues that
internationally affect us. We have cattle wrestling,
which is a big ordeal with the international border
where members of the nation have incidents where cattle
is being wrestled and taken across back to Mexico.

We have a variety of incidents at the
casinos which we have which also market – it's been a
good thing for us financially, economically, making us
independent, taking care of our own business. But it
also attracts the crime that consists with those deals.
So we have a lot of different areas that would be
coming to your courts, whether it be an issue with the
environment where we have our own violations, which is
our Environmental Protection Act where we have
international stuff that we would be bringing before
you or we have our own issues with charging our members
for violations of federal crimes. So we have a vast
majority of things that we bring to your court.

The thing that we focused on when we were
called to do this was what Mr. Washburn had been
talking about, not using the tribal systems, the tribal
sentencings and structure on the backgrounds for those
people that have to take it to the next level. So I
mimic his responses and his concerns there. Our tribal
court is similar to this. The lighting is maybe not
as —

DR. PROVINE: Not as large perhaps.

CHAIR SESSIONS: How about the
catwalk where people can walk around?

VICE CHAIR CARR: Those they have in the
casinos.

MR. LEWIS: Yeah, you're right. We do
have the casinos. But that would be our point, is that
you would look at in your sentencing structure as
being — looking at what the tribal courts have to
offer. I know they're not a court of record. I do
know that they substantially have come to the standards
of the courts of Arizona. They use a lot of what they
have structured as far as civil and criminal matters and procedures. And so I do mirror that challenge that that would work, that you could use that as a basis of which — for presentencing and using the tribal court system.

One incident that we have that I would like to give you some information on is we had one victim, a victim of a minor child, 14 years old, that was abused sexually by two members of her family. One member was fondling and the other one actually impregnated the lady, the young girl. We had two different sentencings to those incidents, which was inconsistent with what we felt was just and to assure that those people be held accountable for what they are doing. And we found that there was inconsistencies with that particular case where the fondling was of more of a — given more time for what he did there, where the other person who impregnated the young lady was given less sentence.

So of all the cases that we have had, and we have had some successes with you folks and we appreciate what's been done, but also some of the inconsistencies that happen out there. I didn't research that particular case itself of why those things were done. But in that case you would certainly
look at that and see that there was certainly
significant difference in the type of crime that was
committed and then the sentencing that was given to
those two situations in the same victim.

We appreciate — we filed approximately
over a hundred cases through your courts and have
successfully prosecuted and sentenced those cases. And
we appreciate that. So we do have some good rapport
and good feedback from what's being done presently. We
have other agencies that do a lot of work on our
nation, the VA, ATF, FBI, of course U.S. Border Patrol.
We have three sectors of the Border Patrol within our
nation.

And so we have all these factors that are
concentrating on immigration issues and border crimes
issues that affect not only our domestic — our
domestic villages, our neighborhoods. We have enjoyed
the fact that we have our brothers in green or whatever
color they are helping us. And so we appreciate the
fact that the job is getting done, but there is a lot
more that needs to be done also. And that is all I
have. Thank you.

CHAIR SESSIONS: Thank you,
Mr. Lewis. Dr. Provine.

DR. PROVINE: This is a funny position, to
be the last person before you catch your planes and you
are worried about it, and I don't blame you. I'm kind
of a deep background for you. My focus is on how local
law enforcement is engaging with unauthorized
immigration. I was a little surprised to be asked to
testify but I am definitely pleased to be here.

And as I was listening this morning to the
previous two panels before Malcolm and me, it became
clear that one of the connections for you is with this
issue of penalties for unauthorized entry and to an
extent the issue of offender characteristics. So
perhaps we can kind of think of it in that light.

My basic message today is that what we are
seeing now represents a real patchwork of local law
enforcement as it feeds into the federal system. I'm
going to tell you a little bit about some research my
three colleagues and I are conducting on what local
police are doing. We have done a national survey. So
we have a sense that's wide but not as comprehensive as
it will be about what's going on.

But let me just first say that right here
in Arizona there has been a massive change just in the
period that I have lived here, which is about nine
years. In the old days, until four or five years ago,
local law enforcement really didn't get engaged much in
immigration control. It was a federal matter. The states and city governments had not gotten involved in it. This all is a very recent phenomenon that we are talking about here and kind of a recent conflict.

There was certainly cooperation between local and federal immigration authorities on particular raids and on particular individuals when they were caught for serious crimes that would generally be reported to immigration authorities, but basically it was kind of an implicit agreement that allowed employers to hire unauthorized immigrants and allowed families to be intact. Very few federal resources were involved in interior enforcement. And you could really see that in Arizona.

The response that immigration is a federal matter actually did kind of fly at what was the radical element at the state level that wanted to criminalize immigration. And then when Congress failed to come up with comprehensive immigration reform in 2006, which was the same year that there were massive immigration marches, everything changed here and in some other places as well. It was very clear here in Arizona. And the answer that Congress will take care of it no longer held back the rush to legislate at the local level, which ultimately can feed into the work you do
through unauthorized reentry.

And so we have criminalized working
without legal — the legal right to be here. We have
criminalized being smuggled here. You are a
cooconspirator if you are smuggled in. You don't have
to be the smuggler. You can be the smugglee. We deny
a bail. We don't let people vote. We have cut off all
sorts of public benefits to undocumented immigrants.
So we have set out a pretty strong stand at that level.
And of course encouraging the police to become more
involved in immigration enforcement is part of this
general trend toward the state and local level trying
to kind of push the issue toward more aggressive
enforcement.

What's interesting, as you notice, that
states and some counties are much more interested in
this than big cities. Well, we became involved in
this. This becomes a really interesting and difficult
issue for police departments because most of them are
very committed to community policing ideals which
involve gaining the trust of all members of a
community. I'm sure Malcolm could address that as
well, that it's important no matter what somebody's
legal status any or other kind of status, that
everybody feel they can call the police if they're a
witness to a crime or a victim and that the relationships be good. And it goes so far as a lot of proactive activities that we discovered as we did our survey.

So we also were watching another kind of movement that was going on, and that is a sheriff who became very interested in immigration enforcement. So we have kind of a contrasting approach is occurring in the same place. In many parts of the country and probably where you all come from, county sheriffs run jails and they deal with the incorporated parts of a county and then they leave to city police the city parts, but we don't do it that way. Our county sheriff goes everywhere. So we have a built-in imbroglio with enforcement because of differences in enforcement ideology and paradigms. And this is replicated at the national level as well. We've got a lot of differences going on.

So what my colleagues and I did was to decide to inquire from police executives how are you handling this situation? So we designed three surveys, one of which has been in the field and analyzed that we did in 2007, 2008 and one of which is in the field now. The first one that is analyzed is the one I will talk about, and that's the medium and large size city
chiefs. These are cities 60,000 or more and with a
certain percentage of immigrants in the states. And
it's about 500 police chiefs we sent this to and we got
over half of them responding to us.

The second survey which is in the field
now is going to be very interesting to you as well, and
that's of sheriffs around the United States, all of the
county sheriffs in states — in counties with any
significant amount of immigrants. And the third survey
which may be of less interest to you is in the near
delivery stage, about to go out in the field, and
that's of small cities and towns. We believe that each
of these levels has kind of different issues and
concerns.

So what we find in this survey — and we
asked a number of questions. One whole area was how do
police chiefs look at these issues or police
departments look at these issues as opposed to people
in the community? And of course we are asking chiefs.
So we are asking their perspective on this. And they
reported to us that within police departments, there is
more of an idea that these — that all members of the
community are relevant to their work and that trust in
the police is important and kind of a professional
refusal to kind of treat this as a controversial issue.
They see outside of the department much more readiness to be in conflict over this, definitely less concern about these issues of trust, definitely less concern about the possibility that an undocumented immigrant might be a victim of a crime. And so there is a kind of isolation there in terms of the sense of the community truly understanding their work.

We found also that the city governments weren't terribly involved with this issue. We hear all the time about cities passing this ordinance or that ordinance. In fact that's still very much a minority activity when you know the number of city governments that are out there. We know states are passing laws and some of those are relevant as well, but some of them are positive and some of them are negative toward immigrants. But then when you get to the level of local police departments, there is kind of a tendency to trust the police to do policing and not to try to micromanage their work.

So two-thirds of our respondents said that they believed their cities were generally satisfied with their work. The local governments, about half of them have no policy at all according to these big city chiefs. Twelve percent said the department was being asked to be more proactive. More — about 15 percent
reported that their community would really prefer not
to know, don't ask, don't tell. Four percent of the
respondents said that their community was a sanctuary
city. It kind of gives you a sense.

One of the things we found was that not
only is there not a lot of guidance coming from city
governments, but within police departments themselves,
there is not a lot of policy being made. Over half of
the police departments, and these are chiefs, so they
know, had no policy at all, written, unwritten.
Thirty-nine percent do have written policies. And less
than half provide any training at all for their
officers, which of course means that police officers
are kind of on their own about when to report an
encounter with a suspected unauthorized immigrant to
immigration authorities.

We asked a question about how do we — how
do chiefs think their officers are handling these
situations where they're kind of trying to figure out I
suppose their own norms. And we found a clear pattern.
We asked kind of the scenarios of enforcement and we
found a clear pattern in which the most serious cases
were the ones that were most likely to result in a
report to the federal immigration authorities, to ICE,
and the least serious were the least likely. It did
surprise us a bit that in that least serious category, we put victims and witnesses to crimes and 13 percent said yeah, we would still report a person to ICE even though they're trying to help us enforce the law but they might be undocumented and so ICE would want to know.

Overall – we asked other questions. I can't really go into details – I know we are pressed for time – that suggested there is quite a complicated relationship between police departments and undocumented – this undocumented immigrant community within our communities. About three-fourths of them accept Mexican consular IDs, which are strictly controversial outside of police departments but treated as valid ID by most police departments.

There are benefits in most departments for officers who learn foreign languages. Obviously that doesn't just appeal to undocumented immigrants. Seventeen percent provide a confidential telephone line to report possible criminal activity and not have to worry about immigration status. That definitely is responsive to that. And there is a very strong commitment to community policing among big city chiefs. Over half of them have bicycle patrols. They meet with churches, community organizations. They work with
non-governmental organizations. And they have officers
who do speak foreign languages.

But I mentioned earlier that there is a
patchwork approach to enforcement. Some of this is
because immigrants themselves are not everywhere.
They're in their own patterns of settlement. But it's
also because there is a highly variable level of
interest in enforcement of this sort. And I suppose
you would say there would be differences in the
resolution of this issue of community policing. Very
few departments have formal agreements with the federal
government. So there is not really guidance coming
from that source.

We found that four percent of these chiefs
had any 287(g) agreement for arrest issues. And three
percent had arrangements with jails. Eight percent
have ICE officers embedded in one or more of their
units. So that means that in terms of day-to-day
either advisories or people there, it's quite
infrequent. Yet most of them if they do arrest someone
who is charged with a serious crime who they believe to
be undocumented, three-fourths of them said that they
would call federal immigration authorities. Fourteen
percent said they never do and wouldn't.

So I would suggest that there are four
crucial kind of points, four major points, and then one 
thing I would like to address with you in particular. 
There is certainly differences between departments and 
communities in terms of this whole hot button issue. 
It's also clear that police officers, individual 
officers lack much guidance of any sort, either from 
their community or from their department about what to 
do when they encounter immigrants. It's also true that 
local governments are not in general pushing police 
toward greater levels of enforcement. Some are, but 
many aren't. And it's also clear that the level of 
formal agreements with federal authorities is very low, 
even with all the attention that's been drawn to this. 
The issue that I wanted to bring home 
besides this one of extraordinary variability of a true 
patchwork of enforcement both at the level of 
departments but also at the level of individual 
officers, the other issue is really the question of 
jails because what we are seeing now is more and more 
federal effort to connect with local — with local 
jails and create communication about who might be 
having a warrant of some sort for an immigration 
violation and to exchange data. And it will probably 
be done electronically. I think the goal is to connect 
all local jails with federal immigration authorities
within — I don't know — the next few years.

And the problem is that the jail ID situation if it's done without any kind of regulation means that essentially the federal government is sucking into a large vacuum cleaner people who have been arrested for very minor violations, sometimes pretextual stops, sometimes because of racial profiling. There can be some very inappropriate behavior that ends up with people in a booking situation. And unless the federal government puts some controls on what it will accept from this source, then essentially its part of the issue.

And where it comes into connection with you folks on the Sentencing Commission is people generally will be — will accept a voluntary departure in this situation where they are confronted with deportation rather than challenging it. They know they're in the country without authorization. So they, quote, unquote, voluntarily depart. It's voluntary within kind of a coercive situation. But then they often — because they have strong roots here, they come back to be with their families or come back to their jobs and then they get caught for illegal reentry and the process of the escalation of their criminality then begins.
It's — I think it's really good of you to kind of want to push this back to the very kind of first stages in which this occurs. And I think what you see if you look at it empirically is it's quite a problematical situation in terms of how cases are getting into the system, which of course makes it extremely difficult for people sitting in your seats and trying to determine how to handle issues of sentence variability and sentence severity when cases have gone to the level that you are seeing them. So I am grateful to you for your interest. And I am certainly grateful to you for your time, given the situation especially. So thanks.

CHAIR SESSIONS: Appreciate that.

VICE CHAIR CARR: Mr. Lewis, what are the newer added crimes that the casinos bring?

MR. LEWIS: To give you an example, we had a situation where we had a group coming out of California and had credit card listings and credit card numbers and were actually duplicating numbers to the cards. So that group has actually taken us back to the Ukraine, Russia. So we are getting those type of situations. We are lucky that our casino didn't lose any money in that particular situation. Those kinds of crimes are — we have the biker — Hell's Angels coming
through, negotiating having that spot as a place to
meet or spend their money. Spending the money is not
the problem. It's just what they engage in is what
causes us some issues and some safety problems there at
the casino.

CHAIR SESSIONS: Thank you very
much. Oh, my goodness, the telephone call has just
told me it's 11:30. So I appreciate very much your
testimony and also coming early. And so thank you.
(Whereupon, proceedings concluded at 11:30 a.m.)

-ooOoo-
STATE OF ARIZONA    )
                  ) ss.
COUNTY OF MARICOPA  )

BE IT KNOWN that the foregoing United States
Sentencing Commission Public Hearing was taken before
us, that we were then and there a Certified Reporter
#50253 and ^ #NUMBER in and for the State of Arizona,
and by virtue thereof authorized to administer an oath;
that the proceedings were taken down by us in shorthand
and thereafter transcribed under our direction, and
that the foregoing pages are a full, true and accurate
transcript of all proceedings had and adduced upon the
taking of said hearing, all done to the best of our
skill and ability.

WE FURTHER CERTIFY that we are not related to
nor employed by any of the parties thereto, and have no
interest in the outcome hereof.

DATED at Phoenix, Arizona, this 18th day of
February, 2010.

MERILYN SANCHEZ, RPR
Federal Reporter

JOANNE WILLIAMS, RPR
Certified Reporter #50253