UNITED STATES SENTENCING COMMISSION

IMPLEMENTING REQUIREMENTS OF

THE PROTECT ACT

PUBLIC HEARING

Tuesday, September 23, 2003

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Thurgood Marshall Judiciary Building
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AGENDA

P R O C E E D I N G S

JUDGE MURPHY: We're very happy today to have some help as we do our work on the PROTECT Act, and we appreciate everybody coming. Our first panel is going to give us some information on their early disposition program that's in effect in the district of Southern California.

And Chief Judge Marilyn Huff has come, and despite--she came from San Diego and has to go right back to San Francisco because she's on the Committee on Judicial Resources and has been chairing the Subcommittee on Judicial Statistics. But anyway, the committee is meeting in San Francisco tomorrow. So we really appreciate your coming.

And with you is Steven Hubachek. Am I torturing your name?

MR. HUBACHEK: It's close enough.

[Laughter.]

JUDGE MURPHY: Who is an assistant federal public defender in that district and, obviously, working

with these--with the guidelines every day.

So without further ado, we'll sit down here. The chairs are so tight together, we have to all sit down at the same time.

MR. JASO: It might be more dramatic to have a big curtain like they have at the Supreme Court, and everybody sort of comes out at the same time.

JUDGE MURPHY: We need a bigger room. Chief Judge Huff, do you want to begin?

JUDGE HUFF: Good afternoon. Thank you for the opportunity to provide information to the Sentencing Commission on your very difficult task on implementing the requirements of the PROTECT Act. Specifically, I'm here to discuss fast track or early disposition programs.

I've submitted written testimony, and my testimony could be summarized in three points. One, fast track is intended to address the serious problem of court congestion. Two, fast track was not judicially created. Rather, it is an exercise of traditional prosecutorial discretion as to what cases to bring and what cases to

dispose. And three, fast track programs benefit the public by saving taxpayer money and substantially reducing court congestion.

With that framework in mind, let me go to the first issue, and that is the problem of congestion, primarily on the Southwest border. I've provided the dramatic statistics to you. In the most recent published statistics from the Sentencing Commission, the Southern District of California sentenced more guideline defendants--4,213--than seven other circuits. That's astounding.

But despite the high volume of cases, the Southern District of California was the fastest in the nation on criminal dispositions. In 2001, the rate was four months. And in 2002, that time was cut down to 3.8 months. And that is shown in Exhibit 1.

The disposition time is primarily due to the existence of two types of fast track programs--one, a departure for drug cases and, two, an early disposition program for criminal aliens. There is

a variant that's discussed in my testimony about alien smuggling cases, which is really a variant of early disposition program.

To put the problem in context, the Southern District of California includes San Diego, the seventh largest city in the United States, that has severe large metropolitan problems like other major metropolitan areas. But also the district shares an approximate 200-mile border with Mexico and has six ports of entry.

When I started as a federal judge, there were only three ports of entry. It's now expanded to six ports of entry. Two of the ports of entry are the busiest land ports of entry in the world. And to dramatize the area, this is Exhibit 1, a frequent exhibit in many of our criminal cases. This is what happens at San Ysidro, a day in the life of the Southern District.

And interestingly, I received from the Department of Homeland Security the statistics on the number of immigration inspections in our district. Last year, 2002, there were 87 million immigration inspections

at our six ports of entry. Additionally, on maritime cases, under the law, the cases are required to be brought to the nearest port, and the Southern District of California happens to be the nearest port for cases that arise in--outside of South America. And so, we've also had two of the record numbers of seizures--12 tons and 13 tons of cocaine--also brought to our district.

To sum up on court congestion, there is a high likelihood of criminal felony cases that are likely to be brought in the Southern District of California and a reduced number of federal district judges that are available to handle this congestion.

On to the second point, the existence of the fast track. Historically, the fast track was created by U.S. attorneys to address the issue of court congestion. At one point in time, we frankly did not have the space to house the criminal defendants. We had no pretrial detention facilities sufficient to house the number of defendants that were being apprehended and brought into our district.

And so, five successive U.S. attorneys have established and monitored a fast track or early disposition program. It was not created by the judges. We are judicial officers. We do not make the law. We simply administer the cases that are brought to us.

And then, finally, the third point. The fast track program actually has benefited the public by saving resources and relieving port congestion.

Ultimately, the Court of Appeals in United States v. Estrada-Plata said, "In light of the overall crime problem in the Southern District of California, the government chose to allow Section 1326(b) defendants"--that's the immigration cases--"the opportunity to plead to a lesser offense if done so at the earliest stage of the case. Like the district court, we find absolutely nothing wrong (and, quite frankly, a great deal right) with such a practice. The policy benefits the government and the court system by relieving congestion."

How does it do that? You know under acceptance

of responsibility, the government can grant two levels--or the court can grant two levels for acceptance of responsibility. And now, under the PROTECT Act, a third level if the government makes a motion. But a defendant could litigate the case up till the day of trial and still receive two levels for acceptance of responsibility.

Under a fast track or early disposition program, it encourages those defendants who are ultimately going to plead to plead early. By pleading early, it saves grand jury time. A vast majority of the criminal immigration cases proceed by way of information, not by indictment, saving the grand jurors from having to meet and assemble.

It saves interpreter time. We have a significant problem with defendants being housed at various places. And so, by encouraging an earlier disposition, the interpreter time is reduced.

It saves federal defender time and the payments to Criminal Justice Act panel attorneys by having less

motions litigated before the court. It also saves immigration judge time because frequently, as a condition of a fast track or early disposition deal, the defendant agrees to be deported or removed and agrees not to reopen, challenge, or otherwise litigate the immigration case.

It also saves magistrate judge time. It saves district judge time. And because there is a waiver of appeal in the majority of these cases, it also saves appellate time.

Overall, the participants in the Southern District of California rate these programs as exceptionally successful. I've provided the statistics on the criminal alien fast track program. And remember, this is the program adopted by the U.S. attorney.

But for our immigration cases, approximately 1,800 are charged with violating Title 8, United States Code Section 1326. Those with serious violent felonies, the crimes of violence, are prosecuted to the fullest extent required by law. The rest are offered an

opportunity to plead to two counts of violating Section 1325, one misdemeanor and one felony, and then under guideline application, under sentencing guideline 5G1.1, the statutory maximum becomes the guideline sentence. And that's a 30-month sentence.

The conditions are the defendant waive indictment, file no motions, plead guilty within 60 days of arraignment, stipulate to removal after completion of the sentence, agree to immediate sentencing, and waive appeal and collateral attack.

Then there are certain exceptions, which are outlined in my testimony, for those defendants who have lesser than 30 months. Typically, this is for recidivist defendants who have many, many, many immigration contacts--for example, 50 voluntary returns--and the government wants to then go further and have a more substantial penalty for the next violation. The parties do rate this program as exceptionally successful.

The second fast track program includes a two-level departure under sentencing guideline 5K2.0 for

the early resolution of border drug cases, and the conditions are similar. But typically, there is not a waiver of a pre-sentence report.

Now in both of these programs, the judge is free to accept or reject the plea bargain that is recommended by the parties. The judge can refuse to take even the statutory maximum. And indeed, that is frequently the case if the judge thinks that this is an unfair or unjust sentence result.

And then, as I said, there is a related alien smuggling program, where defendants who have been charged with a mandatory minimum term for commercial advantage and private financial gain are offered the opportunity to avoid the mandatory minimum term if they plead. This involves no departure. So basically, our only departure case is the criminal drug border bust type of case.

As I said, the fast track program began as a means of coping with an increasing criminal caseload in the district and a lack of other resources. At a time where Border Patrol and other law enforcement was

increasing, the judicial officers in our district were decreasing. We sadly had three deaths in our district and some other health-related issues that actually reduced our available judicial resources.

Additionally, we do have many challenges. Housing the pretrial criminal defendants. I got the current statistics, and they are currently housed in 11 different facilities. There was a time in our district where we were housing people in Seattle, in Kern County, in Bakersfield, over in Texas. And these are pretrial people that then have to be brought to the district.

Our United States marshals spent $46 million last year to house, feed, and provide medical care for the pretrial detainees. If the length of time in our district can be reduced, then their budget is reduced. If the defendants elect to pursue their constitutional right and take these cases to trial, then the defendants will remain longer in our district at a substantial cost to the United States marshal, both in resources and in dollars because they have to contract with a number of

nonfederal facilities in order to house the defendants.

Currently, last week, the district had 2,038 custodial defendants. Now remember, we only currently have seven judges that are in the criminal draw. If all of those defendants elected to go to trial, it would be extremely difficult with speedy trial constraints to have those defendants processed in a time as required by law. So in sum, these circumstances do warrant a flexible fast track or early disposition program as authorized by law.

In conclusion, finally, in legislation intended to reduce departures, Congress did recognize the benefit to the taxpayer, to the public, to the system by authorizing a fast track or early disposition program under limited circumstances. Our district clearly meets those limited circumstances that are authorized. And by adopting in your commentary, policy statements, or guideline amendments, matters that would institutionalize our fast track or early disposition program, if warranted by law, you would be meeting your mandate under the PROTECT Act to substantially reduce departures.

Thank you for the opportunity to provide this insight to you.

JUDGE MURPHY: I should have said that we also invited the United States attorney from the district, and he's not here. But I wanted everybody to know that we did invite him.

And one other person I wanted to recognize, before we turn to Mr. Hubachek, is Judge Lake. Judge Sim Lake is here, who is the chair of the Criminal Law Committee of the Judicial Conference and with whom we work very closely. And the PROTECT Act has given us lots to do, lots of conferring. So we're happy that you could be here at least for part of the hearing.

Now let's hear from you.

MR. HUBACHEK: Thank you very much.

I don't have a tremendous amount to add to Chief Judge Huff's description of the working of the program and the participants' reaction to the fast track program in the Southern District. As she indicated, all the participants are willing participants in it and believe

that it does confer a value on both the criminal defendants and the justice system.

I would add that I actually have been around longer than Chief Judge Huff. And when I arrived in 1989, the vast majority of the cases that she's been discussing this morning were prosecuted as misdemeanors. The illegal entry cases were almost exclusively prosecuted as misdemeanors, and there were huge numbers of them.

And when the fast track program came into effect, I think it's 1994, that that changed the focus to a felony prosecution as opposed to misdemeanor. Now, obviously, there were fewer felonies. But still very large numbers of felonies, as remains the case today.

So I think that the program, in addition to all the savings that Judge Huff has indicated, was also intended to show a different prosecutorial preference, which was to prosecute more serious offenders on a felony basis as opposed to a misdemeanor.

The other point that I'd like to make,

historically, is that these--the disposition of these cases, particularly the 1326s, are very sensitive to variations in the fast track program. And in 1997, the standard deal was a two-year deal as opposed to the 30-month deal now, and that was based on a plea to a single count of 1326(a), which was believed at the time to have a maximum sentence of two years.

Then when Almendarez-Torres was decided, then that understanding was abandoned. And so, the U.S. attorney's office experimented with some different incentives to plead guilty, and the result was that trials shot substantially up. And I don't have statistics with me, but I can tell you that our office had probably our biggest year of trials at that point in time.

So the defendants who are charged with 1326s are very sensitive to variations in the agreement. They're a difficult population for criminal defense lawyers to work with in terms of cultural divides and issues of trust. And the fact that many of these people have been

prosecuted in the state system before, and they have a difficult time comprehending that they'll do more time on their federal immigration offense than they might have on their underlying offense.

So I think that changes in the fast track agreement would, I think, have a substantial effect on the district. Now as Judge Huff mentioned, with respect to the 1326 cases, that does not involve departures under 5G1.1. It's really a guideline sentence that's imposed. And I understand that that may create in your statistics some appearance of disparity.

But one issue that I'd like to bring up is that people who don't get the fast track offer, and they're identified in Chief Judge Huff's written testimony, we call them the super-aggs. And these are the individuals that have the very serious prior convictions, the very violent offenses, the very serious drug offenses, rapes, child-involved offenses. Now those people are not offered the fast track program at all. They get a guideline offer with no additional departure.

So with respect to that population and everyone else in the country who has that type of prior conviction, I wouldn't expect there to be any particular disparity at all. And I think that brings up the notion that the 2L1.2 guideline seems, to us anyway, to apply very broadly in terms of the 16-level enhancement. And I think that--one of your goals, I understand, is to try to reduce departures.

And I think that the Southern District model devised by the U.S. attorney's office, not by the court or by the defense bar, really does identify the most serious offenders. And I think that an application of the 16-level bump to that group of people, as opposed to the much more broad version that exists now, I think would reduce a lot of the departure pressure that exists.

And just to give you an example, I had a case with a defendant who did not choose to accept the fast track bargain. And he had a prior conviction for a robbery, which turned out to be an altercation with another guy in which he took that gentleman's pager. So

he pled guilty for that and ended up getting a two-year sentence after a probation violation.

And the district court judge sentencing him was confronted with the fact that he was looking at a 16-level upward adjustment based upon a pager, whereas the guideline also applies to murders, rapes, even acts of terrorism now. So I think that there is substantial room in the 16-level enhancement to reduce the departure pressure by modifications. And I would throw out the Southern District prosecutorial model of prioritizing among the defendants as a good way to do that.

Another way that I would suggest to do that is with respect to length of sentence. Frequently, the length of sentence is a good proxy for how serious the prior crime is, and I know that currently the 2L1.2 16-level enhancement for crimes of violence doesn't have any requirement of any particular sentence. So I would urge the commission to consider adopting some sort of sentence requirement.

I also would suggest that 13 months, which is

the cutoff for the drug offenses--if you have 13 months, you get a 16 level as opposed to the 12--is also pretty low, too. Because virtually everybody in our district who gets a sentence, I'd say, of less than five years--and I can say this because I know Judge Huff will correct me if I'm wrong. But I think that virtually everybody who gets a sentence of, say, 13 to 30 months in our district is probably going to be a courier.

So when you use the 13-month cutoff level, you're really identifying a large number of people who are not among the most culpable drug defendants. Plus, you know, the sentences in the state of California are also varied. So we see a lot of disparity in terms of the actual worth of the prior conviction, in terms of whether you get the 16-level bump up or not.

Otherwise, though, in the 1326 cases in our district in the fast track cases, there are no departures at all. There is no aberrant behavior. There is no--we're not even allowed to ask for any departures based upon the terms of the plea agreement. So there

really isn't any departure issue at all.

The defendants, as Judge Huff indicated, that do get departures in the criminal context are the individuals who commit what we call the "border busts," which are primarily marijuana cases. And those individuals do get the benefit of an agreement of a minus-two reduction for pleading guilty quickly and under the terms of the agreement.

And I guess, you know, the first answer to that would be that you're getting a lot of convictions in exchange for a little bit of disparity. But I also think that the program is justified in terms of the departures because of the people who actually commit those offenses.

By and large, the people who come across the border with drugs in our district are--have very little criminal record. A lot of them have no record at all. Most of them have some sort of immigration status, which they're certain to lose as a result of this prosecution, and a lot of them are extremely sympathetic individuals.

So they are people who would otherwise would be

very good candidates for departure. In a lot of cases, when you get the minus-two for the fast track, that tends to suppress, particularly the lower level or lower quantity cases, any other departure. So the existence of the fast track program in and of itself does, I think, reduce the number of other departures that would be granted in these drug cases.

Now I also have suggested that the commission might also consider issues in terms of the criminal history departures. I understand that there are a lot of criminal history departures, and I've set out in our written testimony some of the issues that we see in that area involving over-representation of misdemeanors. We frequently see people who have misdemeanor offenses that can get them five, six, seven, eight points total and including as much as five points on one misdemeanor conviction.

So to the extent that the commission is considering limiting departures in that area at all, I would strongly urge that the commission do that in the

context of reforming the actual calculation of the criminal history points. Because there still remain significant disparities, when driving on a suspended license can get you five points and a serious felony conviction may result in only three.

I'd be happy to answer any questions that the commission has.

JUDGE MURPHY: Judge Castillo?

JUDGE CASTILLO: First of all, I want to thank both of you for all the work you do in your district. It's overwhelming just thinking of it, as a judge sitting in Chicago, the number of cases that you have.

I have a couple of questions. As I understand the alien fast track program that you have, it does not involve departures in any sense?

JUDGE HUFF: Correct.

JUDGE CASTILLO: Is it possible that in the rush to put together these judgment and commitment orders that somehow they're being recorded as departures?

JUDGE HUFF: I believe--I think that might be--I

talked to our probation officer about that, and I believe what he said was that the Sentencing Commission treats those as departures. Even though they are not departures, they're being treated as departures.

And they are really not departure cases. They're statutory maximum cases. So maybe we, together, should look at that and make sure that our statistics are being recorded appropriately.

JUDGE CASTILLO: I agree with you because I had the same concern as to whether or not we're getting accurate numbers. Because I mean Congress will take a look at your numbers and see that your district has an overall downward departure rate somewhere in the high 50 percent. I believe that's the number. I could be wrong about that. And questions will be asked that can lead to legislation.

But let me just ask you, the two-level drug downward departure, it is limited to two levels, right?

JUDGE HUFF: Well, the--it's limited to two levels. There was a time that the U.S. attorney offered

a deal, which I consider a high low. We will give you two levels. You may ask for as many levels as you want, and we'll submit it to the court. But in exchange for what I call a mini max. There is a waiver of appeal cases over.

That was an offer that was done in a period of time. I think currently it's no longer the policy. But there was a period of time with at least three U.S. attorneys where there was this what I call mini max. They give you two. You ask for as many, and case is done. And then there's a waiver of appeal.

JUDGE CASTILLO: Would it surprise you now, I have this number, if someone told you your downward departure rate for 2001 was something like 50 percent? That would sound like it's not accurate?

JUDGE HUFF: Hmm, I'd have to go look at the numbers. That--

JUDGE CASTILLO: What--and this is the last question, and then I'll be quiet. What about aberrant behavior? It seems to me that there are a lot of

aberrant behavior downward departures in your district, or at least you have a high statistical number.

Does that come up as one of these two-level drug fast track departures, or is there some other explanation for the use of that particular downward departure?

JUDGE HUFF: That's in the old system. And remember, of the downward departures, what number is really not there, which is the appropriate case inquiry, is how many of these departures were asked for by the government. And as I said, there was a period in time where the government's deal was we give you two. You ask for any authorized by law, and that's what we'll submit to the court.

So aberrant behavior was--is a recognized departure. And so, on occasion, some of the judges were granting aberrant behavior. And even that none of the cases were appealed. So, obviously, if the U.S. attorney's office felt that there was something wrong in the sentence that was imposed by the district court, they could have had the remedy of appeal, except that they

bargained that away in the plea agreement in order to move the cases out of the system for the reasons that I stated.

JUDGE CASTILLO: Both sides would waive their right to appeal?

JUDGE HUFF: Both sides waived their right to appeal. And there was often an exception if it was--if the judge imposed a sentence not greater than the high end of the guideline range recommended by the government, then there was a waiver of appeal.

MR. HUBACHEK: I would say--I haven't looked at the statistics, but I would be very surprised if the rate was 50 percent. It's very rare--I don't think I've ever heard in our district of a 1326 defendant getting an aberrant behavior departure. The 1325, 1324 alien smuggling cases, I think it's much more rare because that tends to be people with a lot of history.

So to the extent that there is aberrant behavior departures, I would expect those to come in the context of the border busts, which, as a whole, I would say tend

to be the least culpable individuals that come through our court in terms of--I mean, their conduct may be culpable, but I mean in terms of their records. They likely have no criminal record. If they do have some criminal record, it's usually not that serious. They tend to have the tremendous family circumstances and what not.

I would expect that group to probably be represented the best in terms of granting such departures. But I would be very surprised if the overall rate was 50 percent.

JUDGE MURPHY: Judge Sessions?

JUDGE SESSIONS: Can I just follow up with the aberrant behavior? Because 36 percent of all aberrant departures across the country are from your district.

JUDGE HUFF: I see.

JUDGE SESSIONS: Which is a large--

JUDGE HUFF: That's a large number.

JUDGE SESSIONS: That would be fair to say that's a large percentage. Am I correct in interpreting

what you said that back in 2001, there was this upper and lower and that the judges would be using aberrant behavior to go below the two-level reduction, but that no longer is the case? So basically, the use of aberrant behavior is substantially reduced from what it was in 2001? Is that fair to say?

JUDGE HUFF: I would imagine that it probably continued over to 2002, but certainly with a change in prosecutorial policies. We had U.S. attorneys that didn't object and, in fact, at sentencing would say, "Judge, the defense attorney is making some very good points. I'll just submit to your discretion."

And did not overtly object or often would, indeed, agree with the position of the defense. So I think now the answer is there are fewer departures. But probably--2002, probably some of those continued over.

JUDGE SESSIONS: Is this, the fast track system with the smuggling of drugs, is this 11(e)(1)(c) pleas so that basically--

JUDGE HUFF: Nonbinding.

JUDGE SESSIONS: Nonbinding?

JUDGE HUFF: They're all nonbinding. They're all nonbinding. There are--in fact, I can think of none that I've had that are binding pleas.

JUDGE SESSIONS: But a defendant is not permitted to raise a separate motion for downward departure for other grounds if one goes through the fast track system. Is that the way it works here?

MR. HUBACHEK: The defendants still make the request. I think that my recollection of what Chief Judge Huff is talking about was there used to be an agreement where the prosecution would stand silent. The agreement might say, "We agree to recommend minus-two, and we agree not to oppose your additional request for another minus-two based upon aberrant behavior," or whatever combination of circumstances, whatever the departure may happen to have been.

The plea agreement now is much more standardized and never or almost never contains that kind of terminology at this point. And again, these cases would

only come up where you had the defendants in these--usually the smaller marijuana cases, where the individuals would be very sympathetic, and some prosecutors would exercise their discretion in favor of those individuals. It's just not happening now with a much more standardized plea agreement.

JUDGE SESSIONS: All right. But still, a defendant has the right to ask for a departure. And I assume this is above and beyond the role adjustment. You must have role adjustments for couriers.

MR. HUBACHEK: Right. Yes. Typically speaking, there is a recommendation for a minus-two role reduction based upon the person's courier status and their other lack of connection. But that particular adjustment almost never exceeds two. It's very rare for it ever to go above that.

JUDGE MURPHY: Commissioner O'Neill?

MR. O'NEILL: Yes. I was just looking--I just pulled out the statistics for the Southern District of California, just to sort of get them right. And I've got

a couple sort of questions about this.

Right now, I mean, by far--not by far, but the largest number of cases that are involving prison listed by primary offense is immigration. The second was drug trafficking, and they

dwarf--those two categories together dwarf everything else that happens in the Southern District of California.

JUDGE HUFF: Correct.

MR. O'NEILL: And interestingly enough, for downward departures, other downward departures, about 50.5 percent of all cases receive a downward departure, 8 percent receive a substantial assistance departure, and 41.3 percent are actually sentenced within the guideline range. And then an amazing 0.2 percent receive upward departures.

I guess a couple questions that I would have. One is one of the things that I think is going on, especially with respect to substantial assistance departures, is that there isn't sufficient room for judges and for the government to be able to rely upon

departures. And my question, would it be helpful to you if there were another category of departures, departures that were listed as initiated by the government, that weren't precisely substantial assistance departures but were some other category?

Do you think that would be helpful to you, just in means of categorizing, you know, the basis for making the departure?

JUDGE HUFF: I think it would be helpful for those who were interpreting the statistics for the system as a whole to be able to track down how many of these are judicially driven versus how many of these are driven by the prosecution under traditional prosecutorial discretion. So having a category saying "initiated by the government" on the statement of reasons form would be helpful, in my view.

MR. O'NEILL: Have you had the chance either to sit down either formally or informally with your U.S. attorney or who ever is in charge of these things to sort of decide how these are going to be handled and whether

or not ultimately the department is going to approve, which I assume it will, sort of the fast track program down there?

I mean, clearly, what's driving all of this is the fact that you just have a lot of cases. And even if you have a lot of INS agents and even if you have a lot of prosecutors, you don't have a lot of judges. And so, it creates an enormous bottleneck. And you don't even have to have any statistical training to figure that out on the basis of these statistics.

Have people sort of sat down and talked about how you're going to--how this is going to be handled in the future? Have you heard anything from the U.S. attorney? Unfortunately, we don't have the U.S. attorney here. We can ask, but--

JUDGE HUFF: We have a good working relationship with our U.S. attorney. And so, interestingly, our judges still take the view that we are judicial officers. We're not in charge of their plea bargaining processes. And under Rule 11, we're precluded from getting involved

in plea bargaining. And so, we really do not think that it is necessarily our role to tell the U.S. attorney what cases to bring or not to bring or to plead or not to plead.

But there was, as demonstrated, a period in our time when, due to unique changes in the law--Almendarez-Torres dramatically affected the way the cases were handled in our district--we just didn't have places to put the defendants. And then, collectively, this fast track program was developed, but it really was not developed by the judges. It was developed by the U.S. attorneys and successive U.S. attorneys who have gone from that point forward.

And so, we do have a good working relationship. But really, it's a matter for the Department of Justice. It's--they decide what cases to bring. They decide what cases to charge. And then we do the best that we can with the limited resources that we have.

We had 37 visiting judges in one year. It was exceptionally difficult because the way that our

resources are given, they're given in the judiciary based on authorized judges, not based on the caseload, in large measure.

And so, our whole district is suffering from lack of overall resources because we only had eight authorized judges. It's now gone up to 13, but none of the five are onboard yet. We're hoping that Congress will pass through the nominees as soon as possible.

MR. O'NEILL: So part of what we really need to do then is we need to be able to delineate which departures are entirely sort of judicially--sort of originate with the judiciary and which of these departures really are coming from the government as part of the means to make sure that the case flow actually occurs.

So I guess part of what the commission's responsibility in this is is just sort of smoking out and making sure that we're reporting to Congress as accurately as possible what the source of the individual departures are. And right now, it strikes me that

perhaps we're not catching that as well as we might.

JUDGE HUFF: And I do--I would like us to check to see if those 1,800 criminal alien cases are being reported as departure cases. If so, that would skew our statistics because they're not really departures. But I do think, looking forward, since your mandate is to reduce departures, the judges follow the law.

Under the PROTECT Act, the standard of review on appeal has changed. Now the government is objecting. Before, they did not object. And so, I think it's a new era, and the judges will respond appropriately.

It's an adversarial system. If the parties are coming to you and saying, "Here is the deal," you can accept it or reject it. The judges decide to accept it or reject it. And indeed, in many cases, the judges were rejecting some of the pleas if they thought that they were too lenient.

JUDGE MURPHY: We've got time for one more question for this panel. Commissioner Steer had his hand up earlier.

MR. STEER: Well, actually, your last comment was directed at the question that I had, which was how often does it happen that a judge might look at a plea agreement and reject it either because--and did I--I thought your earlier comment suggested they might sometimes reject it because they thought it was--that the 30-month cap was too severe. Is that--

JUDGE HUFF: Too lenient.

MR. STEER: Too lenient?

JUDGE HUFF: Too lenient for--

MR. STEER: Oh, okay. Okay.

JUDGE HUFF: Too lenient for somebody facing a guideline range of 77 to 96 months who's been in our district before.

We have one judge who handled 600 cases last year. He's seen the same defendants maybe for the second or third time. And because he's seeing them for the second or third time, if the government is now coming to him with a 30-month cap, he will say, "No, I am not taking this agreement." Because he thinks that it's too

lenient. And that's his option.

JUDGE HINOJOSA: But how can the judge say no if that's the only charge before him or her? I mean--

JUDGE HUFF: He just says he's a judicial officer, and he's a senior judge. And so, he is a volunteer.

[Laughter.]

JUDGE HUFF: And so, he feels as a volunteer, as a senior judge donating his services to the court, he doesn't have to participate. It then goes back to the draw, and then another judge will have to handle it. It is the statutory--

JUDGE HINOJOSA: But there's no means for the judge to reject that because the only charge is--or is there? When the only charge is a criminal information that caps you at, I take it the 30-month cap is 24 months and 6 months for the misdemeanor?

JUDGE HUFF: Correct.

JUDGE HINOJOSA: Which you can run concurrent if you want to.

JUDGE HUFF: But under the guidelines, it should be run consecutive.

JUDGE HINOJOSA: Right. But under the statute, if you wanted to, you could run them concurrent?

JUDGE HUFF: Yes.

JUDGE HINOJOSA: And so, if that's the only charge, and it's strictly the prosecution's decision to bring that charge, what basis--legal basis is for the judge to say, especially if you don't have a pre-sentence report where you don't know the prior background, how would you know that the range would be 77 to 96?

JUDGE HUFF: We do have a criminal rap sheet that lists it out, and we require the prosecutors to come up with a criminal history that will outline at the time of the taking of the plea the guideline range that the defendant would be facing if there was no statutory guideline.

JUDGE HINOJOSA: Most of these have pled to the criminal information?

JUDGE HUFF: Correct.

JUDGE HINOJOSA: And there's no indictment?

JUDGE HUFF: Correct.

JUDGE HINOJOSA: And so, there's nothing for the judge to reject other than just step in and say, "I'm going to become part of this discussion, and therefore I'm not taking it," or--

MR. HUBACHEK: It may be doctrinally vague, but it's very clear when it happens.

[Laughter.]

JUDGE MURPHY: I think on that note we'll have to end with this panel. You can see how interested we are in what you've had to say. And again, I want to thank you very much for coming.

I know Chief Judge Huff had volunteered to testify by teleconference, but you're really great live.

JUDGE HUFF: Oh, thank you so much. I'm going to have to leave or I would really love to hear the remainder of the panels. Thank you so much.

JUDGE MURPHY: Well, we'll move a little farther north now to the Central District of California, which is

still pretty far south. And Judge Lourdes Baird has had a lot of experience in sentencing. She was a United States attorney and on the Attorney General's Advisory Council and some advisory committee for the Sentencing Commission.

And Maria Stratton is the federal public defender now in the Central District of California, but she was in that office for a long time before she became head of it and also worked in the attorney general's--state attorney general's office on serious crimes.

So without more out of me, we'll turn to you, Judge Baird.

JUDGE BAIRD: Hi. I would like to give you a little bit of background about our district and the problem. Our district is the Central District of California. It's just immediately to the north of the Southern District that you just heard from.

However, the southernmost portion of our Central District is only 60 miles from the

U.S.-Mexico border. Our district also has--I can remember from the 1990 census, we had 16 million people in our district alone. I think it's probably up to about 18 or so now. So it's very different than most other districts. In fact, it is the largest district by far as far as population goes.

Because of our proximity to the border, we do have in this district a high percentage of illegal aliens and criminal illegal aliens. Historically, for example, from 1990 to 1992, when I was U.S. attorney, there wasn't very much in the way of these kinds of prosecutions.

And the reason being that there was just so much else going on in the district. If there's any sort of a crime that anyone wants to mention, I would venture to say that in the Central District of California, there is more of it than anywhere else. So it was a question of priorities.

Now that didn't mean that the problem didn't exist, because the problem did exist. And I can recall very vividly when I was U.S. attorney that local law

enforcement authorities and local governments were very unhappy with us because they had this problem of criminal aliens returning back and committing crimes and being deported and returning back. And the federal government was seen as just doing nothing about it. So it was always a conflict.

Now let's move forward. At that time and up until our fast track program began, which was approximately two years ago, the prosecutions were brought under 1326, which is the illegal re-entry after deportation. The typical defendant had many deportations, certainly more than one--two, oftentimes three--and their criminal records were substantial. So that was typically the sort of case that was brought. And I'm just saying this now as judge from 1992 up until our program.

1325s, which are the simple illegal re-entry that we've been talking about here with the six-month misdemeanor the first count and the
24-month maximum felony as the second count, were rarely

brought. I'm sure that Ms. Stratton can tell us more about it, but I don't remember ever seeing one before.

So the problem in the district, as I mentioned, existed. It was exacerbated, and I do believe that the U.S. attorney's office then decided that they really wished to do something about it. In my written testimony, I did provide the letter from the then-acting U.S. attorney, who was John Gordon, explaining the program.

And the program does not, as I mentioned, involve departures. The program involves an information in which on two counts of 1325--that is a simple illegal entry, evading inspection--was brought, and the max was 30 months. Six months for count one, 24 months for count two. They're all binding agreements, Rule 11(e)(1)(c). And as I think--was it Judge Hinojosa?--you mentioned earlier, yes, I have had situations. I do ask for the criminal printout, the rap sheet, so to speak, to see what they have.

And sometimes, not very often, but occasionally,

I've seen what I thought was a rather extensive rap sheet that maybe this person didn't deserve it. And it came to my realization that if I said no, just say no, that means I try the case. And I finish trying the case, and let's assume the person is guilty, and what do I sentence them to? Thirty months. That's the max.

So it is clearly, in my view, an exercise of prosecutorial discretion in order to address the problem in the district. It does save a great deal of time.

I have mentioned to you, I believe, in my written testimony that the number of the 1325 illegal re-entry convictions have gone up about 20 times over that program. The 1326s have not disappeared at all, but they have diminished by one third. And those are reserved for the
severely--the very bad cases, the individual who has a very severe record of deportations, prior deportations and convictions.

Now we have not probably--I believe the total number of cases has gone up to maybe from about 17 or

maybe 40 or 50 to about 250 a year. So it isn't the numbers that we--that you heard about in the prior panel.

The benefit of it is, I think, the fact that there are prosecutions, that there is something being done in the community. The federal government is being receptive to the community and the law enforcement authorities in the community. And we are able to take care of them quickly.

As I also described in my written testimony, the plea agreements encompass waivers of indictment. They encompass waiver of statute of limitations. Very often the prior deportations are outside of the statute of limitations. There is a waiver of venue because the illegal re-entry was clearly at the border. So the venue is in Southern District of California. There is a waiver of appeal on both sides, and also we have a compacted hearing.

At the time of arraignment, this is all done. It is already arranged. So the individual is arraigned on the information. His guilty plea is taken, and he is

sentenced. So it's all one proceeding. And the defendant also does waive the right to have a pre-sentence report prepared prior to sentencing.

I think that the benefit is pretty obvious when I say that only there were that many prosecutions that can come through, and it does not take on an awful lot of resources by all parties--that is, the prosecutors, the defense attorneys, the court, as well as the probation office.

Now I think I've pretty well summarized what it is, but I would hope that you would have some questions of both of us when Ms. Stratton is finished.

MS. STRATTON: I want to thank you for the invitation to appear today. I just want to start out by saying that neither Judge Huff or Judge Baird or myself or Steve are running for governor of California.

[Laughter.]

MR. : There's still time.

MS. STRATTON: Although I may be recalled from my position after you hear what I have to say today

because I'm--if I were writing on a blank slate, I would argue to you that there is no principled reason to write fast tracks into the sentencing guidelines, and there are many principled reasons for leaving them out.

And I speak from my experience in the district where for years--I've been the federal defender for 10 years. For the majority of that time, we did not have a fast track, and as Judge Baird said, and now we do. And what's the difference? Well, besides just the number of people that are prosecuted, the main difference is that with no fast track, the U.S. attorney allocated its resources.

And as Judge Baird said, at that point, they went after what our former U.S. attorney called "the worst of the worst." They went after the predators. They went after people with multiple deportations, multiple serious felony convictions, people who were deported, came back, and reoffended, not just came back to be with their families, but reoffended. People who came here as adults voluntarily, people who had families

and connections to Mexico.

In other words, the prosecution was really aimed at protecting the community against people who came here to victimize the community. It was truly crime and punishment. It was what the criminal justice system is all about, really.

And critical to all of this during the non-fast track years was another very important thing from the defense standpoint, and that is we got full discovery. We got an opportunity to explore our clients' defenses.

And when all was said and done, the judges had the comfort, I think--I've never been a judge, but I have to believe this--the comfort of sentencing someone with no doubt about their guilt, with no doubt about what kind of representation they got, with no doubt about whether all the defenses were fully explored and put to rest. Whether it was a trial or whether it was a plea, it was done and over with.

And so, when it came down to sentencing, it was truly an issue of sentencing defendants and under the

guidelines figuring out how to sentence similarly situated defendants and how to differentiate between--among those defendants who were differently situated and therefore should get a different sentence under the guidelines.

It was pure. It's not pure anymore with the fast track. The predators are not the only people being put away. It allows more people on our district to be prosecuted who probably wouldn't have been prosecuted before.

Now some people in this room and in society are going to say, "Well, that's okay. Let's prosecute as many people as we can as long as we have the goods on them." Let's go with that. That's okay. I can go with that. I'm okay with that. But the difference now is under the fast track is that these defendants are prosecuted without exploring their defenses because there is no discovery. We're lucky if we get an A file.

They're prosecuted on crimes for which they cannot always help their counsel figure out defenses.

Because for 1326 cases, the defenses are very technical. They're very technical. It's almost like habeas corpus. It's challenging deportation.

It's having to have a knowledge of immigration law, which, as you know, is constantly changing, and being up to date on changes in immigration law, being able to listen and get access to a deportation tape in order to be able to challenge a deportation, knowing whether somebody maybe has derivative citizenship.

We have had clients prosecuted for 1326 who ended up being citizens, and they didn't even know it. And if it hadn't been for defense counsel and the prosecutors cooperating and giving us the discovery we needed, we never would have found that out. And it had a profound change in their lives to find out that now they're citizens and they don't have to worry about going back to a country they didn't know in the first place.

They often don't have their own exculpatory evidence to offer in their own defense because most of the evidence, given the technicality of the defenses, is

already in the possession of the government. It's not like they can hand over the alibi or hand over the telephone record that you get--that's going to exonerate them. Usually it's evidence that's--it's in the possession of the government. For example, deportation tapes or A files or that type of thing, which they don't see with these fast tracks.

But most important, I think, for all participants in this process--prosecutors, defense attorneys, and judges--is that when all is said and done, I think that the judges do not sentence now with a certainty that all defenses have been explored. They do not sentence with a certainty that the person standing before them is actually guilty, legally, of the crime--of the acts that they did that made it a crime.

That's very troubling. And for a defense attorney, it's very troubling to get the feeling that you're just processing people. When you go in to talk to your client, you're telling your client, "Well, I don't really know if you're guilty. I can't really say if

you're guilty or not under the law. I don't know if they can prove it beyond a reasonable doubt. But if you don't take this deal, you're looking at 77 months instead of 30 months. And so, what do you want to do?"

And then you have to stand up in front of the judge at the Rule 11 hearing. And when the judge asks you, "Have you advised your client of all his or her defenses?" Really, what you have to say is, "Well, no." I don't have any discovery. I have no idea. But my client wants to do it, and as we all know, the client's in charge of the decision to plead.

The other thing that happens with this is that it's the great equalizer. In our district, it's a Rule 11(e)(1)(c) binding plea to 30 months. You take it or leave it. So the haggling that normally goes on or the plea bargaining that normally goes on between the prosecutor and the defense occurs with a decision to get the deal.

Once the deal is struck, as Judge Baird said, I mean the judge either takes it or leaves it. But

judge--it's charge bargaining, so you're going to end up with the 30 months anyway. But what happens is those defendants who maybe should get more than 30 months aren't getting 30 months, and those defendants who shouldn't get 30 months are getting 30 months.

It's not uniformity in sentencing. It's not what the guidelines were designed to do, which was uniformity in sentencing based on similarly situated defendants, not similar allocation of resources among U.S. attorney's office, which is really what's driving this is how the U.S. attorney's office decides to allocate its resources.

That's not what the Sentencing Commission is all about, and that's why I'm here to urge you, maybe too passionately, that putting this fast track departure in the guidelines corrupts the process. It contradicts the idea of uniformity in sentencing based on similarly situated defendants.

And I guess with that, I'll stop. If you have any questions?

JUDGE BAIRD: May I make one clarification here?

MS. STRATTON: You are running for governor?

JUDGE BAIRD: Yes. I might.

[Laughter.]

JUDGE BAIRD: And bear in mind that the defendants who are offered these "fast track pleas" are defendants that would be eligible for a 1326. That is a defendant who the U.S. attorney believes has been previously been deported and has returned. And also has a prior criminal record, has returned and has a prior criminal record.

They are pleading to a simple illegal entry. The plea, the factual basis is very simple. We'll look at the first date. We'll say, "Mr. Gutierrez, go to January 1998. Did you cross the border?" "Yes." "Where?" "Well, outside of San Ysidro." "How did you cross?" "Under the fence" or "over the hill." "And did you evade inspection?" "Yes." "Did you do that because you wished to evade inspection?" "Yes."

Factual basis is there. So I don't think that

necessarily we have defendants who are pleading to a charge that they are not guilty of. Now I'll step back.

JUDGE MURPHY: Did you want to have the first chance, Judge Hinojosa?

JUDGE HINOJOSA: I don't think there's much more I can say.

This sort of the misdemeanor and the felony, I guess what it does leave out is Ms. Stratton's point of you're treating everybody exactly the same. And as we well know, those of us who handle these cases on a regular basis, there are people who are guilty of this offense, and then there are people who are guilty of it. And it varies on their prior criminal history.

And fast track leaves all those questions open, and what you're caught with is the 30 months and not much information for the judge to make a determination as to should this be higher or lower?

JUDGE BAIRD: Absolutely correct.

JUDGE HINOJOSA: And it relies on information, would you not say, that the INS, which I'm not here to

say that they don't do their job. But that their files are in such condition that as a sitting judge, doesn't it sometimes happen on a somewhat regular basis that the records are not necessarily correct with regards to whether there was a formal deportation or a removal.

And when you don't have the fast track program, there's an opportunity to check that.

JUDGE BAIRD: Under the 1326, which would be a much heavier penalty.

JUDGE HINOJOSA: Right.

JUDGE MURPHY: Commissioner Horowitz?

MR. HOROWITZ: I want to actually touch upon the plea issue that you raised because one of the things that I have noticed when you look at the sentencing statistics for the last 10 years, you notice a creeping up by about half a percent a year pretty steadily the plea rate, guilty plea rate. So that if you looked about 10 years ago, the plea rate was roughly 90--low 90s. Today it's 96.5 percent roughly across the country.

And I noted from looking at the 2001 statistic

book that the plea rate for the Southern District of California is 98.6 percent, and for the Central District, I believe it was 97.4 or so--2 and change.

And it does lead me to wonder whether that's a problem that goes--or that's an issue that you raised that goes beyond just the fast track, and if the guidelines create too strong an incentive to plea or too great an incentive to plea and create the danger that you talked about beyond just the fast track programs?

I'm wondering if beyond the fast track issue there are those concerns, and what accounts for this incremental increase in the guilty plea rate?

MS. STRATTON: Well, I'll tell you that one of the biggest incentives to plead for a client is that given the very, very broad definition of aggravated felony for the 16-point bump-up, almost everybody is an aggravated felony. Even people that just have misdemeanors on their record, those can now be considered aggravated felonies, at least in the Ninth Circuit.

So that's a dramatic increase from 8 to 24, and

I don't really know of any other guideline for any other offense that has this giant increase like this for one thing. Even the loss calculations that go up in fraud cases go up kind of incrementally as the monetary loss goes up. But this is just a major bump.

So that's a big, given that practically everybody is deemed an aggravated felon nowadays, the client's looking--there's a big change from 30 to 77 months, and that's a big incentive to run with the plea. So if there were some way to maybe be further refine what aggravated felonies are or lessen that bump in some way, that might make people more willing to, you know, go to trial.

JUDGE BAIRD: Just aside from the fast track, which I think does--I'm assuming that our statistics--I really haven't looked at them. But I'm assuming that our statistics for pleas might have gone up some percentage points since August of 2001, when this program came in. But prior to that, I do believe that the guilty plea rate has gone up.

I find that disputes now really goes to sentencing. There are an awful lot of fraud cases that are prosecuted in our district, and then that loss issue becomes kind of our little mini trial. So I don't know what--perhaps defense counsel or perhaps Maria would know--believe that they can probably maybe go in and do their argument at the time of sentencing.

JUDGE MURPHY: Commissioner Steer?

MR. STEER: Yes. Ms. Stratton, I, to a certain extent, share your wish that we didn't have to have fast track departures. I think they're sort of fundamentally inconsistent with what the Sentencing Reform Act is all about. But I think under the PROTECT Act, we have little choice but to make that an identified policy statement in the manual for properly identified districts to use, those identified by the decisions of the U.S. attorney and the attorney general.

I guess one question for us is whether or not we should fetter that policy statement in any way with any words to the court. If I had my druthers, one way I

might want to fetter it is to say to the court, you ought not to grant this departure repetitively. You shouldn't grant it for more than once. You know, if the defendant gets this break, he shouldn't get it again.

Judge Baird, I guess at this point, we don't even know whether the Central District of California is going to be so designated. But do you think if those words, words like that were written--and I have no idea whether my colleagues would want to write them--would judges think well or not so well of that sort of thing?

JUDGE BAIRD: Well, Commissioner, I think that that is the discretion of the prosecutor. We don't prosecute. We don't charge. We receive what the prosecutor charges. That's prosecutorial discretion. It has been exercised from the beginning of certainly ever since I became an assistant U.S. attorney, longer than I'd like to acknowledge.

But that's their business. They're doing it. And I'm assuming that they know what they're doing. And we receive the case.

So if they choose to do a charge bargaining, which is what this fast track really is, our discretion is limited to a maximum sentence that is provided by the legislature. So I don't know that we can--

MR. STEER: I understand that. But I'm assuming that we are talking about a future world in which the districts that are identified as fast track districts will use this departure mechanism to achieve a lower sentence that will help to move the freight. So if--and we don't know whether that will be the type of situation that will exist in the Central District or whether it might just continue to be a charge bargaining mechanism.

I understand the difficulties about the charge bargaining, the dynamics there that the judge can't take over the case and prosecute the case. I'm talking about, you know, if we were dealing with a departure mechanism, would judges be inclined to not grant this departure successively?

JUDGE BAIRD: Well, first of all, I can't speak for all the judges certainly. So all I

can--is speak for myself. I frankly don't like the fast track. I'm never satisfied that I'm doing the right thing. I know that the individuals are guilty of the charge that they're pleading to. And by looking at the rap sheets that I do see and I count out the convictions, I'm pretty sure that if they were to be prosecuted exactly for what they might qualify for, they would, indeed, be qualifying for far more than 30 months.

So I just get the sense that maybe in the long run on the deportations, they're not necessarily deportations, they're prior re-entries. So I just--I don't like the fast track. And if it were now put to us to decide whether we wanted to do a downward departure at the request of the government, oftentimes that sort of thing is going on and in not that formal fashion.

For example, there will be a plea bargain in which the plea has been arranged, and this is not under Rule 11(e)(1)(c)--these are nonbinding--in which the defense counsel and the prosecutor have decided that the charge maybe lower or

that the individual should not get an aggravating role, would not qualify for an aggravating role. So I do have situations like that where I make a decision as to whether to honor the agreement between the parties or not, and I have that discretion to do so.

So I guess maybe what you're telling me is the sort of thing that does exist in a nonformal basis all the time, and I would just use my own discretion. I tend, frankly, if the prosecution wants to do it and it doesn't seem like it's unfair or if it seems like it would result in what I think is an appropriate sentence, I would generally go along with them. If I don't, I won't.

JUDGE MURPHY: I think we are going to have to move on to the next--we have to give the prosecution a chance to talk about these matters. Obviously, there's a lot of interest in trying to understand just what's going on. And I'm so glad somebody said the emperor has no clothes, too. I mean, so that we really think about it.

Thank you so much.

JUDGE SESSIONS: Can I just ask a very brief question?

JUDGE MURPHY: Okay. But I've already calmed two down over here. So--

JUDGE SESSIONS: Oh, so can I ask it or--

[Laughter.]

JUDGE MURPHY: I'll never give you a chance again if it isn't just a teeny one.

JUDGE SESSIONS: In these situations where you have the plea agreements which suggest--that don't apply aggravating role, assume that that's, first of all, not fast track. And second, when you're making that decision, do you have a pre-sentence report at that point?

JUDGE BAIRD: Yes, we do.

JUDGE SESSIONS: Or is this all stipulation and just you decide?

JUDGE BAIRD: This would be--since it's not fast track, we would have a pre-sentence report. And very often, frankly, I believe that the probation office

generally tends to support what might be in the plea agreement.

JUDGE SESSIONS: That's all I have.

JUDGE MURPHY: Thank you so much. Very good. Thank you so much.

Originally, we had the prosecution and the law professor world on the same panel, but their presentations aren't quite on the same thing. So we've separated them.

So we'll turn now to Paul Charlton, who is the United States attorney for the District of Arizona and who, of course, is very familiar with these problems.

MR. CHARLTON: Thank you, Your Honor . Judge Murphy and Commissioners, I thank the United States Sentencing Commission for the opportunity to appear before you once again on behalf of the Department of Justice.

My testimony will respond to your request for the department's view on early disposition programs and their impact on federal sentencing policy. Early

disposition or so-called fast track programs developed in the mid 1990s in response to a dramatic increase in the number of immigration cases handled by federal prosecutions on the Southwest border.

The programs were designed to process these cases through the federal criminal justice system as quickly as possible and thus enhance public safety and minimize the burden on the courts, prosecutors, defense counsel, the U.S. marshals, and others while at the same time ensuring the defendants were given a fair opportunity to contest charges that they believed unfounded.

It is undeniable that fast track programs have allowed the federal courts to handle significant increases in prosecutions of criminal aliens who have entered the United States illegally after deportation as well as other types of high-volume cases. We believe these programs have had a major impact in the communities where they exist, reducing crime and increasing public safety, particularly along the Southwest border.

These programs have enjoyed strong support in law enforcement, the judiciary, and the public at large. Nonetheless, we recognize that there is reason for some concern about these programs, both in terms of their expansion beyond immigration and other types of cases that create an extraordinary burden on the Southwest border and relation to sentencing disparities that result from them.

If I may, Your Honor, I will briefly describe some of the fast track programs that we've enacted in the District of Arizona. Early disposition programs in the District of Arizona. Both our Tucson and Phoenix offices currently have fast track programs to enable prosecution of cases that otherwise would be declined because of limited prosecutorial resources, both on state and federal levels.

Over the past decade, prosecutorial and judicial resources have simply not kept pace with the increased federal law enforcement efforts along the border with Mexico. The border between Arizona and Mexico is, for

the most part, sparsely populated desert terrain. In many areas, the border between the two countries consists of a two-strand barbed wire.

To enhance security along the border in the mid 1990s, the government began substantially increasing the number of Border Patrol agents in the area. For example, between 1995 and 2002, the number of agents in the Border Patrol's Tucson sector alone increased 229 percent from 561 agents to the current number of approximately 1,844. This increase in agents, not surprisingly, led to a substantial increase in arrests.

In fiscal year 2002, for example, Border Patrol agents in the Tucson area alone--that doesn't include the whole 370-mile border with Mexico, but approximately 300 miles of our

border--arrested 333,648 aliens illegally in the United States. As a result of improved computerized fingerprint technology, the Border Patrol is now able to determine in a timely manner the immigration and criminal records of many of these individuals apprehended.

Given the entire federal system handles approximately 60,000 guideline cases per year and our district approximately 3,000, we obviously cannot prosecute every individual arrested. Between 1997 and 2002, the number of felony cases prosecuted by the Tucson division of the U.S. attorney's office increased 118 percent from 1,080 cases to 2,356 cases. Last year alone, from 2001 to 2002, the number of felony cases increased 21.9 percent to--from 1,932 to 2,356.

In order to deal with this problem, we explored a number of possible solutions. First, we attempted to get an increase in resources. We've obtained some, and that's addressed the problem to some degree, but not to the degree we would like or necessarily need.

We explored with our local county attorney colleagues the possibility of their enforcing some of the local drug or narcotic problems. But they, too, are limited in resources and unable to assist us in a significant way.

We considered accepting fewer cases for

prosecution by changing our prosecution guidelines in such a way as to make it more difficult to bring cases to our office for prosecution. But there is a balance there, and we need to be careful about which cases, which viable prosecutions we are willing to turn away. It would be irresponsible and a dereliction of our duty to decline large numbers of cases that are uniquely federal.

We therefore tried to find ways to more efficiently prosecute the large numbers of cases we received. Currently, we have fast track programs covering, first, illegal re-entry after deportation offenses; second, alien smuggling; third, offenses involving 100 kilograms of marijuana or less; and other drug cases. Although the details vary for each program, they are designed to encourage a defendant to plead guilty before significant prosecutorial resources are expended in the case.

I'm going to go over each program very briefly, if I may? The fast track program for illegal re-entry is pursuant to 8 U.S.C. Section 1326, is the only exception

is that the assistant U.S. attorney assigned to the case may elect not to make a fast track plea offer if the defendant's criminal history category is too high in that assistant's opinion.

To qualify for the fast track plea, the defendant must agree to plead guilty within 15 days of arraignment. And in our district, we do indict these cases so that there is an indictment for the judge to review. The defendant has to agree to waive the right to appeal. And our standard plea agreements, including those plea agreements that are part of the fast track program, include as well a waiver of collateral issues such as 2255s.

In exchange, the government agrees to a reduction of the defendant's sentencing range, and the amount of the reduction depends on the defendant's offense level. And in my submitted testimony, you'll see how those reductions take place.

Your Honor, I believe there was a question earlier about pre-sentence reports. There are

pre-sentence reports prepared for the judge to review in our district. In fiscal year 2002, the Tucson division prosecuted about 1,150 cases through this program. Approximately 1,325 cases we expect will be prosecuted under this program through the end of this fiscal year.

Alien smuggling fast track. Alien smuggling cases are particularly time-consuming to prosecute cases because it is necessary for us to detain and hold two material witnesses so as to assist in the prosecution. Under local rules and court orders, videotaped depositions of these material witnesses, which are, of course, intended to preserve their testimony for trial, must be conducted within 20 business days after the defendant's arrest.

After the depositions, the material witnesses are deported. Thus, the prosecutor, in essence, has to be prepared to conduct a significant portion of the defendant's trial within 20 business days of the defendant's arrest. To address this problem, the alien smuggling fast track program covers all alien smuggling

charges except cases in which an alien being smuggled was physically injured or placed in extreme danger.

To qualify for the fast track plea offer, the defendant must first agree to plead guilty prior to the time set for the videotaped deposition. As I said, 20 days from the date of arrest. And two, waive the right to appeal. In exchange, the government agrees to a reduction in the defendant's sentencing range.

If the defendant's crime is punishable under 1324(a)(1)(b)(1), transporting or harboring illegal aliens, the defendant is offered a sentencing cap at the low end of the guideline range. If the defendant's crime is punishable under (b)(2), that is bringing aliens into the country for financial gain--which, as you know, carries a mandatory three-year sentence--the defendant is offered a plea to a charge that does not have a mandatory minimum sentence. And in such cases, there is an agreed-upon sentencing range at an offense level of 14.

In fiscal year 2002, again just looking at our Tucson office, we prosecuted 250 cases through this

program. We expect to prosecute 300 such cases through the end of this fiscal year.

Marijuana fast track program. This fast track program covers cases involving between 20 and 100 kilograms of marijuana in which the defendant does not have a prior drug conviction nor possess a firearm. Cases involving less than 20 kilograms of marijuana and cases involving marijuana backpackers--that is individuals who carry the marijuana across individually--are generally treated as misdemeanors.

To qualify for the fast track plea offer, the defendant must agree to plead guilty before the government has to respond to any motions and agree to waive the right to trial. In exchange, the government agrees to a reduction in the defendant's sentencing range, as I've set out in my prepared testimony. These sentencing caps are at the low end of the applicable guideline range as you see them in the testimony that I've already submitted.

In fiscal year 2002, again just looking at the

Tucson office, we prosecuted 360 cases through this program, and we expect to do 390 cases in this fiscal year.

Finally, the last program which we have is the fast track program which covers other drug cases. This fast track program covers drug cases other than marijuana cases. Whether to offer this fast track is made on a case-by-case basis considering the facts of the case and the current caseload of the assistant United States attorney assigned to the case.

Currently, because of caseload problems within our district, this fast track plea offer is, in most cases, offered to the defendant who does not have a prior conviction or a firearm. To qualify for this fast track program, the defendant has to agree to plead before the government has to respond to any motions and agree to waive the right to appeal.

In exchange, the government agrees to an additional two-level reduction in the defendant's sentencing range. In fiscal year 2002, we prosecuted

approximately 175 cases under this program. We expect to do 200 cases before the end of this fiscal year.

The past several U.S. attorneys for the District of Arizona all came to the same conclusion regarding fast track programs. Rather than decline viable cases involving defendants who commit serious crimes, they would offer fast track pleas to allow the office to prosecute more cases than would otherwise be possible. We believe this decision, despite resulting in a higher nonsubstantial assistance downward departure rate under the sentencing guidelines, was the appropriate one to address the needs of the communities along the border.

Without the fast track programs, the number of viable cases that would need to be declined would increase substantially. While such a result might improve the guideline departure statistics, it would produce a more lawless atmosphere along the border as criminals realize that their chances of getting prosecuted are very small, even if caught.

I'm willing to answer any questions, Your Honor,

that the commission may have.

JUDGE MURPHY: Commissioner O'Neill?

MR. O'NEILL: First of all, thank you for agreeing to come and participate in this panel. This is obviously important to hear from the government and especially to hear from the field, you know, U.S. attorneys who are actually working out in the field.

Let me just ask you this. Do you feel that there has been an abuse of the use of downward departures in your district?

MR. CHARLTON: No.

MR. O'NEILL: Are you aware of the fact that there is a 62.8 percent departure rate in that district?

MR. CHARLTON: I'm aware that we have a high percentage. I'm not certain what the exact number is, and what it is the--again how it is you dissolve or break apart those statistics in terms of the ones that we ask for as opposed to the ones the judges do sua sponte, I don't know.

But I can tell you that I own and am responsible

for a great number of downward departures that take place within our district. I think it is an unfair criticism to point the finger at our judges and say that they are the ones responsible for a high number of downward departures in that district when you look at the number of fast track cases that we prosecute.

And our cases, unlike charge bargaining cases, are cases where we invite and ask the court to consider a downward departure because of the fast track program. And I think I need to take responsibility for that great number.

Now because I say that that's not a high enough number, I don't know exactly how you break out that number. And so, if I were to look at the statistics and somebody were to say, "Well, Paul, that's what you said today." And somebody were to show me tomorrow this is how many of the judges do sua sponte, then maybe I'd have a different sense of it.

But I can tell you from a working knowledge, from having been there since 1991, as it relates to our

bench, I don't think there is a disproportionately high number of downward departures that take place sua sponte. There are those downward departures that take place sua sponte, and we have, from time to time, taken those judges up on appeal when we thought it was inappropriate for the judge to downward depart on his or her own.

MR. O'NEILL: You feel that's the appropriate mechanism when a judge has made a departure that you feel uncomfortable with or that you feel isn't supported by the law? That that's the appropriate mechanism then, to appeal the judge's decision?

MR. CHARLTON: I do.

MR. O'NEILL: That's--I mean, to me, that's very enlightening testimony in terms of how your district works. And I appreciate your candor.

MR. CHARLTON: I don't know that that's candor, it's just--you've caused me concern.

JUDGE MURPHY: It sounds a little bit like the joke that they tell about how people don't like Congress, but my congressman is okay. And your judges are okay.

MR. CHARLTON: We have a very good working relationship with the judiciary. I have a great deal of respect for those judges, and that would be, I think, inappropriate for me to say that they were individuals who were exercising poor judgment. When they exercise poor judgment, we take them up on appeal, in our opinion.

Now, again, if we were to be shown statistics that you could break out in some way that would show that there is some sort of extraordinarily high number of aberrant downward departures that those judges did, I may reconsider that. But I can tell you just as a practicing prosecutor there since 1991, those times when they take it up--did I do something wrong?

JUDGE MURPHY: Judge Castillo? Everybody wants to comment, ask questions.

MR. CHARLTON: Yes, Judge?

JUDGE MURPHY: Judge Castillo?

JUDGE CASTILLO: I want to tell you I completely agree with your remarks. I have met your judges in your district. In particular, you only have two judges in the

Tucson division, right?

MR. CHARLTON: No, sir. Judge--

JUDGE CASTILLO: You're up to what?

MR. CHARLTON: I think we may be up to the big number of four by now.

JUDGE CASTILLO: Okay. So each of them now have like 500 criminal cases.

MR. CHARLTON: An extraordinary caseload, as do the prosecutors in our office. And as do the defense attorneys, as does everyone. It is an extraordinary burden.

JUDGE CASTILLO: It's an impossible task, talking to them. And the last time I talked to them, they each had 1,000 criminal cases each. And while we can talk about a 0.2 variation in the plea rate has a dramatic effect on their lives. So I appreciate the work.

Well, let me get to a couple of questions. As I understand, all of your fast track programs involve downward departures, right?

MR. CHARLTON: Well, the vast majority of them do. We also have flip-flop cases, and we didn't--you're familiar with those, Judge?

JUDGE MURPHY: No, but I want to be.

[Laughter.]

MR. CHARLTON: The vast majority--in fact, my understanding the reason I was invited here today was to talk to you about downward departure fast track cases. And we have other programs, and I briefly touched upon them, that relate to, for example, backpackers--those individuals who will carry on with a nylon cord, say, 10 pounds of marijuana or 10 kilos of marijuana across the line.

We may, from time to time, charge those individuals with both a felony offense and a misdemeanor offense. It's a charge bargaining fast track program, if you will, in which they are offered the opportunity to quickly plead guilty to the misdemeanor in lieu of going to trial on the felony offense.

JUDGE CASTILLO: So that would not involve a

downward departure, if they took the misdemeanor plea?

MR. CHARLTON: That's correct. It doesn't involve the--it would involve the guidelines as opposed in the end because there would be a guideline application to the misdemeanor plea, but the cap due to the statute would be 12 months.

JUDGE CASTILLO: If your downward departure rate was 60 percent, it's your belief that it's driven by the fast track programs?

MR. CHARLTON: It's my belief that the vast majority of downward departures that take place in our district are driven by the fast track programs, yes. How it is you break out that 60 percent--20, 40, I'm not certain.

JUDGE CASTILLO: Okay.

MR. CHARLTON: But the vast majority of those downward departures I'm certain are ones that we own--

JUDGE CASTILLO: Now I don't know--

MR. CHARLTON: --and are responsible for.

JUDGE CASTILLO: --if you can answer this

question, but do you know what categories of downward departures are being used?

For example, just like in the Southern District of California, aberrant behavior, which we kind of slipped and we're starting to get into, seems to be one of the categories as well as just general mitigating circumstances. Is that your knowledge that those type of categories are being used to accomplish the downward departure that you need to get to for the fast track program?

MR. CHARLTON: No, sir. Your Honor, I believe that the fast track program reflects in the written plea agreements 5K2.0.

JUDGE CASTILLO: Okay.

MR. CHARLTON: Now I'm not quite so fluent in the sentencing guidelines are you are, sir, but I believe that that is different than an aberrant departure, aberrant behavior downward departure.

JUDGE CASTILLO: That's correct.

MR. CHARLTON: And so, I would say that those

incidents in which we appeal judges who make downward departure decisions are most often those times when the judge has found aberrant behavior and we disagree.

JUDGE CASTILLO: Mm-hmm.

MR. CHARLTON: Those times when we are in agreement, pursuant to a plea agreement, a fast track program, the downward departure is made pursuant to 5K2.0.

JUDGE MURPHY: Judge Sessions and then Judge Hinojosa.

JUDGE SESSIONS: Maybe you can't answer this. If you can't, I mean--

MR. CHARLTON: I'll do my best.

JUDGE SESSIONS: --don't tell me. I mean, you've heard the testimony about the Southern District of California, a dramatically different kind of fast track program. I can tell you from being in New Mexico, dramatically different fast track program.

Is there any effort going on to try to approach this in the same kind of way? Any kind of--well, any way

of all the districts getting together, and this is the way we want to do it?

MR. CHARLTON: We have, Your Honor, visited often. We U.S. attorneys who reside on the border, in an attempt to see if there wasn't some way on the front end--that is, on our charging decisions and how it is we prosecute these cases--could find some uniformity in the way it is that we deal with these cases. We have not advanced so far as to determine how it is that we deal with these cases on the back end.

But if I could just go forward and tell you why it is I think that would be a difficult challenge. If you even consider trying to develop a consistent charging program in the Southern District of California and try to divine one or put one together in Arizona that would be similar, the needs, the geography, the economies are so different that it is difficult to find--and our resources are so different--that it is difficult to find a consistent way to charge individuals.

And I think we've just talked about differences between Los Angeles and San Diego. It's just as true between San Diego and Phoenix. So it's difficult to do.

JUDGE SESSIONS: I mean, the reason I asked the question is let's say the Southern District of Texas versus Western District of Texas. You might have one that has a fast track program and another which doesn't, which means people are treated pretty significantly differently.

And I wondered if, oh, wait. Maybe you've answered the question. Maybe there's just no way that you could get them all together to be able to--at least in regard to the charges that are being filed and the way the charging process is being conducted, you know, a similar kind of approach is developed.

MR. CHARLTON: You're right. It's certainly a worthy goal and a worthy objective. But the hurdles are such given different resource allocations along the border, not only among prosecution and law enforcement,

but among the judiciary, that it's very difficult to find a consistent program throughout the length of the Southwest border.

JUDGE MURPHY: Judge Hinojosa?

JUDGE HINOJOSA: Is there any message that the commission or anyone else should possibly get with the institution of fast track programs, especially in the immigration field, which is obviously a Southwest border area, crime that is more prevalent there than any other place?

In the sense that Ms. Stratton's point of view that maybe the guidelines are too high and because you wouldn't be entering into a fast track, one would think, as a prosecutor for a certain amount of time if you didn't feel that was enough punishment and enough incapacitation period with regards to a particular type of defendant.

Is there any of these--do you have any opinion as to whether any of these fast track programs are driven by the view that this is enough time and this is

sufficient? Because you're a prosecutor, so one would think that you would want to get the sentence that would be appropriate for a case. Not just because of lack of resources, but because that's appropriate in the case.

MR. CHARLTON: Well, I hope that's always our ambition, and I hope that's the way we conduct ourselves. And I can tell you that just as Ms. Stratton spoke in terms of what it would be with a blank piece of paper in a perfect world, I would have enough prosecutors, enough investigators, there would be enough pre-sentence report writers, there would be enough judges to deal with all 333,000 individuals who illegally enter the United States in fiscal year--and not just in the Tucson area, in the District of Arizona for fiscal year 2002.

That's not the world I live in. So then I have to decide of those cases, which ones can I effectively prosecute so as to act as a deterrent? If you were to say tomorrow there is no longer going to be a fast track system, you are only allowed to apply the guidelines as they are currently written, then the number of

prosecutions that would be available to me would be just dramatically, dramatically reduced.

And I believe, therefore, that what little deterrent there is now--and I don't believe that there is a sufficient deterrent, given the resources we are allocated--that what little deterrent there is now would so greatly be reduced that that number, 333,000, would spike. And you'd see a significant number of individuals now crossing through Arizona because they would realize that the chances of our being prosecuted have been greatly diminished.

JUDGE HINOJOSA: But I guess the question is, are you satisfied that the amount of time, that the sentence that's being handed down under your fast track program is sufficient as opposed to a higher guideline sentence?

MR. CHARLTON: Oh, well, that's a difficult one for me to answer. And I suspect it would depend on different cases. There are certainly cases that involve aggravated felons where I would tell you that they

probably are individuals deserving of a more severe sentence.

But again, given the resources which we all have to deal with, there are times when I have to accept that someone's going to get a reduced sentence so as to be able to prosecute more individuals so as to increase the deterrent effect on the border. And it's a balance.

JUDGE MURPHY: Commissioner Horowitz?

MR. HOROWITZ: I want to jump back into the plea trial issue, since I noticed that in this district that in 2001, the plea rate was 99.2 percent, and try and get your reaction to what we talked about with Ms. Stratton in the last panel, which is how do you avoid a situation where the guidelines create a circumstance that everybody is simply processing paper, processing people, moving them through, and there is an inability to have the individualized justice that I think everybody on every side of this issue would like to see?

MR. CHARLTON: Well, I guess that question assumes that plea agreements afford an individual less

justice than a trial does. I don't know that that's always true. I think it's statistically accurate to say that we are trying fewer cases today than we did in the past.

I can tell you that when I began at the U.S. attorney's office in March of 1991, I prosecuted in my first year, I believe, nine felon jury trials. Every year after that, the number of cases that I tried decreased.

Whether that was the result of the sentencing guidelines being fully implemented, the Thornburgh memorandum, or the Reno memorandum which followed, I don't know. But it is a mystery to me which I still yet don't completely understand.

JUDGE CASTILLO: Talking about attorney general memorandums, do you think your fast track programs--

MR. CHARLTON: I'm sorry I slipped that in somehow. How did I--

JUDGE CASTILLO: Do you think your fast track programs will survive the new directives issued by

Attorney General Ashcroft?

MR. CHARLTON: I have read and am familiar with the four categories and standards which that memorandum sets out as a requirement for the U.S. attorneys to submit to the attorney general and the deputy attorney general for approval. And it is my hope that the deputy attorney general and the attorney general will see and accept our fast track programs as fast track programs that fit within those guidelines.

JUDGE MURPHY: Okay. Thank you so much for coming and for your frankness. We appreciate it.

MR. CHARLTON: Thank you.

JUDGE MURPHY: And last, but certainly not least, Professor Bowman, who since we saw him last holds the name chair at the University of Indiana, the Palmer Chair. And--but inexplicably is visiting at Wake Forest. And former prosecutor and one-time special counsel at commission.

MR. BOWMAN: Thank you, Judge Murphy. And members of the commission, thank you for your kind

invitation to speak here today. As always, it's a pleasure and an honor to talk with you.

I have to preface my remarks by saying that I'm really deeply conflicted about this topic, as I'm sure many of you are, I suspect. If I were still an assistant U.S. attorney, I probably would be--and particularly if I were in one of these districts, I probably would be in favor of these fast track programs.

But as I'm not and as my perspective now is a little bit more removed, I'm going to take at least the position today of being the skunk at the feast and suggest a few thoughts which, although I suspect many of them already occurred to you, at least I hope will be the cause for some reflection.

As you all know, of course, the federal sentencing guidelines were created with a number of objectives in mind. Primary among these was the objective of eliminating unwarranted disparity.

To achieve that objective, as we know, the drafters of the guidelines, the original ones, framed a

modified real offense sentencing system, one in which the presumption was that defendants are to be sentenced based upon what they really did rather than some version of events that's cobbled together by the parties in order to grease the skids of a plea bargain.

In addition, the guideline system is based on the idea of truth in sentencing. The notion that the sentence handed down by the judge would be the actual term a defendant would serve with only modest discount for good behavior in prison.

It was because the guidelines were supposed to be a real offense system and because the guideline sentences announced in court were supposed to be the actual term to be served that the commission has, from the beginning, paid the most scrupulous attention to the length of sentences that the guidelines prescribe.

The fast track component of the PROTECT Act represents a formal abandonment of the primary justification for enactment of the guidelines in the first place, the objective of eliminating unwarranted

disparity. In place of a system which at least strives for national uniform sentences for similarly situated offenders, we are about to substitute a system where, as a matter of law, your sentence depends on the federal district in which you were prosecuted.

Henceforward, if you smuggle Mexican aliens across the Mexican border at Tijuana, you are legally entitled to receive a lower sentence than if you smuggled the same number of Chinese aliens into the harbor in San Francisco.

Henceforward, not only will interdistrict disparities be built into the law, but the mechanism for creating those disparities formally abandons the idea that ours is a real offense system in which sentences flow from facts determined by a judge in favor of a system that legitimizes sentence based purely on deals made by the parties.

In addition, if we consider this fast track provision in the context of other recent developments, it represents the abandonment of any pretense that the

guidelines as written have any necessary connection with the sentence that a defendant will really serve. Recall that the PROTECT Act has now granted the government a monopoly on initiating the third-level reduction for acceptance in addition to the power to make or withhold substantial assistance motions that the government always had.

Moreover, yesterday, Attorney General Ashcroft issued his memorandum on plea bargaining policy. On the surface, it looks like a set of tough restrictions on plea bargains by assistant U.S. attorneys. If you read the fine print, the memo changes almost nothing. It reaffirms the government's power to make substantial assistance agreements and its traditional right to charge bargain, as well as prosecutors' ability to make deals based on reassessments of the most readily provable offense.

And for the first time, it gives official Department of Justice sanction to fast track plea bargains. In short, what it really says is "thou shalt

not plea bargain," unless you plea bargain using any of the plea bargaining methods you've always used in addition to fast track. And all of this coming from an administration whose public position is that public safety demands there can be no retreat from the current lengthy federal sentences for federal crimes, particularly drug crimes.

The law is the law, says the administration. It must be enforced to the letter. And anyone, particularly any judge, who has the temerity to exercise discretion to reduce a sentence for a federal felon is a law-breaker himself who must be chastised or, according to some people in Congress, actually impeached.

The fast track provision of the PROTECT Act and the department's plea bargaining policies are what happens when ideological purity and political posturing collide with the facts on the ground. Congress has set extraordinarily high sentences for drug and immigration crimes. These crimes, as we've heard today, have become ever more common on the Mexican border and elsewhere, and

we have for years been beefing up enforcement and interdiction efforts on the border.

At the same time, some U.S. attorney's offices have, quite understandably, wanted to prosecute as felonies more of the offenders caught on the border by law enforcement agencies. However, those caught are nominally subject to the very long sentences that the law mandates. They don't want to plead to these sentences, and the system lacks, or at least claims it lacks, the resources to try them.

So rather than setting sentences at levels commensurate with the seriousness of the offense and then actually imposing them, with guilt and penalty determined by a fair adjudicative process, what we've done is to set penalties at insupportably high levels and then use those high penalties as the starting point for a program of huge sentencing discounts. A program consciously designed to ensure that any sane, competently advised defendant, against whom even a minimally credible case exists, will plead guilty immediately and, if humanly

possible, will cooperate.

The result is that at least as to drug and immigration offenses, in the very district in which those offenses are most common and the allegedly essential deterrent effect of high sentences is most urgently required, virtually nobody is ever sentenced to the sentence that the law says is the correct one.

Now one view of the fast track programs is that they are a new and cynical application of free market theory to the halls of justice. Now defendants are neither evil-doers in need of punishment or fellow sinners in need of rehabilitation, but customers in the sentencing bazaar.

For us, the legal rug merchants, the objective now is neither retribution nor reformation, but productivity. Because, so we are told, we are now in an era of limited means, we must hold the line on both capital outlays in the form of additional courtrooms and labor costs for additional judges, courtroom personnel, prosecutors, and defense attorneys.

And thus, because our customer base is now expanded, we must identify an optimal price differential between the nominal sentence for crime, the one you receive if you insist on exercising your rights, and the sale price of crime, the sentence you receive if you roll over really, really fast. The optimum price differential is the one large enough to ensure that the deals on offer are so attractive that a larger customer volume can be processed through the system without increasing system costs.

Now I really don't believe that the proponents of fast track are thinking in these terms. Justification is offered by the Justice Department, and the judges in these very busy districts are appealing, at least if they're viewed from the local perspective. If you're the U.S. attorney or a district judge for the District of Arizona, and waves of drug smugglers and illegal aliens are washing across the border into your courthouses, what, after all, are you supposed to do?

Well, let me offer a couple of modest

suggestions for things that one might do before urging distortion of the sentencing guideline system. The first thing that one might do, and I think certainly some of the judges and U.S. attorney's offices along the border have done this, is demand more resources. After all, the sole justification for border fast track is the claim that border policemen are catching so many border criminals that the existing number of border prosecutors and judges can't handle the caseload without fudging the law.

If this is the problem, then the Feeney amendment to the PROTECT Act should have contained a section authorizing new border courthouses, judges, and AUSAs, instead of a section legalizing sentence cheating. But of course, due process costs money.

So second, if you can't or won't demand more resources, try using the ones that you have. Again, the justification for fast track is the assertion that there are so many border defendants that we can't possibly try them all, and if we don't offer extraordinary sentencing

discounts, so many defendants will demand trials that the system will collapse.

I say nonsense. No American jurisdiction tries everybody, nor do you have to. What you have to do is to have some sentencing discount large enough to induce pleas, as, for example, a three-level acceptance discount, which actually amounts to 33 percent of the low end of the guideline range. And then you have to try enough cases so that loss of the discount is a plausible threat.

Now nobody can deny that the border districts are loaded with cases, but there is reason to doubt that they've ever tried managing their caseloads with the resources they have without fudging the guidelines.

How can I say that? Look at the statistics, some of which Commissioner Horowitz has already alluded to. In the District of Arizona, in 2001, the U.S. District Court sentenced 3,120 defendants and conducted exactly 26 criminal trials. There are, according to the court Web site, 13 active district court judges in

Arizona, not counting the six senior judges who still have chambers there.

In short, in 2001 in the District of Arizona, each nonsenior judge conducted an average of exactly two criminal trials a piece. If you count senior judges, it was 1.5 trials per year.

In Arizona, there are some, according to the Web site, some 220 people employed by the U.S. attorney's office. I don't know how many of those, because the Web site doesn't say, are assistant U.S. attorneys. But if we assume that roughly a third of them are AUSAs, maybe 70, that means an Arizona assistant attorney goes to trial on average once every three years.

Now this problem isn't limited to Arizona. Nobody particularly on the border goes to trial anymore. In 2001, all five Mexican border districts sentenced 16,833 defendants. Of all of those, exactly 267 of them went to trial. By contrast, in 1993, when I was an assistant U.S. attorney in the Southern District of Florida, our district alone took 347 cases to trial. In

1993, therefore, that one district tried 80 more cases than went to trial in 2001 in all five border districts put together.

This gaping chasm between what might be done and what is now done cries out, I think, for some explanation. Why aren't the border districts trying hundreds of cases every year and using the threat of trials to force guidelines compliance? At the least, why aren't the U.S. attorneys pounding on their senators' doors demanding the resources to make the attempt?

I can think of a couple of reasons. One, I think, to be fair to them, at a certain point the sheer number of cases begins to cut into your ability to try cases. Past a certain point, even if you plead everything, the ministerial burden of processing the cases cuts down on the available time for trials, and I understand that.

Now to what degree that's now happening on the border, I can't say. I can say that I think that--I don't think that the folks in Arizona, for example, are

so overwhelmed the judges can only shoehorn in two criminal trials a year and AUSAs one trial every three years.

Second of all, I think, honestly, having been in the U.S. attorney's office for a long time, it's actually pretty hard for an office of career prosecutors to remain committed year after year to trying hundreds of repetitive, relatively low seriousness cookie-cutter cases. The lawyers get bored, and it doesn't sharpen their skills, and it doesn't advance their career paths, and it's very hard to keep getting them to do it.

But in this observation, I think, lies the seat of a larger point, which is really my final one. If the criminals at issue here were murderers or drug kingpins or corporate titans, both prosecutors and judges would, I think, be working overtime, and they would be demanding the resources to prosecute and sentence them to the full extent of the law.

I think fast track exists and I think it endures because neither judges nor prosecutors--and this really

goes, I think, to a point that Judge Hinojosa was making. I think neither judges nor prosecutors think that most of these cases are that serious, relatively speaking, or that justice or public safety demand the strict application of sentencing law.

Instead, fast track is another manifestation of the quiet consensus that I've had occasion to comment on before here that justice will often be as well or better served by a sentence less than what the guidelines require.

So what does all this mean for you as a commission? The fact is, as Commissioner Steer was really observing a while earlier, like it or not, the PROTECT Act commands you to write a fast track guideline. You may think, as I tend to, that such a guideline really spells the death of the guidelines as a coherent, principled, rational, national sentencing system. But you have to write it anyway.

So if I have any advice to you, and I don't have much, it would be this. If you are most interested in

minimizing the theoretical damage to the guideline structure, you will write a guideline that imposes strict conditions on the attorney general's finding of necessity, insisting, for example, that a fast track program address only crimes of a volume and type that present a genuine national policy concern.

I'm saying this, by the way, I find it interesting that before your even having acted, Attorney General Ashcroft seems to have at least attempted to preempt you by suggesting that he has the sole authority to determine under what circumstances a fast track program might be adopted in a district. It seems to me that's not altogether clear from the statute and that you may have some role to play in setting the parameters for an acceptable fast track program.

And once again, if you were interested in minimizing the damage to the theoretical structure of the guidelines, you might write a guideline with very restrictive rules about when fast track departures are appropriate in individual cases.

On the other hand, if your overriding concern about the federal system today is with outcomes, if what really bugs you is that the guidelines and mandatory minimums too often produce inappropriately long sentences, then you might step back and reflect that the real effect of fast track is to reduce the sentences of thousands of defendants to levels much close to what many believe they should be anyway.

And if you do that, if you're thinking that way, you might choose to give the Justice Department and the attorney general the widest possible leeway to create fast track programs whenever and wherever it suits them.

If you take the latter course, while you may not have achieved guidelines purity, you may at least have the private satisfaction of knowing that inevitably, if irregularly, the punitive and centralizing instincts of those now in control of main justice will be steadily undermined by the pragmatism and the basic decency of the judges and the prosecutors who really do the work of federal criminal law.

JUDGE SESSIONS: Did you say skunk in the--

MR. BOWMAN: No skunks in here.

JUDGE MURPHY: Mr. Jaso?

MR. JASO: I must say that Professor Bowman, his testimony today reminds me a little bit of the old saw about I don't recall who was famously quoted as saying reports of his death have been greatly exaggerated. But it seems that, Professor Bowman, every time you come here, Professor Bowman, it seems like you're proclaiming the death of the guidelines as we knew them.

But in any event, I think that--and what I wanted to ask you about really goes back to the question you attempted to answer in your testimony, which was, well, what do we do? Congress has, it seems to me, clearly carved out as an exception. Perhaps I might argue in conformance with the Sentencing Reform Act's dictate that there be no unwarranted disparities in the system, that perhaps the Congress has determined that this is a warranted disparity in the system.

I absolutely agree with your assessment that, unfortunately, those districts in which these crimes are the most prevalent and the need for the deterrence, as you point out, is the greatest, the system essentially is unable to render the

most--the highest level of deterrence per case. But based on the testimony that we've heard from several people today about what these fast track programs have attempted to do is to rather--is creating a deterrent effect by having a somewhat lower penalty for a greater number of people.

The question that I wanted to pose to you is, how in the realities of the unwillingness perhaps of those--of Washington to give more resources to the border are the U.S. attorneys supposed to change the current programs to more effectively deter?

I would also just throw in as something to think about, there are other districts that perhaps don't have the extraordinary number of cases coming in. One that springs to mind is my own new district, New Jersey, which

has a significant port, several significant ports of entry, is far from the border, clearly. But Route 95 is on the way of sort of an artery of illegal immigration from the borders.

And indeed, Newark Airport having large numbers of immigration and drug cases, and there is no fast track program there. And perhaps--and they, for whatever reasons, have not deemed fit or necessary to have programs. So the question again is what is the--what are the border districts supposed to do about the situation?

MR. BOWMAN: Well, let me first respond, if I might, to the suggestion that the reports that the death of the guidelines have been exaggerated. The guidelines will persist in form as long as Congress keeps them on life support. They'll be there, and judges and prosecutors and defense lawyers will be obliged to deal with what are ostensibly a set of nationally uniform rules.

What I talk about when I talk about the death of the guidelines is the guidelines as they were originally

conceived, a set of guidelines which combined the characteristic of being a modified real offense system with an effort to achieve national uniformity.

What is clear, I think, to me is that that objective, if it were ever possible, clearly has not been obtained. And what we have instead is a national system in which each district essentially has created a different set of sentencing rules based on the general framework of the guidelines, but a system in which sentencing outcomes vary tremendously from district to district.

Now it may well be, and this is a legitimate point--it may well be that an effort to create a nationally uniform or reasonably uniform set of guidelines was both impossible from the outset of achievement and also is maybe undesirable. Maybe what we want instead is a system in which local conditions are the driving force all the time and everywhere.

I disagree with that notion. But what I'm suggesting is that that's what we now have, and the

institution of a fast track guideline confirms that and puts into law something which those of us who've studied the system knew was the case anyway. So the guidelines will go along. But they are not now what they were intended to be, and my guess is that they will never become what they were intended to be, given current developments. But perhaps I'm unduly pessimistic.

Now with respect to your question, I think that the border districts have two basic options if the question is what are you supposed to do? The first is the one that was tried with some success in the Southern District of Florida in the late '80s and early '90s, which is actually apply the guidelines as written--a shocking notion.

But we did it, and we did it granting no downward departures for fast track. We did it giving some substantial assistance departures, but a very low rate, and offering plea agreements that almost uniformly involved nothing more than acceptance of responsibility and a recommendation of low end. And we did it by trying

20 percent of the cases in that district, which was at the time the busiest district in the country and had in 1993 somewhere around 1,400 or 1,500 cases.

Now that is somewhat small compared to the massive numbers that are now flowing through the border. And so, it may be that even with the best will in the world, the Miami model won't work. What I'm suggesting, at least to get people to think about it today, is that I don't think it's even being tried along the Mexican border.

But the conclusion I draw from that is that it's being--it's not being tried for the reasons I suggested, and one of them being that I don't think--although the U.S. attorney from Arizona was commendably cautious in actually admitting it. But I don't think the folks on the border, the prosecutors on the border, or the judges on the border think that the sentences the guidelines require for these cases are necessary.

They don't think that they're necessary for deterrence. They're not necessary, they're not

commensurate with the seriousness of the offense. So one thing that the folks on the border might suggest doing is recommending to this body that the sentences for these kinds of crimes be reduced to a level that is really commensurate with the seriousness that they themselves privately think is appropriate.

On the other hand, I mean, you get down to the basic question, what do you do if you don't want to really try to apply the guidelines? What do you do if you don't want to admit the sentences are too high? What do you do when the INS keeps bringing in all of these cases, and you've got to do something with them? I think you do what they're doing.

I think, at the end of the day, you do what they're doing. And I guess, given the law, the commission has to try to craft the best rules that it can that do the least violence to the principles undergirding the sentencing guidelines and let these--let the districts do their job. But that's all I can really say.

JUDGE MURPHY: Commissioner Horowitz?

MR. HOROWITZ: Let me ask you about--we've heard about this actually from a couple of districts, which is charge bargaining, which is obviously not our purview. We talked a little about the fast track and writing in the four-point reduction into the guidelines.

How do we--how would you look at, from our perspective, the charge bargaining process that's going on that we really don't have certainly any direct involvement in and should not have direct involvement in?

MR. BOWMAN: Again, I'm not sure--I mean, other than recognizing it and, you know, viewing it with concern or something, I'm not sure exactly what you can do.. Because I mean, it is clear, it seems to me, that as a matter of law, the department has the right to enter into those charge bargains. And as several of you have noted, once they're entered into and particularly if it involves, you know, a statutory cap, there's not much that judges can do about it either.

I'm not sure that what you do about it, except that you recognize that it's out there and that it's part

of the overall phenomenon to which you're responding. But I don't know exactly what you do with it.

JUDGE MURPHY: Judge Castillo and then Commissioner Steer.

JUDGE CASTILLO: Let me just again thank you for coming here. You know I have great respect for your work, Professor Bowman, and your career.

Don't you think, in a way, it's progress that we're at least having this hearing today on fast track, whereas five years ago, this was sort of swept under the rug for a lot of people. A lot of people weren't aware of it. At least right now, we're trying to grapple with the situation.

I agree with you that in a perfect world, this wouldn't exist, and I think all of the participants here have said that in so many words. But when I talk to a colleague who has 1,000 criminal cases per year, I realize the world is far from perfect, and dealing with that situation is just not that simple.

MR. BOWMAN: I mean, the answer is, I guess--can

you restate the question?

[Laughter.]

JUDGE CASTILLO: Don't you think we're making progress by just having this hearing--

MR. BOWMAN: I'm sorry.

JUDGE CASTILLO: --on this issue?

MR. BOWMAN: Well, I think it would be--

JUDGE MURPHY: Give us a pat on the back.

MR. BOWMAN: I think it would be making--I think this would be real progress if you were having the hearing before Congress passed a law that basically predetermined the outcome of the hearing. I mean, yes, absolutely.

That would be a wonderful discussion to have, and I think you might well say, you know, the resource constraints involved here are real and pragmatically nothing is going to change. And therefore, we need to give some mechanism to the border districts to deal with their problems, and we're going to decide to do it in a particular way. But I think you've got this altogether

backwards.

Nonetheless, again, as Commissioner Steer has reminded us, there is--you're reminding us there it is. And so, yes, I suppose it's progress in that sense. But I guess I would add this caveat. I'm not sure sometimes that sometimes some kinds of legal evasions are best left as legal evasions, all right?

Because if certain kinds of practices are understood to be illegitimate, then there is a sort of implicit barrier against spreading them. Okay?

Once you say--once you take the thing out from under the table, and you put it on the table, and you say this kind of thing now is perfectly okay, how do you now distinguish, as Mr. Jaso impliedly suggests, between the situation on the border and the situation in the New Jersey airport or the situation in Richmond, where they've got a bunch gun cases because there the U.S. attorney has historically decided that they want to do gun cases.

Or the situation in any other city where the

prosecution essentially creates a self-imposed resource crisis by changing its intake policies, and then says, "Oh, my God. We have a problem. So now let's change the guidelines."

JUDGE CASTILLO: I agree with you. It skews the federal national sentencing guideline system. But at the very least, at the very least, doesn't getting a good handle on this and understanding the impact of the statistics, and then clearing the deck and seeing where everything is once the smoke is cleared and seeing what the real national departure rate is once you take these statistics out, don't you think that would be at least an educational project that the Sentencing Commission can undertake to at least have a better dialogue with Congress?

MR. BOWMAN: Absolutely. And you may well decide--and I don't know whether you will--you may well decide that while--having had this conversation, while you're willing to concede that the border situation is sort of sui generous, that there isn't any other

situation in the country that you can readily imagine that would justify this kind of deviation from guidelines principles. And if that's the case, that would affect the kind of guideline you might write.

JUDGE MURPHY: Commissioner Steer, we're over time here. So I know there may be others who want to ask questions, but I'm hoping this is the last one probably.

MR. STEER: Okay. Well, let me see if I can do this a little more quicker than otherwise. A quick comment. I'm not sure your first suggestion in your testimony is pragmatic because we have that circumscribing the guideline because we have to depend on prosecutors to enforce it. And if they don't want to, then, you know, what good is it?

But what if we took two Sentencing Reform Act principles, equity and deterrence, and went in the other direction? What if we wrote a guideline discount, a downward adjustment for a criminal alien meets basically the criteria for--that the department now uses for fast track in whatever district he is found.

Does all the things about waiving his rights and so forth, comes forward, saving society some resources, the criminal justice system some resources, we give that person a discount. Maybe we even couple it with a fair warning to that defendant, "You got a discount this time. Now what we're trying to do is to get you out of the country and keep you out of the country." That, after all, is the purpose of this punishment.

"Come back again, we're actually going to increase your sentence by the amount of the discount. We're going to put more time on it if you come back again," and we'll do that through the guidelines. And we do that in every district.

And in the border districts, basically, the judge would have the--you know, you would either give the discount or you would give the--if the government still wants to have a fast track, then you give the departure, whichever is, I guess, the best deal. So how does that strike you?

MR. BOWMAN: Well, off the top of my head, it

sounds great. The only thing I wonder, and I would be interested actually--more interested to hear the response of the Department of Justice than my response because my response doesn't matter. But I wonder whether the Department of Justice would really be prepared to accede to the implicit value judgment that comes with that suggestion.

That is, that the sentences that we now prescribe are for many of these defendants unnecessary and that nationally it would make more sense, regardless of whether they're on the border, to give reduced sentences for the kinds of defendants who are now given fast track departures on the border.

If you were to make that determination uniformly, and I don't think you can make any objection to it from the point of view of guideline structure, but is that a politically viable option? I guess you'd have to find that out.

JUDGE MURPHY: Well, you know, Professor Bowman, thanks a lot for coming. You are one of the people that

thinks a lot about this whole area and observes it with a sharp eye, and it's very helpful for us.

MR. BOWMAN: Thank you, Your Honor. It's always a pleasure.

JUDGE MURPHY: Thanks. So we'll close the hearing with that. I think it's been a very good hearing. We appreciate again your coming from the Central District of California.

[Whereupon, at 4:16 p.m., the hearing adjourned.]