Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines

January 20, 2006

I. Introduction

The issue of immigration reform has become a major topic of discussion among policymakers.[1] There are two factors that broadly may account for this increasing interest in immigration reform overall, the increase in the number of illegal immigrations, and the increase in the number of immigration offenses. The first factor is the overall increase in the number of illegal immigrations. According to a House committee report, the number of resident illegal aliens in the United States is estimated to be about 11 million, and approximately 500,000 illegal aliens enter the country unlawfully each year. H. Rep. 109-345, Pt. I at 45 (citations omitted). The issue of illegal immigration, and more specifically, the increasing violence associated with it,[2] has resulted in a vigorous discussion about how to enforce immigration laws and ensure border protection, while at the same time maintaining an economy that is based in large part on an illegal immigrant workforce. Because of this tension, competing approaches to immigration reform have arisen in Congress. In the House, for example, the majority of bills introduced - and the one it ultimately passed in December 2005 - focused almost exclusively on border protection and enforcement. The House supported its approach by noting that, in its opinion, enforcement of the nation's immigration laws has been grossly inadequate. *See* H. Rep. No. 109-345, Pt. I at 45 (Another factor that has contributed to the large number of illegal aliens within the United States is a lack of strong enforcement priorities by current and past administrations)(citations omitted). These bills make illegal presence in the United States a federal crime and do not address what happens to the illegal aliens currently residing in the United States. *See, e.g.*, H.R. 4437, sec. 203 (making illegal presence in the United States a federal crime).[3] The Senate bills have addressed the security/enforcement issue and tried to address the status of illegal aliens currently in the country. This is the approach favored by the Administration, but it also has expressed its support for the House-passed bill.[4]

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[1]During the first session of the 109th Congress, 38 bills related to immigration reform were introduced.

[2]In a CNN report that aired on January 5, 2006, it was reported that border patrol officers in Texas had been shot at 38 times in the prior week. *Broken Borders* segment of Lou Dobbs Tonight, CNN, Jan. 5, 2006.

[3]H.R. 4437 would make illegal entry by an alien, and now illegal presence, a felony by increasing the statutory maximum from six months to one year and a day. H.R. 4437, sec. 203 (amending the criminal penalties codified at 8 U.S.C. § 1325). The bill also would increase the penalties for marriage fraud by increasing the statutory maximum to ten years and adding at the end "An offense under this subsection continues until the fraudulent nature of the marriage is discovered by an immigration officer." The bill also would increase the statutory maximum to ten years if the 1325 offense was committed subsequent to a "conviction or convictions for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or another felony (other than aggravated felony)" and twenty years if the offense was committed subsequent to a conviction for the commission of an aggravated felony. H.R. 4437, sec. 203.

[4]For the purposes of this paper, we have focused on the provisions contained in H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, the House-passed version of immigration reform to inform you about congressional thinking on some of the issues discussed in the paper. As noted above, the

The second factor that may account for this increased interest in immigration reform overall is the increase in the number of immigration offenses. Over the past decade, the number of immigration offenses sentenced in the federal courts has quintupled. In Fiscal Year 1994, a total of 2,338 immigration offenses were sentenced under the federal sentencing guidelines system, which comprised 5.9% of all cases sentenced[5]. As of Fiscal Year 2004, the number of immigration offenses sentenced was 15,717, comprising 22.5% of all cases sentenced under the federal sentencing guidelines[6]. Post-Booker 2005 data show that from January 12, 2005 through November 1, 2005, 23.1 percent of all cases sentenced under the guidelines were immigration offenses[7]. The following chart is a breakdown of the number of immigration cases, and the corresponding percentage of the total number of cases sentenced post-Booker in 2005.

Guideline	Number of Cases (as primary guideline)	Percent of Cases (overall)
§2L1.1	2200	4.9
§2L1.2	7175	16.1
§2L2.1	279	.6
§2L2.2	665	1.5

This report, organized by guideline, outlines certain issues arising out of immigration reform debate. Each immigration reform issue is analyzed in terms of how the issue is: 1) characterized through staff research,[8] public comment, outreach and training, and information

Senate approach to immigration reform likely will be a more comprehensive approach to immigration reform and bills should emerge from both leadership and the Senate Judiciary committee. Because negotiations on new bills are in progress and there is no legislative text at this point on which we can rely comfortably, we have not provided a detailed analysis of the Senate approach to immigration in this paper. As hearings and text move forward, we will update you and revise the paper as warranted.

[5]Source: United States Sentencing Commission 1994 Annual Report.

[6]Source: Selected 2004 United States Sentencing Commission Sourcebook Tables.

[7]The immigration guidelines referred to in this paper are: §§2L1.1 (Smuggling, Transporting, or Harboring and Unlawful Alien), 2L1.2 (Unlawfully Entering or Remaining in the United States), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport).

[8]Staff research includes a review of pending legislation and literature review (including CRS Reports) by the Legislative Staff. In preparation for this report, a number of Congressional Research Service Reports were consulted including: *Immigration Related Border Security Legislation in the 109th Congress*, Dec. 9, 2005 (RL33181); *Immigration Consequences of Criminal Activity*, updated Dec. 7, 2005 (RL32480); *Immigration-Related Document Fraud: Overview of Civil, Criminal, and Immigration Consequences*, updated Dec. 7, 2005 (RL32657);

gathered from the Immigration Roundtable Discussion; 2) treated in the application and operation of the immigration guidelines; 3) informed by data[9] available to the Commission, and 4) addressed in or corresponds to both legislative proposals or proposed amendments and issues for comment. Additionally, this report concludes with a discussion of the particular issues facing the "border districts" and the impact of the operation of "fast track" or Early Disposition Programs on the sentencing of immigration offenses.

II. Discussion of Immigration Issues

This section of the report is divided into three subsections, mirroring generally the structure of the proposed immigration amendment. Subsection one addresses immigration reform issues in relation to §2L1.1 offenses. Subsection two discusses immigration reform issues concerning both §§2L2.1 and 2L2.2 offenses. Subsection three covers immigration reform issues relevant to §2L1.2 offenses. Generally, each issue has a corresponding amendment consideration. The analysis of each issue and potential amendment consideration will consist of various statistical information, any prior amendments made to the immigration guidelines in response to Congressional directives, the application and operation of each guideline, and any pending legislation.

1. §2L1.1 (Smuggling, Harboring, Transporting Aliens)

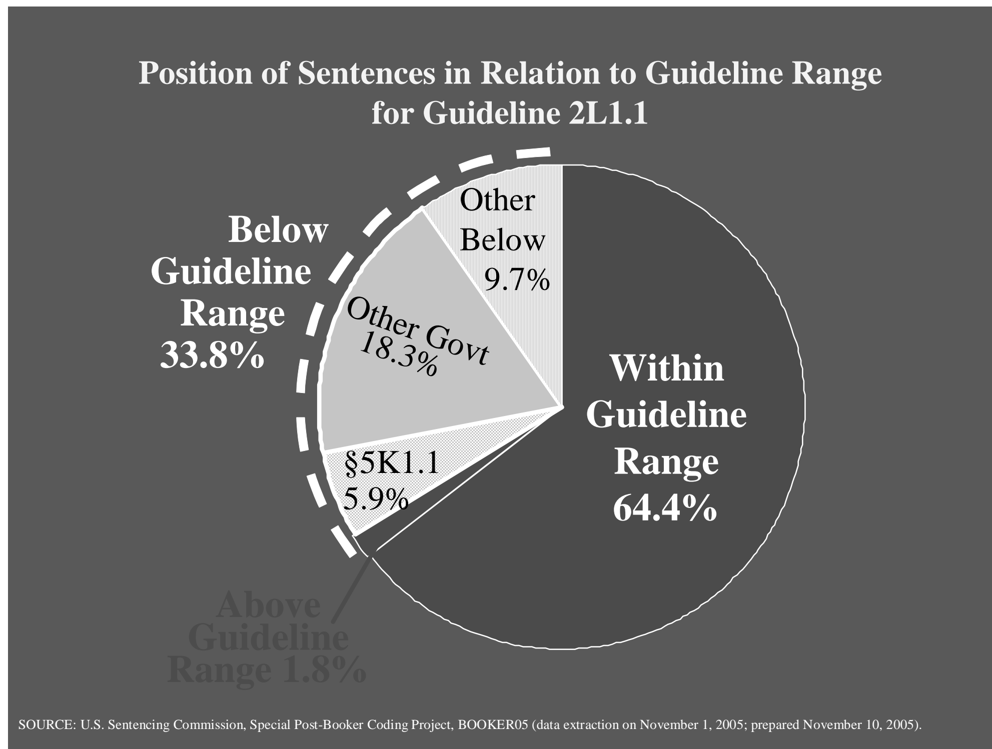
Guideline 2L1.1 addresses offenses involving the smuggling, harboring, and transporting of aliens. Offenses punishable under this guideline include: 8 U.S.C. § 1185(a)(2) (Transportation From or Into the United States with Reason to Believe that the Departure or Entry of Such Other Person is Forbidden); 8 U.S.C. § 1324(a) (Bringing in and Harboring Certain Aliens); and 8 U.S.C. § 1327 (Aiding or Assisting Certain Aliens to Enter).

The following chart provides a glimpse of the types of sentences imposed in §2L1.1 cases post-Booker.[10]

Immigration: Analysis of Major Provisions of the REAL ID Act of 2005, updated May 25, 2005 (RL32754).

[9]Three primary data sources will be referenced in this report: 1) United States Sentencing Commission Annual Reports and Sourcebooks, 2) various 2005 post-Booker data analyses, and 3) the 2005 Immigration Coding Project. The 2005 Immigration Coding Project used a five percent random sample of all cases sentenced under the immigration guidelines (§§2L1.1, 2L1.2, 2L2.1, and 2L2.2) sentenced in 2005 post-Booker to analyze the application of various specific offense characteristics. This coding project used the post-Booker data extraction date of October 19, 2005. For §2L1.1, 136 cases were examined; the coding of §2L1.2 cases involved 393 cases; 15 cases were coded for §2L2.1; and 52 cases were examined for §2L2.2.

[10]Data extraction date for this information is November 1, 2005.



More than 64 percent of the 2200 cases sentenced under §2L1.1 are within the advisory guideline range. Of these 2200 cases, the majority of sentences below the guideline range are the result of government-sponsored departures (24.2 percent). A total of 9.7 percent of the 2200 cases were the result of court-initiated sentences below the otherwise applicable range. For §2L1.1 offenses, the **mean** sentence is **15 months**, and the **median** sentence is **12 months**.

Issue 1: National Security Concerns

During previous amendment cycles, the Commission has received comment expressing concern regarding the smuggling, harboring, or transporting of aliens who pose a threat to the security of the United States. During the Immigration Roundtable Discussion, it was suggested that the Commission address this concern by broadening the application of base offense level (a)(1) which applies to only those defendants **convicted** of 8 U.S.C. § 1327 who knowingly aid or assist any alien inadmissible under section 1182(a)(2) (in so far as that alien has been previously convicted of an aggravated felony) to enter the United States. A violation of 8 U.S.C. § 1327 (which carries a statutory maximum penalty of ten years) sanctions:

> any person who knowingly aids or assists any alien inadmissible under section 1182(a)(2) of this title (in so far as an alien inadmissible under such section

> has been convicted of an aggravated felony); or 1182(a)(3) of this title to enter the United States...[11]

Through public comment and at the Immigration Roundtable Discussion, commentators suggested that base offense level (a)(1) be expanded to include the second part of 8 U.S.C. § 1327, those defendants who knowingly aid or assist an alien inadmissible under 1182(a)(3) to enter the United States. Title 8, section 1182(a)(3) categorizes certain aliens as inadmissible based upon: 1) security and related grounds, 2) terrorist activities, 3) foreign policy, 4) immigrant membership in totalitarian party, or 5) association with terrorist organizations. Option one (page 5 of proposed amendments) addresses this concern. This option provides a base offense level of 25 for any defendant convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3).

Some participants at the Immigration Roundtable Discussion also suggested the Commission provide increases for defendants who not only aid or assist an inadmissible alien to enter the United States, but also for defendants who transport or harbor any inadmissible aliens. Option two incorporates this suggestion and would not require the defendant to be convicted of a violation of 8 U.S. C. § 1327. Option two (page six of the proposed amendment) provides a specific offense characteristic to apply to a defendant who smuggled, harbored, or transported an alien inadmissible under 8 U.S.C. § 1182(a)(3).

Option two also serves to address another concern discussed during the Immigration Roundtable Discussion. Some guidelines users expressed the opinion that the national security risk is the same regardless of whether the defendant knowingly assisted an inadmissible alien. That is, a potential specific offense characteristic or base offense level to address this risk of inadmissible aliens as defined in 1182(a)(3), should be based upon a strict liability standard. Option two is drafted using this standard; the defendant need not know of the alien's inadmissible status.

From the perspective of the court, it may be difficult for judges and probation officers to determine whether any alien smuggled, harbored, or transported is inadmissible as defined under § 1182(a)(3). Given the speed with which smuggled aliens are deported, judges and probation officers may not have access to information about whether the aliens smuggled, harbored, or transported during the course of the offense were inadmissible. Requiring the government to prove a violation of 8 U.S.C. § 1327 involving an inadmissible alien as defined under 1182(a)(3) would ease that potential challenge.

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[11]The House-passed immigration bill, H.R. 4437, would amend 8 U.S.C. § 1327 to "deter smuggling of removed aliens by imposing on smugglers the same sentences that the aliens they have smuggled would receive." See H. Rep. No. 109-345, Pt. I at 63. The new mandatory sentencing ranges for 1327 convictions would be based on revised mandatory minimums for aliens convicted of reentry after removal under 8 U.S.C. § 1326 (section 276 of the INA).

In addition, the definition of inadmissible alien as found in 8 U.S.C. § 1182(a)(3)(A), could be construed broadly. That statute states that any alien "who the Attorney General knows or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in – (...) any other unlawful activity . . .is inadmissible." This language potentially could subject illegal aliens who do not pose a national security risk to a significant increase in penalties. For example, if an alien is being smuggled into the United States with the intention of finding work while using fraudulent documents, it is arguable that alien sought to enter the United States to engage principally in an unlawful activity. As a result, the first issue for comment (pages 16 - 17 of the proposed amendment) requests input on whether the guideline should more specifically identify the subsections of 8 U.S.C. § 1182(a)(3) that pertain to terrorism or national security.

Post-Booker data[12] show that only **two defendants** sentenced under this guideline were convicted under 8 U.S.C. § 1327. Base offense level (a)(1) is applied in less than one percent of cases. Base offense level (a)(2) under this guideline (applied in 99.4 percent of cases) provides a starting offense level of 12.

Issue 2: Number of Aliens

Specific offense characteristic (b)(2) provides increased punishment based upon the number of illegal aliens smuggled, harbored, or transported during the defendant's relevant offense conduct. Effective November 1, 1992, the Commission amended this guideline to include this enhancement based upon the number of aliens smuggled, harbored, or transported as a "more direct measure of the scope of the offense."[13] In May 1997, the Commission responded to a directive contained in section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[14] which required the Commission to increase the sentencing enhancement by at least 50 percent for the number of aliens involved in the offense. Currently, the table provides a three-level increase for offenses involving six to 24 aliens, a six-level increase for offenses involving 25 to 99 aliens, and a nine-level increase for offenses involving 100 or more aliens. Additionally, application note 4 states that an upward departure may be warranted where the "offense involved substantially more than 100 aliens."

The following chart[15] provides the frequencies for application of this specific offense characteristic in 2005 post-Booker cases.

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[12]Data extraction date for this information is November 1, 2005.

[13]Guidelines Manual, Appendix C, Amendment 450 Reason for Amendment.

[14]Pub. L. 104-208, 110 Stat. 3009-566,

[15]Data extraction date for this information is November 1, 2005.

Number of Aliens	Offense Level Increase	Frequency of Application
5 or fewer	0	46.2%
6 - 24	+3	45.8%
25 - 99	+6	6.6%
100 or more	+9	1.4%

Guidelines users have voiced two issues regarding the specific offense characteristic addressing the number of aliens involved in the offense. The first issue involves the expressed concern of some practitioners regarding the adequacy of punishment for those defendants who smuggle a large number of illegal aliens. As an option to address this concern, it was suggested that the Commission add additional increases to the number of aliens table. Option one (page five of the proposed amendment) adds two additional subsections to the number of aliens table. Offenses involving 200 to 299 aliens would warrant a 12-level increase, and offenses involving 300 or more aliens would result in a 15-level increase.

The data indicate that the specific offense characteristic addressing 100 or more aliens is the least frequently applied; less than two percent of cases sentenced under §2L1.1 received this increase. As previously stated, Application Note 4 of this guidelines provides an encouraged upward departure in cases involving substantially more than 100 aliens. Of the 38 cases in which specific offense characteristic (b)(2)(C) was applied, only one case received an upward departure. Fourteen of those 38 cases received a sentence below the applicable guideline range, all but two of which were supported by the government.[16]

The second issue identified by guidelines users regarding the number of illegal aliens involves a desire on the part of some practitioners to rework the structure of this enhancement to provide more delineation between the number of aliens involved in the offense. Option two (page five of the proposed amendment) provides the following table:

6 - 15 aliens	add 3
16 - 49 aliens	add 6
50 - 99 aliens	add 9
100 - 199 aliens	add 12
200 - 299 aliens	add 15
300 or more aliens	add 18.

According to data from the 2005 Immigration Coding Project, the **mean** number of aliens involved in these cases is **15.3**, and the **median** number of aliens involved is **nine**. Only

[16]Six cases received a substantial assistance departure, five received an Early Disposition Program departure, two involved Booker downward departures, and one involved a government-sponsored departure.

eight percent of offenses sentenced post-Booker 2005 involved 25 or more aliens. Ninety-two percent of §2L1.1 cases involved 24 or fewer aliens. The data suggest that implementation of this amendment would increase the sentences for at least eight percent of the cases.

The operation of relevant conduct (§1B1.3) in §2L1.1 allows the court to include not only the number of aliens smuggled during the offense of conviction, but also the number of aliens smuggled during other criminal operations that were the same course of conduct, or common scheme or plan[17] as the offense of conviction. The 2005 Immigration Coding Project revealed that 64 percent of §2L1.1 cases involved one trip or occasion. Offenders who make one trip smuggle a **mean** number of **10.4 aliens**, and a **median** number of **six aliens**. The data also report that offenders who make multiple trips involve, on average, **24.1 aliens** (**median** number of **12**).

Two bills introduced in the House contained directives to the Commission to "triple the penalties" associated with the number of aliens smuggled. *See* H.R. 688, the "Securing America's Future through Enforcement Reform Act of 2005" (introduced by Rep. Barrett Graham) and H.R. 1320, the "Secure Borders Act" (introduced by Rep. Reyes). Basically, the two bills accomplished this by amending the number of aliens and corresponding sentencing ranges set forth at §2L1.1(b)(2). Under both bills, a defendant's smuggling of one to five aliens is directed to receive a 30 month sentence; six to 24 aliens equals a 54 month sentence; 25 to 100 aliens equals 81 months in prison; and 101 or more aliens would receive a 111 month sentence. H.R. 4437 as passed by Congress did not address the number of aliens smuggled table, nor do any of the Senate bills. H.R. 4437 does, however, create a mandatory minimum sentence of 3 years for anyone who smuggles two or more aliens for commercial advantage, profit, or private financial gain. *See* H.R. 4437, sec. 202.

Although H.R.4437 does not address specifically the penalties associated with the number of aliens smuggled as earlier bills did, it does make a strong statement about alien smuggling. "Alien smuggling not only facilitates illegal immigration, but subjects smuggled aliens to inhumane treatment." H. Rep. 109-345, Pt. I at 59. The bill addresses a number of issues raised during the Team's work, including offenses committed for profit, offenses involving injury and death, and use of a weapon. As indicated in the accompanying committee report, the bill attempts to create penalties "based on the factual circumstances of the offense and the danger that the smuggling posed to the alien and to the community rather than on the code section charged" as is the case currently. H. Rep. 109-345, Pt. I at 60.

Issue 3: Smuggling of Minors

Some commentators have suggested that the Commission increase penalties to assess the increased risk of harm involved in the smuggling and transportation of children. The Commission received comment during the 2003-2004 amendment cycle requesting that

[17] *See* §1B1.3(a)(2) and application note 9.

enhancements under §2L1.1 be provided to account for the risk involved when small children are placed in the hands of smugglers. Participants at the Immigration Roundtable provided information regarding potential ways to address this risk, and discussed in detail the types of offenses involving the smuggling of children. The 2005 Immigration Coding Project revealed that 14.7 percent of cases (37 cases) involve the smuggling of children. The average number of children smuggled is two.

The first option presented to the Commission to address this concern is found on page 6 of the proposed amendment. This specific offense characteristic provides an increase of [2],[4], or [6] levels to apply to any defendant who smuggles, harbors, or transports a minor unaccompanied by his/her parent. Some guidelines users recommended that the Commission target only the increased risk involved in the smuggling of minors when those minor aliens are unaccompanied by their parents. Others, however, stated that regardless of whether the minors are unaccompanied, the smuggling of minors should be punished more severely.

Some Roundtable participants expressed concern that smuggling younger minors unaccompanied by their parent(s) is more harmful than smuggling older teenagers because younger minors may end up as wards of the state. This suggests that minors between the ages of 15 and 18 may not present as great of a risk as the smuggling of minors under the age of 15. For those cases[18] in which the age of the minor smuggled was available (19 of 37 cases), the average age of the child is 10.7 years. This data indicate that 52.6% are under the age of 12 years; 21% are between 12 and 15 years old, and 26.3% are between 16 and 18 years old. Option two (page 6 of proposed amendment) provides a specific offense characteristic in which the offense level increases are based upon the age of the unaccompanied minor that was smuggled.

Issue 4: Smuggling Offenses Committed for Profit

Specific offense characteristic, subsection (b)(1), provides a three-level decrease if the smuggling offense was committed other than for profit, or if the offense involved the smuggling, transporting, or harboring of the defendant's spouse or child. This decrease applied in just over six percent (6.1%) of all cases sentenced post-Booker[19]. Some Immigration Roundtable Participants suggested expanding the application of this specific offense characteristic to include cases that involve the smuggling of a relative. The 2005 Immigration Coding Project indicated that about five percent of all cases involve the smuggling of a relative, and almost four percent (3.7%) of cases involve the child or spouse of the offender; however, the child and spouse in this sample were never the only aliens smuggled.

To obtain a better perspective of the offenders who committed the offense for profit, the Immigration Coding Project retrieved information related to offenders receiving payment for the commission of a smuggling offense. The sample revealed that 90.4 percent of cases involved the

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[18]2005 Immigration Coding Project.

[19]Data extraction date for this information is November 1, 2005.

offender receiving payment. The majority of these cases (96.7 percent) involved a cash payment. Less than one percent of cases (.8 percent) received drugs as a form of payment. The remaining percentage, just under two and a half percent (2.4 percent) received some "other" form of payment. On average, offenders who receive payment have a higher sentence than those offenders who do not receive payment (on average 16 months versus 9 months). Offenders who receive payment tend to smuggle more aliens (on average 16.3 aliens versus 5.8 aliens). Additionally, offenders who receive payment are more likely to smuggle on more than one occasion (37.4 percent versus 27.3 percent of cases).

During the Roundtable Discussion, staff inquired whether a measure of pecuniary gain, or a specific offense characteristic addressing defendants who are "in the business of" smuggling may be an option worth exploring. The majority of participants were not in favor of this option, citing difficulty in establishing whether a particular defendant was "in the business of smuggling" as well as the fact that the persons running the smuggling businesses are often never caught, as they reside outside of the United States.

A main concern expressed in H.R. 4437 is the increased use by illegal aliens of alien smuggling services, the costs of which have risen dramatically. H. Rep. 109-345, Pt. I at 59. Under H.R. 4437, "offenses that were committed for commercial profit will be punished more severely than offenses that are not." *See* H. Rep. 109-345, Pt. I at 60 (discussing penalty provisions set forth in Sec. 202 of H.R. 4437). For example, under H.R. 4437, a person convicted of smuggling, transporting, or harboring an alien where the offense was not committed for commercial advantage, profit, or private financial gain, be imprisoned for not more than 5 years, or fined. If, however, the offense was committed for commercial advantage, profit, or private gain, and was a first offense, the statutory maximum is 20 years. If it is a repeat offense, a mandatory minimum of 3 years applies. *See* H.R. 4437, sec. 202(a)(2)(C). The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, already has made changes to 8 U.S.C. § 1324. Under the Act, a conviction under 8 U.S.C. § 1324 may result in a sentence increase of up to ten years if the conduct is part of an ongoing commercial organization or enterprise. *See* Sect. 5401, Pub. L. 108-458.

Issue 5: Offenses Involving Injury and Death

Currently, §2L1.1 provides three separate specific offense characteristics to address harm to the illegal aliens smuggled, harbored, or transported. As directed in section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Commission, under emergency amendment authority, on May 1, 1997, promulgated three specific offense characteristics to address: 1) murder, death, bodily injury, or serious bodily injury to an individual; 2) use or brandishing of a firearm or other dangerous weapon; and 3) conscious or reckless risk of death or serious bodily injury to another person.

Specific offense characteristic (b)(4)(A) provides an increase of six levels and a minimum offense level of 22 if a firearm was discharged during the course of the offense. Subsection (b)(4)(B) provides an increase of four levels and a minimum offense level of 20 if a

dangerous weapon (including a firearm) was brandished or otherwise used. Subsection (b)(4)(C) provides an increase of two levels and a minimum offense level of 18 if a dangerous weapon (including a firearm) was possessed. According to 2005 post-Booker data[20], 3.7 percent of offenses involve the use or possession of a firearm or other dangerous weapon.

The House has expressed concern about the increasing numbers of alien smugglers who are utilizing firearms to facilitate their smuggling. *See* H. Rep. 109-345, Pt. I at 63 (discussing sec. 206). Under H.R. 4437, 18 U.S.C. § 924(c) is amended to include alien smuggling crimes. For purposes of applying 924(c), "alien smuggling crime" is defined as any violation of 8 U.S.C. §§ 1324(a), 1327, or 1328. H.R. 4437, sec. 206.

Specific offense characteristic (b)(5) applies in any case in which the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person. Reckless conduct to which this adjustment applies "includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition)."[21]

As noted above, the House expressed concern about the inhumane treatment of aliens being smuggled into the country. Under H.R. 4437, the penalties for creating a substantial risk of injury or death would be increased. Congress expressed similar concerns in passing the Intel Reform Act. In addition to increasing penalties for alien smuggling as a criminal enterprise, the Act provides for increases in sentences under 8 U.S.C. § 1324 if the offense involved aliens transported in groups of ten or more, or in a manner that put the aliens lives at risk. *See* Sect. 5401, Pub. L. 108-458 (providing increased offenses for 8 U.S.C. § 1324 offenses). Tracking the language set forth in application note 6 of §2L1.1, H.R. 4437 would require a mandatory sentence of five years with a statutory maximum of 20 years in a case where a person creates a risk of serious bodily injury including: transporting a person in an engine compartment, storage compartment, or other confined space; transporting a person at an excessive speed or in excess of the rated capacity of the means of transportation; or transporting or harboring a person in a crowded, dangerous, or inhumane manner. If actual injury occurs, the proposed mandatory sentence is seven years with a statutory maximum of 30 years.

If specific offense characteristic (b)(5) applies, an increase of two levels, or a minimum offense level is 18 is appropriate. About 38 percent (38.2 percent) of all cases sentenced under §2L1.1 post-Booker[22] received this increase. The 2005 Immigration Coding Project indicates that in cases in which specific offense characteristic (b)(5) applies, the **mean** number of aliens smuggled is **11**, and the **median** number of aliens smuggled is **nine**. When specific offense

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[20]Date of data extraction is November 1, 2005.

[21] §2L1.1, Application Note 6.

[22]Date of data extraction for this information is November 1, 2005.

characteristic (b)(5) is not applied, the **median** number of aliens is constant at **nine** aliens smuggled, but the **average** number of aliens smuggled, harbored, or transported increases to **18.4**. This data might suggest that an increased number of aliens involved in an offense does not necessarily equate to an increased risk of harm. However, this increase in the average number of aliens when specific offense characteristic (b)(5) does not apply could be attributed to whether the case involves smuggling conduct or harboring conduct. Potentially, cases involving harboring aliens may involve a greater number of aliens than a smuggling offense. As a result, the harboring of 20 aliens in a house may not trigger application of specific offense characteristic (b)(5), whereas the smuggling of 20 aliens most likely would trigger application of the substantial risk specific offense characteristic.

The third specific offense characteristic under §2L1.1 to address harm to aliens is subsection (b)(6). During the course of the offense, if any person sustained: 1) bodily injury, an increase of two levels is applied; 2) serious bodily injury, an increase of four levels is applied; or 3) permanent or life-threatening bodily injury, an increase of six levels is applied. The court is able to apply an increase from this specific offense characteristic as well as specific offense characteristic (b)(5), which addresses the substantial risk of injury or death. An increase of eight levels is applied in offenses involving death. Approximately two percent of all smuggling cases sentenced post-Booker 2005 received an injury increase (1.9%); just over one percent (1.3%) of §2L1.1 cases received an increase for an offense involving death.

Some guidelines users contend that the current guideline contains insufficient punishment in smuggling cases involving death. Although the guideline also provides a cross reference in subsection (c) that permits the court to apply the appropriate homicide guideline where "any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111", this cross reference would only apply in circumstances involving first or second degree murder. Accordingly, the majority of smuggling cases will not be subject to this cross reference. Therefore, in an offense where death occurred that did not rise to the level of first or second degree murder, only the eight-level increase would be applicable. In many of these cases, the offense level may be lower than the current penalties for voluntary manslaughter (offense level 29) and could potentially be lower than involuntary manslaughter involving a means of transportation (offense level 22).

Page 6 of the proposed amendment provides two changes to §2L1.1 to address concerns relating to offenses involving death. A new specific offense characteristic, (b)(9) is added to provide a ten-level increase if the offense involved the death of any person. Additionally, the cross reference has been modified to allow application of the appropriate homicide guideline (not just first- or second-degree murder) if the resulting offense level is greater than what was otherwise determined under §2L1.1.

Under H.R. 4437, in the case where the offense caused or resulted in the death of any person, an offender may be punished by death or imprisoned for not less than 10 years, or any term of years, or for life, or fined under title 18, United States Code, or both.

Issue 6: Holding Aliens for Ransom

Other guidelines users have commented that the Commission needs to provide increased penalties for harboring offenses that involve holding the smuggled aliens for ransom after arriving at the "safe house". These offenses often involve smugglers demanding additional monies from the relatives and friends of a smuggled alien over and beyond the smuggling fee before releasing the smuggled alien. The 2005 Immigration Coding Project found that, for §2L1.1, almost seven and one-half percent (7.4%) of offenses involved holding aliens for ransom after being smuggled into the United States.

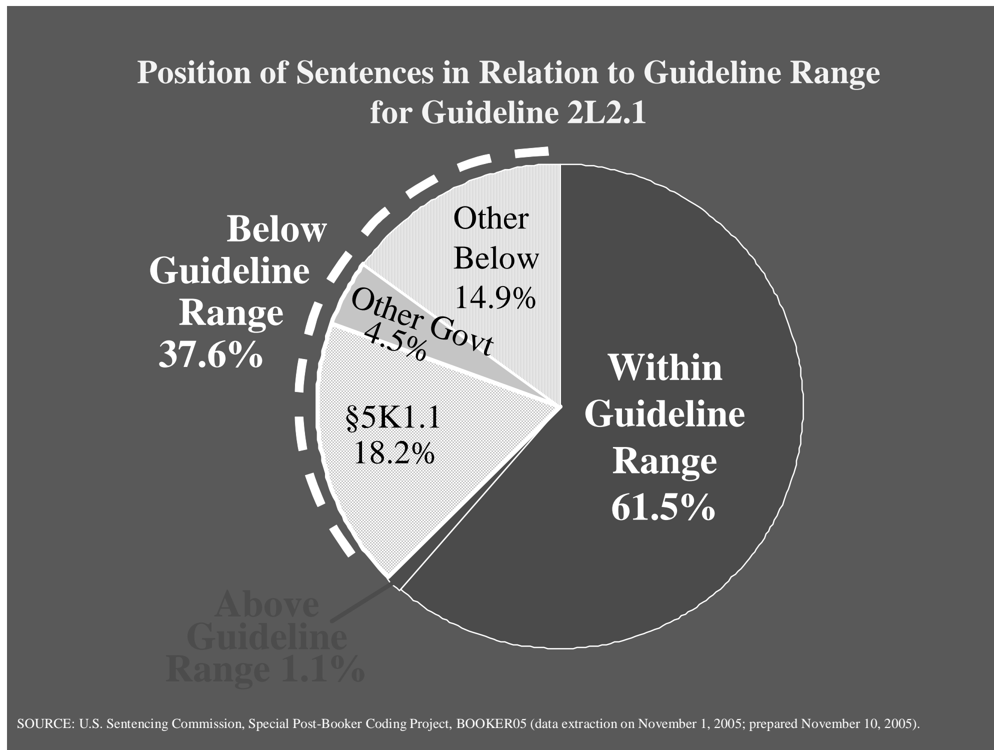
Specific offense characteristic (b)(10) in the proposed amendment (page 6) provides an increase of four levels and a minimum offense level of 23 for offenses in which an alien was kidnapped, abducted, or unlawfully restrained, or if a ransom demand was made. The minimum offense level of 23 was selected to mirror the offense level available at §2A4.2 (Demanding or Receiving Ransom Money). Given congressional concern about inhumane treatment of aliens and the rise of for-profit smuggling enterprises, revisions in this area may be looked at favorably by Congress.

2. §2L2.1 (Trafficking in Documents Relating to Naturalization)

Guideline 2L2.1. addresses offenses involving the trafficking in documents relating to naturalization. Offenses punishable under this guideline include 8 U.S.C. §§ 1185 (a)(3) (Knowingly Making a False Statement in an Application for Permission to Depart From or Enter the United States) and (a)(4) (Knowingly Furnish to Another a Permit to Depart or Enter the United States), 8 U.S.C. § 1255a(c)(6) (False Statements in Applications), and 8 U.S.C. §§ 1325(b) (Improper Entry by Alien) and (c) (Marriage Fraud).

The following chart provides a glimpse of the types of sentences imposed in §2L2.1 cases post-Booker.[23]

[23] The data extraction date for this information is November 1, 2005.



More than 61 percent of the 279 cases sentenced under §2L2.1 are sentenced within the advisory guideline range. One percent of cases (1.1%) receive a sentence above the otherwise applicable advisory guideline range. Of government-sponsored sentences below the advisory guideline range, 18.2 percent consisted of substantial assistance, and an additional four and one-half percent were the result of either Early Disposition Programs or other government sponsored sentences below the guideline range. Approximately 15 percent of sentences were court-initiated below the otherwise applicable guideline range. The **mean** sentence for offenses sentenced under §2L2.1 is **12 months**, and the **median** sentence is **10 months**.

Operation and History of §2L2.1

The guideline provides a base offense level of 11. Effective May 1, 1997, the base offense level was increased from nine to the current 11. This increase was done in response to Section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which directed the Commission to amend the guidelines for offenses relating to the fraudulent use of government-issued documents.

The first specific offense characteristic, subsection (b)(1), provides a three-level decrease if the smuggling offense was committed other than for profit, or if the offense involved the smuggling, transporting, or harboring of the defendant's spouse or child. This decrease applied in just over five percent (5.1%) of all cases sentenced fiscal year 2005.

Specific offense characteristic (b)(2) provides increased punishment based upon the number of documents involved in the offense. Effective November 1, 1992, the Commission amended this guideline to include this enhancement. This enhancement was added at the same time the smuggling guideline, §2L1.1, was amended to include a specific offense characteristic to provide increased penalties based upon the number of aliens smuggled, harbored, or transported during the course of the offense. Amendment 450 indicates that the addition of the documents table under §2L2.1 was done to follow the structure of §2L1.1, to provide in part, a "more direct measure of the scope of the offense." In May, 1997, this specific offense characteristic was amended to respond to a directive contained in section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Currently, the table provides a three-level increase for offenses involving six to 24 documents, a six-level increase for offenses involving 25 to 99 documents, and a nine-level increase for offenses involving 100 or more documents. In all cases sentenced post-Booker, the plurality of cases, 33.7 percent, did not receive an increase under §2L2.1(b)(2), indicating that the majority of cases sentenced post-Booker involved five or fewer documents. Approximately 23 percent (23.2) involved six to 24 documents. Just under twenty percent (19.6 percent) of cases involved 25 to 99 documents, and almost 24 percent (23.8 percent) involved 100 or more documents.

Effective November 1, 1995, specific offense characteristic (b)(3) was added to address defendants who knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense. This four-level increase was applied in 1.8 percent of all cases sentenced in 2005.

The final specific offense characteristic, subsection (b)(4), also was promulgated May 1, 1997, in response to changes required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Under emergency amendment authority, the Commission promulgated specific offense characteristic (b)(4)(A), which provides a two-level increase for any defendant who committed any part of the instant smuggling, harboring, or transporting offense after sustaining a conviction for a felony immigration and naturalization offense. Specific offense characteristic (b)(4)(B) provides an increase of four levels for any defendant who commits any part of the instant offense after sustaining two or more convictions for felony immigration and naturalization offenses arising out of a separate prosecution. Data processed through October 19, 2005, indicates that two percent of all cases (1.8%) received a two-level increase for one prior felony conviction relating to immigration or naturalization, and no cases received a four-level increase for two or more prior felony convictions relating to immigration or naturalization.

Amendment Options for §2L2.1

As suggested by participants of the Immigration Roundtable Discussion, and consistent with the amendment history of §2L2.1, options to modify specific offense characteristic (b)(2) (which addresses the number of documents) have been drafted. On page 8 of the proposed amendment, two options, mirroring the proposed options to §2L1.1 addressing the number of aliens table are present. Amendment history reveals that the number of documents table under

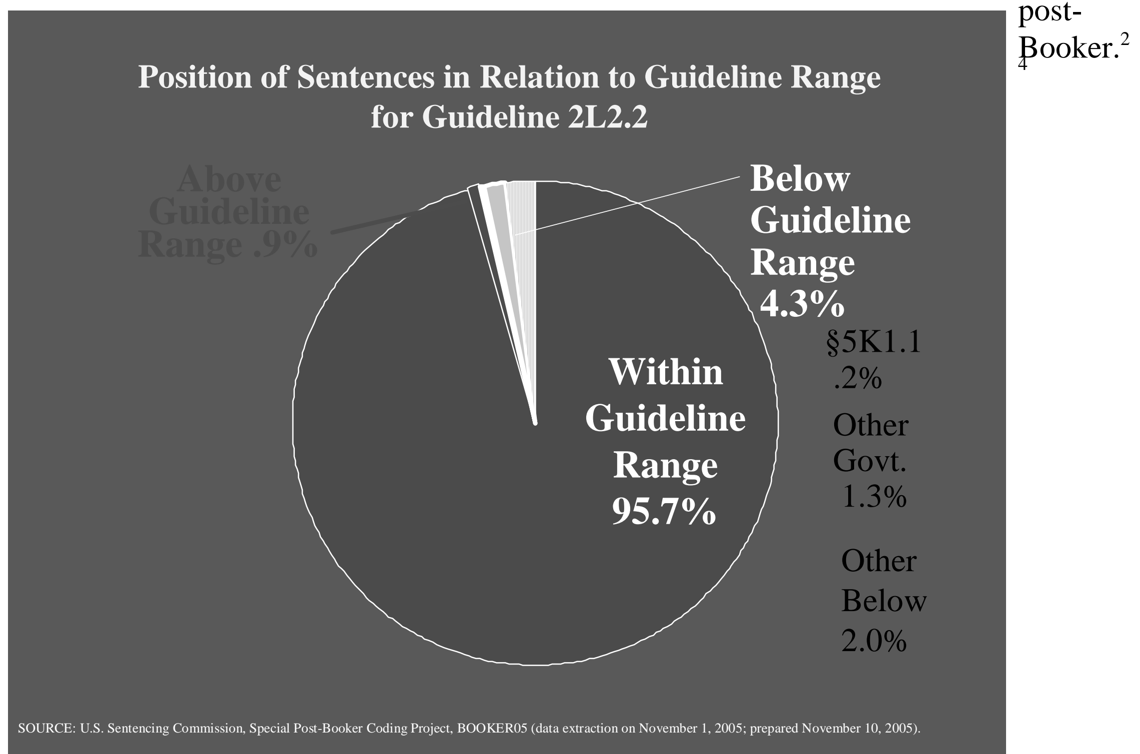
§2L2.1 and the number of aliens table under §2L1.1 mirror each other.

The other option presented is a new specific offense characteristic (b)(5)(A) to add language to punish a defendant who fraudulently obtained or used a United States passport. Addition of this specific offense characteristic will provide consistency between this guideline and §2L2.2.

<u>§2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization)</u>

Guideline 2L2.2 addresses offenses involving the trafficking in documents relating to naturalization. Offenses punishable under this guideline include 8 U.S.C. §§ 1185 (a)(3) (Knowingly Making a False Statement in an Application for Permission to Depart From or Enter the United States) and (a)(5) (Use of Permission to Depart or Enter Not Issued and Designed for His/Her Use), 8 U.S.C.§ 1255a(c)(6) (False Statements in Applications), and 8 U.S.C. §§ 1325(b) (Improper Entry by Alien) and (c) (Marriage Fraud).

The following chart provides a glimpse of the types of sentences imposed in §2L2.2 cases post-Booker.[24]



[24] The data extraction date for this information is November 1, 2005.

More than 95 percent of the 665 cases sentenced under §2L2.2 are sentenced within the advisory guideline range. Approximately one percent of cases (.9%) receive a sentence above the otherwise applicable advisory guideline range. Just over four percent of all sentences under §2L2.2 (4.3%) receive a sentence below the otherwise applicable advisory guideline range. The **mean** sentence for offenses sentenced under §2L2.2 is 4 months, and the **median** sentence is 2.5 months.

Operation and History of §2L2.2

The guideline provides a base offense level of eight. Effective May 1, 1997, the base offense level was increased from six to the current eight. This increase was done in response to Section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which directed the Commission to amend the guidelines for offenses relating to the fraudulent use of government-issued documents.

The first specific offense characteristic, subsection (b)(1), provides a two-level increase if the defendant previously has been deported prior to the instant offense. In 2005, this enhancement applied in 12.7 percent of the cases.

Specific offense characteristic (b)(2) was promulgated May 1, 1997, in response to changes required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Under emergency amendment authority, the Commission promulgated specific offense characteristic (b)(4)(A), which provides a two-level increase for any defendant who committed any part of the instant smuggling, harboring, or transporting offense after sustaining a conviction for a felony immigration and naturalization offense. Specific offense characteristic (b)(4)(B) provides an increase of four levels for any defendant who commits any part of the instant offense after sustaining two or more convictions for felony immigration and naturalization offenses arising out of a separate prosecution. One percent of cases received an increase under this specific offense characteristic[25].

Effective November 1, 2004, specific offense characteristic (b)(3) was added to increase sentences for defendants who fraudulently obtained or used a United States passport. Comment from the Department of State during that amendment cycle heralded the United States passport as the "gold standard" of naturalization documents. In fiscal year 2005, this four-level increase was applied in 3.8 percent of all cases.

Issues Regarding Both §§2L2.1 and 2L2.2

Some guidelines users have indicated that the United States passport should not be the only type of naturalization document to warrant an increased penalty under the guidelines as

[25]A two-level increase for committing the offense after one prior felony conviction for an immigration or naturalization offense was applied in .9% of all 2005 cases. The four-level increase for committing the offense after two or more prior felony convictions for immigration or naturalization offenses was applied in .1% of all cases.

there are other naturalization documents that could also be used as “breeder” documents to make it more difficult to expose document fraud. The following information collected during the 2005 Immigration Coding Project in regard to §§2L2.1 and 2L2.2 enabled the Immigration Policy Team to obtain information regarding the number and types of documents involved in these offenses. As of October 19, 2005, 332 cases were entered with §2L2.1 as the prevailing guideline and 756 cases were entered with §2L2.2 as the prevailing guideline. A five percent sample was obtained from each of the guidelines. Fifteen cases were coded under §2L2.1 and 52 were coded under §2L2.2. The results of that project are given below:

	Combined	**§2L2.1**	**§2L2.2**
	Percent	**Percent**	**Percent**
Number of Offenders	100.0	22.4	77.6
Number of Documents[26]	7.2	23.3	2.4
United States Passport[27]	13.4	0.0	17.3
I -9 Form	9.0	6.7	9.6
Foreign Passport	14.9	0.0	19.2
Green Card	4.5	13.3	1.9
Resident Alien Card	17.9	20.0	17.3
Alien Registration Card	20.9	33.3	17.3
Driver’s License	14.9	13.3	15.4
Visa	7.5	6.7	7.7
Birth Certificate	17.9	13.3	19.2
Social Security Card	50.8	66.7	46.2
Other State ID	7.5	6.7	7.7
Other Document	38.8	60.0	32.7

Senator Feinstein has expressed concern that the penalties for offenses involving foreign passports or naturalization papers are not adequate. In a letter delivered to the Commission, and in numerous discussions with staff, the Senator and her staff have sought a remedy to this

[26]This row gives information on the average number of documents involved in the offense, not the percentage.

[27]The percentages represent the percentage of offenders with these specific documents. Percentages will add to more then 100 percent as offenders often had multiple types of documents.

situation, including a possible gradation in 2L2.2(b)(3) that gives four points for obtaining or using a U.S. passport and a two or three-level enhancement for other passports, and perhaps another enhancement for other naturalization papers.

Under the House immigration bill, a new fraudulent document laboratory would be set up in the Department of Homeland Security to collect, analyze and report on fraudulent document activity at the local, state and federal level. *See* H.R. 4437, sec. 210. The bill also fundamentally rewrites chapter 75 of title 18 to cover passport, visa and immigration fraud.[28] Under section 212 of H.R. 4437 existing provisions in chapter 75 are revised and new sections are added.[29] Section 1541 (currently covering issuance without authority) would become the offense of trafficking in passports. If, during any three period, a person knowingly forges, counterfeits, alters, or falsely makes 10 or more passports; knowingly secures, possesses, uses, buys or receives 10 or more passports, or knowingly completes, mails, prepares, presents, signs 10 or more applications for a *United States* passport knowing the application contains a false statement, an offender will be subject to a three year mandatory minimum penalty with a statutory maximum of twenty years. If this provision is enacted the table for number of passports involved in an offense set forth at 2L2.1 would need to change.[30] Counterfeiting official papers, seals, holograms, and the like also becomes an offense punishable by a three year mandatory minimum.

Making a false statement in an application for a U.S. passport becomes punishable by a statutory maximum of fifteen years (current statutory maximum is graduated depending on other factors involved such as drug trafficking or facilitating terrorism). New section 1543 covers forgery and unlawful production of a passport with statutory maxima for various offenses set at fifteen years. Section 1544 (Misuse of a passport) is amended so that the statutory maximum is fifteen years for general misuse of a passport and a new mandatory minimum of six months if someone uses a forged passport to enter the United States or to defraud the United States. New section 1545 covers schemes to defraud aliens carrying a statutory maximum of fifteen years for anyone who knowingly and falsely represents himself to be an attorney in any matter associated with immigration. New section 1546 addresses some of the issues of concern to Sen. Feinstein.

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[28]Currently chapter 75 is titled “Passports and Visas”. The new title would be “Passport, Visa and Immigration Fraud”.

[29]Section 212 was not included in the bill when it was reported out of committee so the accompanying report does not contain a discussion of these provisions. The section was added as a floor amendment by Rep. Sensenbrenner at the request of the Administration. During debate on the amendment, some MOC’s raised concern that the document fraud provisions were overly harsh and could negatively impact true political refugees and battered immigrant women. *See* statements of Rep. John Conyers and Rep. Howard Berman, 109 Cong Rec. H11949 (Dec. 16, 2005).

[30]As discussed at the December meeting, the table at 2L2.1(b)(2) was pegged to the table covering number of aliens smuggled under 2L1.1. Under the current guideline, a person trafficking in 100 or more passports would receive a 9-level increase to a base offense level of 11. With no other enhancements, and acceptance of responsibility, the final offense level would be 17. A CHC-I offender would, therefore, have a sentencing range of 24-30 months, which is six months below the new mandatory minimum for “trafficking” in 10 or more passports.

First, H.R. 4437 amends 18 U.S.C. § 1546 (fraud and misuse of visas) by including distribution and intent to distribute as an element of the offense. *See* H.R. 4437, sec. 211. It criminalizes the use, counterfeiting of, or false application for an immigration document[31] and sets a fifteen year statutory maximum. It also parallels the passport trafficking provisions by defining trafficking as 10 or more documents within a three-year period ***but*** the penalties for this offense include a two-year mandatory minimum.[32] New section 1547 makes attempts and conspiracies punishable in the same manner as the completed violation. New section 1548 sets forth enhanced penalties for certain offenses.[33] If the offense under chapter 75 was undertaken with the intent to facilitate an act of international terrorism, the penalty is a mandatory minimum of seven years with a maximum of twenty-five years. If the violation occurred with the intent to facilitate the commission of any offense against the United States or a state, and that offense is punishable by imprisonment for more than one year, the mandatory minimum sentence is three years with a maximum of twenty years.[34] New sections 1549-51 cover venue and jurisdiction and section 1152 contains definitions applicable to the chapter.

To address the above-mentioned concerns, page eight of the proposed amendment, an increase has been provided in both §2L2.1 and §2L2.2 to apply to any defendant who fraudulently obtains or uses a foreign passport. Additionally, issue for comment 5 requests input on whether other documents should be punished more severely.

3. §2L1.2 (Unlawfully Entering or Remaining in the United States)

Guideline §2L1.2 addresses offenses involving unlawfully entering or remaining in the United States. Offenses punishable under this guideline include: 8 U.S.C. § 1185(a)(1) (Aliens Departing From or Entering the United States), 8 U.S.C. § 1253 (Failure to Depart), 8 U.S.C. § 1325(a) (Improper Entry by Alien), and 8 U.S.C. § 1326 (Reentry of Removed Aliens).

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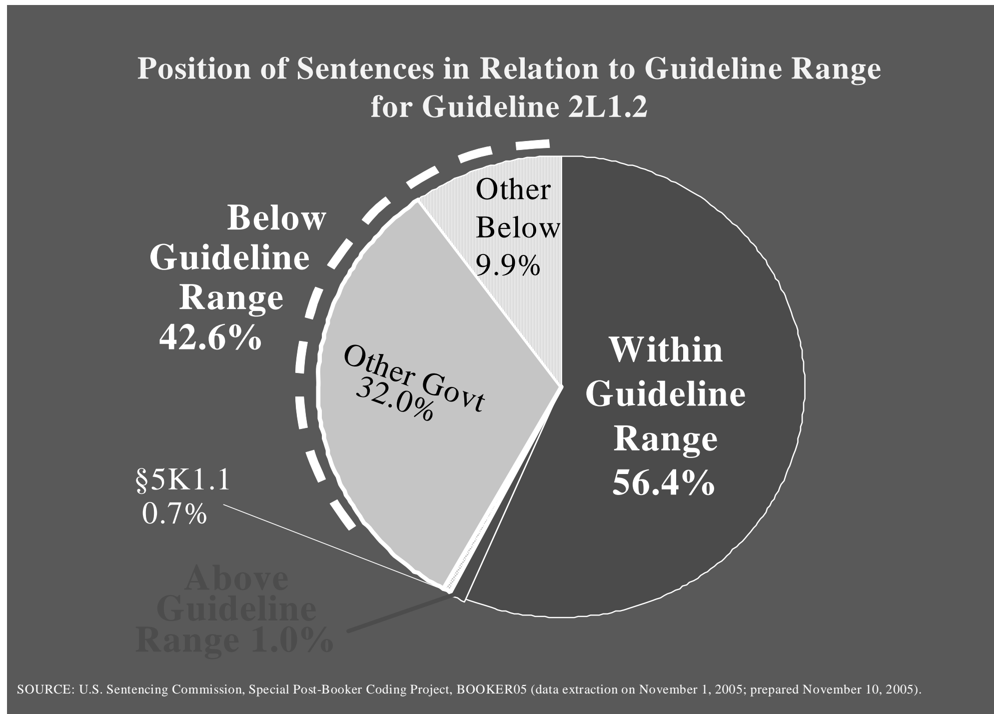
[31]"Immigration document" is defined as: (A) any passport or visa; or (B) any application, petition, affidavit, declaration, attestation, form, identification card, alien registration document, employment authorization document, border crossing card, certificate, permit, order, license, stamp, authorization, grant of authority, or other evidentiary document, arising under or authorized by the immigration laws of the United States. Such term includes any document, photograph, or other piece of evidence attached to or submitted in support of an immigration document. The immigration guidelines do not contain a definition of "document".

[32]Currently, the table at 2L2.2(b)(2) covers offenses involving documents and passports. If the different penalty structures set forth in H.R. 4437 were enacted, it would require rethinking about this table as the two categories could no longer be lumped together.

[33]New section 1548 incorporates penalty enhancements that were listed in the "old" statutory provisions in chapter 75. Rather than repeat them in each section, H.R. 4437 seeks to streamline the chapter.

[34]Under H.R. 4437, illegal entry into the United States would be punishable by a maximum term of one year and a day so the misuse of a passport to gain entry presumably would result in the mandatory term of three years under new section 1548. Specific offense characteristic (b)(3) as noted above was added to address cases in which the passport or immigration document was used to facilitate commission of a felony. The four-level increase, however, would not be sufficient to reach the mandatory three year term proposed in H.R. 4437.

The following chart provides a glimpse of the types of sentences imposed in §2L1.2 cases post-Booker.[35]



More than 56 percent of the 7,175 cases sentenced under §2L1.2 are sentenced within the advisory guideline range. The majority of sentences below the guideline range are the result of government-sponsored departures or variances (32.7 percent). Over 28 percent (28.6 percent) of the 7,175 cases sentenced below the guideline range were the result of Early Disposition Programs. A total of 9.9 percent of cases were the result of court-initiated sentences below the otherwise applicable range. For §2L1.2 offenses, the **mean** sentence is **27 months**, and the **median** sentence is **24 months**.

Amendment History

The guideline provides a base offense level of eight. The base offense level of eight has not been changed since its promulgation in January 1988.

Effective November 1, 1991, the Commission amended §2L1.2 to provide a 16-level increase for any defendant previously deported after a conviction for an aggravated felony. A four-level increase for deportation after a conviction for a felony had been in operation since November 1989.

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[35]Date of data extraction for this information is November 1, 2005.

In response to Section 334 of the Illegal Immigration and Immigrant Responsibility Act of 1996, the Commission amended §2L1.2 by adding a four-level increase for a defendant who had previously been deported after a conviction for three or more misdemeanor crimes of violence or misdemeanor controlled substance offenses. The Commission also amended the definition of "aggravated felony" to correspond directly to the appropriate statutory reference, 8 U.S.C. § 1101(a)(43). These amendments responded to changes made in statutory penalties for these offenses in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796.

Effective November 2001, the Commission made a number of changes to §2L1.2 in response to public comment regarding the operation of this guideline[36]. These amendments provided more graduated offense levels to reflect the seriousness of the prior convictions committed by the defendants. The 16-level increase applied to prior felony convictions that are: 1) drug trafficking offenses for which the sentence imposed exceeded 13 months; 2) crimes of violence; 3) firearms offenses; 4) child pornography offenses; 5) national security or terrorism offenses; 6) human trafficking offenses; and 7) alien smuggling offenses committed for profit. A new 12-level increase was added to address defendants who had a prior felony conviction for a drug trafficking offense for which the sentence imposed was 13 months or less. A new eight-level increase was added to enhance the penalties for any defendant with a prior conviction for an "aggravated felony", as defined in 8 U.S.C. § 1101(a)(43), that was not covered by either the 16-or 12-level increase. The four-level increase applied still to those defendants not covered by the 16-, 12-, or 8-level increases who had a prior felony conviction or three or more misdemeanor crimes of violence or misdemeanor controlled substance offenses.

Data[37] indicates that approximately 20 percent of cases do not receive any increase under this specific offense characteristic. The majority of cases (40.1 percent) receive an increase of 16 levels under §2L1.2. Almost eight percent (7.8%) of cases receive a 12-level increase for having a prior conviction for a drug trafficking offense for which the sentence imposed was 13 months or less. Eighteen percent of cases received an eight-level increase for a prior aggravated felony conviction. Finally, 13.8 percent of cases received a four-level increase for a prior felony conviction or misdemeanor convictions of crimes of violence or controlled substance offenses.

Issue 1: Definition of "Aggravated Felony", the "Categorical Approach", and Crimes of Violence

The criminal grounds for designating an alien as inadmissible or deportable can be classified into two broad categories of crimes, crimes involving moral turpitude or aggravated felonies. Each category (and a separate category for crimes that preclude a finding of good moral character) are overlapping, but not coextensive. *See Immigration Consequences of Criminal Activity* at 3. "Aggravated felony" is defined broadly under the INA in over 20

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[36] *See* Amendment 632.

[37] 2005 post-Booker data; date of data extraction for this information is November 1, 2005.

subparagraphs. H. Rep. 109-345, Pt. I at 58. In addition to making an alien ineligible for a number of forms of relief and release from detention, illegal reentry after conviction of such a crime carries with it increased penalties.

One of proposed changes made by H.R. 4437 is to the definition of "aggravated felony."[38] According to the House, the current aggravated felony definition does not effectively deter many dangerous aliens from "repeatedly reentering the United States illegally." H. Rep. 109-345, Pt. I at 58. H.R. 4437 amends the definition to include "all smuggling offenses, illegal entry and reentry crimes with a sentence of a year or more." H. Rep. 109-345, Pt. I at 58. The bill does not include, however, smuggling in one's immediate family. *See* H. Rep. 109-345, Pt. I at 59. The bill also broadens the definition to include "soliciting, aiding, abetting, counseling, commanding, inducing, procuring or a conspiracy to commit any of the offenses listed in section 101(a)(43) of the INA [8 U.S.C. § 1101(a)(43)]" in order to reverse Ninth Circuit precedent that "has had the effect of requiring federal prosecutors in criminal cases seeking sentencing enhancements to prove that prior convictions were *not* based on aiding and abetting." H. Rep. 109-345, Pt. I at 59.[39] Section 203 of H.R. 4437 amends 8 U.S.C. § 1325 by including at the end of the section:

> The prior convictions in subparagraph (A), (B),or (C) of paragraph (1) are elements of those crimes and the penalties in those subparagraphs shall apply only in cases in which the conviction (or convictions) that form the basis for the additional penalty are alleged in the indictment or information and are proven beyond a reasonable doubt at trial or admitted by the defendant in pleading guilty. Any admissible evidence may be used to show that the prior conviction is a qualifying crime, and the criminal trial for a violation of this section shall not be bifurcated.

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[38]As noted above, the bill also proposes increasing the statutory maximum penalty (to 20 years) for illegal entry under 8 U.S.C. § 1325 if the offense was committed subsequent to conviction for the commission of an aggravated felony.

[39]The House report cites to *United States v. Corona-Sanchez*, 291 F.3d 1208 (9th Cir. 2002) (en banc) as the case it seeks to reverse. In *Corona-Sanchez*, the court considered whether the California state-law crime of petty theft committed by a previous offender was an aggravated felony under the Guidelines. The answer to that question turned on whether the crime was a "theft offense" punishable by a sentence of one year or more in prison. 291 F.3d at 1203-11. Under the California law at issue in *Corona-Sanchez*, the fact that the defendant was a repeat offender rendered him subject to a sentence — two years — that would have made his crime an aggravated felony, even though the underlying offense, petty theft, carried only a six-month statutory maximum. Applying the categorical approach in the case and coupling it with analysis under *Almendarez-Torres*, the Ninth Circuit determined that it is the substantive offense which must meet the year or more requirements, independently of any recidivist enhancement. *See* discussion in *United States v. Moreno-Hernandez*, No. 03-30387 (9th Cir. 2005).

Persons convicted under 8 U.S.C. § 1326(b)(2) are subject to an increased statutory maximum penalty of 20 years because their removal was subsequent to a conviction for commission of an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43). Fiscal year 2005 data indicate that 49.3 percent of all §2L1.2 cases were convicted under the increased statutory maximum at 8 U.S.C. § 1326(b)(2). Of those defendants subject to the increased statutory maximum, 57.4 percent received the 16-level increase as provided by the guideline; 11.2 percent received the 12-level increase, and 26.7 percent received the eight-level increase. Just over one percent (1.3) of cases received no specific offense characteristic increase under §2L1.2, and approximately three and one-half percent (3.4) of cases received a four-level increase under this guideline.

The court's determination of whether a prior conviction meets the definition of "aggravated felony" as described in 8 U.S.C. § 1101(a)(43) relies upon the proper application of the "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 125 S. Ct. 1254 (2005). Both *Taylor* and *Shepard* addressed the determination of whether a prior conviction would qualify a particular defendant as an Armed Career Criminal. As a result of these decisions, to determine whether a prior conviction constitutes an aggravated felony, the court must use a "categorical approach, " in which the court looks only to the fact of the conviction and the statutory definition of the prior offense. If the statute's language is ambiguous or broad enough to encompass both violent and nonviolent crimes, a court may look beyond the statute to certain records of the prior proceeding, such as the charging documents, the judgment, any plea thereto, and findings by the court. In illegal reentry cases, a second "categorical approach" analysis must be done by the court to determine whether a prior conviction meets the appropriate definitions under §2L1.2 to assess the appropriate application of specific offense characteristics.

Many guidelines users have expressed concern regarding the "categorical approach" analyses that are required when sentencing illegal reentry defendants. Given the difficulty in obtaining sentencing documents from jurisdictions across the nation, the limitation on the types of documents that can be used to establish the type of prior conviction (per the "Categorical Approach"), the sheer volume of cases in border districts especially, and the operation of Early Disposition Programs and other time-saving procedures, guidelines users have expressed frustration with this approach to sentencing under §2L1.2.

The five options provided in the proposed amendment (pages eight through 16) provide two approaches to alleviating concerns regarding the categorical approach. None of the proposed amendment options presented will relieve the courts from ever engaging in the categorical approach analysis. Any offense for illegal reentry will inevitably involve one "categorical approach" analysis, due to the fact that the court must determine if the defendant's prior conviction is an aggravated felony for purposes of selecting the appropriate statutory penalty. However, these amendment options will require the court to do only one categorical approach analysis. The first approach, found in options one through four, is to use the statutory definitions provided in 8 U.S.C. § 1101(a)(43) (regarding the definition of aggravated felony) to define the various types of prior convictions delineated in the specific offense characteristics at

§2L1.2. Option five of the proposed amendment (page 16) addresses this concern by removing all references to types of prior convictions from §2L1.2, which would no longer require a separate "categorical approach" analysis for the purposes of guideline calculation.

These five options would also address two additional concerns expressed by guidelines users: 1) the 16-level increase should only apply to those defendants convicted of the enhanced statutory penalty, and 2) the definition of "crime of violence" in the statute differs from the definition of "crime of violence" under §2L1.2.

Concern has also been expressed that the 16-level increase, presumably to be applied to the most serious offenders, can still be applied for specific prior convictions that otherwise do not qualify as an "aggravated felony" pursuant to 8 U.S.C. § 1101(a)(43). For example, a defendant with a prior state conviction for assault who received a sentence of less than one year would qualify for the 16-level increase even though that prior conviction for assault does not qualify as an "aggravated felony", and would not subject the defendant to the increased statutory penalty. Options one through four would alleviate this concern, as only those prior convictions that are aggravated felonies would be subject to the 16-level increase. Option five removes the 16-level increase in its entirety.

Additionally, the application of this guideline is further complicated by the fact that the statutory definition of "crime of violence" differs from the §2L1.2 definition of "crime of violence" in two significant ways. First, the statutory definition includes offenses involving the "substantial risk of physical force against the person or property." Second, the statute requires "imprisonment for at least one year" whereas the guideline requires that a "crime of violence" be punishable by a term of imprisonment exceeding one year. As a result, there are prior convictions for "crimes of violence" that qualify as aggravated felonies under the statutory definition, but do not qualify as "crimes of violence" for purposes of §2L1.2. Similarly, there are prior convictions for "crimes of violence" that qualify for the 16-level increase pursuant to the guideline definition that do not meet the statutory definition of "crime of violence" and therefore, do not qualify as an aggravated felony.

Therefore, the most complicated and time-consuming application exercise for the court involves the determination of whether a prior conviction qualifies as a "crime of violence." First, to determine the statutory maximum penalty, the court must look to 8 U.S.C. § 1101(a)(43)(F), which directs the court to look to 18 U.S.C. § 16[40] to determine if a prior conviction qualifies as a "crime of violence." If the prior conviction is a crime of violence under that statute, that prior conviction qualifies as an aggravated felony as defined in 8 U.S.C. § 1101(a)(43), and the defendant is then exposed to an increased statutory maximum penalty of 20 years. In addition, for guideline application purposes under §2L1.2, the court must then

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[40]"The term 'crime of violence' means - (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." (18 U.S.C. § 16).

determine whether that same prior conviction qualifies as a "crime of violence" as defined in the guideline in Application Note 1(B)(iii).[41] Prior convictions that qualify as "crimes of violence" under the guideline definition will receive a 16-level increase pursuant to §2L1.2(b)(1)(A).

As a result, courts are faced with numerous circuit opinions addressing whether a prior conviction meets the statutory definition for "crime of violence" and/or whether it meets the different guideline definition for "crime of violence" in §2L1.2.

The options presented to the Commission alleviate this complication, again due to the fact that options one through four are tied to the statutory definitions found in 8 U.S.C. 1101(a)(43) (Aggravated Felony). These options remedy these issues by providing consistency between the appropriate statutory and guideline definitions. Specifically, the definition of crime of violence in the guideline would be the same definition of crime of violence in the statute. Option five removes the definition of "crime of violence" from the guideline altogether.

Although these options would reduce the workload of the court as well as reduce some of the complications under this guideline by requiring only one analysis of whether a prior conviction meets the definition of aggravated felony and/or crime of violence, the results may not be desirable. Some prior convictions that currently receive a 16-level increase, under this type of option, potentially could receive an eight- or four-level increase, or no increase whatsoever. For example, the defendant who has a prior state conviction for assault for which the defendant received a sentence of less than one year would qualify for a four-level increase if that prior conviction is a felony. If the prior conviction is a misdemeanor, the defendant would not receive any increase under §2L1.2. In contrast, there is the possibility that certain prior convictions for aggravated felonies, currently receiving an eight-level increase, that, under these options, potentially could be subject to a 16-level increase. For example, a prior conviction for a crime of violence (as defined in 18 U.S.C. § 16) against the property of another that does not meet the current definition of crime of violence as it appears in §2L1.2, would receive an increase of 16-levels if the 16-level increase is tied to the statutory definition. The differences in the options revolve around these issues.

Issue 2: Prior Sentences of Probation for Drug Trafficking Offenses

Under §2L1.2, a prior felony conviction for a drug trafficking offense where the sentence imposed exceeded 13 months warrants application of the 16-level increase at §2L1.2(b)(1)(A). A 12-level increase applies to those defendants whose prior felony conviction for a drug trafficking offense resulted in a sentence imposed of 13 months or less (§2L1.2(b)(2)). "Sentence imposed" is defined as any portion of a sentence that was not probated, suspended, deferred, or stayed. Nonetheless, different interpretations have arisen when a prior conviction

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[41]"'Crime of violence' means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." (§2L1.2 App. Note 1(B)(iii)).

for a drug trafficking offense results in a sentence imposed of probation. Relying on Amendment 632, some courts have applied the increase of 12 levels ("where the sentence imposed is 13 months or less"), finding that the Commission's intent was for all drug trafficking offenses to receive an increase of at least 12 levels.[42]

Other courts have found that because the entire sentence is probated, a sentence imposed of probation for a prior drug trafficking conviction does not fit into the description of "sentence imposed" and therefore should receive an increase of only eight levels for qualifying as an "aggravated felony." In 2003, the Commission amended the commentary in §2L1.2 to align the definition of "sentence imposed" with the definition of "sentence of imprisonment" as found in §4A1.2. As a result, some have argued that this alleviates the question of whether a fully suspended prior sentence for drug trafficking warrants a 12-level increase. Because the definition of "sentence of imprisonment" at §4A1.2 requires a sentence of incarceration, where one is not imposed, the 12-level increase cannot be given, but the eight-level increase is warranted.

During the Roundtable Discussion, most participants indicated that their courts are applying the 12-level increase for any prior drug trafficking conviction not covered in §2L1.2(b)(1)(A). However, the Commission may wish to clarify this issue.

Issue 3: Prior Convictions for Simple Possession Where the Quantity Exceeds Personal Use

Although most prior convictions for simple possession meet the statutory definition of "drug trafficking crime" as provided in 8 U.S.C. § 1101(a)(43)(B), the guideline definition of "drug trafficking" excludes offenses involving simple possession. Some defendants, therefore, with a prior conviction for simple possession are exposed to the increased statutory penalty for having a prior aggravated felony conviction, but they are not subject to the 16- or 12-level increase for certain "drug trafficking" offenses under the guidelines.

In 2003, the Commission received comment regarding the distinction between prior convictions for drug trafficking offenses and prior convictions for simple possession. The statutory scheme for drug offenses in some states allow defendants to be charged with possession when the quantity of controlled substance involved significantly exceeds personal use amounts. The letter expressed concern about the potential disparity between a defendant convicted of trafficking in a very small amount of a controlled substance (which would warrant a 16- or 12-level increase depending upon the sentence imposed), and a defendant who is convicted of possession of a large amount of a controlled substance. Some states, with offenses for possession of large quantities of controlled substances, consider these offenses to be akin to

[42] *See United States v. Mullings*, 330 F.3d 123 (2d Cir. 2003); *United States v. Cordero*, 256 F. Supp. 2d 1378 (N.D. Ga. 2003).

trafficking offenses. Courts have treated these particular state offenses in different ways.[43]

The proposed amendment options tie the guidelines definitions to the corresponding statutory definitions. Options one through four would establish that any prior conviction for drug trafficking that meets the definition of aggravated felony would be subject to either a 16- or 12-level increase. To the extent that simple possession offenses are considered "drug trafficking crimes" under 8 U.S.C. § 1101(a)(43)(B), they would then be subject to 16- or 12-level increases. Although this may resolve the issue presented, overall, the result is an increase in sentences for a number of defendants with prior convictions for simple possession.

Issue 4: Criminal History and "Double Counting"

Some guidelines users have voiced concern regarding the "double counting" that occurs under §2L1.2 when prior convictions are used to increase the offense level as well as the criminal history score of a defendant.

This situation is further aggravated by the fact that many of these defendants, when found to be in the United States illegally, are discovered while serving time in prison. These defendants are potentially subject to an additional increase of up to three criminal history points at §4A1.1(d) and (e) for being under a criminal justice sentence at the time of the offense, and for committing the offense less than two years after release. Courts have held that because a violation of 8 U.S.C. § 1326 is a continuing offense, if a defendant is found to be illegally in the United States while serving a state term of imprisonment, even though the defendant did not commit the state offense until he reentered the country, that conviction can be used to increase the defendant's criminal history score pursuant to §4A1.1(d) and (e).[44]

Additionally, some prior convictions that can be used to increase the offense level under §2L1.2 may be outside of the five, ten, or 15 year time frame for the purpose of calculating criminal history points. Conceivably, a prior conviction that is 20 or more years old, although not countable under Chapter Four for criminal history purposes, (but countable for the purpose of determining the statutory maximum for these offenses) can be used to increase the defendant's offense level under this guideline.

One option offered during the Roundtable Discussion was to subject any prior conviction to the Chapter Four - Criminal History Rules before using that prior conviction to increase the offense level under §2L1.2. On page 17 of the proposed amendment, issue for comment 6 addresses this issue. However, it should be noted that the statute does not restrict the use of any

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[43]*See United States v. Madera-Madera*, 333 F.3d 1228 (11th Cir. 2003); *United States v. Herrera-Roldan*, 2005 WL 1635366 (10th Cir. 2005).

[44]*See United States v. Rosales-Garay*, 283 F.3d 1200 (10th Cir. 2002); *United States v. Corro-Balbuena*, 187 F.3d 483 (5th Cir. 1999); *United States v. Coeur, 196 F.3d 1344 (11th Cir. 1999); United States v. Santana-Castellano,* 74 F.3d 593 (5th Cir. 1996); *cf. United States v. Ruiz-Gea*, 340 F.3d 118 (10th Cir. 2003).

prior convictions based upon the date of the prior conviction.

III. "Border Districts" and "Fast Track"

Border Districts

With over 20 percent of all federal cases sentenced under the immigration guidelines, it is important to note the role of the southwestern "border districts" in the determination of these statistics. These "border districts" include the districts of Arizona, New Mexico, Southern California, Southern Texas and Western Texas. Since Fiscal Year 2000, over 65 percent of all immigration cases sentenced under the guidelines come from these five "border districts" in the southwestern United States.[45] In Fiscal Year 2004, the federal courts in the southwestern "border districts" were responsible for 34 percent of the total criminal felony case filings.[46] During that same fiscal year, these border courts significantly exceeded the national average for felony filings per authorized judgeship. The average number of felony filings in Fiscal Year 2004 was 88 per authorized judgeship. The following table describes the average number of felony filings in Fiscal Year 2004 in the "border districts"[47].

District	Average # of Felony Filings Per Judgeship
Arizona	309
California Southern	262
New Mexico	364
Texas Southern	295
Texas Western	354

Although this paper focuses on all of the immigration guidelines, immigration cases from the "border districts" primarily involve the offenses of smuggling and illegal reentry. Immigration offenses involving the trafficking of fraudulent naturalization documents and the

[45]Sources: U.S. Sentencing Commission Sourcebooks of Federal Sentencing 2000 - 2004; post-Booker data for Southwest Border Conference, July 5, 2005 (data extraction date of May 5, 2005).

[46]Source: "Criminal Felony Case Filings - 2004"; data obtained from participants of the Southwest Border Conference, July 2005.

[47]Source: "Felony Filings Per Authorized Judgeship"; data obtained from participants of the Southwest Border Conference, July 2005.

unlawful possession of naturalization documents are not as prevalent in the "border districts"[48].

The sheer volume of cases in these districts has generated a number of time-saving remedies employed by various districts, including modified presentence reports. Perhaps the most widespread of these remedies is the "fast track" or Early Disposition Program.

Early Disposition/ "Fast Track" Programs

Although these programs were in practice in a number of different districts prior to 2003, these programs were institutionalized and regulated as a result of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Public Law 108-21. Effective October 27, 2003, the Commission promulgated §5K3.1 (Early Disposition Programs) to satisfy the directive to implement section 401(m)(2)(B) of the PROTECT Act of 2003. Policy statement §5K3.1 provides that "Upon motion of the government, the court may depart downward not more than four levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides."

As of October 29, 2004, several districts were authorized by the Attorney General to employ Early Disposition Programs.[49] For cases involving illegal reentry, the following districts were authorized to use an approved "fast track" program: Arizona, Central California, Eastern California, Northern California, Southern California, Idaho, Nebraska, New Mexico, North Dakota, Oregon, Southern Texas, and Western Texas. For transportation or harboring cases, the following districts had an approved "fast track": Arizona, Southern California, New Mexico, Southern Texas, and Western Texas. Only one district, Arizona, had the approval to provide a "fast track" for alien baby and/or child smuggling and "bringing in" cases (in which defendants are caught guiding the alien across the border). "Fast track" programs addressing fraudulent immigration document cases were authorized in the districts of Northern Georgia and Southern Florida.

Not all "fast track" programs address only immigration offenses. The following districts were authorized to use "fast track" programs for certain specific drug offenses: Arizona, Southern California, New Mexico, Eastern New York, Southern Texas (Laredo division only), and Western Texas.

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[48]This is reflected in the list of districts that are approved for a "fast track" in cases involving fraudulent immigration documents. None of the "border districts" is authorized for an early disposition program to address document fraud offenses. However, all "border districts" are listed as authorized to employ "fast track" programs for illegal reentry and transportation and harboring offenses. *See* the following section for the complete list of "fast track" approved districts.

[49]Source: Report on the Department of Justice's Fast Track Programs. Information included in this report reflected those districts approved for Fast Track programs effective October 29, 2004 through September 30, 2005. To continue use of these programs beyond the date of September 30, 2005, each United States Attorney's Office was required to submit a request for reauthorization.

Although §5K3.1 was promulgated to provide a consistent type of "fast track" program, districts do not use the same type of "fast track" program nor the same criteria to award the benefit of a "fast track" program. For example, some "fast track" programs involve charge bargaining to restrict the defendant's statutory exposure to a total of 30 months imprisonment. This program requires charging the defendant with two counts of 8 U.S.C. § 1325(a) (Improper Entry by Alien). The first count carries a statutory maximum penalty of six months, and the second count carries a statutory maximum penalty of 24 months. On the other hand, other "fast track"/early disposition programs rely upon §5K3.1 to depart downward from the otherwise applicable guideline range and provide a decrease of one to four offense levels. The decision as to the appropriate reduction under §5K3.1 (*i.e.*, the number of levels granted upon departure) varies according to district. Additionally, the criteria the defendant must meet in order to qualify for a particular "fast track" program varies from district to district and even from division to division within a particular district.

Some district courts have granted variances from the otherwise applicable guideline range based upon the fact that their particular district does not have an authorized early disposition program. Some district courts view the practice of early disposition programs as causing unwarranted disparity, and have varied from the guidelines on that basis[50]. At least one district court has held that the lack of a "fast track" program in a particular district cannot be used as the basis for a variance from the guidelines.[51]

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[50]*See United States v.Delgado,* (2005 U.S. Dist. Lexis 9341 (M. D. Fla. April 8, 2005); *United States v. Galvez-Barrios,* (355 F. Supp. 2d 958 (E.D. Wis. Feb. 2, 2005); *United States v. Ramirez-Ramirez,* (365 F. Supp. 2d 728 (E.D. Va. April 18, 2005).

[51]*United States v. Perez-Chavez,* 2005 U.S. Dist. Lexis 9252 (D. Utah, May 16, 2005).