Fast-Tracking *United States v. Booker*: Why Judges Should Not Fix Fast Track Disparities

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I. INTRODUCTION

The topic of immigration has once again ascended to the forefront of domestic policy discussions and is recapturing the attention of policymakers.[1] As the number of illegal immigrants entering the country now exceeds a half million per year, the need and desire to address this situation has become more immediate.[2] Unsurprisingly, this stark statistic has spurred a notable increase in immigration-related prosecutions. Over the last decade, the number of immigration offenses has quintupled.[3] The increasing number of illegal immigrations, coupled with the vast number of immigration offenses, has pushed the issue into the limelight and has

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[1] U.S. SENT'G COMM'N, INTERIM STAFF REPORT ON IMMIGRATION REFORM AND THE FEDERAL SENTENCING GUIDELINES 1 (2006), http://www.ussc.gov/publicat/imigration_06.pdf [hereinafter REPORT ON IMMIGRATION]. Most recently, the passage in December of H.R. 4437, 109th Cong. (2005) ("An Act to amend the Immigration and Nationality Act to strengthen enforcement of the immigration laws, to enhance border security, and for other purposes."). Promising to tighten immigration laws and provide for harsher penalties—including making the mere presence of an illegal immigrant a felony—has spawned a mass numbers of protests across cities nationwide. *See, e.g., Thousands Rally in Cities for Immigrant Rights*, N.Y. TIMES, Mar. 25, 2006, at A11; Nicholas Confessore, *Immigration Debates Mirror Concerns in Washington*, N.Y. TIMES, Mar. 26, 2006, at 31 (describing the debate); *see also* Rachel L. Swarns, *A G.O.P. Split On Immigration Vexes a Senator*, N.Y. TIMES, Mar. 26, 2006 at 1. The controversy continues as its companion bill is now introduced in the Senate. S. 2454, 109th Cong. (2006).

[2] According to a U.S. House of Representatives Report, it is estimated that 11 million illegal immigrants currently reside in the U.S. and roughly about a half-million enter the country illegally each year. H.R. REP. NO. 109-345, pt. I, at 45 (2005).

[3] REPORT ON IMMIGRATION, *supra* note 1, at 2. In Fiscal Year 1994, there were a total of 2,338 immigration offenses sentenced under the federal sentencing guidelines system. This number comprised 5.9% of all cases sentenced. As of Fiscal Year 2004, the number of immigration offenses had increased to 15,717, now comprising 22.5% of all cases sentenced nationally. Fiscal Year 2005, shows that from January 12, 2005 (Post *United States v. Booker*) through November 1, 2005, 23.1% of all cases sentenced under the guidelines were immigration offenses. *Id.*

prompted calls for increased debates and immigration reforms within the criminal justice system.[4]

As lawmakers face the ongoing task of deciding whether preventing illegal immigration constitutes sound policy, U.S. Attorneys are stuck enforcing the current immigration laws. While competing approaches have developed, the major response has been to prosecute as many immigration cases as possible in hopes of achieving a deterrent effect. Early Disposition programs (also known as Fast Track) allow prosecutors to address the immigration issues clogging their districts by maximizing the number of immigration cases they are able to process. A Fast Track system provides an avenue for defendants in those jurisdictions to plead guilty and receive a very lenient sentence in exchange for a waiver of procedural rights and a speedy disposition of their case. This, in turn, results in savings of prosecutorial resources.

The programs have been successful in achieving procedural efficiency by allowing the districts along the U.S.-Mexico border to increase their immigration felony conviction rate five-fold.[5] These border districts have been instrumental in making immigration crimes account for roughly one-quarter of all federal felony filings annually.[6]

While the steep sentencing discounts have made Fast Track pleas almost a "no-brainer" for defendants fortunate enough to be arrested and charged in participating districts, it has had the collateral effect of causing blatant sentencing disparities in comparison to similarly situated defendants in districts not hosting an Early Disposition program.[7] Before the Supreme Court's seminal decision in *United States v. Booker*,[8] which made the federal Sentencing Guidelines advisory rather than mandatory, sentencing departures based on inter-district disparities created by Fast Track programs were generally forbidden.[9] Since *Booker*, some district judges have cited "the need to avoid unwarranted sentence disparities

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[4] *Id*. at n.1; *See generally* The President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1811 (Dec. 12, 2005); The President's Radio Address, 42 WEEKLY COMP. PRES. DOC. 513 (Mar. 27, 2006).

[5] REPORT ON IMMIGRATION, *supra* note 1, at 2.

[6] *Id*. at 2, 29. (22.5% in 2004, 23.1% in 2005). In fact, 34% of all criminal felony filings came from these "border districts." *Id*. at 29.

[7] This is the case because all things being equal, a defendant arrested in a Fast Track jurisdiction and choosing to take part in the program will generally receive a much lesser sentence than a similar situated defendant in a federal district not hosting the program. Depending on the Defendant's criminal history and offense level, a Fast Track departure may sometimes make a sentencing window of 70 to 87 months become 12-30 months for the same crime.

[8] 543 U.S. 220 (2005). Instead, the opinion now requires judges to impose a "reasonable sentence" that comports with the requirements of the Sentencing Reform Act under 18 U.S.C. § 3553(a). *Id*.

[9] *See, e.g.,* United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir. 2000); United States v. Banuelos-Rodriguez, 215 F.3d 969 (9th Cir. 2000); United States v. Melendez-Torres, 420 F.3d 45 (1st Cir. 2005).

among defendants with similar records"[10] as grounds to deviate from the now advisory Sentencing Guidelines and impose instead a "reasonable" below-Guideline sentence.[11]

Though some judges in non-Fast Track districts are tempted to draw upon the outcomes of sentencing procedures in other districts to avoid sentencing disparities, they should not. The discretion authorized by Fast Track programs rests with prosecutors, not judges. Moreover, judicial references to Fast Track sentences contravene Congressional intent. A strong argument exists that Early Disposition inconsistencies are not the type of "unwarranted" sentencing disparities Congress intended to have courts cure. Although some district judges have ruled otherwise, and point to their newfound statutory power as enabling them to address disparate sentencing outcomes through their courts, the need to respect the will of Congress and the powers of the Executive Branch, post-*Booker*, militates in favor of not allowing sentencing judges to resolve Fast Track disparities by judicial fiat.

Part I of this note focuses on exploring the history of Fast Track programs and provides a backdrop from which to gauge their modern day purpose and operation. Part II discusses the implications of the *Booker* decision in relation to Fast Track and why, even under this new "advisory" paradigm, judges should refrain from ameliorating sentencing disparities caused by Early Disposition programs. Part II will also explain why such programs are not the type of "unwarranted" disparity that is longing for a cure; how legislative inferences and history support that conclusion; how analogizing the disparity to Federal-State sentencing disparities may provide a solution to the debate; and how allowing judges to solve the sentencing disparity may result in a remedy worse than the disease. Finally, Part III addresses the issue of separation of powers and why Fast Track programs are a legitimate prosecutorial tool.

II. THE CATALYST FOR CHANGE

United States Attorneys in districts along the United States-Mexican border have endured a long history of attempts to fend off illegal immigration. In modern times, prosecutors have acted as America's first line of defense against illegal aliens, but, until 1995, had achieved miniscule success in quelling immigration offenses. By virtue of

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[10] *See* 18 U.S.C.A. § 3553(a)(6) (West 2000 & Supp. 2006). Judges must now take this into account in issuing a "reasonable sentence." *See supra* note 8 and accompanying text.

[11] *See*, *e.g.*, United States v. Peralta-Espinoza, 383 F. Supp. 2d 1107 (E.D. Wis. 2005); United States v. Galvez-Barrios, 355 F. Supp. 2d 958 (E.D. Wis. 2005); United States v. Ramirez-Ramirez, 365 F. Supp. 2d 728 (E.D. Va. 2005); United States v. Medrano-Duran, 386 F. Supp. 2d 943 (N.D. Ill. 2005).

geography, it is not surprising that the majority of immigration arrests were limited to certain jurisdictions, commonly known as the "border districts."[12] Border districts include Arizona, New Mexico, Southern California, Southern Texas, and Western Texas.[13]

Border districts have struggled for decades to prevent the large number of immigration offenses from handicapping those districts' judicial systems. To an extent, they continue to struggle today. For many years, the solution of the border districts to prevent this overcrowding of the criminal justice system was simply to ignore the problem altogether. The logistics, expense, and required resources made it impossible to prosecute the more than half million border arrests every year to the full extent of federal laws.[14]

For many years, immigration arrests netted a large number of illegal alien repatriations but did not provide an avenue for punishment. Aliens who had previously been deported continued to return over and over again.[15] The nation's judicial and correctional systems around the border areas were ill-equipped to adequately handle the numbers of violators they faced.[16] Not surprisingly, arrests had no deterrent value and made the United States' border with Mexico a lawless "no man's land" with a revolving door.[17] The systemic inadequacy of the system was also responsible for causing efforts by law enforcement to be duplicated.[18]

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[12] *See* Alan D. Bersin, *El Tercer Pais: Reinventing the U.S./Mexico Border*, 48 STAN. L. REV. 1413, 1413-15 (1996). This statement is still true today. Since Fiscal Year 2000, over 65% of all immigration cases sentenced under the Guidelines comes from these "border districts." REPORT ON IMMIGRATION, *supra* note 1, at 29.

[13] REPORT ON IMMIGRATION, *supra* note 1, at 29; Erin T. Middleton, Note, *Fast-Track to Disparity: How Federal Sentencing Policies Along the Southwest Border Are Undermining the Sentencing Guidelines and Violating Equal Protection*, 2004 UTAH L. REV. 827, 831 (2004).

[14] *See* Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 287-89 (1998) [hereinafter Bersin & Feigin].

[15] William Braniff, former U.S. Attorney for the Southern District of California states that:

> The San Diego Border Patrol Sector, which apprehends more than 50% of the illegal aliens apprehended in the entire nation, apprehended 565,581 illegal aliens in this district in Fiscal Year 1992. Even though each illegal alien has violated federal law, virtually none of them see the inside of a courtroom, because their prosecution would overwhelm not only the court system in San Diego but the entire federal prison system.

William Braniff, *Local Discretion, Prosecutorial Choices and the Sentencing Guidelines*, 5 FED. SENT'G REP. 309 (1993).

[16] *Id*.

[17] Bersin & Feigin, *supra* note 14, at 287 ("Everyone—prosecutors, aliens, defense counsel, and the court—accepted that the border was a revolving door and that most of the aliens prosecuted as well as those immediately returned to their country of origin, would attempt to reenter as soon as possible."); *see also* Alan D. Bersin, *Reinventing Immigration Law Enforcement in the Southern District Of California*, 8 FED. SENT'G REP. 254, 254-55 (1996) [hereinafter *Reinventing Immigration*].

[18] Bersin & Feigin, *supra* note 14, at 287.

Only a small number of immigrants with pronounced criminal histories faced any real threat from prosecutors.[19] Even then, those who faced prosecution rarely were charged with anything more than misdemeanors.[20] This was no doubt a prosecutorial strategy crafted to keep the limited jail space available for the next misdemeanant.

At that time, it was estimated that one to two million undocumented aliens were crossing U.S. borders and entering local cities while facing minimal peril of prosecution.[21] The numbers alone were a clear indicator to those concerned about immigration that the status of the U.S. immigration defense system along the border required reform. In the mid-1990's, border districts received help by way of unprecedented partnership efforts spearheaded by the Justice Department.[22] A new outpouring of resources was designed to revolutionize antiquated practices and the sinking morale among enforcement along the border.[23] Known as "Operation Gatekeeper," the coordinated effort provided for more border agents, better detection equipment, immigration inspectors, highway checkpoints, and advanced biometric fingerprint systems that reduced the processing times of illegal immigrants from hours to minutes.[24]

These unprecedented efforts delivered extraordinary results. By all accounts, Operation Gatekeeper proved to be a success in terms of making entry into the United States more difficult.[25] By forcing future illegal immigrants to use longer and more arduous paths of entry, it had the effect of making the U.S.-Mexico border the hardest to cross in modern history.[26] More agents, better detection practices, and an improved and efficient identification system translated into more arrests.[27] Illegal aliens, who before had been able to deceive officials with phony names and forged documents, were no longer able to do so and were instead presented for prosecution.[28]

Increased efficiency in policing, however, had the effect of creating an even bigger congestion of cases for both courts and prosecutors.[29] The

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[19] *Id*. at 287-88.

[20] *Id*.

[21] *Reinventing Immigration*, *supra* note 17, at 254.

[22] *Id*. at 255.

[23] *Id*.

[24] Bersin & Feigin, *supra* note 14, at 299-300.

[25] *See id*.

[26] *Reinventing Immigration*, *supra* note 17, at 255 ("These investments are now yielding huge dividends. Gone are the days and nights when hundreds of undocumented persons rush across the border. . . . The border is now harder to cross than at any time in modern history.").

[27] *See id*.

[28] *See id*. at 254-55.

[29] *United States Sentencing Commission Public Hearing on Implementing the Requirements of the PROTECT Act* 6-14 (Sept. 23, 2003), *available at* http://www.ussc.gov/hearings/9_23_03/9_23_03.htm (statement of Marilyn L. Huff, J., S.D. Cal.) [hereinafter *Fast Track Public Hearings*].

continued success of the illegal immigration battle was contingent upon the punishments and what was at stake for those who violated our laws. The criminal system could not afford to rely only on apprehension and deportation, the recipe that failed for decades to stem the flow of immigrants.[30] Prosecution and the threat of actual or prolonged jail time needed to serve as the corollary to an arrest if Operation Gatekeeper was to have a deterrent value.

The U.S. Attorneys for the border districts, however, were not the primary beneficiaries of Operation Gatekeeper. While Operation Gatekeeper made significant strides in constructing a solid law enforcement presence at the border, it provided little aid to the U.S. Attorney's Offices.[31] The culture of neglect, which thus far had proved to be an effective way of not overburdening the system, started coming under criticism from legislators urging reform.[32] Illegal immigration was transformed from a peripheral issue into the limelight of national policy debates. The cities around the borders experienced more than just the financial impact of illegal immigration.[33] The problem also involved the importation of drugs and crimes into surrounding communities. Many of the returning undocumented immigrants had been convicted of felonies on their prior trips and posed a danger to those communities each and every time they re-entered.[34]

By 1994, it was clear that a new prosecutorial policy reassessment was in order and that prosecutors could no longer let the large number of immigration offenses overwhelm their response to the hundreds of thousands of yearly immigration violations along the southwest border. One district in particular, the Southern District of California, took the lead in pioneering a response.

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[30] Bersin & Feigin, *supra* note 14, at 290 ("Our enforcement stance, including prosecutorial policy, obviously embodied an insufficient deterrent. A new approach was necessary.").

[31] *Id*. at 300 n.22; Admin. Off. of the U.S. Courts, *Caseloads Swamp Border Courts,* THIRD BRANCH, Oct. 1999, *available at* http://www.uscourts.gov/ttb/oct99ttb/caseload.html ("Increases in law enforcement resources at the border are not matched by increases in court resources.").

[32] Bersin & Feigin, *supra* note 14, at 287-90. Then Attorney General Janet Reno and INS Commissioner Doris Meissner led a coordinated effort along the border to help prevent illegal entry across the U.S./Mexican border. *Reinventing Immigration*, *supra* note 17, at 254.

[33] U. S. GEN. ACCT. OFF., ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGY RESULTS INCONCLUSIVE; MORE EVALUATION NEEDED GGD-98-21, at 49 (1997), *available at* http://www.gao.gov/cgi-bin/getrpt?GGD-98-21.

[34] "Up to 70 percent of the cocaine smuggled into the United States now comes through Mexico and more than half the cocaine seized in the United States is seized along the Southwest Border. In 1994, approximately 90 percent of all cocaine seized along the Southwest Border was seized in California—a 20 percent increase over 1993 . . . [A]long the Mexicali/Calexico border, had become 'The Cocaine Corridor,' serving as the drug cartels' shipment route of choice. At the same time, heroin, marijuana, methamphetamine and various precursor chemicals increasingly are being imported from Mexico into the United States through this and other border corridors." Bersin & Feigin, *supra* note 14, at 289-90.

A. The Birth of Fast Track Programs

The United States shares roughly a 2000-mile border with Mexico.[35] The Southern District of California's share of that border is 140 miles and is surrounded by large cities such as Tijuana and San Diego on both sides.[36] In addition, the district hosts six land ports of entry, a seaport, and an international airport.[37] While 140 miles may compose only seven percent of the border, the coarse terrain of the Mexican border makes certain areas more hospitable than others.[38] It is estimated that sixty percent of those living along the entire border reside within the segment in, or adjacent to, that District's region.[39] Roughly fifty percent of undocumented immigrants apprehended nationally in the United States were caught in the Southern District of California.[40] The annual arrest of more than a half million illegal aliens apprehended in that district translated into approximately 10,000 immigration cases per week in that district alone.[41]

Practical realities made the prosecutions of that many immigration cases in just one district impossible. The federal government typically prosecutes roughly 60,000 cases of all types nationally for all its districts.[42] The avalanche of incoming cases, many of them the result of Operation Gatekeeper, culminated in a culture of lenient sentences which did little to further the efforts of law enforcement and the deterrent goals of the policy. Consequently, the majority of illegal re-entry suspects avoided prosecution

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[35] Bersin & Feigin, *supra* note 14, at 286 ("Although the land border within this District comprises only 7 percent of the entire U.S./Mexican border, 60 percent of the people who live along the entire 2,000 mile border from Brownsville to San Diego live in, or on the Mexican side adjacent to, the Southern District of California.").

[36] *Id*. ("Second, the District is contiguous with 140 miles of the U.S./Mexican Border.").

[37] U. S. GEN. ACCT. OFF., ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGY RESULTS INCONCLUSIVE; MORE EVALUATION NEEDED 49 (1997), *available at* http://www.gao.gov/cgi-bin/getrpt?GGD-98-21.

[38] Bersin & Feigin, *supra* note 14.

[39] Bersin, *supra* note 14, at 286.

[40] *Id*. at 287; Braniff, *supra* note 15, at 309.

[41] Bersin & Feigin, *supra* note 14, at 287.

[42] *See, e.g.*, EXEC. OFFICE FOR U. S. ATT'YS., DEPT. OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT (2004), http://www.usdoj.gov/usao/reading_room/reports/asr2004/asr 2004.pdf (61,443 cases filed in 1994); Statement of the Honorable Paul G. Cassell to Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives at 30 (Mar. 16, 2006), *available at* http://judiciary.house.gov/media/pdfs/cassell 031606.pdf ("Hardly a dramatic increase given that the system prosecutes 65,000 a year."); *see also* Appellee's Answer Brief at 14, United States v. Alfredo Morales-Chaires, 430 F.3d 1124 (10th Cir. 2005) (No. 04-CR-475-B) ("Indeed, each year the federal government prosecutes a total of only 65,000 cases of all types nationwide.").

or were permitted to plead to minor misdemeanor offenses with sentences ranging from fifteen days to six months.[43]

The United States Attorney for the Southern District of California was pressed to develop a practice which would "regain control and reinstitute the rule of law at the border."[44] The remedy, known as "Fast Track," was the development of a program resulting in more felony convictions and harsher sentences in order to increase the stakes for repeat offenders. Under the original Fast Track construct, defendants were given the option to plead guilty to § 1326(a),[45] a charge carrying a maximum of two years, as opposed to § 1326(b)[46] which carried a maximum of up to twenty years.

Speed and efficiency were the touchstones of the process. The government was to provide defendants discovery and a pre-approved plea bargain within twenty-four hours after arraignment in exchange for an expeditious guilty plea to § 1326(a).[47] In the name of judicial economy, the plea agreement required that defendants submit to immediate sentencing and waive their rights to indictment, pre-trial motions, pre-sentence reports, sentencing appeals, right to trial by jury, and the right to

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[43] *Fast Track Public Hearings*, *supra* note 29, at 16. (statement of Mr. Hubachek, Asst. Fed. Pub. Defender, S.D. Cal.).

> Most aliens arrested were not prosecuted, and were returned voluntarily to their country of origin. Those persons who were prosecuted were allowed to plead guilty to the simple misdemeanor of illegal entry—a charge that carries a maximum penalty of six months in custody. The court, generally, imposed an escalating sentencing scale—often beginning with 15 days custody for the first offense, 30 for the next, and so on for several more prosecutions until the six month ceiling was reached. Felony charges were seldom filed, even after the ceiling had been reached.

Bersin & Feigin, *supra* note 14, at 287.

[44] *Reinventing Immigration*, *supra* note 17, at 254.

[45] 8 U.S.C.A. § 1326(a) (West 2005). This statute makes the reentry of a removed alien to the U.S. illegal. It provides, in relevant part, that:

> Subject to subsection (b), any alien who—(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States . . . shall be fined under title 18, United States Code, or imprisoned not more than 2 years or both.

Id.

[46] 8 U.S.C.A. § 1326(b) (West 2005). This subsection augments subsection (a) and provides that:

> Notwithstanding subsection (a), in the case of any alien described in such subsection (a)—(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, United States Code, imprisoned not more than 10 years, or both;
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> (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both. . . .

Id.

[47] 8 U.S.C.A. § 1326(a) (West 2005); *Fast Track Public Hearings*, *supra* note 29, at 10-11 (statement of Marilyn L. Huff, J., S.D. Cal.).

contest removal from the United States.[48] The new Fast Track method proved a success in terms of efficiency.[49] Without diverting resources from other prosecutorial priorities, the district was able to increase its total felony criminal alien prosecutions by more than five times—a 456 percent increase from the year before.[50] This was a two-fold triumph, as the number of prosecutions was not the only number that had risen; the average amount of time offenders were serving in prisons also increased substantially by virtue of the fact that the crimes now charged carried longer penalties. The utility of such a program was evidenced by its promising ability to dispose of a high number of cases at a low cost to the government while delivering felony convictions as opposed to mere

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[48] *Reinventing Immigration*, *supra* note 17 , at 256.

> Thereafter, if the defendant accepts the [Fast Track] offer, he or she must: (1) waive indictment by a federal grand jury; (2) forego any hearing on motions; (3) plead to a felony information charging reentry after deportation; (4) waive a presentence report; (5) stipulate to the appropriate prison term (usually 24 months); (6) submit to immediate sentencing; (7) waive all sentencing appeals; (8) appear before an Immigration Judge for entry of an order of deportation within 24 hours of sentencing; and (9) waive all appeals of the deportation order.

Id. *See also* United States v. Estrada-Plata, 57 F.3d 757, 759 (9th Cir. 1995) (describing and praising the practice).

[49] This paper does not attempt to advance the premise that more prosecutions of illegal immigrants will necessarily deter future illegal immigration. Notwithstanding any logical inferences one may take away from the policy, there is no conclusive empirical data that confirms more prosecutions leads to fewer illegal re-entries. In fact, the fact that the number of immigration prosecutions since the implementation of Fast Track programs has gone up every year instead of down may indicate that such a policy has little deterrent effect. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 231 (2005), http://www.uscourts.gov/judbus2005/appendices/d2-def.pdf (Table D-2—Defendants) (noting an increase in illegal re-entry cases from 2001 to 2005—7,213, 8,405, 10,456, 11,247, 11,653, respectively.). On the other hand, it may just be that more illegal immigrants are crossing the border than ever before or that the stop rate is higher. Additionally, the decision to re-enter after being deported is sometimes made on more than just economic reasons. Familial ties, cultural assimilation, and moral duties may also come into play.

[50] Bersin & Feigin, *supra* note 14, at 302 ("In 1995, the office filed 1,334 criminal alien cases under section 1326—compared with only 240 the year before. In 1996, 1,297 felony re-entry matters were filed under section 1326 and 1,606 cases during 1997. The Fast Track system allowed this explosion in filings to be accomplished in this area of prosecutorial activity with limited staff increases and, for the most part, without diverting resources from other prosecutorial priorities.").

Additionally, between 1995 and 2003, the total number of prosecutions increased to 14,710, a 1,478% increase compared to the period from 1985 to 1994. Appellee's Answer Brief at 16, United States v. Alfredo Morales-Chaires, 430 F.3d 1124 (10th Cir. 2005) (No. 04-CR-475-B). In sharp contrast to the previous era, the punishment for immigration offenses had become more profound. The Southern District of California had achieved a 3:1 felony to misdemeanor ratio by 1993. *Id*. By 1996, that ratio had increased to 16:1, meaning sixteen felonies for every misdemeanor. *Id*.; *see also Reinventing Immigration*, *supra* note 17, at 256; Bersin & Feigin, *supra* note 14, at 296 n.19.

misdemeanors. Neighboring districts confronting a similar influx of immigration law violators quickly followed suit.[51]

B. Fast Track Today

The benefits of a Fast Track program to the government are obvious: significant numbers of prosecutions and longer punishments without an increase in costs.[52] It follows that other districts adjacent to the southern border were quick to adopt the concept in order to suit the needs of their particular jurisdictions. While many of the offspring programs were similar in nature to the original, a host of other districts implemented policies unique to them. Common to all programs was their ability to produce swift dispositions. Namely, the exchange of procedural rights for reduced sentences and the increase in number of prosecutions.[53] Another universal quality was their unceremonious nature. The Justice Department condoned the use of such Fast Track programs, but neither endorsed nor thwarted efforts to expand their use until 2003.

C. Congress Passes Fast Track Legislation

In 2003, Congress passed one of the most notorious addendums to the Sentencing Reform Act of 1984, which was responsible for making federal judges subject to the Sentencing Guidelines.[54] Commonly known as "the Feeney Amendment,"[55] the law contained a host of restrictions making the Sentencing Guidelines system more controlling in federal sentencing decisions. It was quickly perceived by judicial officers as another shackle on a judge's ability to sentence and was assailed for further restricting the limited discretion federal judges retained.[56] Most notable about the

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[51] Bersin & Feigin, *supra* note 14, at 258 n.1 ("The substantial increase in felony prosecutions for violations of the nation's immigration laws was not limited to the Southern District of California.").

[52] *Fast Track Public Hearings*, *supra* note 29, at 4-13 (statement of Marilyn L. Huff, J., S.D. Cal.).

[53] *See supra* note 48 and accompanying text.

[54] The federal Sentencing Guidelines were a product of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984). It also required the formation of a Commission which would develop a system for standardizing sentencing across the country and curtailing judicial discretion at sentencing.

[55] What is now referred to as the "Feeney Amendment" was enacted as Section 401 of the PROTECT Act. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

[56] *See, e.g.*, Letters to Congress from Sentencing Commissioners, Judicial Conference, and Chief Justice Rehnquist, 15 FED. SENT. REP. 341 (2003). Under the Guidelines system, federal judges are given a relative small window of time to choose from when imposing a sentence. That window is based on a calculation of defendant's "criminal history" and "offense level." For an excellent cursory introduction and description of how the calculation works within the context of Fast Track, please see Erin T. Middleton, Note, *Fast-Track to Disparity: How Federal Sentencing Policies Along the*

legislation was the official implementation of "early disposition" (also known as "Fast Track") programs into the Sentencing Guidelines.[57] Congress's action had the effect of giving legitimacy and legislative support to an already existing practice. The law instructed the United States Sentencing Commission ("USSC") to promulgate a policy statement "authorizing a downward departure of not more than four levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney."[58] The Commission complied with the Congressional mandate by incorporating it almost verbatim into the official Guidelines under section 5K3.1.[59] Some judges, joining other critics of the Feeney Amendment, were alarmed that the Guidelines, which embodied the principle of sentencing uniformity, would now be host to early disposition programs designed to treat similarly situated defendants differently only by virtue of the crime location.[60]

Southwest Border are Undermining the Sentencing Guidelines and Violating Equal Protection, 2004 UTAH L. REV. 827, 835-39 (2004).

[57] Pub. L. No. 108-21, §401(m)(2)(A)-(B), 117 Stat. 650 (2003) (codified as amended at 28 U.S.C.A § 994 note (West 2006)).

[58] The legislation authorizing early disposition program is found in Section 401 of the PROTECT Act.

> (m) Reform of Existing Permissible Grounds of Downward Departures.—Not later than 180 days after the enactment of this Act, the United States Sentencing Commission shall—
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> (1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and
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> (2) promulgate, pursuant to section 994 of title 28, United States Code—
>
> (A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced;
>
> (B) a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney. . . .

Pub. L. No. 108-21, §401(m)(2)(A)-(B), 117 Stat. 650 (2003) (codified as amended at 28 U.S.C.A § 994 note (West 2006)).

[59] U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2005) states:

> "§ 5K3.1. Early Disposition Programs (Policy Statement)
>
> Upon motion of the Government, the court may depart downward not more than 4 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." *Id*.

[60] *See, e.g.*, United States v. Bonnet-Grullon, 53 F. Supp. 2d 430, 435 (S.D.N.Y. 1999), *aff'd*, 212 F.3d 692 (2d Cir. 2000) ("[I]t is difficult to imagine a sentencing disparity less warranted than one which depends upon the accident of the judicial district in which the defendant happens to be arrested."); *Fast Track Public Hearings*, *supra* note 29, at 98-99 (statement of Frank O. Bowman) ("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."); *Id*. at 56 (statement of Maria Stratton, Fed. Pub. Def., C.D. Cal) ("[F]ast track departure in

D. Fast Track at Work

The Early Disposition (Fast Track) programs envisioned by Congress and in practice today are almost identical to the original Southern District of California model. Guilty pleas continue to be obtained in an expedited manner – as opposed to the routine plea bargaining process – in exchange for either a reduced charge or a government's motion for departure.[61] The eligible cases typically involve drugs or immigration violations and are not, according to the Attorney General, available for crimes which have been labeled by the Justice Department as a "crime of violence."[62]

The purpose of the programs has remained the same: saving prosecutorial and judicial resources while achieving an optimum number of felony immigration convictions. Fast Track programs continue to act as a compromise between the expense of full trials and complete prosecutorial rejection.[63] It is a way to process defendants quickly at a substantially reduced cost to the government while still providing those who believe the charges are unfounded an opportunity to challenge them.[64] The specifics of the programs vary by jurisdiction but come in only two major forms.

One style is Fast Track charge bargaining, where defendants enter a pre-indictment guilty plea in exchange for a crime lower than the most readily provable offense.[65] A common scenario involves more serious immigration violations which are reduced to a charge of illegal re-entry.[66] The new charge, having a decreased offense level and receiving less serious treatment under the Guidelines, typically results in a more lenient sentence. Of these requirements, one necessitates that the new charge be enumerated in the district's fast-track program, and that it be commensurate with a drop in punishment of no more than six[67] sentencing guideline levels.[68] As part of the deal, defendants must agree to waive a

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the guidelines corrupts the process. It contradicts the idea of uniformity in sentencing based on similarly situated defendants."); *See generally*, Douglas A. Berman, *Taking Stock of the Feeney Amendment's Many Facets*, 16 FED. SENT'G. REP. 93, 98 (2003).

[61] United States v. Perez-Chavez, 422 F. Supp. 2d 1255, 1258 (D. Utah 2005). The concept of charge bargaining is not new to U.S. Attorneys. *See, e.g., Fast Track Public Hearings*, *supra* note 29, at 10-12 (statement of Marilyn L. Huff, J., S.D. Cal.).

[62] Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors 2 (Sept. 22, 2003), *reprinted in* 16 FED. SENT'G. REP. 134 (2003) [hereinafter Ashcroft Fast-Track Memo].

[63] *Fast Track Public Hearings*, *supra* note 29, at 73 (statement of Paul K. Charlton, U.S. Attn'y, D. Ariz.) ("It would be irresponsible and a dereliction of our duty to decline large numbers of cases that are uniquely federal.").

[64] *Id*. at 69.

[65] *Id*. at 10-12 (statement of Marilyn L. Huff, J., S.D. Cal.).

[66] Those crimes are respectively codified at 8 U.S.C.A. § 1325-26 (West 2005).

[67] The author refers to six levels as opposed to four because a downward departure of a maximum of two points for acceptance of responsibility, *see* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2005), is calculated *in addition to* any departures authorized under a Fast Track program.

[68] *See* Ashcroft Fast-Track Memo, *supra* note 62, at 134.

host of procedural and constitutional rights, be sentenced immediately and, in immigration violations, to removal from the United States upon fulfillment of their sentence.[69]

Sentence departure programs are similar in nature. The prosecutor contracts with a defendant to motion the court for a downward departure of no more than four levels provided a guilty plea is entered within a certain amount of time along with a waiver of rights.[70] Among the waived rights are those of appeal, all habeas claims except for ineffective assistance of counsel, and the right to receive *Brady*[71] information. The constitutionality of these waivers has been tested and affirmed by the Supreme Court.[72]

As is typical of most governmental offices, budgets and resources have overwhelming influence over the goals of an agency. The Justice Department is no exception. Fast Track programs have allowed federal courts to process individuals much more expeditiously, increase public safety, and reduce crime along those districts which utilize them.[73] An absence of Fast Track programs in districts along the Mexican border, for example, would lead to a reduced number of prosecutions of immigration offenses.[74]

Critics, however, remain skeptical about the results of the program. They argue that this construct turns the justice system into an administrative mass-processing mechanism and encourages federal prosecutors to treat serious offenses as though they were routine traffic violations.[75] Citing concerns about possible wrongful convictions, federal public defenders have expressed unease over the fast procedural pace of immigration cases.[76] Judicial districts employing the program have also

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[69] *Fast Track Public Hearings*, *supra* note 29, at 10-12 (statement of Marilyn L. Huff, J., S.D. Cal.).

[70] *See id*.; *see also* Ashcroft Fast-Track Memo, *supra* note 62, at 134.

[71] Brady v. Maryland, 373 U.S. 83 (1963) (providing that prosecutorial suppression of evidence favorable to an accused upon request violated the Due Process Clause where the evidence was material to guilt or punishment, regardless of the State's good or bad faith).

[72] *See* United States v. Ruiz, 536 U.S. 622 (2002), in which the Court made clear that such Fast-Track waivers did not violate the Constitution but where the Justices were silent about redressing sentencing disparities caused by Fast Track programs.

[73] *Fast Track Public Hearings*, *supra* note 29, at 69-70 (statement of Paul K. Charlton, U.S. Att'y, D. Ariz.).

[74] *Id*. at 79 ("Without the fast track programs, the number of viable cases that would need to be declined would increase substantially."). However, refer to the comment in note 56 and its accompanying text, *supra*, regarding the deterrence value of Fast Track.

[75] Middleton, *supra* note 13, at 834. Since prosecutors are no longer required to allocate large resources to prosecute illegal immigration cases federal prosecutors take legal action against those who they normally would not have.

[76] Testifying before the U.S. Sentencing Commission, Maria Stratton, federal public defender for the Central District of California, voiced the concern that "it is very disturbing to get the feeling that you're just processing people." *Fast Track Public Hearings*, *supra* note 29, at 54. Ms. Stratton asserts that Fast Track programs provide little time for discovery and substantive examination of the

been criticized for the program's inability to treat defendants differently in accordance with the severity of the crime.[77]

While the points raised by critics are valid, they fail to address how those concerns are any different from the concerns generally associated with the concept of regular plea negotiation practices. It would seem that critics prefer inequality within the district as they look toward economic and practical constraints to achieve that end.[78] Prosecutors are entrusted with enforcing all of the laws to the best of their capacity. However, because border districts are flooded with illegal immigration and drug offenses, it is proper for them to take measures that stem the incidence of those particular crimes. It seems that in Fast Track jurisdictions, U.S. Attorneys are willing to forego the pursuit of more jail time in exchange for speedy dispositions and avoidance of trial. As in all plea negotiations, the defendant has a choice: plead out in exchange for reduced time or take a chance at trial. Fast Track programs, in this respect, are no different from any other plea negotiation and also leave the determination in the hands of the lawyer and his client.[79] Illegal re-entry immigration cases, for example, are very simple to try as they require only that the government prove a defendant entered the United States after having previously been deported.[80] They are relatively simple cases which lend themselves quite nicely to standardized treatment and not to particular discretionary prosecutorial assessment more typical of unique, long, or complicated cases.

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increasingly complex and technical immigration defenses. Some cases require time but the "take-it-or-leave-it" nature of the program combined with its strict timeline may result in mistakes by defendants pleading guilty when they are not technically so. For example, the government has erroneously prosecuted people who are unaware they are U.S. citizens in the past. *Id*. at 52-54; *see also* Michael O'Connor & Celia Rumann, *The Death of Advocacy In Re-Entry After Deportation Cases*, 23 CHAMPION 42, 43 (1999) ("Sadly, for the majority of the people charged with these offenses, it is ultimately in their best interest to accept such offers because it will reduce the sentence significantly. However, because of the nature of the agreements and the lack of process associated with them, we, as advocates, often are not in a position to adequately assess and advise the defendant on whether that is so.").

[77] Richard Marosi, *Deportees Face U.S. Crackdown If They Return*, LOS ANGELES TIMES, Apr. 12, 1999, at 1; *see also* Thom Mrozek, *Prosecutions on the Rise: U.S. Attorneys Take Varying Approaches to Illegal Re-Entry*, LOS ANGELES DAILY J., Sept. 21, 1995, at 1.

[78] All things being equal, prosecutors in the judicial districts with most illegal immigration arrests do not have enough resources to try or even customize plea negotiations in every illegal re-entry case. Thus, it would seem that U.S. Attorneys would be faced with the choice of prosecuting only a select few. While it is conceded that Fast Track programs cause nationwide disparities, it is not argued that Districts which employ a Fast Track program in their jurisdiction treat similarly situated defendants differently.

[79] The only difference being that Fast Track offers, unlike most criminal plea negotiations, are not subject modifications.

[80] *See generally*, 8 U.S.C.A. § 1326 (West 2005). Depending on the case, the presentation of a court record showing that the defendant has previously been convicted of a felony may also be required. This, too, is rather easily proven.

The programs also eliminated the appearance of judicial indifference toward the offenses covered and the friction it created between law enforcement and prosecutors.[81] It is worth mentioning that, while judges retain the right to reject these departures, they rarely exercise that option.[82] Political pressures and national security concerns stemming from the war against terror have caused the government to take a more aggressive stance on immigration.[83] Eliminating early disposition programs would have the consequence of inhibiting those goals. Additionally, since judges have an interest in moving their dockets, they routinely defer to prosecutorial discretion in the handling of immigration and drug cases.[84]

E. Fast Track Faces Challenges

1. Challenges to the Programs Before United States v. Booker[85]

Even before the passage of the PROTECT Act,[86] officially sanctioning the use of Fast Track practices upon the approval of the Attorney General, defendants tested and challenged the constitutionality of the program as originally implemented. In 1995, the Ninth Circuit Court of Appeals delivered a victory for U.S. Attorneys around the Southwest border when it approved and praised the use of Fast Track programs as an acceptable way for judicial districts to control and manage their caseloads. The court in *United States v. Estrada-Plata*[87] rejected the argument that Fast Track sentencing discriminated against defendants on the basis of race and national origin and denied them effective assistance of counsel.[88] The court held that the government's selective application of Fast Track to mostly immigration violations did not racially discriminate against immigrants.[89] The court found the practice to "conserve prosecutorial and

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[81] *Fast Track Public Hearings*, *supra* note 29, at 73 (statement of Paul K. Charlton, U.S. Attn'y, D Ariz.). The friction refers to the perceived apathy prosecutors portray to law enforcement when large number of arrests result in no prosecution or are ignored.

[82] Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 358, 372 (2004).

[83] *See generally* U.S. SENT'G. COMM'N., INTERIM STAFF REPORT ON IMMIGRATION REFORM AND THE FEDERAL SENTENCING GUIDELINES 1 (2006), http://www.ussc.gov/publicat/imigration_06.pdf ("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.").

[84] O'Hear, *supra* note 82, at 372. These are the types of cases normally covered by Fast Track programs but Early Disposition Programs are sometimes also used for fake immigration document cases and certain drug offenses. Like all Fast Track programs, they are approved at the discretion of the Attorney General.

[85] 543 U.S. 220 (2005).

[86] Pub. L. No. 108-21, § 1, 117 Stat. 650 (2003).

[87] 57 F.3d 757 (9th Cir. 1995).

[88] *Id*. at 761.

[89] *Id*.

judicial resources" and found "absolutely nothing wrong (and, quite frankly, a great deal right) with such a practice. . . ."[90]

In *United States v. Ruiz*[91], the Supreme Court delivered another victory for the government when it held that it did not violate the Constitution to require a defendant to waive his or her right to receive exculpatory impeachment information in exchange for a reduced sentence pursuant to a Fast Track program.[92] The defendant in *Ruiz* originally refused to accept the Fast Track agreement because it required her to waive her right to impeachment information and information supporting any available defenses should she decide to go to trial.[93] The defendant later challenged the constitutionality of the waivers when she was denied access to the program for having previously turned it down.[94] She eventually pled guilty to the charges.[95] The Court dismissed her argument and ruled that she was not entitled to a reduced sentence after rejecting the program.[96]

After *Estrada* and *Ruiz* foreclosed the possibility of shutting down early disposition programs, federal defendants in non-Fast Track jurisdictions began using it offensively. While the value of having early disposition programs as a prosecutorial tool is incalculable to the districts along the southern Mexican border,[97] it resulted in sentencing "challenges" based on the undeniable disparities it created to other similarly situated defendants around the country.[98] Most of the modern "challenges" are no longer aimed at stopping the use of the programs. Instead, these challenges now revolve around the ability of courts (in non-Fast Track districts) to depart downward in order to ameliorate sentencing disparities based on jurisdictional lines or policy decisions of U.S. Attorneys in other districts.[99]

Before *Booker*[100], which held the Sentencing Guidelines advisory, defendant challenges were based on a myriad of claims, most of which came from jurisdictions not employing early disposition programs. Defendants accused of Fast Track eligible crimes in non-Fast Track

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[90] *Id*.

[91] 536 U.S. 622 (2002).

[92] *Id*.

[93] *Id*. at 625.

[94] *Id*. at 626.

[95] *Id*.

[96] *Id*. at 633.

[97] *See* Thom Mrozek, *Prosecutions on the Rise: U.S. Attorneys Take Varying Approaches to Illegal Re-Entry,* LOS ANGELES DAILY J., Sept. 21, 1995, at 1.

[98] It is undeniable that the selective natures of early disposition programs create disparity in sentencing based only upon the jurisdiction in which one is arrested. *See* United States v. Banuelos-Rodriguez, 215 F.3d 969, 979-81 (9th Cir. 2000) (Pregerson, J., dissenting).

[99] *See supra* note 58.

[100] United States v. Booker, 543 U.S. 220 (2005). The implications of this important case are discussed in detail later in this Comment. *See infra* Part III.

jurisdictions made "outside of the heartland,"[101] equal protection,[102] unwarranted disparity,[103] and non-delegation doctrine[104] arguments; in turn, these arguments gave judges a reason to depart from the then mandatory sentencing guidelines in non-Fast Track jurisdictions. Despite the many invitations by the defense bar to form judicially-created early disposition programs in the name of disparity, the Circuits rejected the notion that such disparities were a proper ground to deviate from the then mandatory federal sentencing guidelines.[105]

III. THE "ADVISORY" PARADIGM

It is difficult to deny that early disposition programs discriminate against defendants based solely on jurisdictional lines. Their limited availability makes them per se unfair to those federal defendants who are not in a position to reap their benefits. Thus, it is not surprising that these types of programs have received much criticism and many legal challenges from federal defendants. Indeed, it is not easy to reconcile the fact that a government agency, the United States Sentencing Commission – whose creation was prompted by the disparate treatment of similarly situated defendants – would actually adopt a policy[106] which punishes a person more harshly based solely on geography and not actual conduct.[107] However, their inequality does not make them improper, "unwarranted," or illegal prosecutorial tools. Additionally, allowing judges to "fix" the disparity created by early disposition programs, through adoption by judicial decree, would encroach upon the discretion which the Constitution expressly assigns to the Executive Branch.[108]

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[101] *See, e.g.*, United States v. Rodriguez-Lopez, 198 F.3d 773 (9th Cir. 1999).

[102] *See, e.g.*, United States v. Melendez-Torres, 420 F.3d 45 (1st Cir. 2005); United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir. 2000). *See generally* Erin T. Middleton, Note, *Fast Track to Disparity: How Federal Sentencing Policies Along the Southwest Border are Undermining the Sentencing Guidelines and Violating Equal Protection*, 2004 UTAH L. REV. 827 (2004).

[103] *See* O'Hear, *supra* note 82, at 370.

[104] *See, e.g.*, United States v. Martinez-Flores, 428 F.3d 22 (1st Cir. 2005).

[105] *See, e.g.*, United States v. Melendez-Torres, 420 F.3d 45 (1st Cir. 2005); United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir. 2000); United States v. Banuelos-Rodriguez, 215 F.3d 969 (9th Cir. 2000).

[106] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2005) (early disposition programs).

[107] All facts being the same, a defendant being tried in a jurisdiction without a Fast Track program will be treated more harshly by the guidelines as opposed to one without. United States v. Bonnet-Grullon, 53 F. Supp. 2d 430, 435 (S.D.N.Y. 1999) ("This case illustrates the fact that . . . [the Sentencing Reform Act] is an imperfect means to [eliminate unwarranted sentencing disparities]—it is difficult to . . . imagine a sentencing disparity less warranted than one which depends upon the accident of the judicial district in which the defendant happens to be arrested."), *aff'd*, 212 F.3d 692 (2d Cir. 2000).

[108] The authority granting the Executive Branch the power to "take Care that the Laws be faithfully executed" is rooted in the United States Constitution. U.S. CONST. art. II, § 3.

Courts in jurisdictions not employing Fast Track programs ought not to be able to "alleviate" sentencing disparities by invoking it in any case before them. Arguably, this causes more disparity; not just inter-district but intra-district as well. Instead, courts should accept these programs as part of the realm of prosecutorial discretion grounded within the powers of the Executive branch. If viewed through this scope, Fast Track programs ought to be able to continue to prevail in a post-*Booker* world regardless of their unequal sentencing outcomes or the strong national sentiment in favor of national uniformity in sentencing.

A. Early Disposition Programs After United States v. Booker[109]*,*

Most legal arguments against use of Fast Track programs have maintained relatively small traction.[110] The most appealing claim for allowing judges to consider disparities caused by policy decisions of the Attorney General, as it relates to Fast Track, is still in its infancy and remains largely unresolved.[111] The question is whether a federal court, in a post-*Booker* world, where the Sentencing Guidelines are no longer mandatory, is able to issue a sentence outside normal Guideline range based on the disparity in sentencing that a non-uniform federal Fast Track system creates. To date, this argument has been examined in-depth in only a few courts,[112] and no Circuit Court has sustained the conclusion that Fast Track disparities justify below-Guidelines sentences.

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[109] 543 U.S. 220 (2005).

[110] *See supra* notes 101-105 and accompanying text.

[111] *See, e.g.*, United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006); United States v. Hernandez-Cervantes, No. 05-5414, 2005 WL 3529114 (6th Cir. Dec. 23, 2005) (unpublished); United States v. Morales-Chaires, 430 F.3d 1124 (10th Cir. 2005); United States v. Peralta-Espinoza, 383 F. Supp. 2d 1107 (E.D. Wis. 2005); United States v. Perez-Chavez, 422 F. Supp. 2d 1255 (D. Utah 2005); United States v. Galvez-Barrios, 355 F. Supp. 2d 958 (E.D. Wis. 2005); United States v. Ramirez-Ramirez, 365 F. Supp. 2d 728 (E.D. Va. 2005); United States v. Medrano-Duran, 386 F. Supp. 2d 943 (N.D. Ill. 2005).

[112] Please refer to Part V of this Comment for an in-depth discussion of the current state of Fast Track law. In 2005, the First Circuit identified the issue but because it was not properly preserved for appeal, declined to reach a decision. *See* United States v. Martinez-Flores, 428 F.3d 22, 30 n.3 (1st Cir. 2005) ("It is arguable that even post-Booker, it would never be reasonable to depart downward based on disparities between fast-track and non-fast-track jurisdictions given Congress' clear (if implied) statement in the PROTECT Act provision that such disparities are acceptable"). The "unwarranted" argument victories have been mostly limited to the district courts. *See supra* note 111.

To date, no Circuit Appellate Court has sustained the conclusion that Fast Track disparities justify below-Guidelines sentences. *See, e.g.,* United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006); United States v. Hernandez-Cervantes, No. 05-5414, 2005 WL 3529114 (6th Cir. Dec. 23, 2005) (unpublished) (rejecting the appellant's argument that sentence was unreasonable because the district judge failed to consider the unwarranted disparities created by the existence of fast-track programs in other jurisdictions because, among other things, Congress explicitly authorized such disparities in the PROTECT Act).

The Supreme Court in *United States v. Booker*[113] rendered the controversial federal Sentencing Guidelines advisory.[114] The Court found that the sections of Sentencing Reform Act of 1984,[115] which made the Guidelines mandatory, were incompatible with the requirements of the Sixth Amendment and excised them.[116] The Court, however, left the remainder of the Act intact and required judges to look at the "factors of sentencing," as delineated in the Sentencing Reform Act, when imposing a sentence.[117] Thus, courts are now required to consider, but not obligated to impose, a sentence within the Guidelines.[118]

The *Booker* decision excised the section of the Act describing the standards of review on appeal because it contained critical cross-references to the invalidated section of the Sentencing Act.[119] Since *Booker* only invalidated parts of the Act, the Court specified that the Act would continue to provide an avenue for appeals from sentencing decisions "irrespective of whether the trial judge sentences within or outside the Guidelines range."[120] After *Booker*, the standard that courts must now follow when imposing a sentence is one of "reasonable[ness]." [121] What constitutes a post-*Booker* "reasonable sentence" remains a largely elusive concept and is based on case-specific factual determinations. While the legal meaning of such a sentence is incomplete, and still being formulated by the Circuit courts, some recognizable trends among the Circuits have begun to develop.[122]

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[113] 543 U.S. 220 (2005).

[114] *See id*.

[115] Pub. L. No. 98-473, 98 Stat. 1987 (1984) (as codified in separate sections at 18 U.S.C.A. 3551-59, 3561-66, 3571-74, 3581-86 (West, Westlaw through P.L. 109-481), & 28 U.S.C.A. 991-98 (West 2006)).

[116] United States v. Booker, 543 U.S. 220, 258 (2005).

[117] *Id*.

[118] *See* United States v. Perez-Chavez, 422 F. Supp. 2d 1255, 1259-60 (D. Utah 2005) (citing *United States v. Booker*, 543 U.S. 220 (2005)).

[119] *Booker*, 543 U.S. at 258.

[120] *Id*. at 260.

[121] *Id*. at 262.

[122] The trend has been to adopt a presumption of reasonableness for within-Guidelines sentences resulting in a disproportionate reversal of below-Guidelines sentences under the newfound "reasonableness" standard. *See* U.S. SENT'G COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 27 (2006), http://www.ussc.gov/booker_report/Booker_Report.pdf.

A contemporary circuit-by-circuit review can also be found at Prof. Douglas Berman's excellent "Sentencing Law and Policy" website. *See* Sentencing Law and Policy, http://sentencing.typepad.com/ (Feb. 20, 2006, 9:50 EST) (posting available at http://sentencing.typepad.com/sentencing_law_and_policy/2006/week8/index.html).

B. "Unwarranted" Disparity

Judges are not able to avoid the "unwarranted" sentencing disparity Fast Track programs create in other jurisdictions because the use of the programs in other districts does not make the disparity "unwarranted." The post-*Booker* sentencing approach urges courts to consider the purposes of sentencing not only as incorporated into the Guidelines but also as set forth in 18 U.S.C. § 3553(a).[123] *Booker* directs courts to consider the Guidelines in conjunction with other congressionally-mandated purposes of punishment in determining a sentence.[124] Among those *other* purposes included in § 3553(a) is "the need to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct."[125] This specific requirement has opened the door to claims by defendants in non-Fast Track jurisdictions that sentencing disparities created by early disposition programs give courts an appropriate basis for which to deviate from the standard Guidelines' suggested sentence.[126] Defendants argue that it allows a sentencing court to impose a lower punishment in order to ameliorate the difference.[127]

Courts, however, should continue to refrain from trying to alleviate Fast Track disparities by disjunctive commands. The argument put forward by ineligible defendants fails because it assumes that the disparity caused by Fast Track is an "unwarranted" one. Courts which have examined post-*Booker* sentencing have adopted the general approach that guidelines should be followed unless a reason exists for a deviation.[128] Indeed, the *Booker* court explicitly stated that that the law would still require judges to *consider* the Guidelines.[129] The language of *Booker* in no way suggests that any one factor, specifically § 3553(a)(6), shall be controlling in the sentencing determination of the judge.[130] Additionally, the practice among circuit courts has generally been to hold within-the-

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[123] 18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2006).

[124] *See* United States v. Booker, 543 U.S. 220, 261 (2005). .

[125] This language is found under 18 U.S.C.A. § 3553(a)(6) (West 2000 & Supp. 2006).

[126] *See*, *e.g.*, United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006); United States v. Morales-Chaires, 430 F.3d 1124 (10th Cir. 2005); United States v. Toohey, 132 Fed. Appx. 883 (2d Cir. 2005) (unpublished); United States v. Peralta-Espinoza, 383 F. Supp. 2d 1107 (E.D. Wis. 2005).

[127] *See*, *e.g.*, United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006); United States v. Morales-Chaires, 430 F.3d 1124 (10th Cir. 2005); United States v. Toohey, 132 Fed. Appx. 883 (2d Cir. 2005) (unpublished); United States v. Peralta-Espinoza, 383 F. Supp. 2d 1107 (E.D. Wis. 2005).

[128] *See, e.g.*, United States v. Crosby, 397 F.3d 103 (2d Cir. 2005); United States v. Peach, 356 F. Supp. 2d 1018 (D.N.D. 2005); United States v. Wanning, 354 F. Supp. 2d 1056 (D. Neb. 2005); United States v. Wilson, 350 F. Supp. 2d 910, 911 (D. Utah 2005).

[129] *Booker*, 543 U.S. at 259 ("[T]he [Sentencing Reform] Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals.").

[130] *Id*. ("Without the "mandatory" provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals.").

guidelines sentences as "reasonable" within the meaning of *Booker* and to require persuasive on-the-record justification for "reasonable" below-Guidelines sentences.[131] Assuming, *arguendo*, that the disparity was "unwarranted," the mandate found in § 3553(a)(6) is but one of multiple factors a court *considers* when imposing a sentence. Thus, the court is only bound to *consider* the disparity and by no means *required* to impose a lower sentence.[132]

C. Prosecutorial Discretion & Unwarranted Disparity

Fast Track programs are a byproduct of prosecutorial discretion. A plain reading of the statute makes it clear that it is only "upon motion from the government" that a Fast Track downward departure is to be considered by the court.[133] Nevertheless, legislative history does not explicitly support the notion that Congress had prosecutors' discretion in mind when it passed § 3553(a)(6).[134] Instead, legislative history from the Sentencing Reform Act of 1984 makes evident that the kind of "unwarranted" disparities Congress sought to eradicate were those created by the

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[131] *See* Berman, *infra* note 122, at http://sentencing.typepad.com/sentencing_law_and_policy/2006/03/tracking_reason.html ("Tracking Reasonableness Review Outcomes"); *see also* U.S. SENT'G COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 27-28 (2006), http://www.ussc.gov/booker_report/Booker_Report.pdf.

[132] Some courts have utilized the language found in the U.S. Sentencing Commission Report to Congress in 2003 to bolster the argument that the disparities are indeed "unwarranted." *United States v. Santos*, 406 F. Supp. 2d 320, 326 (S.D.N.Y. 2005). The concerns of the Commission, of course, are cited to imply that the commission itself "expressed serious concern about the unwarranted disparities that result from fast-track programs." *Id*. While the statement was made by the Commission shortly after the passage of the PROTECT Act, it has since publicly retracted any apprehension it may have previously felt:

> In its 2003 Departures Report, the Commission expressed the concern that "sentencing courts in districts without early disposition programs, particularly those in districts that adjoin districts with such programs, may feel pressured to employ other measures – downward departures in particular – to reach similar sentencing outcomes for similarly situated defendants." . . . Analysis conducted for this report indicates that this concern has not been realized generally. One reason is that immigration cases account for only a fraction of the cases sentenced in the 78 districts that do not have early disposition programs. In all, these districts account for 3.6 percent (2,456 cases) of the overall post-*Booker* caseload. Of these 78 districts, only four have sentenced greater than 100 immigration cases post-*Booker*.

U.S. SENT'G. COMM'N., FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 141 (2006), http://www.ussc.gov/booker_report/Booker_Report.pdf.

[133] The language of the Guidelines as amended by the PROTECT Act states:

> "§ 5K3.1. Early Disposition Programs (Policy Statement)
>
> Upon motion of the Government, the court may depart downward not more than 4 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." U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2005).

[134] *See* 149 Cong. Rec. H2405, 2421 (daily ed. Mar. 27, 2003) (commentary to Rep. Feeney's amendment).

divergent judicial philosophies of sentencing judges which "mete[d] out an unjustifiably wide range of sentences to offenders with similar histories."[135]

D. Logical Legislative Inferences

It is difficult to reconcile the "unwarranted" argument with the fact that the PROTECT Act, responsible for formally codifying Fast Track programs into law, was passed after § 3553(a)(6)[136] came into existence. Common tenets of statutory construction presume purpose behind every sentence and strongly disfavor implicit repeals by subsequent legislation. Congress necessarily had to (and is presumed to) have known the consequences of their PROTECT Act legislation vis-à-vis § 3553(a)(6), the current law at that time.[137]

Moreover, Congress passed the legislation in question at a time when not all judicial districts employed a Fast Track program. It appears, then, that it was not their intention to mandate that such programs be available to all districts. To the contrary, Congress concluded that the advantages stemming from Fast Track outweighed their disadvantages by codifying them into law and into the Guidelines.[138] "In order to avoid *unwarranted* sentencing disparities within a given district,"[139] they left the determination as to which districts ought to have the program in the discretion of the local United States Attorney and the Attorney General.[140] It must then follow that Congress' passage of the Act amidst this backdrop was condoning the disparity and thus it is not "unwarranted." Legislative history also demonstrates, at least implicitly, that since Congress recognized the potential for inconsistency, albeit only intra-district, disparities between

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[135] S. REP. NO. 98-225, at 38-39 (1989); *see also* United States v. Banuelos-Rodriguez, 215 F.3d 969, 976 (9th Cir. 2000) ("Additionally, although it is indisputable that the goal of federal sentencing reform was the elimination of unwarranted sentencing disparity, a review of the legislative history suggests that the disparity that Congress sought to eliminate did not stem from the exercise of prosecutorial discretion.").

[136] 18 U.S.C.A. § 3553(a)(6) (West 2000 & Supp. 2006).

[137] Judge Lynn Adelman finds this argument unpersuasive because the limited legislative history only addresses intra-district (and not inter-district) disparity. In her view, Congress had no reason to consider the effects of inter-district disparity because the courts had already rejected departures based on those grounds. United States v. Peralta-Espinoza, 383 F. Supp. 2d 1107, 1111 (E.D. Wis. 2005). However, disparity was not an unknown concept to Congress at the time and it could be that a direct reference to "inter-district" disparity is not present because it was obvious that the program's plain language, making it discretionary, would necessarily cause inter-district disparity. *See* H.R. REP. NO 108-48, at 7 (2003) ("In order to avoid unwarranted sentencing disparities *within a given district* . . . .") (emphasis added).

[138] *See* United States v. Perez-Chavez, 422 F.Supp. 2d 1255, 1263 (D. Utah 2005).

[139] *Id*.

[140] Pub. L. No. 108-21, §401(m)(2)(A)-(B), 117 Stat. 650 (2003) (codified as amended at 28 U.S.C.A § 994 note (West 2006)).

districts were less of a concern, if any concern at all.[141] *Booker*'s remedial majority was of the opinion that, so long as the Guidelines complied with the Constitution, Congress was to govern in sentencing matters.[142] A court must not rely on the *implicit* purpose of the Guidelines to disregard and abandon its *explicit* mandates.

As previously explained, programs such as Fast Track were intended to achieve convictions at a discount for both parties—the government, which saves resources, and defendants, who receive shorter sentences. Prosecutors do not generally choose to dismiss cases which they otherwise could try. However, the costs and staffing needed to prosecute all immigration offenders along the Mexican Border place such a strain on U.S. Attorneys that they are compelled to devise individual district-wide solutions.[143] Additionally, statistics show support among prosecutors for Congress's decision to incorporate Fast Track into the Guidelines.[144] The use of Fast Track programs allows prosecutors to bring more charges and achieve convictions where they otherwise could not.[145]

E. A Trend of Harsher Punishment, Not Leniency

The Guidelines are administrative mandates under the control and auspices of Congress itself, and Fast Track programs are now a part of that universe. It is hard to imagine how the United States Sentencing Commission, an organization created by Congress for the purposes of sentencing, would not be an adequate representation of Congress's intent as it relates to punishment. In this instance, we have more than just the implied will of Congress through the Guidelines; we have legislation from the entity itself requiring that Fast Track programs, administered the way they are today, become the law of the land.[146]

Congress has responded twice by modifying the Guidelines to reflect a tougher approach to immigration offenses, the crime for which the majority of Fast Track violations are fitting. This reflects a sense that Congress is interested in harsher sentences for immigration offenses rather

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[141] This argument is very eloquently made by Asst. U.S. Att'y Jerry N. Jones. *See* Appellee's Answer Brief at 25-26, United States v. Alfredo Morales-Chaires, 430 F.3d 1124 (10th Cir. 2005) (No. 04-CR-475-B).

[142] *See* United States v. Booker, 542 U.S. 220, 244-45 (2005).

[143] *See* Thom Mrozek, *Prosecutions on the Rise: U.S. Attorneys Take Varying Approaches to Illegal Re-Entry,* LOS ANGELES DAILY J., Sept. 21, 1995, at 9 ("[I]llegal re-entry is the single most prosecuted federal offense in [California].").

[144] *Id.*

[145] *See supra* Part II.A-C.

[146] The PROTECT Act commands the U.S. Sentencing Commission to implement such a policy. *See supra* notes 58-59 for the pertinent text of the Act and the accompanying Guideline provision.

than leniency.[147] The early disposition programs are designed to diminish punishment only in those districts where case volume makes prosecution of every case otherwise impractical. Fast Track programs may reduce disparities of a particular kind by ensuring that all cases that should be prosecuted are prosecuted.[148] Because Fast Track programs "permit more prosecutions, they may prevent the even greater disparity that occurs when an offender" is not prosecuted due to "the lack of prosecutorial resources in a district with a large volume of immigration offenses."[149]

F. Contrasting Fast Track to State-Federal Disparity

The "unwarranted" disparity critique of Fast Track closely parallels another argument worthy of note which has likewise failed to attract support: departures based solely on state-federal disparity.[150] It is common knowledge in the field that, due to the Guidelines, a defendant prosecuted under parallel charges in federal court will typically be sentenced for longer than if tried in state court.[151] This inconsistency is readily observable in the area of narcotics violations and possession of weapons charges. Although the difference is partly due to the rigid use of sentencing guidelines, the more lenient, plea-bargain-prone nature of state courts also plays a key role in the disparity.

With the proliferation of federal crimes penalizing behavior already covered by state laws, federal defendants have argued, to no avail, that the disparity between sentences at the federal level and the state level for the same crime allows federal judges to deviate from the Guidelines and impose lower sentences to ameliorate the problem.[152] Before *Booker*, when Guidelines were mandatory, it was argued that since the guidelines neither encouraged nor prohibited this type of departure, it was within the spirit of the Guidelines (uniform sentencing) for federal judges to depart downward from the Guidelines to prevent disparate punishments for the

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[147] The U.S. Sentencing Commission has publicized their intent to increase the punishment for immigration violations yet again. *See* Notice of Proposed Amendments to the Sentencing Guidelines for United States Courts, 71 Fed. Reg. 4785 (Jan. 27, 2006).

[148] *See* United States v. Perez-Chavez, 422 F.Supp. 2d 1255, 1263 (D. Utah 2005).

[149] *Id*.

[150] United States v. Clark, 434 F.3d 684, 687 (4th Cir. 2006) ("Creating sentencing disparities among federal defendants for no other reason than to eliminate the accepted disparities that inhere in the parallel federal and state systems of justice is unreasonable."). However, the same court did note that "the consideration of state sentencing practices is not necessarily impermissible per se." *Id.; see also* United States v. Snyder, 136 F.3d 65, 69 (1st Cir. 1998) ("consideration of federal-state sentencing disparity is flatly incompatible with the structure and theory of the guidelines.").

[151] The First Circuit in *United States v. Snyder* recognized the fact that states and the federal government impose different and varied sentences for the same criminal conduct to be "as obvious as a hippopotamus at a tea party." *Id*.

[152] *See, e.g.*, United States v. Snyder, 136 F.3d 65 (1st Cir. 1998).

same conduct.[153] Courts were quick to reject this approach since "allowing [a downward] departure because the defendant could have been subjected to lower state penalties would undermine the goal of uniformity which Congress sought to ensure: federal sentencing would be dependent on the practice of the state in which the federal court sits."[154]

After *Booker*, in cases similar to Fast Track challenges, defendants have relied on the language of § 3553(a)(6), requiring that courts "avoid unwarranted sentencing disparities among defendants with similar records" to persuade judges to deviate from the nonobligatory Guidelines and take into account the state-federal differences when imposing a sentence.[155] The Fourth Circuit in *United States v. Clark,*[156]examining the argument post-*Booker*, characterized the federal-state sentencing disparity as an inappropriate basis for reducing sentences in a typical case.[157] The court in *Clark* looked to the United States Sentencing Commission's enabling statute in order to limit § 3553(a)(6)'s applicability only to disparities among the federal system.[158] Further, the court ruled that the Guidelines did not seek to eliminate sentencing disparities that are inherent in a scheme of concurrent jurisdiction.[159] According to the court, "concurrent jurisdiction in federal and state forums contemplates and accepts that there may well be different sentences imposed for similar or identical offenses. . . . The Guidelines sought to avoid only the unwarranted disparities that existed in the federal criminal justice system, that system for which the Guidelines are governing law."[160]

The patent similarities between federal-state disparities and fast-track disparities make it fertile ground for comparison. Like Fast Track disparity, federal-state disparity is no accident. Legislative history confirms that Congress was concerned with *federal* disparity and less

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[153] *Id*. at 68.

[154] United States v. Searcy, 132 F.3d 1421, 1422 (11th Cir. 1998).

[155] *Clark*, 434 F.3d at 686-88.

[156] *See id*.

[157] *Id*. at 687.

[158] The sole concern of section 3553(a)(6) is with sentencing disparities among federal defendants. Cf. 28 U.S.C.A. § 991(b)(1)(B) (West 2006) (reciting that one of the statutory purposes of the United States Sentencing Commission is "to establish sentencing policies and practices for the Federal criminal justice system that . . . avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ."). Indeed, concurrent jurisdiction in federal and state fora contemplates and accepts that there may well be different sentences imposed for similar or identical offenses by the two different justice systems. The Federal Sentencing Guidelines did not seek to eliminate these sentencing disparities that inhere in a scheme of concurrent jurisdiction. The Guidelines sought to avoid only the unwarranted disparities that existed in the federal criminal justice system, that system for which the Guidelines are governing law.

Clark, 434 F.3d at 687.

[159] *Id*.

[160] *Id*.

concerned, if at all, with federal-state disparities.[161] It was logical for Congress to assume that the passage of the Guidelines would result in major differences in federal sentences as compared to the states. After all, the Guidelines were designed to be a complex, comprehensive and stringent system of sentencing applicable only to the federal courts.[162] In the face of abundant evidence to the contrary, defendants are pressed to argue that such disparity is "unwarranted." Similarly, it also follows that, based partly on legislative history,[163] Congress' passage of the PROTECT Act, establishing early disposition programs, was a disparity that Congress recognized and was, like the state-federal disparity, willing to live with.[164]

Before *Booker*, it was adjudged that § 3553(a)(6) directed courts to consider the disparities created only by *federal* courts around the nation without regard to their state counterparts.[165] Thus, it would seem that defendants seeking leniency by virtue of the federal-state disparity after *Booker* are foreclosed from making the argument that the same § 3553(a)(6) anti-disparity mandate now directs the courts to consider *state* inconsistencies in sentencing. *Booker* may have made the Guidelines advisory but it did not purport to change the meaning or spirit of § 3553(a)(6).[166] The same rationale applies to Fast Track.

Before *Booker*, challenges to Fast Track programs on § 3553(a)(6) disparity grounds would not have been fruitful. In fact, § 3553(b)(1),[167] a section now invalidated by *Booker*, mandated that courts follow the Guidelines in their entirety. By placing early disposition programs into the

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[161] The Commission itself found that, in the pre-guidelines era:

> The region in which the defendant is convicted is likely to change the length of time served from approximately six months more if one is sentenced in the South to twelve months less if one is sentenced in central California. . . . [B]lack [bank robbery] defendants convicted . . . in the South are likely to actually serve approximately thirteen months longer than similarly situated bank robbers convicted . . . in other regions.

United States v. Aguilar-Pena, 887 F.2d 347, 352 (1st Cir. 1989) (quoting the Hearings on Sentencing Guidelines Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 554, 676-77 (1987) (testimony of Commissioner Ilene H. Nagel)).

[162] *See supra* Part II.C.

[163] *See, e.g.,* United States v. Clark, 434 F.3d 684 (4th Cir. 2006).

[164] While the meaning of "unwarranted disparity" remains undefined, the House Report explicitly rules out the possibility that Congress did not consider the disparity early disposition programs under passed as part of the PROTECT Act would create:

> "Several districts, particularly on the southwest border, have early disposition programs that allow them to process very large numbers of cases with relatively limited resources. . . . This section preserves the authority to grant limited departures pursuant to such programs. In order to avoid unwarranted sentencing disparities within a given district. . . ."
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> H.R. REP. NO 108-48, at 7 (2003).

[165] *See, e.g.*, United States v. Snyder, 136 F.3d 65, 69 (1st Cir. 1998); United States v. Aguilar-Pena, 887 F.2d 347, 351-52 (1st Cir. 1989).

[166] *See supra* Part II.

[167] 18 U.S.C.A. § 3553(b)(1) (West 2000 & Supp. 2006), *invalidated by* United States v. Booker, 543 U.S. 220 (2005) (section no longer Constitutional after *United States v. Booker*).

Guidelines, Congress commanded and sanctioned the creation of Fast Track disparities. Since the PROTECT Act's Fast Track additions to the Guidelines were not presumed by Congress to be in conflict with § 3553(a)(6) pre-*Booker*, it follows that the same section should not be in conflict post-*Booker*. Again, this is because the text and meaning of § 3553(a)(6) remained unchanged by the *Booker* decision.[168]

The First Circuit in *United States v. Snyder*[169] recognized that the states and federal government imposed different and varied sentences for the same criminal conduct, and that such a practice was "as obvious as a hippopotamus at a tea party."[170] It would, therefore, be improper to characterize the federal system's tougher punishment scheme as unintentional.[171] To the contrary, Congress' choice of stiffer penalties may reflect its efforts to deter crime. It would thus seem that asking a sentencing judge to repair the state-federal sentencing disparities deliberately created by Congress would be in direct contradiction to their "tough-on-crime" approach.[172] This rationale is also applicable to the use of Fast Track.

Legislative history confirms that Congress' decision to induct early disposition departures into the Guidelines was due to the need to save government resources.[173] On the other hand, Congress has shown interest in addressing the increasing illegal immigration problem by escalating the stakes for violators.[174] Political pressures and national security concerns have caused the government to take a more aggressive stance against immigration and drug offenses, the crimes typically associated with the majority of Fast Track departures. Congress, however, has decided to

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[168] United States v. Booker, 543 U.S. 220, 259-60 (2005).

[169] United States v. Snyder, 136 F.3d 65 (1st Cir. 1998).

[170] *See id.* at 69.

[171] *See id.* Congress has, in the past, crafted laws with the aim of the making punishment tougher.

> "We add, moreover, that disparity between federal and state sentences in career offender cases is hardly serendipitous. Congress crafted the [Armed Career Criminal Act] on the central premise that armed career criminals were being treated too gently by state courts -- coddled, some might say -- and that these defendants ought to receive much stiffer sentences. For these defendants, significant disparity between sentences at the federal and state levels is the rule, not the exception. Hence, if [a defendant] is entitled to a downward departure on this basis, then virtually every defendant subject to the [Armed Career Criminal Act] is similarly entitled."

Id. (citations omitted).

[172] *See id.*

[173] "Several districts, particularly on the southwest border, have early disposition programs that allow them to process very large numbers of cases with relatively limited resources." H.R. REP. NO. 108-48, at 7 (2003).

[174] U.S. SENT'G. COMM'N., INTERIM STAFF REPORT ON IMMIGRATION REFORM AND THE FEDERAL SENTENCING GUIDELINES 1 (2006), http://www.ussc.gov/publicat/imigration_06.pdf. In addition, the punishment for immigration offenses is about to increase again. *See* Notice of Proposed Amendments to the Sentencing Guidelines for United States Courts, 71 Fed. Reg. 4785 (Jan. 27, 2006).

suspend this policy in Fast Track jurisdictions in order to process very large numbers of cases with relatively limited resources. In this regard, the inference can be made that, just as in federal-state disparity, Fast Track disparity is anything but serendipitous. It would seem that the intent of Congress is for courts to impose stricter penalties in non-Fast Track jurisdictions rather than impairing their crime control efforts by making Fast Track program the rule rather than the exception.

Another point on the legitimacy of early disposition departures is deserving of mention. Before *Booker*, it was generally settled law that downward departures based solely on inter-district Fast Track disparity would be rejected by appellate courts.[175] Moreover, it was widely held that equalizing sentences, whether done at a national or intra-district level, among co-defendants who committed the same crime and were in an equal footing, were improper grounds for departures.[176] Courts had ruled that Congress' method of avoiding unwarranted disparity was "a guideline system that prescribes appropriate sentencing ranges for various combinations of facts concerning an offense and an offender and permits a sentencing judge to depart from the recommended range in unusual circumstances."[177]

In other words, the Guidelines themselves were the anti-disparity mechanism adopted by Congress to achieve uniformity in sentencing. Such a rationale had been used to uphold disparity-producing sections of the Guidelines such as substantial assistance departures,[178] acceptance of responsibility,[179] and the like. The Second Circuit's opinion in *United States v. Joyner,* defending the discrepancies in sentences created by the Guidelines above, very eloquently explained that Congress intended the disparities caused by the application of the Sentencing Guidelines.[180] At least three Circuits have opined that *Joyner*'s construction of the role the Guidelines play in § 3553(a)(6)'s consideration "remains essentially

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[175] *See, e.g.*, United States v. Melendez-Torres, 420 F.3d 45 (1st Cir. 2005); United States v. Banuelos-Rodriguez, 215 F.3d 969 (9th Cir. 2000); United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir. 2000).

[176] *Banuelos-Rodriguez*, 215 F.3d at 978.

[177] United States v. Joyner, 924 F.2d 454, 460 (2d Cir. 1991).

[178] These types of downward departures come about when the government petitions the court for a departure in order to reward a defendant for cooperating with the government. These departures are the subject of much controversy because they too are accused of creating sentencing disparities. *See, e.g.*, United States v. Nichols, 376 F.3d 440, 443 (5th Cir. 2004) (holding that disparities occasioned by substantial assistance departures are "justified.").

[179] This departure is used to entice a defendant when making a choice to go to trial or to plead guilty.

[180] *Joyner*, 924 F.2d at 460-61.

unchanged" in the wake of *Booker*.[181] Put differently, even in the face of § 3553(a)(6)'s mandate, the "method chosen by Congress to avoid unwarranted disparities" are the Guidelines themselves, as remains in light of *Booker*.[182] Thus, it would seem that, by analogy, those holdings ought to proscribe sentencing judges from adjudging Fast Track disparities as "unwarranted" in order to afford challenging defendants a lower sentence on those grounds.

G. Judge-Made Fast Track Disparity

Ironically, it seems that the only "unwarranted disparity" as a result of Fast Track programs is being created by sentencing judges themselves, as illustrated by Judge Marrero in *United States v. Duran*.[183]

> As a result of differences in interpretation of the Sentencing Guidelines in light of *United States v. Booker* and 18 U.S.C. § 3553(a), substantial variations in sentences for illegal reentry cases have been produced in different districts. The effects will be most pronounced, and potentially even pernicious, in districts where judges of the same court split conceptually into different camps and impose sentences for this offense depending upon whether they accept or reject . . . fast-track arguments as legitimate grounds to guide their sentencing decisions. By dint of that discord, a form of wheel-of-fortune effect may be emerging in some districts . . . [where] offenders' sentences will be determined, or even predetermined, by whether or not the judge randomly assigned the case conceptually recognizes . . . fast-track considerations as decisive grounds for modifying the sentence produced by application of the Guidelines.[184]

The split in sentencing approach will no doubt get bigger in the absence of guidance from the higher courts. Until now, the debate has unsurprisingly been limited to certain district judges. Indeed, judges in the Southern District of New York have openly displayed their conceptual split and are on the verge of causing the unwarranted disparity they purport to

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[181] United States v. Duhon, 440 F.3d 711, 720-21 (5th Cir. 2006); United States v. Boscarino, 437 F.3d 634, 637-38 (7th Cir. 2006); United States v. Toohey, 132 Fed. Appx. 883, 887 (2d Cir. 2005) (unpublished).

[182] After *Booker*, this ruling still rings true. United States v. Toohey, 132 Fed. Appx. 883, 886 (2d Cir. 2005) (unpublished).

[183] United States v. Duran, 399 F. Supp. 2d 543, 545-46 (S.D.N.Y. 2005).

[184] *Duran*, 399 F. Supp. 2d at 545-46 (citations omitted).

curtail.[185] Ironically, the limited legislative history suggests this is the very type of inconsistency that Congress sought to eradicate by the passage of the Sentencing Reform Act[186] and the PROTECT Act.[187] This adverse result is not limited to merely one district. Arguably, the remediation of Fast Track disparities by judicial action will eventually lead to intra-district and inter-district disparities reminiscent of the pre-Guidelines sentencing environment.

It is unclear how the unilateral actions of certain judges help to ameliorate the disparity. Absent a district-wide approach, whether the "unwarranted" disparity is remediated will depend upon the defendant's luck. Even if all judges in a particular district subscribed to the philosophy that the disparity is "unwarranted," the sentences would no doubt be in accord with those of Fast Track jurisdictions but would still be in conflict with the districts not hosting Fast Track. As the Second Circuit Court of Appeals has concluded, it would lead to one of two inappropriate results:

> First, if, as seems likely, some judges [would] exercise their discretion in favor of departing and others [would] not, there would still be disparity, without any relevant difference in conduct or circumstance between the group of defendants who received departures and the group who did not. And since a discretionary refusal to grant a departure is not reviewable on appeal . . . that disparity would be uncorrectable. Alternatively, if all district judges were to grant departures in order to match the effects of [another district's] [p]olicy, departures would become the rule, rather than the exception, and few . . . defendants would be punished with the severity expressly intended by Congress.[188]

Against this backdrop, it is only a matter of time before the body of sentencing decisions create "de facto," judge-made, "unwarranted" disparities which were neither contemplated by Congress, nor a result of prosecutorial discretion, nor a product of the Guidelines and now truly deserving of consideration under § 3553(a)(6).

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[185] In Judge Morrero's district alone, at least five judges have demonstrated their differences in the debate. For example, out of the five opinions referenced by Judge Morrero, three judges did not find the disparity "unwarranted" while two others believed it was. *Id*. at 544-45.

[186] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

[187] H.R. REP. NO. 108-48, at 7 (2003) ("In order to avoid unwarranted sentencing disparities *within a given district*, any [Fast Track] departure . . . must be pursuant to a formal program that is approved by the United States Attorney and that applies generally to a specified class of offenders.") (emphasis added).

[188] United States v. Bonnet-Grullon, 212 F.3d 692, 709 (2d Cir. 2000) (citations omitted).

At first glance, Fast Track programs appear to produce disparities in sentencing. However, the nature of our criminal justice system, a scheme dependent on plea bargains, prosecutorial discretion, and the Guidelines, is not capable of eliminating *all* disparity in sentencing. Indeed, the practical side of sentencing sometimes requires the government to take into account individual actions in order to reward cooperation, acceptance of responsibility, and the like. Although the system has sentencing equality as its goal, coming short of that is not unconstitutional or impermissible and nonetheless complies with the mandates and requirements of the Sentencing Reform Act of 1984.[189] Further, the majority of courts which have examined the issue agree that early disposition programs are neither an undue delegation of legislative authority nor a violation of the fundamental right to equal protection under the Fifth Amendment.[190]

In sum, charge or departure based early disposition programs are not new to government prosecutors.[191] The disparities early disposition programs create are not "unwarranted" and in need of a cure from the bench. Such "programs"[192] were in existence in the judicial districts along the southwest border well before the official legislative reform in 2003.[193] The prosecutorial and sentencing reforms blossomed in response to the dramatic increase in the number of immigration cases handled by federal prosecutors in the states bordering Mexico.[194] Congress has explicitly required that only the Attorney General have the discretionary power to create Fast Track programs, not the courts.[195] Fast Track was not designed to be used nationwide or to be applicable in all cases. Legislative history, although limited, confirms that the sentencing discrepancies produced by Fast Track are not "unwarranted" within the meaning of § 3553(a)(6). This point is more evident if one compares and contrasts early disposition programs to other commonly accepted sentencing irregularities. The challengers of Fast Track, defendants in non-Fast Track jurisdictions, who highlight the inconsistency in nationwide sentencing created by Fast Track, must be forbidden from asking the courts to do something they cannot do: substitute the will of Congress and the Attorney General for their own.

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[189] Pub. L. No. 98-473, 98 Stat. 1987 (1984).

[190] *See supra* Part III.

[191] *See generally Fast Track Public Hearings*, *supra* note 29, at 8, 11-12, 70-79, 85-86.

[192] The author uses this term loosely. Although not officially referred to as a "program," the practice was condoned by the Justice Department for some time. *See*, O'Hear, *supra* note 82, at 360-65.

[193] The official legislative nod came in form of the "Feeney amendment" to the PROTECT Act. *See supra* notes 55-58.

[194] *Fast Track Public Hearings*, *supra* note 29, at 69 (statement of Paul K. Charlton, U.S. Attn'y, D Ariz.)

[195] Pub Pub. L. No. 108-21, §401(m)(2)(A)-(B), 117 Stat. 650 (2003) (codified as amended at 28 U.S.C.A § 994 note (West 2006)).

IV. SEPARATION OF POWERS

A. Fast Track as a Prosecutorial Tool

As of October 29, 2004, the Attorney General had authorized the use of Fast Track programs in only thirteen federal judicial districts.[196] The invitation given to a defendant to be part of an established Fast Track program is a charging decision made by prosecutors who calculate strategies and balance the options available to them. Judicially-induced Fast Track decisions would unduly interpose the judge in the process of charging a defendant and essentially make such judge an unwelcome participant in the discretionary charging process.

Early disposition programs are tools prosecutors use in order to process cases which they otherwise could not for lack of resources. It is common knowledge that the justice system does not, and should not, prosecute everyone it can. Fast Track programs act as a compromise between the expense of full trials and complete prosecutorial rejection. An absence of Fast Track programs in districts along the Mexican border, for example, would lead to diminished prosecutions of immigration offenses.[197] Political pressures and national security concerns stemming from the war against terror have caused the government to take a more aggressive stance on immigration. Eliminating early disposition programs would have the consequence of inhibiting those goals.

The best way to emphasize the importance of early disposition programs is to look at their impact along the judicial districts that use them most: the southwest border districts.[198] In an effort to combat illegal immigration, the Federal government has persistently increased the presence of law enforcement in the southwest regions of the United States. To illustrate this point, consider the fact that, from 1995 to 2002, the number of agents patrolling the Arizona sector of the border along the southwest region increased by 229 percent.[199] Agents are also now better equipped technologically. The use of improved computerized fingerprint systems allows them to quickly decipher the immigration status of detainees.[200] Not surprisingly, this has yielded a substantial number of

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[196] Memorandum from James B. Comey, Deputy Attorney General, to Selected Federal Prosecutors 2 (Oct. 29, 2004). The memo is available from Prof. Douglas A. Berman's sentencing website on Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and policy/files/61005_govt_opposition_to_sg_variance_due_to_fasttrack.pdf., p. 45.

[197] *Fast Track Public Hearings*, *supra* note 29, at 79 (statement of Charlton, U.S. Attn'y, D. Ariz.) ("Without the fast track programs, the number of viable cases that would need to be declined would increase substantially.")

[198] *Id*. at 72; *see also supra* note 6 and accompanying text.

[199] *Fast Track Public Hearings*, *supra* note 29, at 71.

[200] Bersin & Feigin, *supra* note 14, at 299-300.

more arrests; in 2002, 333,648 arrests were made in one district alone.[201] The fact that the entire federal system handles an average of more than 60,000 "Guideline"[202] cases a year,[203] suggests that not all those new arrests were, or could have been, prosecuted.

At least one U.S. Attorney has admitted that but for Fast Track programs, cases which normally would have been declined at the state and federal level due to lack of resources are now being actively prosecuted.[204] Admittedly, the government has options for remedying the difficulties a mass increase in cases creates. First, it could petition Congress for more funding for federal prosecutors; it could also redirect resources and move personnel from other areas to attack difficult zones.[205] Alternatively, a change in the threshold required for federal prosecution would also tend to alleviate the issue. After all, not all federal crimes, even in the face of overwhelming evidence, are prosecuted by the federal government.[206] Both of these approaches, however, are inadequate solutions when compared to the benefits of addressing these issues with the use of a Fast Track program.

Even if the Justice Department were to double the amount of prosecutors in areas affected by the type of crimes currently amenable to Fast Track dispositions, these efforts would not resolve all of the problems associated with mass prosecutions. A shifting of resources (more agents and prosecutors) does nothing, for example, about the quantity of available judges.[207] The Executive Branch is only one of the participants and does not dominate the entire criminal process.[208] The absence of an early disposition program removes the incentive for defendants to plead guilty and would undoubtedly lead to more trials and larger dockets.

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[201] *Fast Track Public Hearings*, *supra* note 29, at 71.

[202] "Guideline" cases refers to the amount of cases requiring United States Sentencing Guidelines computation.

[203] *Fast Track Public Hearings*, *supra* note 29, at 72.

[204] *Id*. at 70.

[205] The problem is actually more complex due to the less obvious resources that would need to be reoriented. For example, clerical staff and other court-support personnel affect the ability for courts to manage their dockets. *See, e.g.,* Admin. Off. of the U.S. Courts, *Immigration-Related Cases Soar Over 5 Year Period,* THIRD BRANCH, May 1998, *available at* http://www.uscourts.gov/ttb/may98ttb/page2.html#t5; Admin. Off. of the U.S. Courts, *Court Interpreters Feel Impact of Illegal Immigration Caseload,* THIRD BRANCH, Feb. 2005, *available at* http://www.uscourts.gov/ttb/feb05ttb/interpreters/index.html.

[206] *Fast Track Public Hearings*, *supra* note 29, at 73. For example, it is not unusual for tax cases to reach a numerical threshold before being prosecuted.

[207] Admin. Off. of the U.S. Courts, *Caseloads Swamp Border Courts,* THIRD BRANCH, Oct. 1999, *available at* http://www.uscourts.gov/ttb/oct99ttb/caseload.html.

[208] *Fast Track Public Hearings*, *supra* note 29, at 35 (statement of Comm'r. O'Neill, U.S. Sent'g. Comm.).

Frontloading one part of the process would merely postpone the inevitable by leading to bottlenecking at another end not controlled by prosecutors.[209]

Refusing to prosecute is not a more suitable alternative. Aside from the political ramifications of being perceived as "soft on crime," such efforts could be seen as a blatant dereliction of the duty to enforce laws beyond what is acceptable under the doctrine of prosecutorial discretion.[210] This alternative is more poignant when one factors in that many of the cases which are covered under Fast Track are federal violations, meaning that state courts—which are better suited to dispose of mass numbers of prosecutions quickly—are barred from picking up the slack because immigration offenses fall under the jurisdiction of the local U.S. Attorney only.[211] Thus, the deterrent value of prosecuting a substantial number of viable cases by offering a reduced sentence, albeit at the cost of obvious sentencing disparities, heavily outweighs the benefits of declining to prosecute them at all.[212] Eliminating Fast Track programs would have a profound impact along the districts sharing the Mexican borders. If those districts are depending on Fast Track programs to dispose of a high number of immigration cases, it is not unreasonable to presume that a significant decline in the number of prosecutions would produce a sense of anarchy in respect to those violations. As one U.S. Attorney has put it, not prosecuting would create "an atmosphere of lawlessness around the [Mexican] border as criminals realize their chances of being prosecuted are very small, even if caught."[213]

B. Prosecutorial Discretion at Work

Perhaps the most difficult argument defendants petitioning a court for a downward departure based on Fast Track disparities confront is that early disposition programs are seen as being part of the realm of prosecutorial

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[209] *Id*. (statement of Marilyn L. Huff, J., S.D. Cal.).

[210] *Id*. at 73. (statement of Charlton, U.S. Attn'y, D. Ariz.).

[211] Even cases that could be prosecuted by the local state courts sometimes are not. For example, the District Attorney of San Diego, as a matter of long-standing policy, will not prosecute any cases related to the border. As a result, these cases must be prosecuted in federal court or not at all. Braniff, *supra* note 15, at 310.

[212] The author realizes that measuring the deterrence value of prosecutorial idiosyncrasies is quite difficult. In fact, even U.S. Attorneys disagree as to deterrent value of Early Disposition Programs. *See* Thom Mrozek, *Prosecutions on the Rise: U.S. Attorneys Take Varying Approaches to Illegal Re-Entry*, LOS ANGELES DAILY J., Sept. 21, 1995, at 1; *see also supra* note 49 and accompanying text. To date, I could find no empirical data to suggest that more prosecutions did, or did not, actually deter the number of people trying to re-enter the country illegally. However, a prosecution resulting in incarceration incapacitates those individuals currently in jail. To that end, Fast Track prosecutions do have, although it may be limited and temporary, a deterrent effect.

[213] *Fast Track Public Hearings, supra* note 29, at 79.

discretion—something which courts are not able to control.[214] Post-*Booker*,[215] the Guidelines still have a substantial influence in sentencing decisions. The Guidelines, as well as any pertinent policy statements issued by the Sentencing Commission, still need to be calculated, and applied to every case.[216] Even under an advisory Guidelines system, district courts "will normally have to determine the applicable Guidelines range in the same manner as before *Booker*, in order to decide whether (i) to impose the sentence that would have been imposed under the Guidelines, i.e., a sentence within the applicable Guidelines range or within permissible departure authority, or (ii) to impose a non-Guidelines sentence."[217] While the cases discussed above were decided at a time when the Guidelines were mandatory, their import is still persuasive because the advisory nature of the Guidelines does not change the Executive Branch's exclusive right to discretion in determining the charges it will bring against offenders.

It is well established that the decision as to which crime the government will charge falls within the "broad discretion" of the Attorney General and the U.S. Attorneys as prosecutors.[218] As agents designated by the executive branch of our government to "take Care that the Laws be faithfully executed,"[219] their actions are seen as having the indicia of regularity and of proper implementation unless there is clear evidence to the contrary.[220] This broad discretion rests on the recognition that the decision prosecutors make in charging are ill-suited for judicial review.[221]

The Sentencing Commission is not unmindful of the power sentencing reform shifted to prosecutors. It has recognized that prosecutorial discretion was among the most important of issues in prescribing the current guidelines.[222] The commission found that a "pure real offense [conduct] system" was unduly complex and hence unworkable and ultimately opted for the current charge-based system.[223] While admitting that the guidelines were giving prosecutors "a loophole large enough to undo the good that the guidelines would bring," the Sentencing Commission decided not to make major changes in plea agreement

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[214] United States v. Armenta-Castro, 227 F.3d 1255, 1258 (10th Cir. 2000); United States v. Bonnet-Grullon, 212 F.3d 692, 698-99, 707 (2d Cir. 2000).

[215] United States v. Booker, 543 U.S. 220 (2005).

[216] *See* 18 U.S.C.A. § 3553(a)(4)-(5) (West 2000 & Supp. 2006). *United States v. Booker* stands for the proposition that courts must consider those factors when imposing a "reasonable" sentence.

[217] *See* United States v. Crosby, 397 F.3d 103, 111-13 (2d Cir. 2005)

[218] Wayte v. United States, 470 U.S. 598, 607 (1985).

[219] U.S. CONST., ART. II, § 3.

[220] United States v. Armstrong, 517 U.S. 456, 464 (1996).

[221] *Wayte*, 470 U.S. at 607.

[222] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A., subpt. 4(a) and 4(e) (2005).

[223] *Id.*; s*ee also* United States v. Bonnet-Grullon, 212 F.3d 692, 702 (2d Cir. 2000).

practices.[224] The Commission admitted drafting the Guidelines with an eye toward plea bargaining and conceded that the Guidelines were designed to apply to more than ninety percent of all cases since "nearly ninety percent of all federal criminal cases involve guilty pleas."[225]

Deference to prosecutorial discretion did not mean that prosecutors would retain unfettered power to manipulate the guidelines.[226] The Guidelines provided remedies for judges to redress potential "inappropriate manipulation" of the guidelines by prosecutors.[227] For instance, a sentencing court has the power to reject a plea agreement if it determines that the agreement does not adequately reflect the seriousness of the actual offense behavior or that accepting the agreement will undermine the statutory purposes of sentencing or the Guidelines.[228] This supervisory power came with the blatant caveat that Guidelines do "not authorize judges to intrude upon the charging discretion of the prosecutor."[229] In any event, the Sentencing Commission viewed these departures as a safety valve and "expected that such departures would be 'highly infrequent.'"[230] Nothing in *Booker* changes this methodology.[231]

In the cases available to date, defendants have stipulated to no wrongdoing on the part of prosecutors.[232] Instead, they base their claim

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[224] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subpt. 4(c).

[225] *Id*. at ch.1, pt. A, subpt. 5 and subpt. 4(c).

[226] *Id*. at ch.1 pt. A subpt. 4(a).

[227] *Id*.

[228] U.S. SENTENCING GUIDELINES MANUAL § 6B1.2(a).

[229] U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 & § 6B1.2 comt.

[230] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. p.s. 4(b); *see also* Koon v. United States, 518 U.S. 81, 96 (so stating).

[231] District Court Judge Lynn Adelman takes a different view. Accordingly, she opines that "the government is free to bring charges or not, plea-bargain with those it has charged, and agree to any sentence it believes appropriate" and that a court's reduction of a defendant's sentence based on Fast-Track disparity violates none of these prerogatives. Moreover, after *Booker*, courts must consider § 3553(a)(6) independent of a prosecutor's sentencing recommendation because sentencing is primarily a judicial function which is up to the courts to decide. United States v. Peralta-Espinoza, 383 F. Supp. 2d 1107, 1110 (D. Wis. 2005).

The problem with this argument is that it views § 3553(a)(6) as giving judges an unlimited power to review the application of plea bargaining. This practice usurps prosecutorial discretion because it allows judges to do more than simply reject or accept the plea agreement. Using Fast Track disparity as a reason for departure makes the program available in a jurisdiction that simply does not have it regardless of what method is used to import it. Additionally, criminal cases implicate different values in different areas. (i.e., possession of a weapon may be a big deal in an urban state like New York but not so big in a hunting state like, say, Wyoming.) It follows that as prosecutors react to local crime concerns and not always look toward national trends, disparate prosecutions of certain type of cases will always be an issue. Border districts, for example, will always be concerned with immigration much more than the District of Maine. Under the Judge's construct, § 3553(a)(6) gives any sentencing judge unbridled power to ameliorate these benign sentencing inconsistencies because sentencing is a "judicial function."

[232] *See, e.g.*, United States v. Bonnet-Grullon, 212 F.3d 692, 706-07 (2d Cir. 2000).

solely on the judge's power to remedy a situation created by prosecutors in other districts. This, they argue, offends the fundamental principles of the Guidelines as they see it: the unequal treatment of similarly situated defendants. In this particular instance, it is caused by non-Fast Track jurisdictions.[233] Their demands for judicial intervention have failed because courts generally have no place interfering with a prosecutor's discretion regarding who to prosecute, what charges to file, and whether to engage in plea negotiations.[234] Absent a "substantial threshold showing of improper motive,"[235] prosecutors have broad discretion in determining the offense that will be used to establish the statutory parameters, within which, a sentence must be determined. Recognition of Fast Track policies as part of the genre encompassing prosecutorial discretion means that this power is not reviewable by a court unless the government's actions are based on an impermissible basis such as gender, race or denial of a constitutional right.[236]

The "prosecutorial mischief" argument in regard to Fast Track has also been rejected by the courts. Courts have refused to hold that the disparities in sentencing created by prosecutorial strategy are the type of prosecutorial "inappropriate manipulation" which judges should have the power to remedy.[237] This genre of challenges to Fast Track is flawed because it labels the sentencing disparity created by jurisdictions with a Fast Track program as an "inappropriate manipulation" of the Guidelines in one hand while asking the courts to essentially make this "inappropriate manipulation" more widespread by endorsing such departures in the districts without Fast Track.[238]

Under the assumption that the lack of a nationwide Fast Track system makes this type of prosecutorial discretion an "inappropriate manipulation" of the guidelines, other sections of the Guidelines still obstruct a judge's ability to remedy such matters.[239] The "safety valve" provision in the Guidelines was expected to be the exception rather than the rule.[240] The Sentencing Commission "expected that such departures would be 'highly

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[233] *See*, United States v. Banuelos-Rodriguez, 215 F.3d 969, 972 (9th Cir. 2000); *Bonnet-Grullon*, 212 F.3d at 692; United States v. Armenta-Castro, 227 F.3d 1255 (10th Cir. 2000).

[234] See United States v. LaBonte, 520 U.S. 751, 762 (1997); s*ee also*, United States v. Armstrong, 517 U.S. 456, 464 (1996) ("United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws. . . .").

[235] *See* Wade v. United States, 504 U.S. 181, 181 (1992).

[236] *See id*.

[237] *See e.g*., United States v. Bonnet-Grullon, 212 F.3d 692 (2d Cir. 2000).

[238] *Id*. at 709. ("It would hardly be appropriate to condone departures that would make the "mischief" more widespread.").

[239] *See* Koon v. United States, 518 U.S. 81, 98-99 (1996).

[240] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. p.s. 4(b).

infrequent.'"[241] Allowing this practice in sentencing proceedings would require cumbersome evidentiary hearings in most cases. If permitted, every defendant tried for a Fast Track crime in a non-Fast Track jurisdiction would raise its absence as a reason for departure from the Guidelines in his or her particular case.[242] This is an approach clearly at odds with the Supreme Court's view of sentencing proceedings.[243] The ultimate result would be to turn the Sentencing Guidelines mandate that departures be "highly infrequent"[244] on its head; a trend which, after *Booker*,[245] has become the norm.[246]

All of the justifications given in defense of early disposition programs are equally valid to their use in both contexts—as a sentencing departure mechanism or a charge bargaining method. Congress,[247] the Guidelines[248] and the Attorney General[249] have all condoned the use of either practice so long as they are approved by first by the Justice Department. Nothing in either process is superior as both achieve the same purpose: reducing the length of a sentence for a qualifying crime. It is, nonetheless, more difficult for a defendant to argue inequality vis-à-vis a district which employs the charge bargaining method. It would be disingenuous to argue one should be given a judicially-induced departure because he was not given the opportunity to plead to an offense someone else in a different jurisdiction was privy to.[250] Granting a downward departure on the grounds that another similarly situated defendant received a shorter one after having been convicted of a different crime would be inappropriate.[251] An opposite holding would fly in the face of every policy statement regarding prosecutorial discretion alluded to in the Guidelines and would invite judges to be participants in the plea bargaining process.

The proposal by defendants seeking to repair the gap in sentences between Fast Track and non-Fast Track districts necessarily encroaches upon the discretion of prosecutors. Judges who adopt this invitation would essentially be creating Fast Track districts in places which did not have it.

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[241] *Id*.; *see also* Koon, 518 U.S. at 96.

[242] *See* United States v. Banuelos-Rodriguez, 215 F.3d 969, 975 (9th Cir. 2000).

[243] *See Koon*, 518 U.S. at 98-99.

[244] *See Banuelos-Rodriguez*, 215 F.3d at 974 (quoting U.S. SENTENCING GUIDELINES MANUAL. ch.1, pt. A).

[245] United States v. Booker, 543 U.S. 220 (2005).

[246] *See supra* notes 122, 131 and corresponding text.

[247] *See supra* note 55.

[248] U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2005) (early disposition programs).

[249] Ashcroft Fast-Track Memo, *supra* note 62, at 2.

[250] *See e.g*., United States v. Enriquez-Munoz, 906 F.2d 1356, 1359 (9th Cir. 1990).

[251] United States v. Banuelos-Rodriguez, 215 F.3d 969, 974 (9th Cir. 2000) ("allowing sentencing departures grounded on the length of sentences received by others who engaged in similar conduct but were convicted of different offenses would require courts to 'look behind . . . plea agreements and assess the actual culpability of . . . defendants.'").

As a result, it would require that all defendants be sentenced as if they had been prosecuted in a Fast Track system. Such a result would necessarily require that judges ignore the decisions of local U.S. Attorneys and the Attorney General not to have such a program in a specific district. Moreover, it would allow judges not only to bring in the program but also to control its application. Arguably, this adverse result would be giving judges in non-Fast Track jurisdictions more power than those judges sitting in jurisdictions actually hosting the program because they would control who got it, how much the drop in sentence would be, and what type of crime it would be applicable to. Obviously, all decisions within the realm of prosecutorial discretion and made by prosecutors, not judges, in Fast Track jurisdictions.

One other important point is that all early disposition programs currently in existence are unique in certain ways.[252] Forcing the existence of Fast Track by judicial mandate would require a decision regarding which program, from the pool of vastly different Fast Track programs, would be adopted. These are decisions traditionally made by the Executive Branch. What crimes will these judicial-Fast Tracks cover? Who would qualify as a dangerous criminal not deserving of the program? Could the

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[252] As of October 29, 2004, 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. *See* REPORT ON IMMIGRATION, *supra* note 1, at 30. In order to appreciate how different some programs can be, consider the following chart:

District	**Fast-Track Resolution**	**District**	**Fast-Track Resolution**
Arizona (Tucson) Arizona (Phoenix, Yuma)	3-Level downward depart. 4-Level downward depart.	Oregon	Plead to 2 counts of 8 U.S.C. § 1325.*
California (East. District)	4-Level downward depart.	Nebraska	4-Level downward depart.
California (Central Dist.)	Plead to 2 counts of 8 U.S.C. § 1325.*	New Mexico	2-Level downward depart.
California (North. District) California (South. District)	Plead to 2 counts of 8 U.S.C. § 1325.*	North Dakota	4-Level downward depart.
Texas (South. District)	Net 1-Level departure.	Washington (West. Dist.)	2-Level downward depart.

**other considerations such as age, prior crimes, and prior criminal history category may bar program participation.*

See Appellee's Answer Brief at 20-21, United States v. Alfredo Morales-Chaires, 430 F.3d 1124 (10th Cir. 2005) (No. 04-CR-475-B) (charting how a particular person's sentence would be treated in different districts).

Not all "Fast track" programs address immigration violations. For example, false document cases Fast Track programs were authorized in the districts of Northern Georgia and Southern Florida. In addition, drug offenses programs have been authorized in Arizona, Southern California, New Mexico, Eastern District of New York, Southern Texas, and Western Texas. REPORT ON IMMIGRATION, *supra* note 1, at 30.

state oppose? How many levels would be the appropriate departure? These questions demonstrate why Congress and the Sentencing Commission have made their intent clear and have warned many times that, except for very limited occasions, our laws do "not authorize judges to intrude upon the charging discretion of the prosecutor.'"[253]

Judge Cassell's assertion, that cases holding the opposite are "well intentioned but wrongly decided," rings true and valid.[254] They are judicial examples of a tail wagging the dog. In an attempt to create a feigned sense of national equality, the dissenting courts have usurped a right expressly reserved for the Attorney General and made it theirs. They have, in fact, created judicially-made Fast Track districts which cannot guarantee uniformity even within their own district. Do all judges in their respective districts have contracted to give all defendants appearing before them the benefit of Fast Track? If so, as Judge Cassell states, "the sentences of those districts would then match those given in fast-track districts but would still differ from those in non-fast districts."[255] Where is the national equity? What have those judges really fixed? As Judge Marrero very eloquently puts it:

> [T]he disparities between sentencing in fast-track and non-fast-track districts arise from prosecutorial decisions similar to an individual prosecutor's decisions to charge, to engage in plea-bargaining or offer cooperation agreements, or to a particular United States Attorney's Office's policies regarding charging or plea bargaining. Of necessity, a prosecutor's choice to charge certain offenders or offenses more severely than others or to enter into plea agreements with some defendants but not others involved in the same crime is bound to engender significant variations in the sentences that result in the same case or type of case, or from one district to another where different prosecutorial policies or social conditions may prevail. But such inevitable, indeed probably common, sentencing disparities as regards other cases could not serve to warrant determination by a court in one district to impose sentences resting solely or even predominantly on the existence of that policy in another court or district.[256]

The fundamentally unworkable nature of the judicial Fast Track philosophy is evidenced by the fact that judges would be deciding, on an

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[253] U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 cmt. (2005).
[254] United States v. Perez-Chavez, 422 F.Supp. 2d at 1263 (D. Utah 2005).
[255] *See id*. at 1264.
[256] United States v. Duran, 399 F. Supp. 2d 543, 548 (S.D.N.Y. 2005).

ad hoc basis, what program to adopt. In other words, whether the defendant would be entitled to a one, two, three, or four level departure would depend on which courtroom he was assigned. In some jurisdictions, the Fast Track program is applied by way of charge bargaining.[257] On what legal basis could judges fix the "unwarranted" disparity those programs create? Basic legal principles preclude a judge from sentencing for an offense other than the one to which a defendant has pleaded guilty. The uncertainty of this process would no doubt affect prosecutors in plea negotiations and produce a disparity of a worse degree, the type which is unknown and based only on luck.

In summary, judges are ill-advised to impose Fast Track programs by judicial mandate. Such decisions have the inescapable result of invading the province of the prosecutor by delivering the discretion to charge and establish enforcement policies into the hands of judges. Before *Booker*, it was improper for courts to equalize Fast Track sentences based on the discretionary actions of out-of-state prosecutors.[258] The outcome in those cases was partly based on judicial respect for prosecutorial discretion.[259] After *Booker*, the importance of those decisions remains unchanged and militates in favor of holding that decisions as to who will be prosecuted, how one is charged, and whether to engage in the plea bargaining of offenses typically covered by early disposition programs will remain within the province of the prosecutor in non-Fast Track districts.

V. CONCLUSION

As of today, some federal district and appellate courts have had the opportunity to preliminarily examine and decide a number of Fast Track cases.[260] Since the *Booker* decision, federal courts have scrambled to decipher an acceptable way of determining standards for reasonable sentencing and standards for appellate review of such sentences in a world where the Guidelines are "advisory." Since the early part of 2006, decisions regarding sentencing standards after *Booker* have been published

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[257] *See supra* Part II.D.

[258] *See* Banuelos-Rodriguez, 215 F.3d 969, 976-77 (9th Cir. 2000); Bonnet-Grullon, 212 F.3d 692, 698 (2d Cir. 2000).

[259] *See* Banuelos-Rodriguez, 215 F.3d 969, 976-77 (9th Cir. 2000); Bonnet-Grullon, 212 F.3d 692, 698-701 (2d Cir. 2000).

[260] *See, e.g.*, United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006) (en banc); United States v. Mejia, 461 F.3d 158 (2d Cir. 2006); United States v. Perez-Pena, 453 F.3d 236 (4th Cir. 2006); United States v. Aguirre-Villa, 460 F.3d 681 (5th Cir. 2006) (per curiam); United States v. Hernandez-Fierros, 453 F.3d 309 (6th Cir. 2006); United States v. Martinez-Martinez, 442 F.3d 539 (7th Cir. 2006); United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006); United States v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006); United States v. Castro, 455 F.3d 1249 (11th Cir. 2006) (per curiam). *See also* United States v. Galicia-Cardenas, 443 F.3d 553, 555 (7th Cir. 2006) (per curiam); United States v. Arevalo-Juarez, 464 F.3d 1246 (11th Cir. 2006).

in almost a weekly basis across most federal circuit courts of appeal. Unsurprisingly, Fast Track and early disposition programs have been the focus of some of those opinions.[261] Today, the debate as to whether judges ought to fix Fast Track disparities continues but litigation has been reduced to two legal questions. The legal arguments signaling the way to the suggested correct resolution of those questions were the subject of this paper.

The first question is whether a sentence that fails to account for the lesser sentence a defendant presumably would have received if he had been adjudicated in one of the jurisdictions that use a Fast Track program is an unreasonable sentence. The argument is grounded on the fact that if such a sentence fails to accounts for one of the sentencing factors found in 18 U.S.C. § 3553(a)[262] it is considered erroneous.[263] In other words, the

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[261] At least nine federal circuit courts of appeals have examined the issue of Fast Track disparity. *See* United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006) (en banc); United States v. Mejia, 461 F.3d 158 (2d Cir. 2006); United States v. Perez-Pena, 453 F.3d 236 (4th Cir. 2006); United States v. Aguirre-Villa, 460 F.3d 681 (5th Cir. 2006) (per curiam); United States v. Hernandez-Fierros, 453 F.3d 309 (6th Cir. 2006); United States v. Martinez-Martinez, 442 F.3d 539 (7th Cir. 2006); United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006); United States v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006); United States v. Castro, 455 F.3d 1249 (11th Cir. 2006) (per curiam).

[262] After *Booker*, Judges must consider all of the factors set forth in 18 U.S.C. § 3553(a) in imposing sentence. These factors include:

> "(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for--
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-- . . .
> (5) any pertinent policy statement—[issued by the Sentencing Commission] . . .
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victims of the offense."

18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2006).

Taking into account the above factors, a sentencing judge must impose a sentence sufficient but not greater than necessary to satisfy the purposes of sentencing set forth in 18 U.S.C.A. § 3553(a)(2) (West 2000 & Supp. 2006).

[263] As explained previously, prior to *United States v. Booker*, judges could not grant a downward departure in order to account for the fact that a Fast Track program did not exist in their jurisdiction. *See supra* note 9. Post *Booker*, the scope of the inquiry requires sentencing judges to consider the sentencing factors specified in 18 U.S.C. § 3553(a), which includes "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C.A. § 3553(a)(6) (West 2000 & Supp. 2006).

question has asked appellate judges to decide whether a sentencing judge in a non-Fast Track jurisdiction, per § 3553(a)(6), is required to address the alleged "unwarranted" disparity in sentencing that not having a Fast Track program creates.[264] Those courts which have had the opportunity to resolve the argument have used the same rationale and reasoning found in this paper to deliver a resounding "no!" All nine federal appeal circuits which have examined the question have ruled that the failure of sentencing judges to take into account the alleged "unwarranted" disparity a nonuniform Fast Track system creates when they sentence a defendant is not erroneous and does not create an unreasonable sentence.[265] Prosecutorial discretion and Congress's unambiguous intentions when it created a non-uniform Fast Track program by statute were cited repeatedly as the chief justifications for finding that these disparities were not "unwarranted."[266] These cases speak clearly to the fact that sentencing judges are not required to compensate for or address the disparity created by early disposition programs in other jurisdictions because the disparity is not the "unwarranted" type referred to in 18 U.S.C. § 3553(a)(6).

Although it is clear that judges need not address Fast Track disparity because such disparity does not implicate § 3553(a)(6), a substantial question still remains as to whether judges *could*—as oppose to *must*—take Fast Track disparities into account at sentencing. In other words, is lowering a defendant's sentence due to Fast Track disparity an impermissible ground for a downward departure? Unlike the previous question, this one remains mostly undecided and is likely to dominate the future of the Fast Track debate. To date, only the Fourth, Seventh, and

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[264] *See, e.g.*, United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006) ("Because 18 U.S.C. § 3553(a)(6) requires the district court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," [defendant] argues that the more favorable treatment of aliens with similar records and similar offense conduct in judicial districts with fast-track programs makes it unreasonable to apply the advisory range to him.").

[265] United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006) (en banc); United States v. Mejia, 461 F.3d 158 (2d Cir. 2006); United States v. Perez-Pena, 453 F.3d 236 (4th Cir. 2006); United States v. Aguirre-Villa, 460 F.3d 681 (5th Cir. 2006) (per curiam); United States v. Hernandez-Fierros, 453 F.3d 309 (6th Cir. 2006); United States v. Martinez-Martinez, 442 F.3d 539 (7th Cir. 2006); United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006); United States v. Marcial-Santiago, 447 F.3d 715 (9th Cir. 2006); United States v. Castro, 455 F.3d 1249 (11th Cir. 2006) (per curiam).

[266] *See Perez-Pena*, 453 F.3d at 244 ("[T]here is no reason to believe that Congress intended that sentencing disparities between defendants who benefited from prosecutorial discretion and those who did not could be 'unwarranted' within the meaning of § 3553(a)(6)."); *Sebastian*, 436 F.3d at 916 ("The command that courts should consider the need to avoid 'unwarranted sentence disparities' . . . emanates from a statute, and it is thus within the province of the policymaking branches of government to determine that certain disparities are warranted, and thus need not be avoided."); *Mejia*, 461 F.3d at 162 (2d Cir. 2006) ("[N]o unwarranted disparity is created when one district adopts a policy needed to facilitate the administration of justice in that district. . . . The opinion recognized that disparities created by the exercise of prosecutorial discretion are not 'unwarranted.'").

Eleventh Circuits have addressed this question.[267] All three courts have concluded that it is impermissible for a district court to consider disparities associated with early disposition programs in imposing a sentence, because such disparities are not "unwarranted" for purposes of § 3553(a)(6).[268] In those circuits, not only is a judge not required to address Fast Track disparities, the sentencing judge is forbidden from considering it as a ground for a more lenient sentence altogether.[269] It is likely that in the future months and years more circuit courts will adopt the reasoning of the Fourth, Seventh, and Eleventh Circuits. The same logic used to resolve question one, which is explained and argued throughout this Comment, is easily transferable to the unresolved secondary inquiry.

Legislatures, judges, and prosecutors are pulled in different directions, especially when it comes to sanctioning violators of immigration law. Efforts to punish all violators or to just punish severely have led to inefficiencies in the legal system. Addressing illegal immigration and prosecutorial efficiency, however, necessitated unique solutions which have unfortunately led to inconsistent punishments and divergent treatment of similarly situated offenders. Perhaps accepting and exempting Fast Track programs is the best remedy for these irresolvable tensions.

A fairer and uniform, judicially-made, Fast Track program can never be an adequate substitute for the original Fast Track. Legally, such a program would undoubtedly run afoul of separation of powers doctrines. Simply put, judges cannot fix the sentencing disparities because they lack the power to do so even after *Booker*. The mandate of § 3553(a)(6) is

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[267] *See* United States v. Perez-Pena, 453 F.3d 236 (4th Cir. 2006); United States v. Galicia-Cardenas, 443 F.3d 553 (7th Cir. 2006) (per curiam); United States v. Arevalo-Juarez, 464 F.3d 1246 (11th Cir. 2006).

[268] *Perez-Pena*, 453 F.3d at 244 ("[T]here is no reason to believe that Congress intended that sentencing disparities between defendants who benefited from prosecutorial discretion and those who did not could be "unwarranted" within the meaning of § 3553(a)(6). We therefore conclude that the need to avoid such disparities did not justify the imposition of a below-guidelines variance sentence."); *Galicia-Cardenas*, 443 F.3d at 555 ("[W]e cannot say that a sentence is unreasonable simply because it was imposed in a district that does not employ an early disposition program.[] By the same logic, we cannot say that a sentence imposed after a downward departure is by itself reasonable because a district does not have a fast-track program."); *Arevalo-Juarez*, 464 F.3d at 1251 ("[I]t was impermissible for the district court to consider disparities associated with early disposition programs in imposing Arevalo-Juarez's sentence, because such disparities are not "unwarranted sentencing disparities" for the purposes of § 3553(a)(6).").

[269] It is not disputed, however, that a judge may still reduce a sentence if other factors found in § 3553(a) allows him or her to do so. The three federal appellate opinions simply stand for the limited proposition that it is reversible error to cite the lack of a Fast Track program as a ground for departure. *See Galicia-Cardenas*, 443 F.3d at 555 ("Whether [defendant] deserves a sentence below the advisory guideline range based on other factors is left to the discretion of the district court."); *Arevalo-Juarez*, 464 F.3d at 1251 (Wilson, J concurring) ("Here we make no determination as to the reasonableness of [the defendant's] sentence, rather we find that the trial court based the sentence on an improper consideration by downward departing solely on the basis of the Fast-Track disparity.").

equally inapplicable because, as the majority of appeals courts indicate, any disparity created by the mechanics of the Fast Track program are not unwarranted. Congress's general aim of equality in sentencing necessarily was qualified by their unambiguous directive in passing the PROTECT Act.[270] Allowing judges to discretionarily resolve Fast Track sentencing disparities under a cloak of equality would have an arguably worse consequence—adding more irregularity to an already inconsistent system by making it judge-specific as opposed to jurisdictional. In our system of justice, some sentencing disparities are the result of legislative choice and can only be fixed by way of legislation. In this case, the disparity in sentencing created by the Fast Track program can only be effectively repaired by the creator of such program—Congress. Until such time, judges should continue to fend off the temptation to correct a "problem" which they are not empowered to address.

[270] The legislation authorizing early disposition program is found in Section 401 of the PROTECT Act. Pub. L. No. 108-21, §401(m)(2)(A)-(B), 117 Stat. 650 (2003) (codified as amended at 28 U.S.C.A § 994 note (West 2006)).