

# FEDERAL SENTENCING GUIDELINES AND THE POLICY PARADOX OF EARLY DISPOSITION PROGRAMS: A Primer on “Fast-Track” Sentences

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## I. WHY A PRIMER ON FAST-TRACK?

There has been a sharp rise in federal criminal prosecutions of immigration offenses.<sup>1</sup> This is a result of both increased vigilance on the border and the sheer number of illegal aliens seeking to enter the United States. The waves of illegal aliens, drawn by economic need, have become a flood.<sup>2</sup> While only a small percentage of the aliens that illegally enter the United States are prosecuted by law enforcement, that stream of aliens still numbers in the tens of thousands. The criminal justice system has struggled to deal with these numbers.

Most persons who illegally enter the country either avoid prosecution or receive minimal punishment. To increase the number of prosecutions, and to deal with lack of resources, some federal districts in the Southwest have introduced “fast-track” or early disposition programs. Under these programs, federal prosecutors offer defendants who are charged with the crime of illegal reentry after deportation (in violation of 8 U.S.C. § 1326, among other crimes) extremely favorable sentences, outside of the federal

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1. To illustrate, in fiscal year 1997, there were approximately 6690 immigration cases sentenced in federal court, representing 13.7% of all federal criminal cases that year. U.S. SENTENCING COMM’N, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 12, tbl.3 (1998). In fiscal year 2003, the most recent year for which statistics are available, there were 15,081 immigration cases sentenced in federal court, representing 21.6% of all federal criminal cases that year. U.S. SENTENCING COMM’N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl.1 (2004).

2. John B. Judis, *Border War*, THE NEW REPUBLIC, Jan. 16, 2006, at 15 (estimating that about 2 million people come into the United States each year illegally from Mexico).

sentencing guideline parameters, for willingness to almost immediately accept a guilty plea.<sup>3</sup>

Courts have endorsed the so-called “fast-track” approach amidst various legal challenges. Under the federal sentencing guideline system, Congress and the courts have made an uneasy accommodation to these programs. Defendants charged with immigration crimes in certain districts benefit by either charge-bargains (pleading to a less serious offense), or by receiving sentencing reductions as a result of downward departures for a “totality of circumstances” or based on an enumerated departure basis in the guidelines. This practice has had the effect of significantly increasing the rates of departure under the guidelines, though these departures are sanctioned by the government.

In 2003, Congress, under the roundly-criticized PROTECT Act, legislatively approved “early disposition” or fast-track programs.<sup>4</sup> The United States Sentencing Commission was instructed to create a policy statement authorizing downward departures “pursuant to an early disposition program authorized by the Attorney General . . . and the United States Attorney.”<sup>5</sup> As a result of the PROTECT Act, the Attorney General must approve any early disposition program for a specific district. Once the Attorney General has done so, the Guidelines accommodate such a departure separate from their calibrated sentencing scheme or their approved other departure basis. The primary purpose of this fast-track or early disposition system is to allow for the prosecution of more cases. Such programs, however, undermine the stated policies of the United States Sentencing Guidelines, which are to avoid unwarranted disparity between equally situated offenders, to create a transparent sentencing system, to

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3. For a historical overview of the “fast-track” programs, and a discussion of constitutional concerns, see generally Alan D. Bersin, *El Tercer País: Reinventing the U.S./Mexico Border*, 48 STAN. L. REV. 1413 (1996) [hereinafter *El Tercer País*] (Mr. Bersin was the U.S. Attorney for the Southern District of California who instituted the fast-track practice.); Alan D. Bersin, *Reinventing Immigration Law Enforcement in The Southern District of California*, 8 FED. SENT’G. REP. 254 (1996) [hereinafter *Reinventing*]; Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Border: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285 (1998); Erin T. Middleton, Comment, *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).

4. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, § 401(m)(2)(B), 28 U.S.C.A. § 994 (West 2005); U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 cmt. background (2005).

5. U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 cmt. background (2005); see also *United States v. Medrano-Duran*, 386 F. Supp. 2d 943, 945 (N.D. Ill. 2005) (discussing creation of fast-track departure in the federal sentencing guidelines).

promote a sense of appropriate sentences and fairness.<sup>6</sup> Fast-track programs reflect the reality of conflicting goals.

The purpose of this Article is to provide a primer on fast-track or early disposition programs in the context of prosecutions of illegal reentry after deportation. The government offers fast-track or early disposition programs in other types of cases, such as alien smuggling cases and minor drug offenses along the border, but prosecutions of illegal reentry make up the majority of fast-track cases.<sup>7</sup> This article seeks to explain these programs, their scope, and their practice. In so doing, the paradoxes of the programs in regard to how they operate with the Federal Sentencing Guidelines are identified and explored. The sentencing guidelines' goals of treating similarly situated defendants alike conflicts with the disparate favorable treatment given to fast-track offenders. How courts have addressed this paradox in light of *United States v. Booker*<sup>8</sup> is examined. The primer ends with a call to the Sentencing Commission to amend the immigration guidelines in light of the growing disparity and manifest unfairness caused by such fast-track programs.

## II. WHY IS THERE A NEED FOR FAST-TRACK?

### A. *The Increase in Immigration Cases*

Nationally, approximately 70,000 federal criminal cases are prosecuted annually that result in convictions and sentences.<sup>9</sup> This includes the whole spectrum of federal cases, ranging from illegal drugs, firearms, fraud, terrorism, environmental crimes, crimes arising from special jurisdiction, such as Indian reservations, and of course immigration.<sup>10</sup> Immigration cases comprise approximately 22% of this total,<sup>11</sup> and these numbers have increased over the years.<sup>12</sup> Prior to the mid-1990s, immigration prosecutions

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6. 18 U.S.C.A. § 3553 (West 2006). See generally Robert Wesiberg & Marc L. Miller, *Sentencing Lessons, A More Perfect System: Twenty Five Years of Guideline Sentencing Reform*, 58 STAN. L. REV. 1 (2005) (reviewing guidelines of sentencing reform).

7. See Government's Supplemental Response in Opposition to Defendant's Motion for a Non-Guideline Sentence Based on Fast-Track Programs, ex. 2, *United States v. Medrano-Duran*, 386 F. Supp. 2d 943 (N.D. Ill. 2005) (No. 04-CR-00884).

8. 543 U.S. 220 (2005).

9. See U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL STATISTICS, tbl.2 (2004) (indicating that 70,258 cases resulted in sentences in 2003).

10. *Id.* at tbl.1.

11. *Id.*

12. *Id.*

were not as high a percentage of federal criminal practice as they are today. Hundreds of thousands of arrests on immigration charges are made every year, with a very high number of those arrests taking place along the 2000-mile border between Mexico and the United States.<sup>13</sup> Immigration prosecutions now comprise the bulk of criminal cases in many federal districts on the border. In fiscal year 2003, they comprised more than 50% of the criminal case loads in the Southern District of California, the District of Arizona, the District of New Mexico, and the Southern District of Texas.<sup>14</sup> Given this crush of cases, prior to the development of fast-track programs, most persons arrested on the border for immigration charges were either civilly deported or allowed to plead to misdemeanors, with a minimal sentence of thirty or sixty days imprisonment.<sup>15</sup>

### *B. The Federal Sentencing Guidelines as Applied to Illegal Reentry Cases*

Under the federal sentencing guidelines, a defendant found guilty by either a plea or after a guilty verdict at trial is sentenced based on two major criteria: (1) the offense level, which reflects the seriousness of the offense; and (2) the defendant's criminal history category, which reflects the number and nature of defendant's prior convictions. Each crime is assigned a "base offense level" and then points are added or subtracted based on the specific offense characteristics. Once the court determines the offense level and criminal history category, the court consults the sentencing table in the sentencing guidelines manual, which sets forth a range of imprisonment in months. As discussed below, prior to *Booker*, the guidelines were "mandatory."<sup>16</sup> Except for extraordinary reasons, the sentencing court had to sentence within the guideline range. Even under this mandatory scheme, however, the courts were permitted to sentence below the guideline range pursuant to a procedure called "downward departure." The guidelines manual set forth specific bases for downward and upward departures, including a catch-all departure based on the totality of the circumstances.<sup>17</sup> Today, following the *Booker* opinion, the guidelines are advisory only; but, nevertheless, the courts continue to follow the guidelines, and the guidelines still drive the fast-track plea offers.

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13. See Judis, *supra* note 2, at 15–16.

14. U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT & CIRCUIT (2003), available at <http://www.ussc.gov/JUDPACK/JP2003.htm>.

15. See *Reinventing*, *supra* note 3, at 254.

16. See *infra* Part VII.

17. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(2)(B) (2005).

A defendant who is charged with illegal reentry after deportation, in violation of 8 U.S.C. § 1326, does not have many options. The charge is very close to strict liability: the government has to prove that (1) the defendant is an alien; (2) the defendant has previously been deported from the United States; and (3) the defendant reentered or attempted to reenter the United States without consent—previously of the Attorney General—or, presently, of the Secretary of the Department of Homeland Security or any representative of that department. An alien is a person who is not a natural-born or naturalized citizen of the United States.<sup>18</sup> The defenses are very limited, and the chance of acquittal virtually nil. For defendants with prior aggravated felony convictions,<sup>19</sup> the potential term of imprisonment may be as high as ten years, with a typical sentence for a defendant with a serious prior conviction (with no reduction for pleading guilty) being in the five-year range.<sup>20</sup> In light of this, most defendants plead guilty.

Under the current version of the sentencing guidelines, the base offense level for the crime of unlawfully entering or remaining in the United States is level eight.<sup>21</sup> Points are added if the defendant was convicted of certain crimes prior to being deported or removed from the United States. When this guideline was originally drafted, there were no increases to the offense level based on prior convictions. There was merely a suggestion that a defendant with prior criminal convictions should receive a sentence “at or near the maximum of the applicable guideline range.”<sup>22</sup> As with so many other provisions of the guidelines, guideline levels were gradually ratcheted up. At first there was merely a four-level increase for having a prior felony conviction.<sup>23</sup> The Commission then added a sixteen-level increase for a defendant with any prior aggravated felony conviction.<sup>24</sup> These increases

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18. See, e.g., NINTH CIRCUIT JURY INSTRUCTIONS COMMITTEE, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, Instr. 9.5 & 9.5A, at 359–61 (2003).

19. 8 U.S.C. § 1101(a)(43) (2000) (defining what is an “aggravated felony” for purposes of federal immigration law). An alien with a conviction for an aggravated felony is “conclusively presumed to be deportable from the United States” and is not eligible for any relief from removal from the United States. See § 1228(c) (2000); see also §§ 1227(a)(2)(A)(iii), 1228(b)(5) (2000).

20. A defendant at the highest possible offense level, level 24, and the highest possible criminal history category, category VI, would be facing a recommended guideline range of 100 to 125 months. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, ch. 5, pt. A (2005). A defendant at offense level 24 and criminal history category III would be facing a sentence of 63 to 78 months. *Id.* The statutory maximum for the crime of illegal reentry after deportation with an enhancement for having a prior aggravated felony conviction is twenty years of imprisonment. 8 U.S.C. §§ 1326(a), (b)(2) (2006).

21. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(a) (2005).

22. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt. n.2 (1988).

23. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (b)(1) (1989).

24. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (b)(2) (1991).

corresponded with Congress's enactment of statutes relating to immigration offenses. The Anti-Drug Abuse Act of 1988 created a new category of deportable criminal offenses called "aggravated felonies."<sup>25</sup> The sentencing guidelines effectively result in a double-counting of the defendant's criminal history, because the prior convictions increase both the offense level and the criminal history category.<sup>26</sup>

Initially, the term "aggravated felony," in the immigration statute, referred to truly serious felonies, namely murder, major drug trafficking, and firearms trafficking.<sup>27</sup> However, over time, the term "aggravated felony" has been expanded to include a myriad of felonies, some serious and some not, including crimes of violence, theft offenses, burglary, some fraud offenses, alien smuggling, forgery, counterfeiting, and the list goes on.<sup>28</sup> One of the effects of having a prior aggravated felony is that it triggers the twenty-year statutory maximum for the crime of illegal reentry after deportation.

To ameliorate the draconian effect of the one-size-fits-all sixteen-level offense increase for having an aggravated felony, the Sentencing Commission revised the illegal reentry sentencing guideline to provide a tiered system. Defendants who commit the crime of illegal reentry who have a prior conviction for any of the following crimes still receive the sixteen-level increase: a drug trafficking offense for which the sentence imposed exceeded thirteen months; a crime of violence; a firearms offense; a child pornography offense; a national security or terrorism offense; a human trafficking offense; or an alien smuggling offense committed for profit. These are referred to herein as level twenty-four offenses, because the total offense level with a base offense level of eight and enhancement of sixteen equals twenty-four. A defendant with a prior conviction for drug trafficking for which the sentence imposed was thirteen months or less receives a twelve-level increase.<sup>29</sup> These are referred to herein as level twenty offenses. Any other prior aggravated felony conviction results in an eight-level increase.<sup>30</sup> These are referred to herein as level sixteen offenses.

Any defendant who pleads guilty to a crime may receive up to a three-level reduction for acceptance of responsibility, with the government's

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25. See NORTON TOOBY, *AGGRAVATED FELONIES*, 4–8 (2d ed. 2003); see also 8 U.S.C. § 1101(a)(43) (2000).

26. See, e.g., *United States v. Santos*, 406 F. Supp 2d. 320, 328–29 (S.D.N.Y. 2005) (finding that sentence below the guidelines justified based on inter-district disparity of fast-track programs and double-counting of criminal history).

27. See TOOBY, *supra* note 25, at 5.

28. See 8 U.S.C. § 1101(a)(43) (2000).

29. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(B).

30. § 2L1.2(b)(1)(C).

recommendation.<sup>31</sup> The fast-track programs may result in up to an additional four-level decrease in the offense level.<sup>32</sup>

### C. *The Southwest Border Reaction: Fast-Track*

In reaction to this deluge of immigration cases, U.S. Attorneys in the southwest have developed what is known as “fast-track” or, bureaucratically, “early disposition programs.” The earliest such program for disposing of illegal reentry charges was developed in the Southern District of California (San Diego).<sup>33</sup> The San Diego program resulted in an increase in prosecutions. Other districts along the southwest border soon adopted fast-track programs, which are described below. Such programs have withstood legal challenges as to equal protection and due process.<sup>34</sup> Different districts operate with different plea policies, and there is no set “fast-track” offer. In some districts with a high rate of immigration cases, such as the District of Nevada, the District of Utah, the New York districts, the Florida districts, and certain divisions in the Southern District of Texas, there are still no fast-track plea offers. In these districts and divisions, if the defendant pleads guilty to illegal reentry after deportation, then the only reduction is the standard three-level reduction for acceptance of responsibility. Other districts have capped the sentence at thirty or forty-eight months, with a “charge-bargaining” variation, in which the defendant pleads to two or three counts of illegal entry, in violation of 8 U.S.C. § 1325. The prevalent fast-track deal is a plea to the § 1326 charge, with a flat reduction of one to three levels for entering into a fast-track plea, or a scaled reduction from the guideline sentence based on the seriousness of the prior conviction.

### D. *Examples of Unwarranted Disparity*

There are stark differences between those districts that offer fast-track and those that do not. Those that do offer the programs may border those

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31. § 3E1.1 (2005) (defendants may receive a three-level reduction when the total offense level is sixteen levels or higher; however, the government must make the motion for the third point).

32. 5K3.1 (early disposition programs).

33. *United States v. Estrada-Plata*, 57 F.3d 757, 759 (9th Cir. 1995); *see* sources cited *supra* note 3.

34. *See, e.g., United States v. Ruiz*, 536 U.S. 622, 631 (2002) (finding fast-track plea agreement requiring defendant to waive right to receive government’s information relating to affirmative defense does not violate due process); *Estrada-Plata*, 57 F.3d at 761 (finding no merit in defendant’s equal protection argument).

that do not, and judicial divisions within the same district may offer widely different plea deals. As the fast-track programs were becoming accepted, districts were making their own decision whether to employ them. California presented a microcosm of the different approaches for the plea policies. The Southern District of California developed the first fast-track program based on a charge-bargaining system. Initially, the other California district with a large number of illegal reentry cases, the Central District of California (Los Angeles), had no fast-track program. Over time, the Central District, the Northern District (San Francisco), and the Eastern District of California have all developed fast-track programs, but they are not the same.

Against this backdrop, an illustrative example shows the patchwork quality of the plea policies. Assume three illegal aliens came across the Mexican border: Diego, Angelo, and Francisco. All of them have the same criminal history category of V and all have a prior aggravated felony conviction for a crime of violence. They go to the bus station in San Diego. Diego is immediately picked up by the Border Patrol. His recommended sentencing range if he goes to trial and is found guilty (with no reduction for acceptance of responsibility) would be ninety-two to one hundred and fifteen months, based on an offense level of twenty-four and criminal history category of V, and if he pleads guilty and receives a three-level reduction for acceptance of responsibility, then his sentencing range would be seventy to eighty-seven months. However, Diego is lucky. He is prosecuted in a district with a fast-track program, and so he is offered a “fast-track” deal involving charge-bargaining, for which he receives a thirty-month sentence. His two friends, Angelo and Francisco, continue north. Angelo gets off the bus in Los Angeles, where he is arrested. Angelo is not so fortunate. There is no “fast-track” deal offered.<sup>35</sup> He pleads guilty, receives the standard three-level reduction for acceptance of responsibility, and is given a sentence of between seventy and eighty-seven months. Only Francisco remains, and he continues up the coast and gets off in San Francisco, where he too is arrested. He is in another fast-track district; however, in this district the fast-track deal is for a four-level reduction from the offense level in addition to the three-level reduction for acceptance of responsibility, which results in an adjusted offense level of seventeen, and thus a possible sentencing range of forty-six to fifty-seven months.<sup>36</sup>

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35. The Central District of California, where Los Angeles is located, now has a fast-track deal, similar to the fast-track deal offered in the Southern District of California.

36. The fast-track deal offered in the Northern District of California is actually more similar to the deal offered in the Central District and the Southern District of California.

The resulting sentencing ranges look like this:

| <u>Name</u> | <u>Location/District</u> | <u>Plea Offer</u> |
|-------------|--------------------------|-------------------|
| Diego       | San Diego                | 30 months         |
| Angelo      | Los Angeles              | 70 to 87 months   |
| Francisco   | San Francisco            | 46 to 57 months   |

Such distinctions also occur, albeit with even less generous deals, in other parts of the country. For example, three defendants going to work in the meat-packing plants of Nebraska cross Western Texas. One of them, Antonio, is picked up and is given a deal of a one-level reduction for “fast-track” and a three-level reduction for acceptance. His sentencing range with the benefit of the fast-track plea agreement is sixty-three to seventy-eight months. His friend Oscar is picked up in Oklahoma, where there is no fast-track program, and his sentencing range after pleading guilty, with only the standard three-level reduction for acceptance of responsibility, is ninety-two to one hundred and fifteen months. The third alien makes it to Nebraska, where he is arrested. He receives the benefit of a fast-track program, which results in a total five-level reduction (two levels off for fast-track and three levels for acceptance of responsibility), and thus his potential sentencing range is fifty-seven to seventy-one months.<sup>37</sup>

### III. WHAT DOES CONGRESS THINK OF THIS?

In 2003, Congress enacted the PROTECT Act.<sup>38</sup> The PROTECT Act was a significant change from the Sentencing Reform Act of 1984.<sup>39</sup> Signed into law on April 30, 2003, the PROTECT Act was passed by Congress with little debate, and against strenuous objections by the judiciary and the defense bar.<sup>40</sup> The purpose of the PROTECT Act was supposedly to “reign in” federal judges, and to limit the courts’ abilities to depart from

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37. In the last examples, the defendants illegally reenter the United States from Canada and head to Seattle, Washington, Missoula, Montana and Bismark, North Dakota. All three are arrested. Defendants appearing in court in Seattle, Western District of Washington, and in Bismark, District of North Dakota, get fast-track deals. The unfortunate defendant appearing in Missoula, District of Montana, does not. This is even not as disparate as the Southern District of Texas, where only the Brownsville and McAllen Divisions offer fast-track.

38. PROTECT Act Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28, and 42 U.S.C.).

39. See Middleton, *supra* note 3, at 838–41.

40. Pub. L. No. 98-473, 98 Stat. 1987 (1984). See Middleton, *supra* note 3, at 840 (noting that the National Association of Criminal Defense Lawyers were concerned that the Act eliminated or significantly curtailed the ability of judges to downward depart and that Chief Justice Rehnquist criticized the Act as being “an unwarranted and ill-considered effort to intimidate individual judges”) (citations omitted).

sentencing guidelines. The PROTECT Act prohibited departures in certain types of cases, chilled departures in all types of cases, and subjected certain departures to de novo review.<sup>41</sup>

One stated purpose of the PROTECT Act was to reduce the number of downward departures, which had been steadily increasing since the advent of the sentencing guidelines.<sup>42</sup> Ignored by Congress was the fact that an increase in these downward departures came with the approval of the government, and in the case of “fast-track,” was a result of government-initiated programs.<sup>43</sup> The U.S. Sentencing Commission, which, among other things, gathers federal sentencing data, often coded, for statistical and analytical purposes, such downward departures as being based on the “totality of circumstances,” pursuant to U.S.S.G. § 5K2.0,<sup>44</sup> even though fast-track was the direct result of the government asking the court for such accommodation.

The Department of Justice, in supporting the PROTECT Act, endorsed specific approval of such programs.<sup>45</sup> In the legislative history, the House of Representatives made clear that it had determined that certain programs, such as illegal reentry fast-track programs, did not create “unwarranted” sentencing disparities and furthered the purpose of the guidelines:

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. Such programs are based on the premise that a defendant who promptly agrees to participate in such a program has saved the government significant and scarce resources that can be used in prosecuting other defendants and has demonstrated an acceptance of responsibility above and beyond what is already taken into account. . . . This section preserves the authority to grant limited departures pursuant to such programs. In order to avoid unwarranted sentencing disparities within a given district, any departure under this section

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41. Middleton, *supra* note 3, at 839.

42. See U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (2003), available at <http://www.ussc.gov/depart03/depart03.pdf> [hereinafter “DEPARTURE REPORT”].

43. *Id.* at iv–v (estimating that government initiated programs accounted for approximately 40% of the downward departures that were not for substantial assistance or cooperation).

44. *Id.* at 26–27.

45. See Memorandum from Attorney General John Ashcroft to Federal Prosecutors (Sept. 22, 2003) (regarding department principles for implementing an expedited disposition or “fast-track” prosecution program in a district), reprinted in 16 FED. SENT’G. REP. 134 (Dec. 2003) [hereinafter “Ashcroft Memo”]; see also *United States v. Martinez-Flores*, 428 F.3d 22, 25–26 (1st Cir. 2005).

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.<sup>46</sup>

Therefore, in approving these fast-track programs, Congress stated that “unwarranted sentencing disparities” were created because such programs saved the government significant and scarce resources.<sup>47</sup> Essentially Congress carved out a guideline exception for defendants who were fortunate enough to be arrested in such districts. Congress instructed the U.S. Sentencing Commission to draft a departure guideline relating to early disposition programs.<sup>48</sup> For a district to establish an early disposition program, it must have that authority specifically conferred by the Attorney General.<sup>49</sup> The local United States Attorney must submit a proposal to the Attorney General demonstrating that (1) the district has an exceptionally large number of a specific class of offenses and failure to handle such cases by “fast-track” would “significantly strain prosecutorial and judicial resources available in the district” or that there is some other “exceptional” circumstance with respect to a specific class of cases in that jurisdiction; (2) state prosecution is not available or warranted; (3) “the specific class of cases consists of ones that are highly repetitive and present substantially similar fact scenarios”; and (4) the cases do not involve crimes of violence.<sup>50</sup>

Congress seemingly embraced disparity when districts got busy. In so doing, Congress ran counter to the goals of the sentencing guidelines, which state that the courts should impose the same sentences for similarly situated defendants.<sup>51</sup> It makes no sense to allow disparity simply because a defendant is caught in one district and not another. The fast-track system exposes the fact that the guidelines that relate to the crime of illegal reentry are themselves too high. Looking back to our examples above, it is hard to justify why an illegal alien who has done nothing more than take a bus up to

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46. 149 CONG. REC. H2405, H242 (2003).

47. *Id.*

48. See DEPARTURE REPORT, *supra* note 42, at 14–15; see also U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2005) (implementing the directive to the Commission in the PROTECT Act to draft a policy statement relating to early disposition programs).

49. Ashcroft Memo, *supra* note 45.

50. *Id.*

51. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 cmt. ed. note (noting that the objectives of Congress in creating the federal sentencing guidelines were *honesty* in sentencing where the defendant serves the sentence imposed without substantial reductions pursuant to parole or other means, *uniformity* “by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders,” and *proportionality* where the “system . . . imposes appropriat[e] . . . sentences for criminal conduct of different severity”).

Los Angeles to work should be facing approximately six to seven years in prison—if he pleads guilty! A defendant who goes to trial may get a sentence of close to ten years imprisonment. Granted, some of these defendants may have serious criminal histories, but this does not justify such long periods of imprisonment. Underlying the fast-track programs is the unspoken belief that lower sentences, such as sentences of thirty months or two-and-a-half years, are sufficient punishment for the crime. The discussion of the need to conserve resources and prosecute a large number of defendants would not occur if the guideline sentences were in fact lower.

#### IV. WHAT IS THE STATE OF “FAST-TRACK”?

Obtaining information on fast-track programs is not simple. The government seemingly does want to share information with the public regarding what fast-track programs it offers. For example, in a case out of the Southern District of New York where a defendant was arguing for a lower sentence based on the fact that he was not afforded the benefit of a fast-track plea in an illegal reentry case, the prosecutor had to move for three continuances to obtain data from the Department of Justice regarding fast-track programs.<sup>52</sup> Judge Kaplan wrote in response to this third request that: “In view of the Department’s stated goal of achieving uniform sentencing of like offenders, it is surprising that this information—which has such an impact on the stated goal—is not readily at hand.”<sup>53</sup> Indeed, the Department of Justice has been reluctant to provide such data to the United States Sentencing Commission. Nevertheless, such data on the state of fast-track programs has become available in response to the litigation regarding the disparity in the availability of such programs.

Based on data available at this time, the following districts have fast-track or early disposition programs available for illegal reentry after deportation cases: District of Arizona; all districts of California; District of Idaho; District of Nebraska; District of New Mexico; District of North Dakota; District of Oregon; some divisions in the Southern District of

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52. Letter from Reed Michael Brodsky, Assistant U.S. Attorney, to Lewis A. Kaplan, U.S. District Judge, S. Dist. of N.Y., (May 24, 2005) (regarding *United States v. Krukowski*, 04-CR-1308 (LAK) S.D.N.Y.) (endorsed letter requesting extension of time to respond to judge’s request for information from the Department of Justice). The district court in this case denied the defendant’s request for a sentence below the guideline range based on unwarranted disparity of fast-track programs.

53. *Id.*

Texas; some divisions in the Western District of Texas; and the Western District of Washington.<sup>54</sup>

One type of fast-track program is the charge bargain. For example, in the Southern District of California, defendants charged with illegal reentry after deportation who have a prior aggravated felony conviction but less serious criminal histories, are offered a thirty-month deal where they plead guilty to two counts of illegal entry, in violation of 8 U.S.C. § 1325.<sup>55</sup> For the first count, they receive a sentence of six months, and on the second count, they receive a sentence of twenty-four months, with the sentences ordered to run consecutively for a total of thirty months of imprisonment. For defendants with more serious criminal histories, which are generally level twenty-four offenders, a forty-eight month deal is offered where the defendant pleads to three counts of § 1325, and the stipulation is that defendant will be sentenced to six months on the first count of § 1325, and the maximum of twenty-four months on the second and third counts to run consecutively, with the six-month sentence to run concurrently. In this district, like many others, defendants with particularly serious prior violent convictions may not be offered any fast-track plea at all, although the vast majority are fast-track eligible.

The Central District of California also employs the charge-bargaining system, with the same thirty-month deal as described for the Southern District of California.<sup>56</sup> Some defendants with minimal criminal histories are offered a “super fast-track” deal where they plead to only one count of § 1325 and receive a sentence of six months.<sup>57</sup> The Central District, unlike the Southern District, does not appear to have the “forty-eight-month” deal for illegal reentries with serious criminal histories.<sup>58</sup> It appears that the Central District of California simply declines to offer any fast-track for certain defendants. The Northern District of California and the Western District of

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54. Memorandum from James B. Comey, Deputy Attorney General, to United States Attorneys (Oct. 29, 2004) (on file with author) [hereinafter Comey Memo]; *see also* United States v. Perez-Chavez, No. 2:05-CR-00003-PGC, 2005 U.S. Dist. LEXIS 9252 at \*44 (appendix A) (D. Utah May 16, 2005); Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 145–48 (2005) (discussing unjustified sentencing variations based on fast-track programs and noting that some southwest border districts employ fast-track programs and process large numbers of cases whereas other districts, such as the Southern District of Florida, which also processes a large number of immigration and drug-trafficking cases, does not offer fast-track programs). This data also is based on the authors’ direct conversations with federal defenders in the relevant districts.

55. *Perez-Chavez*, 2005 U.S. Dist. LEXIS 9252, at \*44 (appendix A).

56. *Id.*

57. *Id.*

58. *Id.*

Washington also have the charge-bargaining system and the thirty-month deal.<sup>59</sup>

One notable fact about these charge-bargains is that they do not show up, for statistical purposes, as downward departures or even as early disposition programs, because rather than receiving a reduction from the guideline system, the defendant is pleading to a lesser charge and receiving the maximum sentence for that lesser charge.

The other districts who have fast-track in illegal reentry cases employ departures pursuant to U.S.S.G. § 5K3.1. In the Phoenix and Yuma divisions of the District of Arizona, the level twenty-four offenders receive a four-level reduction for fast-track; level twenty offenders receive a three-level reduction; and level sixteen offenders receive a one-level reduction.<sup>60</sup> These reductions are in addition to the standard adjustment for acceptance of responsibility. In the Tucson Division of the District of Arizona, all defendants charged with illegal reentry who have an aggravated felony receive a three-level reduction for fast-track in addition to acceptance of responsibility.<sup>61</sup> In the District of Nebraska and the District of New Mexico, illegal reentry defendants receive only a two-level reduction pursuant to U.S.S.G. § 5K3.1 for fast-track.<sup>62</sup> Only the Brownsville and McAllen Divisions of the Southern District of Texas have fast-track for illegal reentry, and in those divisions the defendants receive a two-level reduction pursuant to U.S.S.G. § 5K3.1.<sup>63</sup> In the Western District of Texas, only the Del Rio Division has a fast-track for illegal reentry, and it is only a one-level reduction pursuant to U.S.S.G. § 5K3.1.<sup>64</sup> In the District of Idaho, a defendant charged with illegal reentry may receive a two-level reduction for fast-track pursuant to § 5K3.1, provided certain other criteria are met regarding criminal history and number of prior deportations. Lastly, the District of North Dakota offers a fast-track plea providing a four-level reduction pursuant to § 5K3.1.

In most of these districts, it is necessary for the defendant to waive indictment and plead to an information; to waive the preliminary hearing and detention hearing; to agree to not file any motions for additional downward departures; to waive the right to appeal; and to enter into the plea on an expedited basis to take advantage of the offer. Defendants who are on

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59. See *Comey Memo*, *supra* note 54, at 2.

60. *Perez-Chavez*, 2005 U.S. Dist. LEXIS 9252, at \*44.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

supervised release at the time they reenter the United States are generally offered less favorable deals.

It is difficult to understand why some districts have fast-track programs while others do not. The Southern and Western Districts of Texas, the District of Arizona, the Southern, Central and Eastern Districts of California, the District of New Mexico, the Southern District of Florida, the District of Nevada, and the District of Utah—in roughly that order—handle 75% of all immigration cases that result in convictions in the United States.<sup>65</sup> Not all of these districts have fast-track. Judge Cassell noted in *Perez-Chavez* that the U.S. Attorney for the District of Utah asked the Attorney General to allow a fast-track program for illegal reentry cases in Utah, but the request was denied.<sup>66</sup> The reasons for the application and for the denial are not public record.<sup>67</sup> Utah handles a significant number of immigration cases as does Nevada and certain districts in Florida and New York, but none of those districts have fast-track.<sup>68</sup> The Districts of North Dakota and Nebraska, on the other hand, handle a very small number of immigration cases and have fast-track.<sup>69</sup>

#### V. HOW DOES THE FAST-TRACK WORK PRACTICALLY?

The fast-track is premised on speed. To give a sense of how the system works, the following is the procedure in the Phoenix Division of the District of Arizona.

Aliens are arrested by the agents of the Bureau of Immigration and Customs Enforcement (“ICE”) of the Department of Homeland Security at the border attempting entry, at a port of entry, or sometimes they are “found” in the United States while in custody on some unrelated matter or in the course of a traffic stop. The defendant of course is interrogated and the vast majority confess that they are aliens, that they have been previously deported, and that they have returned to the United States without permission. ICE can quickly access immigration status and criminal records. A complaint is then prepared and the defendant is taken to court. Aliens who have no criminal history are usually not prosecuted and are

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65. See U.S. SENTENCING COMM’N 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, app. B (2002), available at <http://www.ussc.gov/ANNRPT/2002/SBTOC02.htm> [hereinafter 2002 SOURCEBOOK].

66. 2005 U.S. Dist. LEXIS 9252, at \*8–9.

67. *Id.*

68. See *id.* at \*44; Comey Memo, *supra* note 54, at 2; 2002 SOURCEBOOK, *supra* note 65, at app. B.

69. See sources cited *supra* note 68.

simply returned to their country of origin. However, aliens who are found to be in the country illegally and to have serious prior criminal convictions are prosecuted.

After the initial appearance and appointment of counsel, the defendant is advised of the right to both a preliminary hearing (assuming no indictment has been handed down) and a detention hearing.<sup>70</sup> At this juncture, the prosecutor will inform defense counsel that this is a fast-track case. The prosecutor does not have to make a fast-track offer. In some districts, the prosecutor might not offer a fast-track deal if the defendant has a particularly serious prior violent felony conviction, such as a murder or child molest conviction. In the District of Arizona, the prosecutors rarely fail to offer the fast-track deal. The prosecutor immediately provides defense counsel with a packet of discovery containing records of the previous deportation proceedings, prior convictions, and any statements made by the defendant. Time becomes of the essence because the deal is only held open until the deadline for holding the preliminary and detention hearings, and to take advantage of the deal, the defendant must waive these hearings.

Over the next several days, defense counsel meets with her client. She must establish a relationship with the defendant, get background information, review the charges, explain his trial rights, the penalties (including the guidelines and possible sentencing outcomes), and the “fast-track” deal. In this span of a few short days, counsel must establish trust between herself and the defendant, assess whether there is a defense, and the likelihood of success. Given that the vast majority of counsel are appointed, there could well be distrust and skepticism over the efforts of counsel. Moreover, the defendant, if he has limited criminal history, or has not faced a previous federal charge, is usually skeptical over the extent of the penalties he faces. Frequently the defendant questions why the penalties are so high for simply returning to the United States, or why his past convictions, for which he has already “paid,” are being used again. It is defense counsel, and not the prosecutor, who presents the plea, and, with her imperfect assessment, makes the decision whether to recommend acceptance to the client. A federal defender commented before the Sentencing Commission that, “[f]or a defense attorney, it is very disturbing to get the feeling that you’re just processing people.”<sup>71</sup> However, the fact is

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70. See 18 U.S.C.A. § 3142(f) (2005) (right to detention hearing); 18 U.S.C. § 3161(b) (2000) (indictment must be filed within thirty days of arrest); FED. R. CRIM. P. 5.1(c) (defendant charged with felony offense has right to preliminary hearing within ten days of initial appearance if defendant in custody); FED. R. CRIM. P. 7 (right to indictment).

71. Middleton, *supra* note 3, at 834 n.61 (quoting Federal Public Defender for the Central

that the deal is a good one, and it is almost always in the defendant's best interests to take it.

After the defendant enters his guilty plea, the case proceeds in a fashion similar to any other case. In the District of Arizona, pre-sentence reports are prepared; however, in some districts with stipulated sentences, there may be no pre-sentence report prepared and sentencing may be expedited. After sentencing, the conviction is final and there will be no appeal. Because the defendant is serving time on an illegal reentry conviction, he will be treated differently in prison in that he will not be provided with certain programs or opportunities, nor be eligible for a halfway house at the end of his sentence like many other defendants. Instead, at the end of his sentence, he will be deported to his country of origin, and if he comes back to the United States illegally during his period of supervised release he will be prosecuted for violating his supervised release in addition to being prosecuted again for the crime of illegal reentry.<sup>72</sup>

#### VI. CAN THE FAST-TRACK BE CONSTITUTIONALLY CHALLENGED?

Fast-track has been challenged in the federal courts but with little success. The United States Supreme Court has recognized that decisions regarding what criminal charges to file against a defendant are within the discretion of the executive branch.<sup>73</sup> This arises from the separation of powers doctrine, in which the United States Constitution grants the President and the President's delegates the power to "take Care that the Laws be faithfully executed."<sup>74</sup> In *United States v. Armstrong*, the Court held that the Attorney General and the United States Attorneys have wide-ranging discretion to enforce federal criminal law.<sup>75</sup> "As a result, '[t]he presumption of regularity supports' the prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'"<sup>76</sup> The Supreme Court has also

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District of California, Maria Stratton, at Fast-Track Hearings before the U.S. Sentencing Commission).

72. See *United States v. Ramirez-Ramirez*, 365 F. Supp. 2d 728, 732–33 (E.D. Va. 2005) (noting in a case involving illegal reentry after deportation, that defendant would not be eligible for placement at a "camp" facility, that he would be ineligible for early release to a community corrections facility, i.e., a halfway house, that he would not be eligible for early release upon completion of the intensive drug treatment program, and that he would be removed from the United States after completion of his sentence).

73. See *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (finding no right to a plea bargain, as the decision to offer a plea bargain is a matter of constitutional discretion).

74. U.S. CONST. art. II, § 3.

75. 517 U.S. 456, 464 (1996).

76. *Id.* (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

upheld provisions in fast-track programs that require defendants to give up the right to disclosure of impeachment information, finding that the Fifth and Sixth Amendments do not require such disclosure.<sup>77</sup> In *United States v. Banuelos-Rodriguez*, the Ninth Circuit denied a defendant's motion for downward departure based on an equal protection argument even though the defendant, who was prosecuted in the Central District of California, which did not have a fast-track program at the time, was treated differently from a defendant prosecuted in the Southern District of California, which did have fast-track program.<sup>78</sup> Post-*Booker*, the First Circuit also rejected the equal protection argument.<sup>79</sup> Similarly the Second and Tenth Circuits have ruled that the sentencing guidelines "proscribed consideration of sentencing disparities that resulted from the exercise of prosecutorial discretion."<sup>80</sup> An argument that the PROTECT Act provision approving fast-track programs violates the non-delegation doctrine also has been rejected.<sup>81</sup>

Some commentators have advocated application of a strict scrutiny standard to geographically based equal-protection violations when they infringe upon fundamental rights.<sup>82</sup> At first blush, such a challenge appears problematic given the congressional decision to allow fast-track programs as a prosecutorial tool justified by and justifying a greater number of prosecutions. However, such programs appear completely arbitrary, and the implementation of fast-track programs at the discretion of the Attorney General does not "fit" with congressional intent. Admittedly such a challenge faces an uphill battle, as courts are loath to get involved in prosecutorial decisions, but fast-track programs are a policy implementation, which must have some rational basis that advances the Sentencing Reform Act goals.<sup>83</sup>

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77. *United States v. Ruiz*, 536 U.S. 622, 625 (2002).

78. 215 F.3d 969, 971, 978 (9th Cir. 2000) (en banc).

79. *See United States v. Melendez-Torres*, 420 F.3d 45, 52–53 (1st Cir. 2005) (finding that disparity from fast-track programs does not violate equal protection).

80. *United States v. Medrano-Duran*, 386 F. Supp. 2d 943, 945 (N.D. Ill. 2005) (discussing pre-*Booker* cases that held disparity resulting from early disposition programs did not warrant downward departures); *see also United States v. Bonnet-Grullon*, 212 F.3d 692, 697–710 (2d Cir. 2000); *United States v. Armenta-Castro*, 227 F.3d 1255, 1257–60 (10th Cir. 2000).

81. *United States v. Martinez-Flores*, 428 F.3d 22, 26–29 (1st Cir. 2005).

82. *See Gerald L. Neuman, Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 275 (1987) (discussing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)); Middleton, *supra* note 3, at 848–49.

83. Middleton argues that fast-track programs in limited geographic areas violate equal protection. Middleton, *supra* note 3, at 847. Fast-track programs grounded in prosecutorial discretion have survived constitutional challenges. *Id.* at 850. Middleton shifts the analysis away from prosecutorial discretion to liberty interests arising out of the federal sentencing law. *Id.* at

VII. DOES *BLAKELY/BOOKER* DERAIL THE FAST-TRACK?

In *United States v. Booker*, the United States Supreme Court held that the Federal Sentencing Guidelines were unconstitutional because their mandatory nature had judges, not juries, finding facts that enhanced sentences.<sup>84</sup> This power shift from jury to judges, a hallmark of the many guideline-determinate sentencing schemes that accompanied sentencing reform in the past quarter century, violated the Sixth Amendment.<sup>85</sup> In the *Booker* remedy, a different majority, led by Justice Breyer, held that the requirement that the jury, and not the judge, determine enhancing sentencing facts was apparently too contrary to congressional intent in the enactment of the federal sentencing guidelines.<sup>86</sup> The Court stated that Congress would prefer the judicial determination of facts in a discretionary system rather than a determinative system where the enhancing facts are found by a jury.<sup>87</sup> The Federal Sentencing Guidelines were therefore transformed from mandatory to advisory. Judges no longer find facts in a mandatory system, but rather judges make factual findings that are used in an advisory system.

“Fast-track” is not directly affected by the ramifications of *Booker*, because the sentence in a fast-track case is a stipulation between the government and the defendant.<sup>88</sup> The stipulation uses the guidelines, in an advisory context, as a benchmark, to determine what the agreed upon fast-track sentence will be, and the stipulation binds the parties.

“Fast-track” is affected, however, indirectly by *Booker*. The program can only function if the result of rejecting the fast-track is so severe that it is not in the defendant’s interests to force the government to trial. Thus, the advisory nature of the guidelines, with the high sentences for illegal reentries, must be effectuated in a way that still makes the fast-track a good deal. The courts and prosecutors therefore have an incentive in imposing high guideline sentences to keep the fast-track going.

The defenses in illegal reentry cases are few, and the enhancement factors, which are the prior convictions, are exempt from the *Booker* jury

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850–51. Middleton questions whether such sentencing disparity can survive a strict scrutiny analysis. *Id.* at 847–49.

84. 543 U.S. 220 (2005).

85. *Id.* at 245.

86. *Id.* at 246–47.

87. *Id.*

88. In the plea agreement, the parties may stipulate, pursuant to FED. R. CRIM. P. 11(c)(1)(C), to either a specific sentence or a specific range in the sentencing guidelines. Attached is a sample plea agreement from the District of Arizona, which contains such a stipulation. Such a stipulation is binding on the sentencing court once it accepts the plea agreement. *Id.*

determinations. *Booker* continues to carve out the exception for past convictions as enhancing facts. The Court, in *Almendarez-Torres*, held that prior convictions used to enhance sentences under 8 U.S.C. § 1326 were not elements of the offense, but instead sentencing factors of such a kind and nature that judges, and not juries, could make the determinations.<sup>89</sup> This exception for prior convictions has been recognized in the subsequent sentencing cases—*Apprendi*, *Blakely*, and *Booker*—and in sentencing recidivist decisions such as *Shepard*.<sup>90</sup> This is so despite the repeated calls by Justice Thomas for reversal of the holding in *Almendarez-Torres* in light of the Sixth Amendment sentencing jurisprudence that followed and the confessed error on his part.<sup>91</sup> The effect on illegal reentry cases is to limit the options at trial, because issues regarding the categorization or validity of the prior convictions are not allowed.<sup>92</sup> Presently, the only viable defenses to the crime of illegal reentry revolve around whether the defendant has some claim to U.S. citizenship, usually of a derivative nature, whether the prior deportation can be challenged as violating due process where the defendant can show prejudice as a result of the violation, or, whether the defendant can show he was always subject to official restraint because he was under surveillance the entire time that he crossed or attempted to cross the international border.<sup>93</sup>

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89. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

90. *See Shepard v. United States*, 544 U.S. 13 (2005); *Booker v. United States*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

91. *See Apprendi*, 530 U.S. at 520–21 (Thomas, J., concurring).

92. *See United States v. Pacheco-Zepeda*, 234 F.3d 411 (9th Cir. 2000) (holding that under *Almendarez-Torres*, the government is not required to include the defendant's prior aggravated felony conviction in the indictment nor is it required to prove the existence of the prior aggravated felony at trial because it is not an element of the offense); *see also* 9th Cir. Crim. Jury Instr. 9.6 cmt. Alien-reentry of deported alien after conviction for a felony or an aggravated felony (2003) (regarding instruction for violation of 8 U.S.C. § 1326(b)(1) and (2), explaining the effect of *Almendarez-Torres*, the jury need only find the elements of illegal reentry after deportation where the defendant has an aggravated felony; in addition, the judge may consider the felony at sentencing, but it is not an element of the offense that must be found by the jury beyond a reasonable doubt).

93. *See, e.g., United States v. Parga-Rosas*, 238 F.3d 1209, 1213 (9th Cir. 2001) (defining the elements of offense and examining the accused's defense that he is a United States national); *United States v. Gracidias-Ulibarry*, 231 F.3d 1188, 1191 n.3 (9th Cir. 2000) (en banc) (indicating that an alien has not entered until free from official restraint); *United States v. Alvarado-Delgado*, 98 F.3d 492, 493 (9th Cir. 1996) (en banc) (holding lawfulness of prior deportation not an issue for jury); *United States v. Galicia-Gonzalez*, 997 F.2d 602, 603–04 (9th Cir. 1993) (holding that a defendant must show prejudice even if error in prior deportation proceeding) (citing *United States v. Proa-Tovar*, 975 F.2d 592, 595 (9th Cir. 1992) (en banc)).

The impact of *Booker* comes in sentencing of non-fast-track cases. This will be discussed further below,<sup>94</sup> but the issue is whether the existence of fast-track can be considered at the sentencing of defendants who are in non-fast-track districts. Federal sentencing, post-*Booker*, now looks to the sentencing factors set forth in 18 U.S.C. § 3553(a) in imposing a sentence. These listed factors include the nature of the offense, the criminal history of the defendant, the need for deterrence, rehabilitation, the guidelines (by virtue of *Booker*), and of course unwarranted disparity.<sup>95</sup> The problem is whether such fast-track sentences, which account for close to 75% of the reentry cases,<sup>96</sup> have made the fast-track sentence the norm, and so can be considered in non-fast-track sentencings.

#### VIII. CAN FAST-TRACK PROVIDE A VARIANCE IN NON-FAST-TRACK CASES?

##### A. *Booker* Advisory Sentences: What is Reasonable?

As stated above, in *United States v. Booker*, the Federal Sentencing Guidelines are rendered “advisory.”<sup>97</sup> Courts are required to consult the guidelines but are not required to follow them.<sup>98</sup> The question that the courts are grappling with is whether the guidelines are but one factor of many in the constellation of 18 U.S.C. § 3553 concerns, or whether the guidelines, which take into account the § 3553 factors, should be given substantial weight, or considered presumptively correct, in setting a sentence. If a defendant accepts the “fast-track,” the stipulation will control sentencing. However, for those defendants who are not in a fast-track district, or who decline the fast-track deal, then the *Booker* sentencing analysis, and how it is calibrated, is critical.

*Booker* states that a sentencing court must consider the congressionally mandated purposes of punishment in determining a sentence. These are set out in 18 U.S.C. § 3553(a)(2), (6). Congress has stated that criminal sentences should consider four purposes:

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94. See *infra* Part VIII.A.

95. 18 U.S.C.A. § 3553(a)(1), (2), (4), (6) (2005); *Booker*, 543 U.S. at 267.

96. See *United States v. Perez-Chavez*, No. 2:05-OR-00003PGC, 2005 U.S. Dist. LEXIS 9252, at \*39 (D. Utah May 16, 2005) (stating that approximately 73% of illegal reentry cases are already subject to fast-track disposition).

97. *Booker*, 543 U.S. at 245.

98. *Id.* at 245–46.

- (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.<sup>99</sup>

The statute also stresses that the court must consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>100</sup> The Sentencing Reform Act as codified cautions that the district court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth” in the statute.<sup>101</sup>

### B. *Two Different Approaches: Ranum and Wilson*

In the wake of *Booker*, courts have basically staked out two approaches. In one, the guidelines are but one of the sentencing factors; in the other, the guidelines articulate and express the sentencing concerns and thus are given presumptive weight. These two approaches are set forth in: *United States v. Ranum*<sup>102</sup> and *United States v. Wilson*.<sup>103</sup>

#### 1. *United States v. Ranum*

In *Ranum*, Judge Lynn Adelman stakes out the “one factor among many” approach. The case involved a bank officer who was charged with misapplication of funds and false statements.<sup>104</sup> He made a series of loans to what he thought was a promising start-up company, and in doing so lied to the bank committee about the company’s reserves.<sup>105</sup> He himself did not

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99. 18 U.S.C.A. § 3553 (a)(2) (2006).

100. § 3553(a)(6).

101. § 3553(a).

102. 353 F. Supp. 2d 984 (E.D. Wis. 2005).

103. 350 F. Supp. 2d 910 (D. Utah 2005), *adhered to on denial of reconsideration by*, *United States v. Wilson*, 355 F. Supp. 2d 1269 (D. Utah 2005).

104. *Ranum*, 353 F. Supp. 2d at 987–88.

105. *Id.*

profit from the transactions.<sup>106</sup> After conviction, he faced a guideline range of thirty-seven to forty-six months.<sup>107</sup>

The court, in sentencing, reasoned that when the Supreme Court in *Booker* struck down the provision that made the Federal Sentencing Guidelines mandatory, the majority recalibrated the sentencing factors. As Judge Adelman wrote:

The remedial majority held that district courts must still consider the guideline range, 18 U.S.C. § 3553(a)(4) & (5), but must also consider the other directives set forth in § 3553(a). Thus, under *Booker*, courts must treat the guidelines as just one of a number of sentencing factors.<sup>108</sup>

These sentencing factors, as stated above, include the factors set forth at 18 U.S.C. § 3553(a)(2), (6). The consideration of these factors are not optional, but rather mandatory. They must be factored into the sentencing, but the guidelines themselves are not controlling.

In this way, *Ranum* takes the § 3553(a) factors and creates a sentencing framework under *Booker* that is both logical and compelling. As the court stated:

I determined that the factors set forth in § 3553(a) fell into three general categories: the nature of the offense, the history and character of the defendant, and the needs of the public and the victims of the offense. I analyzed each category and in doing so considered the specific statutory factors under § 3553(a), including the advisory guidelines.<sup>109</sup>

In sentencing the defendant, the court in *Ranum* analyzed these categories with respect to the individual in front of it. In assessing the offense, the harms, and the defendant, the court found that a sentence of one year and one day of imprisonment was appropriate, which was one-third of the guideline range.<sup>110</sup>

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106. *Id.* at 990 (finding that defendant's culpability was mitigated because he did not act for personal gain).

107. *Id.* at 989.

108. *Id.* at 985.

109. *Id.* at 989.

110. *Id.* at 991 (finding that the recommended guideline range of thirty-seven to forty-six months was "much greater than necessary to satisfy the purposes of sentencing set forth in § 3553(a)"). The Ninth Circuit adopted this approach. *United States v. Zavala*, No. 05-30120, slip op. 4013 (9th Cir. Apr. 11, 2006).

## 2. *United States v. Wilson*

In contrast to *Ranum*, Judge Cassell in *United States v. Wilson* found that the sentencing guidelines adequately consider and give effect to all of the § 3553 factors, and he concluded that the sentencing court should give “heavy weight” to the recommended guideline range and that the court should deviate from the guidelines only in the unusual case.<sup>111</sup> The impact of this sentencing framework is to make the guidelines per se reasonable, transforming them into a mandatory scheme in all but name. In *Wilson*, the defendant pled guilty to armed bank robbery.<sup>112</sup> While robbing a bank, the defendant threatened tellers with a sawed-off shotgun and stole more than \$13,000.<sup>113</sup> He later used this same weapon to threaten his girlfriend, which led to his arrest.<sup>114</sup> The defendant had a lengthy criminal record, including prior convictions for crimes of violence.<sup>115</sup>

At sentencing, the district court, like the court in *Ranum*, began by discussing the statutory purposes of the Sentencing Reform Act as set forth in § 3553(a).<sup>116</sup> *Wilson*, however, discussed the formulation of the guidelines, and how the propagation of these guidelines effectuated the goals of the Act.<sup>117</sup> In assessing the history of the United States Sentencing Commission, and how the guidelines are drafted, proposed, and enacted, the court concluded that guideline sentences can be considered sufficient punishment in most cases, and that the guidelines focus the sentencing factors of § 3553(a) through their prism of presumptive ranges.<sup>118</sup>

In *Wilson*, the court essentially says that the guidelines are presumptive unless facts presented are sufficiently unusual and exceptional to justify a sentence outside the guidelines.<sup>119</sup> This smacks, of course, of departure jurisprudence.<sup>120</sup> This approach does acknowledge that there is judicial discretion at sentencing. By adhering closely to the guidelines and exercising this new found freedom “responsibly,” Judge Cassell observes

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111. *United States v. Wilson*, 350 F. Supp. 2d 910, 912, 925 (D. Utah 2005).

112. *Id.* at 927.

113. *Id.* at 926.

114. *Id.*

115. *Id.* at 927 (discussing Wilson’s prior convictions, which included rape of a fourteen-year-old girl, two robberies, and attempted sexual abuse of a twelve-year-old girl).

116. *Id.* at 912.

117. *Id.* at 914–25.

118. *Id.* at 925–26.

119. *See id.*

120. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K2.0, cmt. background (2005) (“Departures permit courts to impose an appropriate sentence in the *exceptional* case in which mechanical application of the guidelines would fail to achieve statutory purposes and goals of sentencing.”) (emphasis added).

that Congress “may be inclined to give judges greater flexibility under a new sentencing system.”<sup>121</sup> Judge Cassell appears fearful that if judges vary too much from the guidelines, then their ability to do so will be revoked by Congress.

### C. Application of the Post-Booker Sentencing Framework to Illegal Reentry Cases

The following two cases, *United States v. Galvez-Barrios*<sup>122</sup> and *United States v. Perez-Chavez*,<sup>123</sup> exemplify the two different sentencing approaches set forth above in *Ranum* and *Wilson* as applied to defendants sentenced for the crime of illegal reentry after deportation who did not have the benefit of a fast-track plea option.<sup>124</sup>

#### 1. *Galvez-Barrios* Takes the *Ranum* Approach

In *United States v. Galvez-Barrios*, Judge Adelman applied his sentencing approach to a defendant charged with illegal reentry after deportation.<sup>125</sup> The defendant had been convicted of a prior aggravated battery with a firearm in the Illinois state court.<sup>126</sup> The charge was a result of the defendant’s attempt to regain property that gang members had taken from him after being beaten and robbed.<sup>127</sup> After that conviction, Galvez-Barrios was deported in 1998. He subsequently returned illegally to the United States and lived in Chicago, Illinois, uneventfully, until his truck broke down in a snow storm.<sup>128</sup> When the police came to help him, his

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121. *Wilson*, 350 F. Supp. 2d at 932.

122. 355 F. Supp. 2d 958 (E.D. Wis. 2005).

123. No. 2:05-CR-00003 PGC, 2005 U.S. Dist. LEXIS 9252 (D. Utah May 16, 2005).

124. *See also* *United States v. Morales-Chaires*, 430 F.3d 1124, 1130–31 (10th Cir. 2005) (upholding district court’s rejection of downward departure for fast-track disparity); *United States v. Martinez-Flores*, 428 F.3d 22, 29–30 (1st Cir. 2005) (rejecting argument for downward departure based on fast-track disparities); *United States v. Santos*, 406 F. Supp. 2d 320, 324–29 (S.D.N.Y. 2005) (sentencing defendant below guideline range based on inter-district fast-track disparity, double-counting of criminal history, and other factors); *United States v. Medrano-Duran*, 386 F. Supp. 2d 943, 948 (N.D. Ill. 2005) (sentencing defendant below the guideline range based on unwarranted disparity of fast-track programs); *United States v. Ramirez-Ramirez*, 365 F. Supp. 2d 728, 731–733 (E.D. Va. 2005) (sentencing defendant below guideline range based on fast-track disparity and other factors).

125. 355 F. Supp. 2d at 959–60.

126. *Id.* at 959.

127. *Id.*

128. *Id.* at 959–60.

illegal status was discovered, and he was arrested on the immigration charge.<sup>129</sup>

The Eastern District of Wisconsin, where defendant Galvez-Barrios was charged, does not have a fast-track program.<sup>130</sup> The defendant, however, asked the district court to consider a variance from the recommended guideline range, based upon sentencing disparity with fast-track programs.<sup>131</sup> The court, using its approach set forth in *Ranum*, found that the history and rationale of the Federal Sentencing Guidelines as to the crime of illegal reentry after deportation to be lacking.<sup>132</sup> The court noted that the increased penalty for defendants with a prior conviction for a violent aggravated felony appeared to be without any study, research, or principled basis.<sup>133</sup>

Moreover, the court was struck with a disparity between districts with fast-track programs, which roughly reduce the sentence by half, and those districts that do not have it.<sup>134</sup> As the court quoted, “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.”<sup>135</sup> Judge Adelman concluded it was appropriate, in some cases, for a court to exercise its sentencing discretion to minimize the sentencing disparity that fast-track programs create.<sup>136</sup> The court sentenced defendant to twenty-four months of imprisonment, which was below the guideline range, after considering various factors, including whether the defendant had promptly pled guilty, whether the guideline range was excessive, the reason for the defendant’s return, and the need to reduce disparity.<sup>137</sup>

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129. *Id.*

130. *Id.* at 963–64; *see also* United States v. Peralta-Espinoza, 383 F. Supp. 2d 1107, 1108–09 (E.D. Wis. 2005) (noting that the Eastern District of Wisconsin does not have fast-track; in this case, Judge Adelman rejects the defendant’s argument for a sentence reduction based on fast-track disparity and other factors).

131. *Galvez-Barrios*, 355 F. Supp. 2d at 960, 963.

132. *Id.* at 961–63 (noting that the sixteen-level enhancement for having an aggravated felony was equal to the enhancement under the fraud guideline for stealing \$5,000,000 to \$10,000,000).

133. *Id.* at 962 (“The Commission did no study to determine if such sentences were necessary—or desirable from any penal theory.”) (quoting Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 FED. SENT’G. REP. 275, 276 (1996)).

134. *See id.* at 963.

135. *Id.* at 962 (quoting 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)).

136. *Id.*; *cf.* United States v. Peralta-Espinoza, 383 F. Supp. 2d 1107, 1108 (E.D. Wis. 2005) (rejecting defendant’s argument for a sentence reduction based on fast-track disparity).

137. *Galvez-Barrios*, 355 F. Supp. 2d at 964.

## 2. *Perez-Chavez* Takes the *Wilson* Approach

Again, in contrast to Judge Adelman's approach in *Galvez-Barrios*, Judge Wilson in *Perez-Chavez* concluded that fast-track sentencing disparity is not an appropriate factor for imposing a sentence outside the guideline range.<sup>138</sup> In *Perez-Chavez*, the defendant had been deported previously along with his wife.<sup>139</sup> They had three American-born children.<sup>140</sup> The wife returned because of health complications related to a subsequent pregnancy.<sup>141</sup> She was only able to get adequate medical care in the United States, and thus she returned to Salt Lake City, where she had previously lived.<sup>142</sup> She had the baby prematurely and the baby was in critical condition, so she remained in the United States to allow her child's health to improve.<sup>143</sup> When she prepared to return to Mexico, her grandfather, who lived in the United States, became terminally ill with cancer, and it fell on her to care for him.<sup>144</sup> She then asked her husband, the defendant, to return to the United States to help her.<sup>145</sup> He did so reluctantly, knowing that he had a prior conviction for possession with a narcotic substance.<sup>146</sup> He did return in November of 2004, and his wife's grandfather died three weeks later.<sup>147</sup> In December of 2004, he and his wife were pulled over for speeding, at which point they were arrested and charged with illegal reentry.<sup>148</sup> The wife pled and was given a sentence of time-served.<sup>149</sup> The defendant, who faced a more serious sentence because he had a prior aggravated felony conviction, asked for a departure from the guidelines and a variance based on the fast-track.<sup>150</sup>

The district court was sympathetic to the defendant and to the disparity of the fast-track programs.<sup>151</sup> Judge Cassell concluded, however, that the lack of a fast-track program prior to *Booker* had not afforded a basis for departure because plea bargaining policies were not considered an

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138. *United States v. Perez-Chavez*, No. 2:05-CR-00003PGC, 2005 U.S. Dist. LEXIS 9252, at \*23 (D. Utah May 16, 2005).

139. *Id.* at \*4.

140. *Id.*

141. *Id.* at \*4–5.

142. *Id.* at \*5.

143. *Id.*

144. *Id.* at \*5–6.

145. *Id.* at \*6.

146. *Id.* at \*6, \*9.

147. *Id.* at \*6.

148. *Id.*

149. *Id.*

150. *Id.* at \*7, \*9.

151. *Id.* at \*35.

appropriate consideration.<sup>152</sup> Further, Judge Cassell noted that pre-*Booker* courts found that “departure analysis must be tied to the specific facts of the case at hand,” and the sentencing policies of other districts were “irrelevant.”<sup>153</sup>

Judge Cassell found that even post-*Booker* a “variance” to reflect fast-track disparity was not warranted.<sup>154</sup> Judge Cassell noted that Congress has set out the terms for fast-track programs under the PROTECT Act and has vested the Attorney General with the discretion to approve such programs.<sup>155</sup> “To give Mr. Perez-Chavez a variance from the Guidelines in this case . . . would effectively overturn the Attorney General’s decision that Utah does not qualify for a fast-track program.”<sup>156</sup> The court, in somewhat strange fashion, stated that “[f]ast-track programs also arguably reduce disparity by allowing more violators to be prosecuted,” and “they may prevent the even greater disparity that occurs when an offender goes *unprosecuted* because of the lack of prosecutorial resources” in a border district.<sup>157</sup>

Judge Cassell criticized Judge Adelman’s approach and argued that having judges decide which variances should be granted for non-fast-track cases will lead to greater intra-judge disparity.<sup>158</sup> Although Judge Cassell declined to sentence the defendant below the guideline range based on a variance for fast-track disparity, he did depart under existing guideline jurisprudence on the basis of extraordinary family responsibilities and gave the defendant a sentence below the guideline range.<sup>159</sup>

Judge Cassell did express concerns with the fast-track programs.<sup>160</sup> He stated that one of the problems with fast-track is “the mystery surrounding how the Justice Department decides which districts will qualify for fast-track programs.”<sup>161</sup> He wrote that the Attorney General’s “principles” for selection of where fast-track programs will be implemented “are pitched at such a high level of generality that they reveal little about how decisions are actually reached.”<sup>162</sup> He wondered why the District of Utah would not have

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152. *Id.* at \*17, \*21.

153. *Id.* at \*17.

154. *Id.* at \*15–30.

155. *Id.* at \*21–25.

156. *Id.* at \*25.

157. *Id.* at \*22–23 (emphasis in original).

158. *Id.* at \*24–26.

159. *Id.* at \*39–43.

160. *Id.* at \*35–39.

161. *Id.* at \*35–36.

162. *Id.* at \*36.

fast-track approved whereas Nebraska does.<sup>163</sup> The district court in *Perez-Chavez* also questioned whether fast-track programs are really necessary.<sup>164</sup> Judge Cassell opined that immigration offenses probably could be processed rapidly even without fast-track given the ease of proving the elements of the offense and the defendant's motivation, due to the high sentences, to plead guilty.<sup>165</sup>

### 3. Why *Galvez-Barrrios* is Better Than *Perez-Chavez*

A comparison of the two approaches reveals their advantages and disadvantages. In *Perez-Chavez*, Judge Cassell emphasized the decision of Congress to explicitly allow such disparity among defendants based on resources in the border districts.<sup>166</sup> In so doing, the district court side-stepped the issue of the appropriateness of the sentencing guideline offense levels set for illegal reentry under U.S.S.G. § 2L1.2. The *Wilson* decision, also authored by Judge Cassell, paid great deference to the so-called expertise of the Sentencing Commission in formulating guidelines.<sup>167</sup> If *Wilson* stands as a salutation to the expertise of the guidelines, *Perez-Chavez* has to stand as a criticism, otherwise, the district court would have embraced the presumptive guideline ranges.<sup>168</sup> The court's criticism in that case of the fast-track system, especially given the high percentage of cases that are resolved by it, also implicitly criticizes the high sentences recommended by the guidelines. The high sentences have been roundly criticized by the courts and commentators,<sup>169</sup> and the government itself tacitly acknowledges that the sentences are higher than necessary, because fast-track must be deemed by the government as providing sufficient deterrence and punishment at the reduced sentencing level. The remaining one-quarter of illegal reentry cases that are resolved without fast-track are not a result of prosecutorial policy to "get tough" with these offenders, but rather these defendants experience the sheer bad luck of being caught in the wrong place at the wrong time.

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163. *Id.*

164. *Id.* at \*37.

165. *Id.* See *United States v. Martinez-Martinez*, 442 F.3d 539, 542–43 (7th Cir. 2006) (finding congressional approval of disparity in fast-track plea offers).

166. *Perez-Chavez*, 2005 U.S. Dist. LEXIS 9252, at \*22–23.

167. *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005) (noting that "[o]ver the last several years, the Sentencing Commission has promulgated and honed the Guidelines to achieve these congressional purposes" set forth in the Sentencing Reform Act).

168. *Perez-Chavez*, 2005 U.S. Dist. LEXIS 9252, at \*34–44 (sentencing defendant ten months below the low end of the recommended guideline range).

169. See, e.g., *Galvez-Barrrios*, 355 F. Supp. 2d at 961–63.

In *Galvez-Barríos*, Judge Adelman's approach recognizes that the disparity between fast-track and non-fast-track cases cannot be excused by prosecutorial plea bargaining.<sup>170</sup> Judge Adelman's approach, although criticized by Judge Cassell, avoids unwarranted disparity and actually promotes the return to individualized consideration of the defendant in the context of the four § 3553(a) factors. The same considerations that go into fast-track such as prompt pleading, circumstances of the offender, deterrence, and punishment, can be assessed and reviewed on appeal for reasonableness. This approach furthers the goals of the guidelines as opposed to the wholesale abdication of fast-track disparity advocated by Judge Cassell.

#### IX. QUESTIONS THE COMMISSION SHOULD ASK

The issue of fast-track, more than anything else, is a calling to the United States Sentencing Commission to revise its illegal reentry guidelines so as to better fit the punishment to the crime. The fast-track programs show, from a prosecutorial standpoint, that the guidelines are too high. The Sentencing Commission must address this and bring the penalties more in line with the reality of what the punishment should be (and actually is in most cases). The fast-track success shows that punishment, at the fast-track level, will serve the goals of the Sentencing Reform Act. If the punishment recommended by the guidelines is more fitting, perhaps the government can dispense with the fast-track altogether, as suggested by Judge Cassell in *Perez-Chavez*,<sup>171</sup> because the cases can be processed with the benefit of the traditional guideline litigation, namely acceptance of responsibility.<sup>172</sup> Indeed, the ease of prosecution would make such resolutions still desirable by the defendants. The fast-track programs, if still needed, can be tweaked or amended so that the "benefit" may not be in years but in months, still something to be embraced. The refusal by the Sentencing Commission to amend the sentencing guidelines for illegal reentry makes the Sentencing Commission complicit in the perpetuation of the unwarranted disparity between defendants for illegal reentry.<sup>173</sup> These programs hold the

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170. *Id.* at 963.

171. *Perez-Chavez*, 2005 U.S. Dist. LEXIS 9252, at \*37–39.

172. *Id.*; see also U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2005) (defendant may receive two-level downward adjustment from the offense level for acceptance of responsibility).

173. See U.S. SENTENCING COMM'N, INTERIM STAFF REPORT ON IMMIGRATION REFORM AND THE FEDERAL SENTENCING GUIDELINES (2006) (recognizing disparity and problems but offering only minor adjustments or technical fixes in proposed amendments; the Commission refuses to reconsider or justify the present base offense levels and enhancements in § 2L1.2 reentry cases).

guidelines hostage to prosecutorial plea policies by the Department of Justice, and further exacerbate the shift in sentencing decisions from the courts to the prosecution.

The U.S. Sentencing Commission should ask the following questions:

1. Do the government's claimed case management needs truly inform whether a disparity is "warranted"? According to the § 3553 factors, a disparity is measured according to whether the defendants have "similar records" and "have been found guilty of similar conduct," and not according to the government's prosecutorial or administrative convenience. As the Commission has previously stated:

Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.<sup>174</sup>

2. Assuming that Congress reasonably could conclude that quick processing of a large number of illegal reentry cases outweighed unjustified inter-district disparity, does a variance for non-fast-track districts interfere with such quick processing of cases in the fast-track districts? The goals of increased prosecution seemingly are not affected by variance sentencing in non-fast-track districts.

3. Did congressional approval of the fast-track programs actually envision the ones in place? It appears that the Attorney General has authorized fast-track programs of two distinct kinds: one involving a downward departure authorized under the PROTECT Act, and the other relying on charge bargaining. The former has variations within itself, according to the districts. The charge bargaining programs generally result in lesser sentences than the departure programs, and this would seem at odds with congressional intent. The wide variations in programs, and the apparent haphazard approval of such programs, undermines competence in sentencing, and calls into question the exercise of discretion by the Department of Justice.

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174. DEPARTURE REPORT, *supra* note 42 at 66–67.