

Fact Sheet: There Is No “Tension between 18 U.S.C. § 3553(a) and 28 U.S.C. §§ 991, et seq.” for Congress to Resolve.

Before *Booker*, district court and appellate judges reported that restrictions on mitigating offender characteristics were a primary failing of the guidelines.¹ *Booker* and subsequent decisions rectified that failing, and numerous witnesses have since advised the Commission that mitigating offender characteristics are highly relevant under § 3553(a).² In a 2010 survey, large majorities of judges stated that mitigating factors which the Commission’s policy statements deem never or “not ordinarily relevant” are in fact quite relevant to sentencing,³ and that as a result, the policy statements are inadequate, too restrictive, and inconsistent with § 3553(a).⁴

In partial response to the strong views of judges and practitioners, the Commission in 2010 slightly broadened the ability to depart under the Guidelines’ “heartland” standard based on certain offender characteristics.⁵ But the Commission continues to resist consideration of mitigating offender characteristics in general,⁶ and to deem a number of factors to be never or not ordinarily relevant.⁷ This resistance appears to be based, at least in part, on the Commission’s interpretation of a provision of the SRA. With due respect to the Commission, this interpretation is not correct.

Testifying at the congressional hearing on October 12, 2011, the Commission Chair stated that Congress had directed the Commission “not to incorporate certain offender characteristics into the guidelines,” and that such factors “shouldn’t generally be considered” at sentencing.⁸ And she asked Congress to “address the tension between directives to the Commission set forth at 28 U.S.C. §§ 991, et seq., and directives to the courts at 18 U.S.C. § 3553(a), particularly as they relate to certain offender characteristics.”⁹

Contrary to the Chair’s testimony, there is no tension between the directives to the Commission regarding offender characteristics, and the instructions to the courts in § 3553(a). In 28 U.S.C. § 994(d), Congress directed the Commission, in establishing categories of offenders in the guidelines and policy statements regarding the type, length, and conditions of sentences, to consider the relevance of eleven offender characteristics, “among others”: (1) age, (2) education, (3) vocational skills, (4) mental and emotional conditions, (5) physical condition, including drug dependence, (6) employment record, (7) family ties and responsibilities, (8) community ties, (9) role in the offense, (10) criminal history, and (11) degree of dependence on criminal activity for a livelihood.

Congress considered all eleven offender characteristics to be relevant to all aspects of the sentencing decision, with one narrow exception. Congress directed the Commission in 28 U.S.C. § 994(e) to “assure that the guidelines and policy statements, *in recommending a term of imprisonment or length of a term of imprisonment*, reflect the general inappropriateness of considering” five of those factors: “the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.” (emphasis added).

In support of the claimed “tension,” the Commission cites only § 994(e), and reads it as directing the Commission to ensure that the five factors listed there are generally inappropriate considerations in determining a sentence within or outside the guideline range.¹⁰ The

Commission misreads the statute: § 994(e) limits consideration of these factors as a basis for *imprisonment*, not as a basis for *sentencing*. As the Senate Report stated: “The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.”¹¹ Section 994(e) was one of three provisions of the SRA reflecting Congress’s judgment that prison was not an effective means of rehabilitation and that the disadvantaged should not be warehoused in prison on the theory that prison might be rehabilitative.¹² Interpreting the other two provisions, the Supreme Court stated: “Section 994(k) bars the Commission from recommending a ‘term of imprisonment’—a phrase that again refers both to the fact and to the length of incarceration—based on a defendant’s rehabilitative needs. And § 3582(a) prohibits a court from considering those needs to impose or lengthen a period of confinement when selecting a sentence from within, or choosing to depart from, the Guidelines range.”¹³

Thus, the Commission was not to recommend imprisonment over probation, or a longer prison term over a shorter one, based on the defendant’s lack of education, vocational skills, employment, or stabilizing ties. But these factors could otherwise be considered at sentencing when appropriate. As Congress explained, “each of these factors may play other roles in the sentencing decision.”¹⁴ For example, “they may, in an appropriate case, call for the use of a term of probation instead of imprisonment.”¹⁵ The Senate Report gave several specific examples suggesting how the Commission might recommend that these and other offender characteristics be considered to mitigate sentences.¹⁶

Therefore, far from “direct[ing] the Commission not to incorporate certain offender characteristics into the guidelines,” as the Chair testified, Congress directed the Commission to consider and include any and all factors it found relevant to the sentencing decision when it formulated the guidelines.¹⁷

Congress also recognized that it was not possible to write all relevant factors into general rules. It therefore directed the Commission to “maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors *not* taken into account” in the guidelines.¹⁸ The Senate Report stated:

[E]ach offender stands before the court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors – the facts in the case; the mitigating or aggravating circumstances; the offender’s characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case – cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.¹⁹

At the same time, Congress directed judges in § 3553(a)(1) to consider “the nature and circumstances of the offense and the history and characteristics of the defendant.” Referring specifically to § 3553(a)(1), the Senate Report stated: “All of these considerations and others the judge believed to be appropriate would . . . help the judge to determine whether there were circumstances or factors that were not taken into account in the sentencing guidelines and that call for the imposition of a sentence outside the applicable guideline.”²⁰ Thus, contrary to the

Chair’s testimony that individual offender characteristics “shouldn’t generally be considered” at sentencing, Congress clearly directed the courts to consider “the history and characteristics of the defendant,” and further directed: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”²¹

In sum, Congress believed “that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case.”²² The purpose of the guidelines was “not to eliminate the thoughtful imposition of individualized sentences.”²³ Judges would “impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender.”²⁴

Thus, contrary to the Commission’s claims, there is no tension between the directives it received, and the characteristics judges must consider under § 3553(a). The only tension is between the Commission’s policy statements, which discourage or prohibit consideration of numerous offender characteristics, and the Sentencing Reform Act, which clearly makes such characteristics relevant.²⁵ The Commission is free to resolve this tension itself, without resort to Congress. It can amend its policy statements to encourage greater consideration of these important sentencing factors as grounds for “departure.” Meanwhile, these factors must be considered at sentencing under § 3553(a).²⁶

¹ U.S. Sent’g Comm’n, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines*, Executive Summary (2003) (“Both district and circuit court judges were most likely to indicate” that “fewer” of the guidelines “maintain[ed] sufficient flexibility to permit individualized sentences,” or “provid[ed] defendants with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner where rehabilitation is appropriate.”).

² *See, e.g.*, Tr. of Hearing Before the U.S. Sent’g Comm’n, Denver, Colo., at 281-82, 301-02 (Oct. 20, 2009) (remarks of Hon. Joan Ericksen); *id.* at 289-90, 295-96 (remarks of Hon. Robert Pratt); *id.* at 91-92 (remarks of Hon. Thomas Marten); *id.* at 107-08 (remarks of Kevin Lowry, Chief U.S. Probation Officer); *id.* at 318-20 (remarks of Raymond Moore); Statement of Alan Dubois and Nicole Kaplan, Hearing Before the U.S. Sent’g Comm’n, at 44-45, 47-50 (Feb. 10, 2009); Tr. of Hearing Before the U.S. Sent’g Comm’n, Atlanta, Ga., at 53-54 (Feb. 10, 2009) (remarks of Thomas Bishop, Chief U.S. Probation Officer); Statement of Thomas W. Hiller, II and Davina Chen, Hearing Before the U.S. Sent’g Comm’n, at 35-37 (May 27, 2009); Tr. of Hearing Before the U.S. Sent’g Comm’n, Stanford, Calif., at 284-86, 357-59 (May 27-28, 2009) (remarks of Thomas W. Hillier II); *id.* at 360-62 (remarks of Davina Chen); *id.* at 168 (remarks of Chris Hansen, Chief U.S. Probation Officer); Tr. of Hearing Before the U.S. Sent’g Comm’n, New York, N.Y., at 331 (July 10, 2009) (remarks of Hon. Donetta W. Ambrose); Statement of Michael Nachmanoff Before the U.S. Sent’g Comm’n, New York, N.Y., at 22-25 (July 9, 2009); Tr. of Hearing Before the U.S. Sent’g Comm’n, Chicago, Ill., at 104-05 (Sept. 9, 2009) (remarks of Hon. Philip Simon); Statement of Carol Brook Before the U.S. Sent’g Comm’n, at 26-33 (Sept. 10, 2009); Statement of Julia O’Connell Before the U.S. Sent’g Comm’n, Austin, Tex., at 4-10 (Nov. 19, 2009); Statement of Heather Williams Before the U.S. Sent’g Comm’n, Phoenix, Ariz., at 35, 39-40 (Jan. 21, 2010).

³ U.S. Sent’g Comm’n, *Survey of United States District Judges January 2010 through March 2010*, tbl.13.

⁴ *Id.*, tbl. 14.

⁵ *See* USSG App. C, amend. 739 (“after reviewing recent federal sentencing data, trial and appellate court case law, . . . public comment and testimony, and feedback in various forms from federal judges,” age, mental and emotional conditions, physical condition, and military service, rather than “not ordinarily relevant,” now “may be relevant,” but only if “present to an unusual degree and distinguish the case from the typical cases covered by the guidelines,” and drug or alcohol dependence or abuse, rather than “not relevant,” is now “ordinarily not” relevant).

⁶ At the same time, the Commission amended the introductory commentary to Chapter 5H to generally disapprove of offender characteristics, stating that their “most appropriate use” is not for imposing a sentence outside the guideline range but for sentencing within the guideline range. USSG ch. 5, pt. H, intro. comment.

⁷ USSG §§ 5H1.2 (education and vocational skills not ordinarily relevant), 5H1.4 (gambling addiction not a basis for departure, drug or alcohol dependence or abuse ordinarily not a basis for departure), 5H1.5 (employment record not ordinarily relevant), 5H1.6 (family ties and responsibilities not ordinarily relevant), 5H1.7 (role in the offense not a basis for departure), 5H1.11 (civic, charitable, or public service; employment-related contributions; and similar prior good works not ordinarily relevant); 5H1.12 (lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing not a basis for departure), 5K2.12 (personal financial difficulties and economic pressures upon a trade or business not a basis for departure), 5K2.13 (diminished capacity if caused by the voluntary use of drugs or other intoxicants, or defendant was convicted of a sex offense, not a basis for departure), 5K2.19 (post-sentencing rehabilitation not a basis for departure), 5K2.0(d) (acceptance of responsibility, role in the offense, decision to plead guilty, fulfillment of restitution obligations as required by law not a basis for departure), p.s.

⁸ Hearing on Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*, Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary of the House of Representatives (testimony of Judge Patti B. Saris), http://judiciary.house.gov/hearings/hear_10122011.html.

⁹ Prepared Testimony of U.S. Sentencing Commission Chair Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 57 (Oct. 12, 2011).

¹⁰ Commission Testimony at 57.

¹¹ S. Rep. No. 98-225, at 175 (1983).

¹² See 28 U.S.C. § 994(k) (“The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”); 18 U.S.C. § 3582(a) (“The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”); S. Rep. No. 98-225, at 31, 38, 40, 67 n.262, 76-77, 95, 119, 171 & n.531 (1983).

¹³ *Tapia v. United States*, 131 S. Ct. 2382, 2390 (2011).

¹⁴ S. Rep. No. 98-225, at 174 (1983).

¹⁵ *Id.* at 174-75.

¹⁶ See *id.* at 172-73 (“need for an educational program might call for a sentence to probation” with a program to provide for rehabilitative needs if imprisonment was not necessary for some other purpose of sentencing); *id.* at 173 (same regarding vocational skills); *id.* (same regarding employment); *id.* at 171 n. 531 (“if an offense does not warrant imprisonment for some other purpose of sentencing, the committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training”); *id.* at 173 n.532 (“a defendant’s education or vocation would, of course, be highly pertinent in determining the nature of community service he might be ordered to perform as a condition of probation or supervised release”); *id.* at 174 (family ties and responsibilities may indicate, for example, that the defendant “should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family”); *id.* at 173 (mental or emotional conditions might “call[] for probation with a condition of psychiatric treatment, rather than imprisonment”); *id.* (“drug dependence” might cause the Commission to “recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison, for ‘drying out,’ as a condition of probation”).

¹⁷ *Id.* at 175 (encouraging “Commission to explore the relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise.”).

¹⁸ 28 U.S.C. § 991(b)(1)(B) (emphasis added).

¹⁹ S. Rep. No. 98-225, at 150 (1983).

²⁰ *Id.* at 75.

²¹ 18 U.S.C. § 3661.

²² S. Rep. No. 98-225, at 52.

²³ *Id.* at 52-53.

²⁴ *Id.* at 53.

²⁵ This is explained by previous Commission policy against downward departures, not by congressional directives. The original Commission excluded from the guidelines all factors listed in § 994(d) other than role in the offense and the aggravating factor of criminal history, and went further, using policy statements to deem the mitigating factors to be “not ordinarily relevant” in departing from the guidelines. USSG §§ 5H1.1 (age), 5H1.2 (education and vocational skills), 5H1.3 (mental and emotional conditions), 5H1.4 (physical condition), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities), p.s. (Nov. 1, 1987). Drug and alcohol dependence or abuse, personal financial difficulties, and economic pressure on a trade or business were prohibited grounds for departure. USSG §§ 5H1.4, 5K2.12, p.s. (Nov. 1, 1987). None of these policy statements was accompanied by “analysis” or “supporting reasons.” *Cf.* S. Rep. No. 98-225, at 175 (1983). The original Commission did not explain the policy statements deeming education, vocational skills, employment record, family ties and responsibilities, and community ties to be “not ordinarily relevant” with reference to § 994(e). Later, the Commission amended its commentary to “clarify” that the policy statements were “required” by § 994(e). USSG ch. 5, pt. H, intro. comment. (Nov. 1, 1990); USSG, App. C, amend. 357 (Nov. 1, 1990).

Then-Commissioner Breyer unofficially explained that the Commission had omitted from the guidelines most of the factors “which Congress suggested that the Commission should, but was not required to, consider,” as one of several “‘trade-offs’ among Commissioners with different viewpoints.” Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 & n.98 (1988). Later, Justice Breyer said that the decision to omit mitigating offender characteristics was “intended to be provisional and [] subject to revision in light of Guideline implementation experience.” Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent’g Rep. 180, 1999 WL 730985, at *5 (Jan./Feb. 1999). That revision did not materialize; instead, further restrictions were added. For example, when a court of appeals upheld a departure based on the defendant’s “diminutive size and immature appearance,” after he had been sexually victimized and placed in solitary confinement for his protection, *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), the Commission immediately issued an amended policy statement asserting that physical “appearance, including physique,” is not ordinarily relevant in deciding whether to depart. USSG § 5H1.4 p.s.; USSG App. C, amend. 386 (Nov. 1, 1991). In response to a court of appeals’ holding that a disadvantaged childhood could justify downward departure, *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991), the Commission issued a policy statement asserting that a defendant’s “lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing” are “not relevant” grounds for departure. USSG § 5H1.12 p.s.; USSG App. C, amend. 466 (Nov. 1, 1992). Military, civic, charitable and public service, employment-related contributions, and prior good works were all likewise deemed not ordinarily relevant, USSG § 5H1.11, p.s.; USSG App. C, amend. 386 (Nov. 1, 1991), “in response to court decisions.” USSC, *Simplification Draft Paper, Departures and Offender Characteristics*, Part II(B)(3). The Commission also prohibited departure based on post-sentencing rehabilitation “even if exceptional.” USSG § 5K2.19, p.s.; USSG App. C, amend. 602 (Nov. 1, 2000).

²⁶ *Pepper v. United States*, 131 S. Ct. 1229 (2011); *Gall v. United States*, 552 U.S. 38 (2007).