Michigan Law Review

Volume 98 | Issue 5

2000

Sentencing Equality for Deportable Aliens: Departures from the Sentencing Guidelines on the Basis of Alienage

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Recommended Citation

Jason Bent, *Sentencing Equality for Deportable Aliens: Departures from the Sentencing Guidelines on the Basis of Alienage*, 98 MICH. L. REV. 1320 (2000).

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NOTES

Sentencing Equality for Deportable Aliens: Departures from the Sentencing Guidelines on the Basis of Alienage

Jason Bent*

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INTRODUCTION

Peter Bakeas, a thirty-three-year-old Greek citizen living in West Lynn, Massachusetts and working in an entry-level position at the First National Bank of Greece in Massachusetts, developed a cocaine habit he could not afford.¹ Mounting debt from his cocaine habit pressured him to find alternative means for obtaining income. Bakeas, using his position at First National Bank of Greece, began to

* I am deeply grateful for the support of my mother, Marilyn Bent, and the helpful comments of Jennifer Boatwright.

1. The facts described in this paragraph are taken from *United States v. Bakeas*, 987 F. Supp. 44 (D. Mass. 1997).

embezzle money from the accounts of a distant relative and some family friends. When his scheme was discovered, he confessed and made arrangements to repay the money he had taken. Bakeas pled guilty to embezzlement by a bank officer, in violation of 18 U.S.C. § 656.² It was his first offense. Normally, under the United States Sentencing Guidelines, a defendant convicted of this crime under these circumstances and with no criminal record would be sentenced to three years of probation, twelve months of which would be served in a community confinement center. A community confinement center is a minimum security facility that allows inmates a more normal life and more contact with the community than a typical prison. According to Federal Bureau of Prisons ("Bureau") policy, however, an alien like Bakeas would not have been placed in one of these community centers, but rather would have been placed in a medium security prison — a decidedly more punitive environment. In Bakeas's case, Judge Gertner, the sentencing judge, was aware of the Bureau's policy and decided to depart from the statutorily prescribed sentence. Judge Gertner instead imposed a sentence of three years probation, with ten months of home confinement, in which Bakeas could leave his apartment only for work, religious observance, or medical care. In doing so, Judge Gertner imposed a sentence that was similar to what a non-alien defendant would have received for the same crime. Did Judge Gertner have the discretion under the Sentencing Guidelines to make this decision?

The Sentencing Reform Act of 1984 ("Act") established the United States Sentencing Commission ("Commission") in order to compose and administer the United States Sentencing Guidelines ("Guidelines"). The Guidelines are a complex punishment formula based on a number of factors relating to the crime and the criminal involved.³ The Act represents an attempt by Congress to introduce a more uniform sentencing system for defendants convicted of federal crimes.⁴ Congress, however, anticipated that despite the need to punish criminals in a proportional and just fashion, it would be impossible to predict all of the relevant factors and circumstances that attend

2. 18 U.S.C. § 656 (1994 and Supp. IV 1998).

3. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-59, 3561-66, 3571-74, 3581-86; 28 U.S.C. §§ 991-98 (1994)).

4. See S. REP. NO. 98-225, at 52-53 (1983); U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, at A3, p.s. (1998) [hereinafter "USSG"; all references are to the November 1998 version unless otherwise indicated]; Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 308 n.34 (1996) ("The Senate Committee characterized this reduction in disparity among similarly situated defendants as a 'primary goal of sentencing reform.' "). See generally Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

each individual case.⁵ No formula, no matter how complex, could always arrive at the proper punishment range for every case. Recognizing this, Congress expressly provided for departures from the prescribed sentence, to be exercised at the discretion of the district court judge.⁶

Departures from the Guidelines, however, must be relatively infrequent in order to attain the desired goals of a uniform system of punishment — if departures were the rule, and not the exception, the Guidelines would fail to reduce sentencing disparities. Consequently, the discretion of sentencing judges to depart has been limited, to some extent, by Congress⁷ and the Commission. A sentencing judge is expressly forbidden from considering factors, relating to the criminal or the crime itself, as a basis for a departure.⁸ Others are expressly mentioned as potential bases for departure.⁹ Still many other factors are

5. See S. REP. NO. 98-225, at 52-53 (1983); Gelacek et al., *supra* note 4, at 301.

6. See 18 U.S.C. § 3553(b) (1994). The text of section 3553(b) reads:

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

The legislative history reveals that the departure provision was meant to account for cases that the Commission did not fully anticipate:

[T]he provision provides the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines. A particular kind of circumstance, for example, might not have been considered by the sentencing commission at all because of its rarity, or it might have been considered only in its usual form and not in the particularly extreme form present in a particular case.

S. REP. NO. 98-225, at 142 (1983).

Although many departure factors, such as a voluntary confession, are connected to the moral blameworthiness of the defendant for the criminal act, some are not. The Guidelines explicitly recognize that a factor may justify a downward departure even though it has nothing to do with moral blameworthiness. See *infra* note 42 and accompanying text.

7. Congress's restrictive approach to departures is evident in the Sentencing Reform Act. First, Congress required judges to state in open court the reasons for a departure from the Guidelines. See 18 U.S.C. § 3553(c)(2) (1994). Additionally, Congress provided for appellate review of sentencing courts' decisions to depart. See 18 U.S.C. § 3742 (1994).

8. The complete list of forbidden bases for departure is: race, sex, national origin, creed, religion, socio-economic status, see USSG § 5H1.10, p.s., lack of guidance as a youth, see USSG § 5H1.12, p.s., drug or alcohol dependence, see USSG § 5H1.4, p.s., and economic hardship, see USSG § 5K2.12.

9. The explicitly mentioned bases for departure fall into two categories: encouraged and discouraged. See *Koon v. United States*, 518 U.S. 81, 94 (1996) [For a complete discussion of the facts and holding in *Koon*, see *infra* Part II.]. Encouraged factors are those that the Commission explicitly recognized that it was unable to take into account adequately in formulating the Guidelines. See *id.* at 94. Although the presence of an encouraged factor does not always justify a departure, see *id.* at 94-95, this explicit recognition implies that the Commission expected such factors to lead to departures in many cases. Examples of encouraged bases for downward departure are: voluntary disclosure of the offense to authorities, see USSG § 5K2.16, p.s., and diminished capacity, see USSG § 5K2.13, p.s. In contrast, discouraged factors are those that the Commission has determined are "not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline

not mentioned in the Guidelines — either intentionally or because the drafters did not consider them.¹⁰ One unmentioned factor that some courts have considered as a basis for departure is the defendant's ineligibility for prerelease confinement programs due to the defendant's status as a deportable alien. Although the Guidelines forbid the use of race and national origin as a basis for departure,¹¹ they do not mention the defendant's alienage, or the consequences of the defendant's status as an alien for confinement conditions.¹²

Under Federal Bureau of Prisons policy, deportable aliens are generally ineligible for lower-security confinement programs, such as halfway houses, which give the prisoner greater freedom and the ability to carry on a more normal life.¹³ Presumably, the Bureau's policy is

range." USSG ch. 5, pt. H, intro. cmt.; see also *Koon*, 518 U.S. at 95. The Guidelines instruct that discouraged factors are only relevant if "such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines." USSG § 5K2.0, p.s. The Guidelines define "heartland" as a "set of typical cases embodying the conduct that each guideline describes." See USSG ch. 1, pt. A, at 4(b). Examples of discouraged bases for downward departure are: family ties and responsibilities, see USSG § 5H1.6, p.s., and educational or vocational skills, see USSG § 5H1.2.

10. See USSG § 5K2.0, p.s. (noting that all the factors justifying departure could not be listed comprehensively and providing that unmentioned factors "may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court.").

11. See *supra* note 8.

12. See *United States v. Restrepo*, 999 F.2d 640, 644 (2d Cir. 1993) (stating that "[n]ational origin, i.e., having been born in a particular country . . . is not synonymous with 'alienage,' i.e., simply not being a citizen of the country in which one is present."); see also *United States v. Smith*, 27 F.3d 649, 654 (D.C. Cir. 1994) (agreeing with the distinction used in *Restrepo*).

13. The Federal Bureau of Prisons ("Bureau") is the executive agency responsible for assigning federal prisoners to specific confinement facilities. The Bureau makes decisions concerning the security level of incarceration and eligibility for lower security confinement, including prerelease programs. In doing so, the Bureau evaluates several factors, including the prisoner's escape history, behavior problems while incarcerated, and history of violence. See FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, Program Statement 5100.07, ch. 7, at 4 (1999). Congress has instructed the Bureau of Prisons to ensure that most prisoners have the opportunity to spend the last portion of their sentences in lower security confinement or in community confinement programs (halfway houses). See 18 U.S.C. § 3624(c) (1994). For the relevant text of section 3624(c), see *infra* text accompanying note 23.

Halfway houses are privatized confinement facilities within the community that provide the inmate with the opportunity to be employed in the community and participate in other structured programs outside of the confinement facility. See FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, Program Statement 7310.04 (1998). In accordance with Congress's instructions, the Bureau has made halfway houses widely available to federal inmates. Between October 1998 and September 1999, 74.7% of federal inmates released from prison were sent to halfway houses for the last portion of their sentences. See Telephone Interview with Jane Rhoades, Program Analyst, Bureau of Prisons (Mar. 17, 2000). The Bureau, however, has set three requirements for a deportable alien to participate in these pre-release programs, which make this opportunity essentially unavailable for aliens. Those requirements include verified strong family ties in the United States, a verified history of domicile in the United States (five or more consecutive years), and a documented or verified history of stable employment in the United States. See BUREAU OF PRISONS, 5100.07, ch. 7, at 3-4; see also *Smith*, 27 F.3d at 651 n.2 (noting that these requirements make it essentially impossible for aliens to qualify for prerelease programs). An alien who fails to meet these

based on the belief that an alien who knows he or she will be deported upon release from prison will be more likely to attempt an escape than other inmates.¹⁴ As a result of the Bureau's policy, deportable aliens often face objectively harsher confinement conditions than the average citizen defendant, all else being equal.¹⁵ Some courts have recognized these harsher conditions of confinement and have, therefore, acknowledged alien status as a basis for a downward departure.¹⁶ For example, in *United States v. Smith*,¹⁷ the defendant, Renford George Smith, was a deportable alien convicted of unlawful possession of cocaine base with intent to distribute.¹⁸ The district judge imposed the minimum sentence available in the sentencing range prescribed by the Sentencing Guidelines, given the relevant factors present in the case, but indicated that she would have liked to reduce the sentence even more.¹⁹ Although Smith argued that the court should depart downward to reduce the sentence further, the judge declined to depart, stating: "I really don't see any basis for departure."²⁰ On appeal,

requirements will be denied access to these programs unless the requirements are either voluntarily waived by the Regional Director of the Bureau, or the Immigration and Naturalization Service ("INS") has determined that it will not initiate a deportation hearing against the inmate. See *Smith*, 27 F.3d at 651 n.2. Conversely, if the INS has ordered the alien to be deported following incarceration, the alien will be denied access to community confinement even if he or she meets these three requirements. See BUREAU OF PRISONS, 5100.07, ch. 7, at 4.

14. Although Program Statement 5100.07 does not expressly state the reasons for the special treatment of deportable aliens, the three requirements for an alien to get an exception to the ordinary level of incarceration, enumerated at *supra* note 13, suggest that the threat of escape, with its accompanying defeat of the alien's eventual deportation, was a central concern. See *Smith*, 27 F.3d at 655 (suggesting that flight risk was the rationale underlying the Bureau's denial of access to prerelease programs to deportable aliens). In addition, the risk of escape is a crucial factor in Bureau decisions respecting the level of incarceration. See BUREAU OF PRISONS, 5100.07, ch. 7, at 4-5.

15. The phrase "all else being equal" refers to the circumstances of the crime and the criminal history of the defendant. In other words, it envisions an identical case with the exception that the defendant is not a deportable alien.

16. See, e.g., *United States v. Farouil*, 124 F.3d 838, 847 (7th Cir. 1997) (requiring the sentencing court to consider a departure on the basis of alienage when the defendant's alien status causes an increase in the objective harshness of confinement conditions); *Smith*, 27 F.3d at 649 (same); *United States v. Bakeas*, 987 F. Supp. 44, 47-49 (D. Mass. 1997) (following *Farouil* and *Smith*, and departing downward on the basis of the defendant's alien status).

17. 27 F.3d at 649.

18. See *Smith*, 27 F.3d at 650.

19. See *Smith*, 27 F.3d at 650.

20. *Smith*, 27 F.3d at 650. The D.C. Circuit recognized that the district judge's language was ambiguous, and could have meant that "she had authority to depart but the circumstances did not warrant departure." *Smith*, 27 F.3d at 650 n.1. The court, however, assumed, for the purposes of the opinion, that the language meant that the judge thought she lacked authority to depart. *Smith*, 27 F.3d at 650 & n.1. In a recent opinion, Judge Sentelle (the dissenter in *Smith*) discussed the effect of ambiguous statements, such as these, and argued that they should usually be interpreted as an indication that the judge could not, in good conscience, depart on a given factor. Judge Sentelle, therefore, did not interpret the state-

Smith argued that the district judge improperly refused to consider that Smith would be subject to harsher conditions of confinement than an otherwise similarly situated American citizen who had been convicted of the same crime.²¹ Smith pointed out that he would "almost certainly [be] ineligible for the benefits of 18 U.S.C. § 3624(c)."²² That provision requires the Bureau of Prisons,

to the extent practicable, [to] assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term . . . under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community.²³

The D.C. Court of Appeals noted that the Bureau of Prisons regulations make it nearly impossible for a deportable alien to qualify for such favorable prerelease programs.²⁴ The court held "that a downward departure may be appropriate where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence."²⁵ Since the district judge's statement that she did not see any basis for departure could have been interpreted as indicating that the judge felt that she lacked authority to depart on such a basis, the court reversed and remanded for resentencing.²⁶

ment "I don't have any alternative" as a misunderstanding of the judge's ability to depart from the Guidelines. See *In re Sealed Case*, 199 F.3d 488, 491 (D.C. Cir. 1999).

21. See *Smith*, 27 F.3d at 650.

22. *Smith*, 27 F.3d at 650-51 (citing 18 U.S.C. 3624(c) (1994)).

23. 18 U.S.C. § 3624(c) (1994).

24. See *Smith*, 27 F.3d at 651; see also *supra* note 13.

25. *Smith*, 27 F.3d at 655. "Fortuitous" is probably the last word that an alien defendant would use to describe this situation. Perhaps a more accurate description would be: an increase in the severity of sentence, which is unconnected to guiltiness or any other justifiable basis for increasing the severity of punishment. The cases on this subject, however, use the shorthand phrase "fortuitous increase in the severity," see, e.g., *Smith*, 27 F.3d at 655, which should be read as emphasizing the "chance" or "randomness" with which the increase in severity applies to alien defendants, rather than the "good luck" of the defendants. The key point is to distinguish these cases from the situation in which a defendant's status as an alien is a relevant factor in determining his "guiltiness," and therefore, his punishment. See, e.g., *United States v. Gonzalez-Portillo*, 121 F.3d 1122, 1125 (7th Cir. 1997) (distinguishing *Smith* because the defendant was convicted of illegal reentry into the United States, a crime that can only be committed by aliens, and therefore the Commission must have taken alien status into account when setting the Guidelines range for this offense); *United States v. Ebolum*, 72 F.3d 35, 38-39 (6th Cir. 1995) (same).

26. See *Smith*, 27 F.3d at 656. The court, however, noted that some limitations should be placed on sentencing courts considering a departure on the basis of alienage, in order to ensure that such departures remain the exception, and not the rule. The court stated:

For a departure on such a basis to be reasonable the difference in severity must be substantial and the sentencing court must have a high degree of confidence that it will in fact apply for a substantial portion of the defendant's sentence. Finally, as the defendant's status as a deportable alien is by no means necessarily unrelated to his just deserts, even a court confident that the status will lead to worse conditions should depart only when persuaded that the greater severity is undeserved. Thus the court will fulfil the Guidelines' command that such departures will be "highly infrequent."

Other federal courts have rejected this approach. These courts have stated that anticipation of harsher conditions of confinement, stemming solely from a defendant's status as a deportable alien, may *never* serve as the basis for a downward departure.²⁷ For instance, in *United States v. Restrepo*,²⁸ the Second Circuit vacated a district court's imposition of a sentence that was based partly on a downward departure in anticipation of the alien defendant's ineligibility for halfway houses or other minimum security facilities. The *Restrepo* court reasoned that Congress gave the Bureau of Prisons discretion over the placement of inmates, and altering a sentence in anticipation of a harsh placement would amount to an encroachment on the Bureau's discretion.²⁹

A 1996 U.S. Supreme Court decision, *Koon v. United States*, addressed departures from the Guidelines and held that appellate courts could not categorically proscribe a factor as the basis of a departure unless that factor was explicitly forbidden from consideration by the Guidelines.³⁰ Although the tension between the Supreme Court's statement in *Koon* and the cases rejecting departures on the basis of alienage is apparent, the *Koon* case has failed to resolve the issue. Although several federal courts have read *Koon* as implicitly overruling *Restrepo*,³¹ others have continued to follow *Restrepo* and have refused to depart on the basis of alienage.³²

Id. at 655. These limitations serve an important function, and should alleviate many of the concerns that other courts have had concerning such departures. See *infra* Section I.B & Part III.

27. See, e.g., *United States v. Gregory*, No. 97-4090, 1998 WL 390176 (4th Cir. June 23, 1998) (maintaining that alien status alone is an inappropriate basis for departure); *United States v. Restrepo*, 999 F.2d 640 (2d Cir. 1993) (holding that increased harshness in the conditions of confinement stemming from alien status is not a proper basis for a downward departure); *Martin-Camacho v. United States*, No. 96 CR 0475(SJ), 1998 WL 352313 (E.D.N.Y. June 24, 1998) (explicitly following *Restrepo* and rejecting *Smith*); *Tsang v. United States*, No. 97 CIV. 1886 (CSH), 1997 WL 630182 (S.D.N.Y. Oct. 9, 1997) (same).

28. 999 F.2d 640 (2d Cir. 1993).

29. See *Restrepo*, 999 F.2d at 645-46.

30. 518 U.S. 81, 106-07 (1996) ("Thus, for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policymaking authority vested in the Commission.").

31. See, e.g., *United States v. Farouil*, 124 F.3d 838, 847 (7th Cir. 1997) (viewing *Koon* as resolving the issue in favor of the D.C. Circuit's opinion in *Smith*); *United States v. Angel-Martinez*, 988 F. Supp. 475, 483 (D.N.J. 1997) (same); see also *United States v. DeBeir*, 186 F.3d 561, 569 (4th Cir. 1999) (considering departures on the basis of alienage and noting, in dicta, that *Koon* "clarified that a district court is free to consider any factor not prohibited by the Guidelines").

32. One court of appeals and a number of district courts have relied explicitly on *Restrepo* in holding that a defendant's status as a deportable alien is not an appropriate basis for departure, even after the *Koon* decision. See *Gregory*, 1998 WL 390176 at *6; *Martin-Camacho*, 1998 WL 352313 at *2; *Tsang*, 1997 WL 630182 at *2.

This Note argues that district court judges should not be categorically prohibited from departing on the basis of alienage. Instead, they should have discretion to depart downward from a prescribed sentence on the basis of a defendant's status as a deportable alien, when that status results in a "fortuitous" increase in the severity of the sentence. Part I of this Note argues that departures on the basis of alienage in anticipation of harsh conditions of confinement are consistent with Congress's charge to the Commission, Congress's intent in enacting section 3624, and with the Guidelines themselves. Part II argues that the Supreme Court's decision in *Koon* and a recent amendment to the Guidelines prohibit categorical rejections of bases for departure that are not specifically forbidden by the Guidelines, and that the Supreme Court and the Commission would, therefore, allow such departures in some cases. Part III of this Note argues that equality in sentencing and effective use of judicial discretion mandate that appellate judges defer to the discretion of district judges who depart downward on the basis of alienage in appropriate cases. Specifically, Part III concludes that aliens and citizens have substantially equal rights under criminal law, and that district judges should therefore be allowed to depart on the basis of a defendant's status as a deportable alien when that status adversely affects the defendant's conditions of confinement.

I. THE PRE-*KOON* ANALYSIS: ALLOWING DEPARTURES ON THE BASIS OF ALIENAGE IN ANTICIPATION OF HARSH CONFINEMENT CONDITIONS

This Part argues that, even absent the Supreme Court's pronouncement in *Koon*, the Guidelines should be interpreted to permit a downward departure on the basis of alienage in order to offset the harsher conditions of confinement faced by aliens who are not eligible for prerelease programs. Section I.A shows that the term "mitigating circumstances," as used in Congress's charge to the Commission, may be interpreted to include alienage, because to do so would remain consistent with Congressional intent. Section I.B argues that departing in anticipation of an alien's harsh conditions of confinement is a legitimate use of the departure tool for sentencing judges, since judges depart to offset other prospective conditions. Finally, Section I.C responds to the argument that Congress never intended aliens to benefit from the programs described in section 3624 and concludes that, absent evidence of an intent to treat aliens more harshly, a departure is warranted to offset the disparate confinement effects stemming from section 3624.

A. Alienage As a "Mitigating Circumstance"

The starting point for the consideration of alienage as a mitigating circumstance is the text of the departure provision, 18 U.S.C. § 3553(b).³³ According to that provision, alienage must be either an "aggravating or mitigating circumstance" in order to be a valid basis for departure from the U.S. Sentencing Guidelines.³⁴ Courts allowing for departure on the basis of alienage have determined that it can sometimes be a mitigating circumstance.³⁵ This conclusion, however, is not beyond question. At least one judge has argued strenuously that alienage, as an offender characteristic, should never be considered a mitigating circumstance.³⁶ This Section demonstrates that alienage can be a mitigating circumstance under the Guidelines, by showing that such an interpretation is consistent with the congressional directive to the Commission.

A complete view of the legislative directive to the Commission reveals that Congress may have intended for offender characteristics, including alienage, to sometimes qualify as "mitigating circumstances." The text of the departure provision, section 3553(b), does not state expressly that offender characteristics should be included as mitigating circumstances.³⁷ Evidence from portions of the congressional directive to the Commission, however, supports the proposition that Congress did envision offender characteristics as potential mitigating circumstances. Most revealing is 18 U.S.C. § 994, which lists a number of offender characteristics (not including alienage) as potential factors in determining the appropriate sentence, and instructs the Sentencing Commission to determine whether or not those factors were rele-

33. See text of 18 U.S.C. § 3553(b), *supra* note 6.

34. In 18 U.S.C. § 3553(b), Congress expressly allowed sentencing judges the discretion to depart from the Guidelines on the basis of "aggravating or mitigating circumstances" that were not adequately taken into account by the Commission in formulating the Guidelines.

35. See *United States v. Smith*, 27 F.3d 649, 651-54 (D.C. Cir. 1994) (arguing that alienage can be a "mitigating circumstance"); see also *Farouil*, 124 F.3d at 846-47 (generally following the *Smith* approach); *United States v. Bakeas*, 987 F. Supp. 44, 47-49 (D. Mass. 1997) (same).

36. See *Smith*, 27 F.3d at 657-69 (Sentelle, J., dissenting) (maintaining that the Commission did not intend for alienage to be considered a mitigating circumstance). Offender characteristics should be distinguished from offense characteristics. The former refer to attributes of the defendant himself, such as: age, education, physical condition, family ties, criminal history, and community ties. The latter refer to attributes of the crime itself, such as: whether the victim died, whether a weapon was used, and whether the defendant confessed to the crime. See generally USSG § 1B1.1; *United States v. La Bonte*, 520 U.S. 751, 764-65 (1997).

37. See text of 18 U.S.C. § 3553(b), *supra* note 6.

vant.³⁸ The list of characteristics in section 994 is not exclusive,³⁹ and therefore it is reasonable to assume that other offender characteristics may also be mitigating circumstances.⁴⁰

The Commission's response to section 994 is found in Chapter 5, Part H of the Guidelines, which states that the offender characteristics listed in section 994 are "not ordinarily relevant" to the decision to depart, but may, in "exceptional" cases, be relevant to that decision.⁴¹ The Guidelines further "make[] plain that [these offender characteristics] may be a basis for departure even in circumstances where their connection to the sentence has nothing to do with moral blameworthiness."⁴²

This text from the Guidelines suggests that, in the Commission's view, *some* offender characteristics may be used as the basis for departure, albeit only in unusual cases. Although alien status is not specifically mentioned as one of the offender characteristics that might be relevant, the Sentencing Commission's statement in the Guidelines Manual, Chapter 1, Part A shows that the Commission did not intend to prohibit departure for alien status. This portion of the Guidelines Manual reads:

Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), § 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), and the last sentence of § 5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. *With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.*⁴³

As this statement makes clear, the mere fact that alienage is not mentioned in Chapter 5, Part H of the Guidelines is not sufficient evi-

38. See 28 U.S.C. § 994(d) (1994). This section directs the Commission to "consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence. . . ." 28 U.S.C. § 994(d). Congress's list of factors in § 994(d) consists mostly of offender characteristics, such as age, education, vocational skills, physical condition, community ties, family ties, and criminal history. Section 994(d) further directs the Commission to "take [these factors] into account only to the extent that they do have relevance." 28 U.S.C. § 994(d).

39. This is clear from the inclusion of the phrase "among others" in the statute. See 28 U.S.C. § 994(d), *supra* note 38.

40. See *Smith*, 27 F.3d at 651-52 (noting that ten of the eleven items listed in § 994(d) are offender characteristics).

41. See USSG ch. 5, pt. H, intro. cmt. (1998). The Guidelines seem to equate "exceptional" or "unusual" cases with those cases falling outside the "heartland" of cases. See *supra* note 9 for a complete discussion of the "heartland" concept.

42. *Smith*, 27 F.3d at 652.

43. USSG ch. 1, pt. A at 4(b) (1998) (emphasis added).

dence to conclude that the Sentencing Commission has determined that it is *always* irrelevant. Under the Guidelines, therefore, a defendant's status as an alien is an offender characteristic that may be considered by the sentencing court. Alien status, thus, stands in stark contrast to factors such as race and national origin,⁴⁴ which are expressly forbidden. The conclusion, then, that alien status may be considered as a mitigating circumstance (and hence the basis for a departure) in certain, limited circumstances is consistent with Congress's directive to the Commission.

Upon concluding that alienage could be a mitigating circumstance, the *Smith* decision held that sentencing courts have the discretion to depart on the basis of alienage.⁴⁵ The court, however, limited such departures to cases in which the alien faces a substantially more severe sentence over a substantial portion of his sentence, due to his alien status, when that status is unrelated to his just desserts. In such an "unusual"⁴⁶ case, alienage is a relevant factor that was not considered by the Commission in drafting the Guidelines, and therefore, a downward departure is well within the discretion of the sentencing judge.

One criticism that has been levied against this conclusion is that it inappropriately relies on Congress's charge to the Commission in 28 U.S.C. § 994. For example, the dissent in *Smith* stated that

28 U.S.C. § 994(d) has nothing whatsoever to do with mitigating circumstances under 18 U.S.C. § 3553(b). 28 U.S.C. § 994 was the charge to the Sentencing Commission setting out the scope of its undertaking. . . . That section is not directed to the sentencing of defendants, but rather toward the creation of a set of guidelines, which are then to be the framework for sentencing defendants.⁴⁷

In other words, the dissent maintains that the nonexclusive list of factors in section 994 is an inappropriate place to look for the definition of "mitigating circumstances" as used in section 3553(b), since section 994 was simply a directive to the Sentencing Commission and not a definitional provision.

The *Smith* dissent, however, mischaracterizes the effect of section 994. Neither this Note nor the courts allowing for departures on the basis of alienage argue that section 994 *defines* the phrase "aggravat-

44. See *supra* note 12 for the distinction between national origin and alienage.

45. See *Smith*, 27 F.3d at 655.

46. The court in *Smith* noted that the limitations it provided, see *supra* note 26, would be sufficient to keep such departures "highly infrequent." Even if most aliens will meet these limitations and be eligible for such a departure, (which is not at all clear, see *supra* note 26), this does not offend the Commission's desire for departures based on unmentioned factors to be unusual. The Commission recognized that it did not foresee all potential mitigating and aggravating circumstances. See *supra* note 10 and accompanying text. The case of aliens who are ineligible for halfway houses may simply be the sort of case that was unusual enough to be overlooked by the Commission in setting the Guidelines for most offenses.

47. *Smith*, 27 F.3d at 658 (Sentelle, J., dissenting).

ing or mitigating circumstance.”⁴⁸ Rather, this Note demonstrates that treating alienage as a mitigating circumstance is *consistent with* Congress’s directives, given the Commission’s approach to offender characteristics in section 5H. Section 994 illustrates that Congress anticipated that some offender characteristics might be relevant to sentencing and, therefore, directed the Commission to consider a number of them to determine whether they were relevant and to incorporate them into the Guidelines accordingly.⁴⁹

The dissent continues by arguing that Congress’s directive in section 994 was met by the Commission’s treatment of the characteristics in Section 5H, and that there is, therefore, no basis for a court to rely on this directive to interpret the phrase “mitigating circumstances.”⁵⁰ In other words, since Congress only instructed the Commission to *consider* each of a number of factors in section 994, once the Commission decided how to treat each factor under section 5H, section 994 lost any value in aiding the interpretation of other relevant provisions. This argument, however, overlooks the reality that the end result of the directive of section 994 was not only section 5H, but the entire framework of the Guidelines as a whole. That the Sentencing Commission chose to forbid only a few factors from departure consideration reflects the method that the Commission thought would be most appropriate in meeting Congress’s directive. By including some offender characteristics in section 5H, and by clearly stating that no factors are forbidden other than those expressly named in the Guidelines, the Commission made it clear that unmentioned offender characteristics may be considered mitigating circumstances and serve as the basis for a departure. The *Smith* decision demonstrates the consistency of this approach with Congressional intent by pointing to section 994 simply to show that Congress realized that some offender characteristics might be relevant to sentencing and should, therefore, be incorporated into the Guidelines’ overall scheme.⁵¹

A second argument against treating alienage as a mitigating circumstance is that each of the factors listed in section 5H were declared

48. The majority in *Smith* never claims that § 994 determines the definition of “mitigating circumstances.” Rather, the majority notes that the Commission has interpreted that phrase to include some offender characteristics, and that the Commission’s interpretation is not an unreasonable one, given Congress’s indications in § 994. Specifically, the majority’s argument is that: “The first question is whether § 3553(b) reaches offender characteristics not related to culpability. . . . We believe that although the controlling statutes are ambiguous on the point, the *Sentencing Commission* has answered it affirmatively, and that that answer is an entirely reasonable reading of the statutes.” *Smith*, 27 F.3d at 651 (emphasis added) (citation omitted).

49. See *supra* note 38 and accompanying text.

50. *Smith*, 27 F.3d at 659 (Sentelle, J., dissenting) (stating that “the Commission has carried out its statutory charge. . . . [T]he Commission has determined and specified in § 5H of the guidelines the extent to which each of several characteristics has relevance. . . .”).

51. See *supra* note 48.

by the Commission to be “not ordinarily relevant in determining whether a sentence should be outside the applicable Guideline range.”⁵² This argument maintains that the Commission’s treatment of the section 994 factors in section 5H is an insufficient basis on which to determine that the Commission has interpreted “mitigating circumstances” as including some offender characteristics, such as alienage.⁵³

While it is true that the Commission has declared the offender characteristics in section 5H to be “not ordinarily relevant” to a decision to depart,⁵⁴ it does not follow that the Commission thought they would *never* be relevant to departure. The Commission carefully framed the use of factors for departing, and specifically declared that only the factors expressly forbidden were beyond the authority of a court to consider as bases for a departure. Therefore, although not an approval of the *frequent* use of certain discouraged offender characteristics, such as extreme age, for departure, section 5H does support an interpretation of “mitigating circumstances” that would include any offender characteristic not expressly forbidden.

In response to this reasoning, those advancing this second argument contend that such a “nod to the possibility of unforeseen circumstances” is not sufficient evidence of the Commission’s interpretation of “mitigating circumstances” to command deference from the courts.⁵⁵ The Commission’s choice of a framework that encourages some factors, discourages others, and expressly forbids only a few,⁵⁶ however, should not be thought of as merely a “nod” to the unforeseen. Rather, such a detailed breakdown of factors shows that a variety of offender characteristics may be relevant in some extraordinary cases. For this reason, the Commission was careful not to remove *completely* consideration of these “not ordinarily relevant” factors from the authority of the sentencing courts. In keeping with that framework, this Note only advocates departures on the basis of alienage in certain, limited circumstances, thus making it similar to factors that are expressly declared not ordinarily relevant⁵⁷ (i.e., a “discouraged” factor⁵⁸).

52. *Smith*, 27 F.3d at 660 (Sentelle, J., dissenting) (quoting USSG §§ 5H1.1-5H1.6).

53. *See Smith*, 27 F.3d at 660 (Sentelle, J., dissenting).

54. *See* USSG ch. 5, pt. H (1995).

55. *Smith*, 27 F.3d at 660 (Sentelle, J., dissenting).

56. For an explanation of “encouraged,” “discouraged,” “forbidden,” and “unmentioned” factors, see *supra* notes 8-10 and accompanying text.

57. In particular, this Note advocates departure under the limitations suggested by the *Smith* court. *See supra* note 26 and accompanying text.

58. *See supra* note 9.

B. *Departure in Anticipation of Harsh Confinement Conditions*

In departing from the Guidelines on the basis of alienage, judges must anticipate that the alien will face harsher conditions of confinement once incarcerated. Initially, such a departure may seem inappropriate as unduly speculative, since the court is essentially predicting where the Bureau of Prisons will place the defendant, and then sentencing accordingly.⁵⁹ Some courts, recognizing the "anticipatory" nature of the departure, have refused to depart on the basis of alienage.⁶⁰ These courts primarily are concerned that this anticipatory departure may encroach on the authority of other agencies — specifically the Bureau of Prisons, which is charged with the decision whether a given inmate will be placed in minimum security confinement or community confinement.⁶¹ The purpose of Section I.B is to demonstrate the propriety of such a "preemptive" departure. Anticipatory departures often are used by courts in other situations without serious question. Even if anticipatory departures are not always valid, they should be upheld in the specific case of conditions of confinement departures for aliens.

"Encroachments" on the discretion of the Bureau or other prison authorities have been upheld in other cases involving similar circumstances.⁶² In a number of cases, federal courts have upheld departures in anticipation of Bureau (or other prison authority) actions that would cause a seemingly "fortuitous" increase in the objective severity of the sentence.⁶³ For instance, in *United States v. Lara*, the Second

59. The sentencing court is also necessarily predicting that the Bureau's policy will not change within the time the alien is sentenced and that the alien would otherwise become eligible for the prerelease confinement described in 18 U.S.C. § 3624(c) (1994). Although prison regulations are more susceptible to change than a statute, there is no indication that there is any momentum or pressure to change this particular Bureau policy.

60. See, e.g., *United States v. Restrepo*, 999 F.2d 640 (2d Cir. 1993). In *Restrepo*, the court reversed the sentencing court's decision to depart on the basis of alienage, relying heavily on Congress's intent to give the Bureau of Prisons discretion with respect to the application of 18 U.S.C. § 3624 (the same confinement provision at issue in *Smith*). The Second Circuit characterized the kind of anticipatory departure embraced by the *Smith* court as an "encroachment" on the Bureau of Prison's discretion. See *id.* at 645; see also *United States v. Sutton*, 973 F. Supp. 488 (D.N.J. 1997) (encouraging the Commission to make conditions of confinement a forbidden factor, in part relying on *Restrepo*'s characterization of anticipatory departures as "speculative and inappropriate").

61. See *supra* note 13 for a description of the Bureau's authority over the placement of inmates.

62. See *United States v. Smith*, 27 F.3d 649, 654-55 (D.C. Cir. 1994).

63. See *Smith*, 27 F.3d at 653-55. These other cases typically involve the offsetting of potential victimization or potential solitary confinement due to vulnerability. See, e.g., *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990) (approving a downward departure where the district court found that the defendant's small size, his appearance, and his bisexual orientation made him extremely susceptible to abuse in prison, and that the only way for prison officials to protect him would be to place him in solitary confinement); see also *United States v. Tucker*, 986 F.2d 278 (8th Cir. 1993) (agreeing with *Lara* that potential for victimization in prison may be a justifiable basis for departure, but finding insufficient evidence of such po-

Circuit upheld a departure as a means to offset the probability that prison authorities would place a particularly vulnerable defendant in solitary confinement in order to protect him from sexual assault.⁶⁴ In *United States v. Tucker*, the Eighth Circuit agreed that sentencing courts may depart downward in anticipation of abuse in prison.⁶⁵ These decisions indicate that, when the policies of the Bureau or other prison officials are predictable enough to enable the court to foresee a fortuitous increase in the severity of the sentence for a particular defendant, the sentencing court may depart to "offset" the harsh outcome.⁶⁶

Even if it is not always valid to depart on the basis of an anticipated event, the specific anticipatory departure at issue in this Note should be allowed because it is more predictable than other Bureau decisions. First, departure on the basis of alienage for harsh conditions of confinement is based on a uniquely certain event — the denial of access to prerelease programs. The clarity and certainty of the Bureau of Prisons policy⁶⁷ make it extremely unlikely that a deportable alien defendant will be granted access to prerelease programs. In addition, it would be easy for a sentencing judge to learn of the alien's circumstances so as to predict with nearly perfect accuracy whether or not the defendant will meet the Bureau's requirements for placement in a halfway house.⁶⁸ This level of

tential for victimization to support such a departure); *United States v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991) (approving a departure where the defendant had a feminine appearance, would be susceptible to abuse in prison, and would likely face more severe prison conditions as a result). In *Gonzalez*, the Second Circuit stressed that sentencing courts should be able to depart even before any abuse actually has occurred. See *Gonzalez*, 945 F.2d at 527.

64. 905 F.2d at 603.

65. 986 F.2d at 280.

66. In addition to these cases, the U.S. Supreme Court apparently granted its approval to such anticipatory departures in *Koon v. United States*, 518 U.S. 81 (1996). Although the full implication of *Koon* is discussed *infra* Part II, it should be noted at this point that the Court upheld the trial court's grant of a downward departure in anticipation of the defendants' susceptibility to abuse in prison, which was clearly in anticipation of future events. In doing so, the Court cited *Lara* as an example, and noted that, after *Lara*, the Commission made "physical . . . appearance, including physique" a discouraged factor. See *Koon*, 518 U.S. at 107. The Court went on to state that even discouraged factors are not totally removed from the consideration of the sentencing judge as a basis for departure. See *id.* at 107-09. With respect to the susceptibility departure, the Court affirmed the district court's decision to depart, which was based on the finding that the defendants were "particularly likely to be targets of abuse during their incarceration." *Id.* at 112 (quoting *United States v. Koon*, 833 F. Supp. 769, 788 (C.D. Cal. 1993)). The extraordinarily high degree of probability that the defendants would be abused was enough to support the district court's conclusion that this was an "unusual" case that the Commission had not considered. See *id.*

67. The Bureau's policy is stated in BUREAU OF PRISONS, 5100.07, ch. 7, *supra* note 13.

68. The judge simply would need to inquire about whether the INS has declared its intent to deport the alien following incarceration, and whether the alien has the requisite ties to the community listed in BUREAU OF PRISONS, 5100.07, ch. 7, at 3-4, *supra* note 13. This makes the determination that the alien will be denied access to a halfway house an easy one.

certainty is at least greater than that which a sentencing judge could have about whether or not a given defendant will be abused in prison — an anticipation that, as noted above, frequently has been upheld as valid, even by the Supreme Court.⁶⁹

Second, the departure at issue here can be limited specifically by the restrictions established in *Smith*. In *Smith*, the D.C. Circuit expressly limited departures on the basis of alienage to cases in which the difference in severity (1) is substantial, (2) will apply for a substantial part of the sentence, and (3) is “undeserved.”⁷⁰ These limits act to prevent a court from encroaching too far on the discretion Congress granted to the Bureau. As long as the courts granting downward departures are restrained by these three requirements, the departures do not represent an improper threat to the discretion of the Bureau.

C. Congressional Intent

Critics of anticipatory departures based on alienage argue that Congress never intended for section 3624 to apply to aliens, since aliens will be deported following the completion of their prison term. These critics rely on the text of section 3624 to contend that the purpose of prerelease programs (such as halfway houses) is to give the prisoner a reasonable opportunity to adjust to and “prepare for his re-entry into the community.”⁷¹ For example, the *Restrepo* court noted:

Given the focus of § 3624(c) on prisoners who are to reenter the community, it is arguable that Congress, having instructed that deportable aliens not be released into the community, did not mean § 3624(c) to apply to such aliens. Had Congress so stated, a court’s disapproval of that policy choice would not be an appropriate basis for a departure from the Guidelines⁷²

At first, this argument seems persuasive, given the inclusion of the language “re-entry into the community.”⁷³ The argument, however,

The determination of whether the alien’s status was the *only factor* that caused that denial, however, is an altogether different, and much more difficult, determination. For a discussion of this problem, and how it may affect the number of these anticipatory departures, see *infra* note 113. *United States v. DeBeir*, 186 F.3d 561 (4th Cir. 1999), is an example of a situation in which the defendant’s alienage was not the only factor that caused the denial of access to a halfway house. In *DeBeir*, the Fourth Circuit distinguished *Smith* by pointing out that the alien defendant in this case was unable to find a halfway house that would take him because of the nature of his offense (involving the sexual assault of a minor), not because of his alien status. See *DeBeir*, 186 F.3d at 569-70.

69. See *supra* notes 63-66.

70. See *United States v. Smith*, 27 F.3d 649, 655 (D.C. Cir. 1994).

71. *United States v. Restrepo*, 999 F.2d 640, 645 (2d Cir. 1993) (citing 18 U.S.C. § 3624(c) (1988 & Supp. II 1990)).

72. *Restrepo*, 999 F.2d at 645.

73. 18 U.S.C. § 3624(c) (1994).

has little support in the legislative history of section 3624, and in this country's historical treatment of aliens.

The legislative history of the provision and the general legal status of aliens in the United States do not support an interpretation of section 3624 that would treat aliens more harshly than citizens. To make this point clear, the counterargument must be fully understood. Essentially, the argument is that since Congress meant to exclude aliens from the benefits of section 3624, the aliens should not get an offsetting departure. For the counterargument to be persuasive, it must be true that Congress *consciously intended* to treat aliens more harshly than citizens, by not allowing them to be placed in the halfway houses contemplated under section 3624.⁷⁴

If Congress actually intended to treat aliens more harshly, it would have been deviating from the traditional treatment of aliens in the United States legal system. Although alien status may not rise to the level of a protected classification, such as race, it is a characteristic that the Supreme Court has deemed worthy of some level of heightened scrutiny in constitutional analysis.⁷⁵ The fact that the Court has treated alienage as a category warranting some heightened scrutiny would suggest that Congress would not distinguish lightly between aliens and U.S. citizens in a statute. Furthermore, distinctions on the basis of alienage in the specific context of criminal punishment may be

74. An assumption that Congress simply *overlooked* the disparate effects of § 3624 on alien inmates (as one would probably suspect) would not be sufficient to support the counterargument. If that were the case, then the critic should not object to a departure by a sentencing judge to offset the *unintended* harsh effects of the statute on alien defendants. Indeed, the *Restrepo* court's argument centers on the inappropriateness of a departure that "palliates" the intent of Congress. See *Restrepo*, 999 F.2d at 645.

75. The Supreme Court's decisions regarding the constitutionality of laws distinguishing between aliens and citizens leave much confusion. The Supreme Court, in 1971, seemed to adopt a strict scrutiny test for the review of state laws that drew such a distinction. See *Graham v. Richardson*, 403 U.S. 365 (1971) (holding that states may not deny welfare benefits to aliens). In 1978, however, the Court began to review such laws more deferentially. See *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding a New York law that prohibited aliens from being state troopers). In *Mathews v. Diaz*, 426 U.S. 67 (1976), the Court applied a deferential standard to uphold a federal law that conditioned aliens' eligibility for Medicare on admission for permanent residence and continuous residence for five years. That the Court has moved toward more deference, especially with respect to federal regulation of aliens, however, does not make the counterargument persuasive. To the contrary, the simple fact that alienage has fallen somewhere between strict scrutiny and rational basis review suggests that the U.S. legal system is sensitive to discrimination on the basis of alienage. See generally GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 720-25 (1997) (listing alienage among the "other classifications arguably warranting heightened scrutiny," and discussing the Supreme Court's decisions). Section 3624, a federal regulation, would probably have been upheld if it was determined to be not arbitrary or unreasonable, even if it explicitly denied aliens access to halfway houses. The Court's general skepticism of classifications on the basis of alienage, however, would suggest that if Congress meant to classify on that basis, it would have done so expressly in the statute, or would have at least mentioned it in the legislative history. This observation is sufficient to undermine the counterargument that Congress actually did mean to deny aliens the benefits of § 3624, even though the legislative history does not reveal that intent.

even more susceptible to the scrutiny of federal courts.⁷⁶ It is difficult to imagine, therefore, that Congress intentionally would punish aliens more severely than citizens without any record of such an intent in the legislative history. To the contrary, at other places in the U.S. Code, Congress appears to hold a strong conviction that aliens should not be punished differently than citizens.⁷⁷

It may well be true that Congress actually intended to treat aliens differently under section 3624. But if Congress consciously made this decision, it would be reflected in the legislative history of section 3624. The history of alien status in Constitutional law would make such a disparate treatment of aliens a significant legislative move — one that would not be made lightly. A comprehensive search of the legislative history of section 3624, however, reveals no debates about such disparate treatment of aliens, nor any other indication that Congress deliberately decided to treat aliens unequally in light of countervailing policy concerns.⁷⁸ The counterargument simply ignores this gap in the legislative history and reads into the plain language of the statute an intent to differentiate between aliens and citizens. Although it may be possible to imagine compelling reasons for Congress to make such a differentiation,⁷⁹ an assumption that Congress so intended is simply too much of a leap when the resulting interpretation treats aliens differently than other inmates. In the absence of any concrete evidence, any ambiguity about Congress's intent in enacting section 3624 should be resolved in favor of the equal treatment of aliens and citizens.

II. THE POST-KOON ANALYSIS: THE SUPREME COURT AND THE SENTENCING COMMISSION AGREE

To this point, this Note has demonstrated that a departure on the basis of alienage in anticipation of ineligibility for prerelease programs is not inconsistent with the Sentencing Guidelines, congressional intent, and common law notions about the validity of anticipatory departures. Part II argues that the U.S. Supreme Court's decision in 1996,

76. See, e.g., *United States v. Borrero-Isaza*, 887 F.2d 1349, 1352 (9th Cir. 1989) (stating that giving a defendant a more severe sentence on the basis of national origin and alienage is a violation of due process rights); *United States v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986) (stating that sentencing a defendant more severely on the basis of nationality or alien status is unconstitutional).

77. See 18 U.S.C. § 242 (1994 & Supp. II 1996), discussed *infra* note 116, which makes it a crime to punish aliens more severely on the basis of their alien status.

78. In fact, there is very scant legislative history on the provision at issue. Senate Report 98-225 specifically addresses § 3624(c), and makes no mention of an intention to exclude aliens from the benefits of the provision. See S. REP. NO. 98-225 (1983).

79. For instance, Congress could have intended to deny aliens access to halfway house programs because of a fear that deportable aliens would be more likely to attempt to escape from them to defeat deportation.

Koon v. United States,⁸⁰ should have settled the dispute once and for all — invalidating the categorical approach to departures in favor of an approach that affords sentencing judges more discretion. Section II.A of this Note argues that the *Koon* decision reaffirmed a discretionary approach to departures, and implicitly overruled decisions that categorically prohibit departure factors that are not forbidden by the Guidelines. Section II.B discusses a recent amendment to the Guidelines that incorporated *Koon*, and concludes that the amendment also endorses the discretionary approach.

A. *The Court's Rejection of a Categorical Approach to Departures in Favor of Sentencing Court Discretion*

In *Koon*, the defendants were police officers convicted of “violating [a suspect’s] constitutional rights under color of law” during the arrest of Rodney King.⁸¹ The intense media coverage and the anger felt by the black community in Los Angeles toward the defendants made *Koon* a special case — one in which the district court found several factors that took the case outside of the “heartland” of Guidelines cases.⁸² The district court, therefore, departed downward from the Guidelines on a number of bases, including the officers’ susceptibility to abuse in prison.⁸³ The Ninth Circuit Court of Appeals rejected all of the bases for departure relied upon by the district judge,⁸⁴ but the

80. 518 U.S. 81 (1996).

81. *Koon*, 518 U.S. at 88. The district court found the following facts: California Highway Patrol officers saw King, who was intoxicated, speeding on a major freeway and attempted to pull him over. They followed him with their lights on and used the loudspeaker to order him to pull over, but King kept driving. The defendants, Los Angeles Police Department officers, joined in the chase. After the police had chased King for about eight miles, King stopped at a recreation area. The officers ordered King to assume a felony prone position (lying face down on his stomach with his legs spread and his arms behind his back). King got on his knees, but did not lie down. When some officers tried to force him down, he resisted. Defendant Koon then used a taser dart to stun King. King then got up and charged toward another officer, defendant Powell. Powell then began to beat King with his baton, knocking him to the ground. The defendant officers continued to beat King with batons to prevent him from getting up. For several seconds after the officers no longer considered King to be a threat, the defendant officers continued to beat King with batons and stomp on him. Much of the beating was caught on videotape and shown repeatedly on national news programs. Four of the officers were tried in state court, and all were acquitted of all charges except for one charge against defendant Koon that resulted in a hung jury. The announcement of the verdicts in the widely-publicized case sparked civil unrest in Los Angeles. See *Koon*, 518 U.S. at 85-88.

82. See *Koon*, 518 U.S. at 89-90. For the definition of “heartland,” see *supra* note 9.

83. See *Koon*, 518 U.S. at 89-90. The other bases for departure employed by the district judge were the victim’s misconduct that provoked the offense, the likelihood that the officers would lose their jobs and would be prevented from future employment in law enforcement, the fact that the officers had been subject to successive state and federal trials, and the low risk of recidivism. See *Koon*, 518 U.S. at 89-90.

84. See *Koon*, 518 U.S. at 90.

Supreme Court reversed the Ninth Circuit's treatment of some of these bases for departure.⁸⁵ In so holding, the *Koon* decision provided a useful analytical framework for evaluating the propriety of departures from the Guidelines, stating:

If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. . . . *If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," . . . decide whether it is sufficient to take the case out of the Guideline's heartland.*⁸⁶

The *Koon* Court clearly emphasized that deference should be given to district courts in Sentencing Guidelines' departures on unmentioned factors, and disapproved of the district court's departures only where there was a clear abuse of discretion.⁸⁷ The Court further stressed that courts of appeals have a limited role in the evaluation of unmentioned factors as potential bases for departures. The Court disapproved of the Ninth Circuit's categorical rejection of "susceptibility to prison abuse" as a factor that can serve as the basis for departure.⁸⁸ The Court plainly stated that appellate courts could not determine that this particular factor was *always* an inappropriate basis for departure, since such a holding would be to "transgress the policymaking authority vested in the Commission."⁸⁹ The *Koon* deci-

85. See *Koon*, 518 U.S. at 91. The Court held that the district court did not abuse its discretion in departing on the basis of the victim's misconduct. See *Koon*, 518 U.S. at 105. Furthermore, the Court stated that the district court could appropriately consider susceptibility to abuse in prison and the successive prosecutions as factors for departure. See *Koon*, 518 U.S. at 111. The Court, however, found that the district court abused its discretion in considering the career losses of the defendants, because that is clearly an expected consequence of the crime of violating 18 U.S.C. § 242, which prohibits a governmental authority from violating a person's rights. See *Koon*, 518 U.S. at 110. It is important to note that the Court concluded that the Commission must have considered this expected factor only after recognizing that the district court deserved deference on this question. See *Koon*, 518 U.S. at 110. The Court also disapproved of the district court's consideration of low risk of recidivism, given that the Commission expressly dealt with that specific factor in the Guidelines. See *Koon*, 518 U.S. at 111.

86. *Koon*, 518 U.S. at 95-96 (emphasis added) (citations omitted) (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1993)).

87. See *supra* note 85.

88. See *Koon*, 518 U.S. at 106-09.

89. *Koon*, 518 U.S. at 107 ("By urging us to hold susceptibility to abuse in prison to be an impermissible factor in all cases, the Government would have us reject the Commission's considered judgment in favor of our own.").

sion, therefore, emphasized the importance of the sentencing court's discretion in deciding whether to depart based on unmentioned factors.

Although the *Koon* holding did not address expressly the circuit split regarding alienage as a basis for departure, the framework that the *Koon* decision implemented for departure jurisprudence speaks to the conflict. The Supreme Court implicitly reaffirmed the discretionary approach embodied in *Smith* by approving of discretionary departures based on an unmentioned factor.⁹⁰

Ineligibility for favorable conditions of confinement due to deportable alien status is not mentioned in the Guidelines.⁹¹ According to the *Koon* decision, the district court must, therefore, consider the structure and theory of the relevant individual guidelines and the Guidelines as a whole to determine whether it is sufficient to take the case out of the heartland.⁹² The Supreme Court noted that this is a fact-specific inquiry that district judges are better situated to resolve than appellate judges.⁹³ The discretionary approach properly acknowledges this fact by giving the district judge discretion to determine whether or not the consequences of a defendant's status as a deportable alien based on conditions of his confinement could be an appropriate basis for departure in that particular case.⁹⁴ In short, the discretionary approach refuses to categorically prohibit departures based on an alien's ineligibility for prerelease confinement programs.⁹⁵ This discretionary approach recognizes the limited role of appellate courts in departure jurisprudence, as envisioned by the *Koon* decision. It allows sentencing judges to determine whether or not a factor is present that the Commission did not consider adequately and that takes the case out of the heartland, without intrusive review from appellate courts unfamiliar with the facts of each case. The *Koon* decision, therefore, indicates the Supreme Court's implicit approval of the discretionary approach to departure jurisprudence that would allow downward departures on the basis of alienage in limited circumstances.

90. See *supra* text accompanying notes 86-89.

91. See generally USSG (1998); *United States v. Romero*, No. Crim. 97-388(JBS), 1998 WL 690010, at *15 (D.N.J. Sept. 25, 1998) (noting that "a deportable alien's ineligibility for pre-release confinement under § 3624(c) is not mentioned in the Guidelines . . ."), *reversed in part* by *United States v. Romero* 193 F.3d 515 (1999).

92. See *supra* text accompanying notes 86-89.

93. See *Koon*, 518 U.S. at 98-99 (noting that "[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do").

94. See *United States v. Smith*, 27 F.3d 649, 655-56 (D.C. Cir. 1994) (concluding that "a downward departure may be appropriate where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence . . .").

95. See *Smith*, 27 F.3d at 655-56.

In contrast to the *Smith* court's discretionary approach, the *Restrepo* decision holds that downward departures on the basis of an alien defendant's likely ineligibility for prerelease programs under section 3624 are inappropriate.⁹⁶ This categorical prohibition of an unmentioned factor is erroneous in the wake of *Koon*. *Koon* teaches that an appellate court should allow district courts discretion in determining whether a factor (other than a prohibited factor) present in a given case takes the case outside of the "heartland" of Guidelines cases.⁹⁷ For an appellate court to rule that ineligibility of aliens for a section 3624 prerelease program *never* takes a case out of the heartland is inappropriate in light of the *Koon* Court's statement that such a categorical prohibition would be an usurpation of the Commission's authority.⁹⁸

Many federal courts have disagreed with the foregoing interpretation of *Koon*'s impact in the context of departures for the conditions of confinement faced by deportable aliens. Most of these courts have simply adhered to the categorical *Restrepo* approach without discussing the impact of the Supreme Court's decision in *Koon*.⁹⁹ At least one federal district court has gone further, expressly declaring that *Koon* does *not* overrule *Restrepo*. In *United States v. Holguin*, the court held that *Restrepo* was good law, despite the *Koon* holding.¹⁰⁰ In a footnote, the court addressed the tension between the cases:

First, *Koon* does not discuss the precise factor of deportable alien status at all. Second, *Koon* merely gives the district courts a framework within which to consider factors not specifically mentioned in the Sentencing Guidelines. The holding in *Koon* does not go so far as to implicitly overrule decisions like that in *Restrepo*. Rather, *Koon* reminds district courts of their discretion pursuant to 18 U.S.C. § 3553(b) to depart only if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."¹⁰¹

The two arguments advanced by the *Holguin* court are deficient. First, the fact that *Koon* did not deal specifically with deportable alien

96. See *United States v. Restrepo*, 999 F.2d 640, 644 (2d Cir. 1993) ("[W]e conclude that none of the bases relied upon by the district court, i.e., (1) the unavailability of preferred conditions of confinement . . . justified the departure."); see also *Romero*, 1998 WL 690010, at *15 ("*Restrepo* ruled out the prospect of a downward departure based solely upon an alien's typical ineligibility for pre-release confinement . . .").

97. See *supra* note 86 and accompanying text.

98. See *supra* note 89 and accompanying text.

99. See, e.g., *Martin-Camacho v. United States*, No. 96 CR 0475(SJ), 1998 WL 352313, at *2 (E.D.N.Y. June 24, 1998); *Tsang v. United States*, No. 97 CIV. 1886(CSH), 1997 WL 630182, at *2 (S.D.N.Y. Oct. 9, 1997).

100. See *United States v. Holguin*, 16 F. Supp. 595, 600 (D. Md. 1998).

101. *Holguin*, 16 F. Supp. at 600 n.2 (quoting *Koon*, 518 U.S. at 92 (citing § 3553(b))).

status is irrelevant. The Supreme Court did not limit its analysis to the specific factors involved in the *Koon* case. Quite the contrary, the decision clearly stated that *no* factor is ruled out unless the Guidelines specifically prohibit consideration of the factor.¹⁰² Furthermore, the Supreme Court carefully described a procedure for considering unmentioned factors, which demonstrates the Court's acute awareness that the opinion would be used as a guide for the consideration of other unmentioned factors that might later become the subject of departure jurisprudence.

The second argument of the *Holguin* court is equally unpersuasive. Simply put, the *Koon* decision does not "merely" provide a framework for district courts to consider unmentioned factors. Rather, the *Koon* opinion goes further by discussing the limited role of appellate courts in reviewing district court departure decisions.¹⁰³ The *Holguin* court apparently overlooked the Supreme Court's declaration that no factor may be categorically ruled out by an appellate court, except for the factors expressly prohibited by the Commission.¹⁰⁴

Less creative federal courts have simply declared that comparatively harsh conditions of confinement due to alien status is an inappropriate basis for departure, relying on the *Restrepo* precedent, and ignoring the effect of the *Koon* decision.¹⁰⁵ For example, the Fourth Circuit's opinion in *United States v. Gregory*, decided after *Koon*, adopted a categorical rule that "illegal alien status, alone, is an inappropriate basis for departure."¹⁰⁶ These courts erroneously deny district courts the discretion to determine, under the facts of their individual cases, whether or not that factor may be an appropriate basis for departure. According to *Koon*, such a denial of discretion is improper and counterproductive.¹⁰⁷ Only those district courts that carefully consider the structure and theory of the Guidelines can appropri-

102. See *Koon*, 518 U.S. at 109 ("We conclude, then, that a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no — as it will be most of the time — the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.").

103. See *Koon*, 518 U.S. at 98. In fact, there is an entire section of the opinion devoted to the general standard of appellate review for departure determinations. See *Koon*, 518 U.S. at 96-100.

104. See *supra* note 86 and accompanying text.

105. See *supra* note 99 and accompanying text.

106. *United States v. Gregory*, No. 97-4090, 1998 WL 390176, at *6 (4th Cir. June 23, 1998) (rejecting, without any explanation other than a cite to *Restrepo*, the defendant's argument that he should get a downward departure since he will be incarcerated in a maximum security facility and ineligible for community confinement due to his alien status).

107. See *Koon*, 518 U.S. at 98 (noting the "institutional advantage" of district courts in making the determination of whether a factor is present in "some unusual or exceptional way").

ately deny a departure on the basis of alien status and its impact on confinement.¹⁰⁸ To the extent that any federal appellate court claims to exclude categorically, as a basis for departure, any factor that has not been prohibited from consideration by the Guidelines, such as alienage,¹⁰⁹ that court's decision is irreconcilable with *Koon*, and is therefore unsound.

B. *The 1998 Amendment to the Sentencing Guidelines*

A 1998 amendment to the commentary to section 5K2.0 of the Guidelines, which expressly incorporates the *Koon* holding, demonstrates that both the U.S. Sentencing Commission and Congress have embraced the discretionary approach. The new amendment reads, in pertinent part:

The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. *Koon v. United States* "[To determine whether a case falls outside of the heartland,] the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission . . . [is a matter] determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do."¹¹⁰

This amendment quotes extensively the key language from the *Koon* case. The amendment makes clear the Sentencing Commission's adoption of the *Koon* holding and its approval of the limited role for appellate courts in departure jurisprudence described in the court's opinion. No courts considering the types of departures at issue in this Note have discussed the effect of the new amendment to the Guidelines. Presumably, however, courts like the Fourth Circuit in *Gregory* and the District Court for the District of Maryland in *Holguin* would not change their decisions, since they do not see *Koon* as a barrier to categorical rejection of alienage as a basis for departure.¹¹¹ If, as the *Holguin* court argues, *Koon* does not implicitly overrule *Restrepo*, then there is no reason to think that the amendment does either.

108. See *supra* note 86 and accompanying text.

109. Alienage is not one of the few factors prohibited as a basis for departure by the Guidelines. See *supra* note 8.

110. USSG § 5K2.0 cmt. (1998) (quoting *Koon*, 518 U.S. at 98).

111. See *supra* notes 100-101, 106 and accompanying text.

If, as this Note has argued, the *Koon* decision implicitly overrules *Restrepo*, then the amendment to the Guidelines places the Commission's stamp of approval on the discretionary approach. After the amendment, any courts that continue to follow *Restrepo*'s categorical proscription of an alien's ineligibility for prerelease programs as a basis for departure would not only ignore Supreme Court precedent, but will also ignore the express will of the U.S. Sentencing Commission and Congress, as expressed in the new amendment.

III. POLICY JUSTIFICATIONS FOR ALLOWING DEPARTURE ON THE BASIS OF ALIENAGE

Part III argues that the independent policy goals of equal punishment and trial court discretion justify departures on the basis of alienage in anticipation of harsh conditions of confinement. Section III.A shows that such departures ensure that aliens are treated the same as other inmates. Section III.B argues that trial courts should be given more discretion to fashion appropriate sentences for individual defendants — including granting departures on the basis of alienage.

A. *Equal Treatment for Alien Defendants*

Allowing for downward departures to compensate illegal aliens for facing objectively more severe conditions of confinement results in equal treatment of citizen and alien defendants who are otherwise similarly situated. The Bureau of Prisons' Policy Statement contains special requirements, applicable only to aliens, that must be met in order to gain eligibility for minimum security or community confinement.¹¹² As a result, most alien defendants will face objectively harsher conditions of confinement than a comparable citizen defendant, based on their alienage.¹¹³ An approach to sentencing that al-

112. See *supra* note 13.

113. See *supra* notes 13, 23 and accompanying text. It is important to note, however, that it may be difficult, in some cases, to identify alienage as the factor that actually caused the increased severity of confinement conditions. Since there are a number of variables in the Bureau's determination of placement of an inmate, it will often be difficult to isolate the alienage variable as the cause of the disparity. In the words of the *Smith* court, "in trying to assess whether deportable alien status *per se* will really affect assignment, it may be hard to identify an otherwise identical citizen to serve as a benchmark." *United States v. Smith*, 27 F.3d 649, 655 (D.C. Cir. 1994). The *Smith* court, however, went on to note that, under some circumstances, the effect of the alienage factor is clear:

[I]f a deportable alien is assigned to a more drastic prison than otherwise solely because his escape would have the extra consequence of defeating his deportation, then the defendant's status as a deportable alien would have clearly generated increased severity and thus might be the proper subject of a departure.

Smith, 27 F.3d at 655. Thus, in cases like Peter Bakeas's, there is little question that a similarly-situated citizen "benchmark" would have been treated differently. The only factor that would have caused the difference in the Bureau's placement of Bakeas and the hypothetical

lows a trial judge sufficient discretion to counteract this disparity in certain cases would serve to balance the severity of punishment on otherwise similarly situated alien and citizen defendants.¹¹⁴ This balancing is desirable, because the idea of equal treatment for similarly situated defendants was central to the creation of a uniform system of sentencing guidelines.¹¹⁵ The desirability of equal punishment for aliens and citizens is underscored by criminal law. As one judge and scholar has noted, "[i]ndeed, it is a crime to punish an alien differently than a citizen merely because of alienage."¹¹⁶

Critics of departure for alienage will respond by arguing that a departure does exactly that — it unjustifiably punishes an alien differently than a citizen solely on the basis of alienage. These critics claim that departing on the basis of alienage will cause the alien to receive a

citizen defendant was alien status. It is in cases like these that the *Smith* court thought departures would be necessary, but the court recognized that these type of cases might be "quite rare." *Smith*, 27 F.3d at 655. Cf. *United States v. DeBeir*, 186 F.3d 561 (4th Cir. 1999), discussed *supra* note 68.

114. For an analysis of the validity of such "anticipatory" offsetting departures, see *supra* Section I.B.

115. See 28 U.S.C. § 991(b)(1)(B) (1994) (charging the U.S. Sentencing Commission to achieve "certainty and fairness" through a reduction in "unwarranted sentencing disparities"); USSG, ch. 1, pt. A, intro. cmt., at 1-2 (Nov. 1993) (stating Congress's goals as including proportionality for "similar criminal offenses committed by similar offenders."). See also Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combatting Ultra-Uniformity*, 35 B.C. L. REV. 799, 800-01 (1994) (describing the "thinking," including uniformity concerns, that motivated the promulgation and adoption of the Guidelines); Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 3-5 (1991) (noting the goal of eliminating discrimination on the basis of race, sex, and other variables as one of the objectives of the Guidelines).

116. Arthur L. Burnett Sr., *National Origin and Ethnicity in Sentencing*, 9 CRIM. JUST., Fall 1994, at 28 (citing 18 U.S.C. § 242 (1994)). Section 242 states, in relevant part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both . . .

18 U.S.C. § 242 (1994). In addition to this criminal violation, it appears that such differential punishment is a violation of an alien's Constitutional rights. See *supra* note 75. The key point here is that the different punishment cannot be assessed *solely* on the basis of alienage. If, however, a noncitizen's alienage is otherwise relevant in determining an appropriate sentence, then the punishment would not be based purely on alien status. For example, a Columbian drug smuggler justifiably may be treated differently because of his connection to Columbia in a case where he is shown to have been involved in drug smuggling operations and repeat violent offenses in Columbia. There, the basis for a sentencing enhancement would not be simply alien status, but rather an attempt "to incapacitate drug smuggling operations and to deter drug smugglers from sending violent criminals to the United States." Burnett, *supra*, at 28 (describing the facts of *United States v. Escobar*, 803 F. Supp. 611 (E.D.N.Y. 1992)). Another example of when aliens can be treated differently is when their alienage relates directly to their culpability, as when the alien is convicted of illegal reentry into the United States. See *supra* note 25 and *infra* note 124.

more lenient sentence than a citizen simply because of his or her status as an alien.¹¹⁷

This argument, however, focuses too narrowly on the isolated decision to depart by the sentencing judge. It fails to take notice of the disparity that is caused by a different, later decision — the one that is guided by the Bureau of Prisons. The Bureau's policy is to treat aliens differently than citizen defendants. Therefore, the truly equal treatment of aliens and citizens can be accomplished only by taking alienage into consideration at another step in the punishment process — namely, the sentencing decision. Thus, the sentencing judge's decision offsets the Bureau's later unequal treatment, resulting in more equal punishment overall.¹¹⁸ In light of this equalizing effect, the argument that a departure would unfairly treat aliens differently is short-sighted.

A second response to the equal punishment justification for departures, similar to those employed in *Smith*, is that alienage is not an irrelevant factor. Proponents of this argument maintain that a defendant's status as an alien is an important consideration in determining the appropriate punishment for the defendant.¹¹⁹ This implies that the Bureau of Prisons is justified in creating the difficult requirements for alien defendants to become eligible for preferred conditions of confinement.

The most likely justification for such disparate treatment is that the Bureau suspects that many aliens are escape threats, due to the deportation that awaits most alien prisoners at the end of their sentence.¹²⁰ The Bureau may consider that the escape of an alien defendant would have the additional consequence of defeating his deportation. In light of this concern, alienage would not seem to be irrelevant in determining eligibility for minimum security or community confinement.

There are three problems with this reasoning. First, courts should recognize that the Bureau is simply using alien status as a proxy for

117. See *United States v. Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991) (characterizing a downward departure on the basis of alienage in anticipation of harsh confinement conditions as "sentencing an offender on the basis of [alienage]" in violation of the Constitutional prohibitions described *supra* note 76).

118. Of course, the sentence of the citizen defendant and the alien defendant who receives a departure will not be identical. They will simply be "more equal" than they would be without a departure. In some cases the departure will give the alien what appears to be a lesser sentence than what a citizen defendant would have received. In other cases, however, the departure may not be sufficient to fully offset the harsh effects. In *Bakeas*, for example, the sentencing judge thought that the home confinement would still be harsher than what a citizen defendant would have received, but noted that "it is as close as the current Bureau of Prisons policy allows me to come in implementing the sentence the guidelines envisioned for this crime and this offender." *United States v. Bakeas*, 987 F. Supp. 44, 51-52 (D. Mass. 1997).

119. See *United States v. Restrepo*, 999 F.2d 640, 644 (2d Cir. 1993).

120. See *Smith*, 27 F.3d at 655 (noting that the three requirements listed in the Bureau's Program Statement, see *supra* note 13, "suggest[] that ineligibility stems primarily from the greater likelihood of escape").

the variables that are actually relevant, and so alienage will not correspond perfectly with the risk of escape.¹²¹ Second, even if aliens are more likely than citizens to be escape threats, that reasoning only justifies keeping alien prisoners out of lower security confinement programs; it does not go so far as to justify a categorical rejection of *Smith*-type departures. Allowing a judge to depart in some cases to counteract the harsh conditions disparity caused by the Bureau will not necessarily undo any escape-prevention effect that is intended and justified. Generally, if a departure is granted, the alien prisoner will still serve his entire sentence in higher security conditions, but the overall *length* of the incarceration would be decreased to compensate the prisoner.¹²² The risk of escape, and the resultant defeat of deportation, is still kept to a minimum, but the alien defendant will not serve an objectively harsher sentence to accomplish this goal.

A third flaw in this reasoning is that it ignores the limitations on departures due to alienage. According to the departure scheme devised by the *Smith* court and advocated by this Note, departures would only be appropriate when there is no connection between the defendant's alienage and the blameworthiness of the defendant.¹²³ The *Smith* court stated: "[A]s the defendant's status as a deportable alien is by no means necessarily unrelated to his just des[s]erts, even a court confident that the status will lead to worse conditions should depart only when persuaded that the greater severity is undeserved."¹²⁴ Thus, when the defendant's status is relevant to his punishment, such as when he is convicted of illegal reentry into the United States, the

121. As the *Smith* court notes, it may be appropriate to take the Bureau's three considerations (family or community ties, stable employment, and five years of residence in the U.S.) into account, given their effect on flight risk. Using alien status as a proxy for these factors, however, may cause an alien to be assigned to "a more drastic prison than otherwise solely because his escape would have the extra consequence of defeating his deportation." *Smith*, 27 F.3d at 655. In such a case, a departure may be appropriate. See *id.*

122. Although the *Smith* and *Restrepo* courts do not acknowledge explicitly that a departure would likely affect the *length* of the confinement, not the *conditions*, this notion seems to underlie the reasoning employed by both courts. The *Bakeas* case described in the Introduction differs from this norm, in that the judge's departure allowed Mr. Bakeas to be placed in home confinement, rather than just shortening his stay in a medium security prison. See *Bakeas*, 987 F. Supp. at 51.

123. See *supra* notes 25-26 and accompanying text.

124. *Smith*, 27 F.3d at 655. It is clear, for instance, that a court should not depart to offset harsh conditions when the alien has been convicted of illegal reentry into the United States. Such a defendant would present a flight risk, since he has tried to defeat deportation before, and may be likely to do so again. Courts consistently have distinguished these cases from *Smith*, however, and have denied departures. See *United States v. Gonzalez-Portillo*, 121 F.3d 1122, 1124-25 (7th Cir. 1997) ("Because deportable alien status is an inherent element of the crime[] . . . this factor was clearly 'taken into consideration by the Sentencing Commission in formulating the guideline[]' . . . and was accounted for in the offense level it established In [*Smith*], however, the defendant had been sentenced under a guideline that did not already take his deportability into consideration." (citation omitted)); *United States v. Ebolum*, 72 F.3d 35, 38 (6th Cir. 1995) (using a similar analysis).

Commission likely will have considered alien status, and a departure on that basis would be inappropriate.

B. Trial Court Discretion in Fashioning Sentences

A categorical approach, like the one employed in *Restrepo*, that prohibits sentencing judges from departing based on an alien defendant's likelihood of facing harsher conditions of confinement, creates limitations on the discretion of trial courts that would decrease the quality of sentencing results. Such restrictive appellate court review of sentencing decisions precludes trial judges from tailoring sentences appropriately to individual crimes and individual defendants.¹²⁵

An appellate court ruling that prevents district courts from departing on the basis of alienage where the alien defendant faces harsher conditions of confinement would replace the trial court's sound exercise of discretion with the categorical view that such a circumstance can never justify a departure from the Guidelines. Such a view is not only contrary to what Congress and the Sentencing Commission intended,¹²⁶ and contrary to what the Supreme Court has announced regarding departure jurisprudence in *Koon*,¹²⁷ but also tends to lead to sentences that are not narrowly-tailored to fit the defendant's crime and circumstances.

A trial court has several advantages in determining whether or not to depart. First, the trial court is familiar with the specific facts of each case, whereas the circuit court only has access to the official record.¹²⁸ Second, the trial court judges see many more Guidelines cases than their appellate counterparts. Third, trial courts hear more ordinary cases, while the appellate courts are likely to hear mostly atypical cases, since those are the ones that generally will present issues for appeal.¹²⁹ These factors make the trial court better at determining whether or not the factors involved in a specific case are sufficiently unique, or are present to a sufficient degree, to take the case outside

125. See *Koon v. United States*, 518 U.S. 81, 97 (1996) ("Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions."); see also Gregory N. Racz, Note, *Exploring Collateral Consequences: Koon v. United States, Third Party Harm, and Departures from Federal Sentencing Guidelines*, 72 N.Y.U. L. REV. 1462, 1470-71 (1997) (noting *Koon's* rejection of a de novo standard of review due to a need to give "substantial deference to the district court's application of the Guidelines to the facts of each case").

126. See *supra* Part I.

127. See *supra* Part II.

128. See Racz, *supra* note 125, at 1470-71 ("As one appellate judge stated: 'We do not see or hear the witnesses or the defendant. . . . We do not see real people in their struggle to live, only abstract people — 'plaintiffs' and 'defendants,' 'appellants' and 'appellees,' 'petitioners' and 'respondents.' '") (quoting *United States v. Brewer*, 899 F.2d 503, 514 (6th Cir. 1990) (Merritt, C.J., dissenting)).

129. See *United States v. Rivera*, 994 F.2d 942, 951 (1st Cir. 1993).

the "heartland" of Guidelines cases.¹³⁰ That is, the trial court is in a much better position to make case-specific determinations regarding the validity of departures from the Guidelines.¹³¹ As the Supreme Court stated in *Koon*, and at least one circuit court has also noted, the decision whether or not a case is within the "heartland" is exactly the kind of determination that trial courts have an advantage over appellate courts in making.¹³²

A common response to calls for more trial court discretion in departures from the guidelines is that such a course would return the sentencing process to the relative chaos that inspired the formulation and adoption of the Sentencing Guidelines.¹³³ This response, however persuasive it may be in regard to departures generally, overlooks the limitations on a trial court's discretion to grant this type of departure. Specifically, the limitations enumerated by the *Smith* court and advocated by this Note will ensure that such departures are granted only in "unusual" cases, thus preserving the desired uniformity of the Guidelines.¹³⁴ These limitations will serve as guidance to the lower courts, rather than a broad categorical appellate pronouncement that this specific type of departure is *never* warranted.¹³⁵ These limits serve to keep the number of departures based on conditions of confinement relatively low. Indeed, the framework outlined by the *Smith* opinion would not defeat the uniformity goal of the Guidelines, but rather

130. See *Koon*, 518 U.S. at 98 (1996). But see Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of Koon v. United States*, 58 OHIO STATE L.J. 1697, 1731-45 (1998) (arguing that the Supreme Court's reliance on the argument that trial courts have an "institutional advantage" was flawed).

131. See *Racz*, *supra* note 125, at 1470 (noting that deference to the district courts "makes sense" in sentencing questions).

132. See *Koon*, 518 U.S. at 98; *Rivera*, 994 F.2d at 951.

133. See *supra* note 4.

134. The D.C. Circuit held that trial courts may depart on the basis of objectively harsher conditions of confinement, but emphasized that those courts should only do so when the difference in conditions is substantial, applied for a significant part of the sentence, and is undeserved. See *supra* note 26 and accompanying text.

135. It could be argued, however, that any appellate limitations on departures that are unmentioned in the Guidelines are actually categorical rules if you define the category more narrowly. For instance, one could claim that the D.C. Circuit's statement that the difference in conditions should be undeserved is a categorical rule against downward departures for aliens who will be confined under harsher conditions, but whose alien status causes them to deserve a harsher penalty. This, however, stretches the definition of a "factor," as used in the Guidelines, too far. Certainly harsh conditions of confinement are accepted as a potentially relevant factor (although unmentioned in the Guidelines) for consideration, but the more narrow, hypothetical category described above does not seem to fit the Commission's view of a "factor," given the factors that the Commission actually mentions in the Guidelines, such as having been abused as a child or vulnerability to attack in prison.

would "fulfil the Guidelines' command that such departures will be 'highly infrequent.'"¹³⁶

Restrepo represented a categorical declaration that harsh conditions of confinement based on the fortuity of alien status could *never* take a case outside of the "heartland" of Guidelines cases.¹³⁷ Such an approach by an appellate court negates the institutional advantages that make a trial court uniquely suited to make departure decisions. In contrast, the *Smith* court's discretionary approach would take advantage of those institutional efficiencies.

CONCLUSION

This Note has shown that appellate courts should refuse to proscribe categorically, as a basis for downward departure from the U.S. Sentencing Guidelines, the fact that a defendant will face objectively harsher conditions of confinement based solely on the fortuity that the defendant is a deportable alien. Not only does such a proscription intrude upon the trial court's sentencing discretion, which was expressly preserved by the Supreme Court in *Koon*, but it also results in objectively unequal sentences — exactly what the Guidelines were meant to minimize. In cases where the sentencing judge is confident that an alien defendant will face substantially more severe confinement conditions than a similarly situated citizen, over a substantial portion of his sentence, and where the judge is also confident that this inequality is undeserved, she should have the discretion to depart downward to offset that undeserved severity. Punishing aliens more severely, simply because they are aliens, is illegal and perhaps unconstitutional. The Sentencing Guidelines, therefore, must be interpreted to give sentencing judges the discretion to depart on the basis of alienage where alien status causes a fortuitous increase in the severity of the sentence. In light of this conclusion, Judge Gertner's decision to grant Peter Bakeas a downward departure was an appropriate one.

136. *United States v. Smith*, 27 F.3d 649, 655 (D.C. Cir. 1994) (quoting USSG, ch. 1, pt. A, § 4(b) (1992)).

137. See *supra* note 96 and accompanying text.