

University of Miami Law School

University of Miami School of Law Institutional Repository

Articles

Faculty and Deans

10-1988

Appellate Review of Refusals to Depart

David Yellen

Follow this and additional works at: https://repository.law.miami.edu/fac_articles



Part of the [Courts Commons](#), and the [Jurisprudence Commons](#)

COMMENTARY

**APPELLATE REVIEW OF
REFUSALS TO DEPART**

By David N. Yellen

A question that has not received much attention is whether a judge's refusal to depart from the guidelines can be appealed. There seems to be a general assumption that a sentencing court's decision not to depart is totally discretionary, and therefore not subject to appellate review. The Department of Justice, for example, has stated, without citing any authority, that a sentence "is not appealable by either the government or the defendant . . . if one party or the other requested a sentence outside the guidelines which the court declined to impose."¹ In fact, such appeals do not seem to be foreclosed by the Sentencing Reform Act and could contribute to the fairness and consistency of the guideline system.

Perhaps the main argument against appellate review of refusals to depart is that Congress, by not expressly authorizing such appeals in 18 U.S.C. 3742, implicitly rejected them. It is clear, however, that Congress did not address every issue pertaining to the availability of appellate review; there are gaps in section 3742 that courts must fill in.² There is no evidence that Congress consciously considered this issue or assumed that such appeals would not be allowable.

David N. Yellen is an Assistant Professor at Hofstra University School of Law. Previously he was Assistant Counsel to the House Judiciary Committee's Criminal Justice Subcommittee. This article is adapted from a portion of Federal Sentencing: Law and Practice, a forthcoming book co-authored by Mr. Yellen.

A more compelling counter to this argument is that appeals of refusals to depart may, in fact, be authorized by the existing statutory framework. The key question in this inquiry is whether a sentencing court has a duty to depart from the guidelines. If the departure decision is discretionary, there can almost certainly be no appeal of a refusal. If, however, the statute obligates the court to depart in some circumstances, a refusal would result in a sentence imposed in violation of law, which would be appealable under 18 U.S.C. 3742(a)(1) or (b)(1).

There are two possible bases for an obligation to depart. The first is 18 U.S.C. 3553(a). Section 3553(a) states that the court "shall impose a sentence sufficient, but not greater than necessary, to comply with the [statutory] purposes" of sentencing. It has been debated in Congress whether this provision authorizes downward departures from the guidelines.³ If a departure under this provision is appropriate, it would seem that the court would be *compelled* to depart downwards where the guideline sentence was harsher than necessary to comply with the purposes of sentencing. A refusal to depart, then, would be a violation of a statutory direction and appealable under 18 U.S.C. 3742(a)(1).

A second possible basis for a duty to depart comes from 18 U.S.C. 3553(b). Under section 3553(b), the court must impose a sentence within the guidelines unless "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" outside of the applicable guideline range. There is no indication in the statute, however, whether the sentencing court "may" or "must" depart from the guidelines where such aggravating or mitigating circumstances exist.

There is support in the legislative history of the Sentencing Reform Act for the view that the court must depart in the appropriate circumstances. The Senate Report on the Sentencing Reform Act states that "the sentencing judge *has an obligation* . . . to impose a sentence outside the guidelines in an appropriate case."⁴ On the other hand, there is also language indicating that departures may be discretionary, not mandatory.⁵

What seems most persuasive is that allowing appeals of refusals to depart is consistent with the goals of the Sentencing Reform Act. One of the primary goals of the Act is reducing unwarranted sentencing disparity.⁶ If a judge departs in a case where most would not, unwarranted disparity results. However, unwarranted disparity also results if a judge refuses to depart in a situation where most courts would. Just as reversing the judge who improperly departs reduces unwarranted disparity, so too does correcting the judge who fails to depart when the facts of a case clearly call for a departure.

Two other goals of the Sentencing Reform Act, fairness and proportionality,⁷ also argue for allowing appeals of refusals to depart. The Sentencing Commission, itself, has recognized that the guidelines simply carve out a "heartland"⁸ — a set of typical cases—and that in some instances where the guidelines apply linguistically a departure may be appropriate. It is not hard to imagine that there will be cases where, because of characteristics of the offender or the offense, rigid application of the guidelines would result in a clearly disproportionate sentence that an appellate court would feel compelled to correct.

The "heartland" concept further suggests that appellate review of refusals to depart is consistent with the approach taken by the Sentencing Commission in the initial guidelines. The Commission has invited

COMMENTARY

departures in a variety of contexts and has indicated that it views the guidelines as evolutionary. Departures are thus an important tool, not only in obtaining justice in an individual defendant's case, but also in helping the Commission identify and correct flaws in the guidelines. The appellate courts certainly have an important role to play in this process, one aspect of which should be an ability to point out, by in effect requiring a departure, areas where the guidelines are deficient.

One reason for the government's apparent opposition to appellate review of refusals to depart may be a recognition that the appellate courts will be more likely to overturn a refusal to depart downward than upward. The general perception, shared by a number of judges, that the guidelines frequently result in very harsh punishment would suggest a greater tolerance of downward departures. Further, although the constitutionality of government appeals of sentences may be settled, some basic notion of fairness may be violated where, after the sentencing court has imposed a sentence, an appellate court in effect orders a harsher sentence.

The only plausible policy argument against appellate review of failures to depart is that it would take away too much discretion from the sentencing court. It is clear that Congress did not intend to divest sentencing courts of all discretion. The Senate Report on the Sentencing Reform Act states that "the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court."⁹

This concern seems misplaced. First, appellate review of failures to depart is no more inconsistent with judicial discretion than is review of departures. Further, even if appeals of refusals to depart are permissible, it is unlikely that a

large percentage of sentences within the guidelines will be overturned on this basis. A sentencing court's decision to depart will usually have both objective and subjective elements. The sentencing court's findings of fact are reversible only if clearly erroneous, and the appellate courts should afford reasonable deference to the lower court's ability to judge the credibility and reliability of evidence presented prior to sentencing.

In reviewing refusals to depart, the appellate courts should not simply substitute their judgment for that of the sentencing court, but should seek to encourage consistency and avoid injustice. It will be appropriate for appellate courts to exercise this authority somewhat more frequently in the early phases of guideline sentencing, but as a common law of sentencing is developed, and as the Commission refines the guidelines, the need for this review should diminish.

The standard of review that evolves might be that an appellate court will overturn a sentence that is within the guidelines but is "plainly excessive".¹⁰ Appeals of refusals to depart could thus serve as a useful corrective mechanism to alleviate some unduly harsh sentences. Such a corrective mechanism is consistent with the purposes of the Sentencing Reform Act and should not significantly infringe upon the sentencing court's discretion.

FOOTNOTES

¹See "Prosecutors Handbook on Sentencing Guidelines" 75 (prepared by the U.S. Department of Justice, November 1, 1987) (emphasis in original).

²See, e.g., *U.S. v. Birmingham*, 1 Fed. Sent. R. 130; U.S. App. LEXIS 11118 (2d Cir. 1988) (appellate court need not resolve alleged misapplication of the guidelines if: 1) the sentence imposed is within the guideline range that would apply if the disputed factor is decided in favor of the appellant; and 2) the sentencing court has indicated that the same sentence would be imposed if the alternative guideline range applies).

³See 133 Cong. Record H10018 (daily ed. Nov. 16, 1987); *id.* at S16646-48 (daily ed. November 20, 1987).

⁴Sen. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983) (emphasis added).

⁵See *id.* at 52 (the court "may . . . impose sentence outside the guidelines") (emphasis added).

⁶See, e.g., *id.* at 39, 52.

⁷See *id.* at 50-52.

⁸See *Guidelines Manual*, Chapter One, Part A, Subpart 4(b).

⁹Sen. Rep. No. 225, 98th Cong., 1st Sess. 150 (1983). See also *id.* at 48, 49, 148 (allowing departures is a way to preserve some of the district court's discretion).

¹⁰This is the same standard that Judge Newman urged Congress to provide by statute. See *Sentencing Guidelines: Hearings before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 485, 536 (1987) (statement of Hon. Jon Newman, U.S. Court of Appeals for the Second Circuit). Although Judge Newman seemed to believe that the Sentencing Reform Act would have to be amended to provide for review of refusals to depart, the foregoing discussion argues otherwise.