

Trump Is Right About Stone Sentencing, For Wrong Reasons

By **Alan Ellis and Mark Allenbaugh** (February 18, 2020)

President Donald Trump recently voiced his ire, via Twitter, about the government's recommendation to U.S. District Judge Amy Berman Jackson that Roger Stone be sentenced according to the U.S. sentencing guidelines advisory sentencing range of 87 to 108 months (a little more than seven to nine years).

The president called such a recommendation a "miscarriage of justice." As a result, the government, rather controversially, backed off that recommendation and now suggests that a sentence between 37 and 46 months would be "more in line with the typical sentences imposed in obstruction cases."

Despite the U.S. Department of Justice's written policy that prosecutors should recommend "in most cases" a sentencing within the sentencing guidelines, and despite the obvious conflict of interest with regard to Stone, Trump was right to be outraged over the guidelines' recommendation, but for the wrong reasons.

It is beyond dispute that it is inappropriate for a president to get directly involved in the sentencing process of a single individual, especially where, as here, there are clear conflicts of interest. And this is so despite the fact that the president is the chief executive and therefore the ultimate authority over all federal prosecutors. Our criminal justice system, which not only values impartiality, but uniformity, proportionality and certainty, is not designed for such ad hoc intervention at the sentencing stage. Such ad hoc power is reserved for the pardon process.

It is, nevertheless, appropriate for a president to critique the criminal justice system writ large and set policy, and to promote such policies through appropriate legislation. Witness President Barack Obama's championing of the Fair Sentencing Act and the Second Chance Act, and more recently, Trump's First Step Act. Both pieces of legislation sought to further policy objectives such as lowering prison sentences, decreasing the prison inmate population and reducing recidivism rates among federal offenders. And such efforts by the president ought rightly to be applauded.

But while Trump went about this the wrong way — and caused quite a commotion within the DOJ as a result — he nonetheless was right to find such a recommendation shocking, and the DOJ was right to back off such a recommendation. The guidelines themselves, and in particular the sentencing table, need to be revised downward as many federal judges have indicated in their opinions and in the sentences they actually impose.

According to our analysis of U.S. Sentencing Commission data, from 2005 (when the U.S. Supreme Court made the guidelines merely advisory) to 2018 (the most recent year for which data is available), there have been 1,281 individuals like Stone who were sentenced under the obstruction of justice sentencing guideline and had little to no criminal history. A sentence of 87 months, which is at the bottom of the government's recommended range, would still be the third-highest sentence ever imposed on such individuals.

The only sentences that were higher — 156 and 240 months — were imposed on men in



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their early 20s, and the 240-month sentence involved a firearm. At 67 years old, a sentence of just 87 months would nearly constitute a de facto life sentence for Stone.

Recent studies suggest that inmates in general can expect to lose two years of their life expectancy for every year in custody. A 67-year-old male like Stone is estimated to have 17.4 years of life expectancy according to the Social Security Administration. A seven-year sentence would thus reduce Stone's life expectancy by 14 years thereby consuming nearly all his remaining life expectancy.

Moreover, as the DOJ's own inspector general found in a 2015 report,[1] due to a lack of funding, insufficient training and infrastructure shortfalls, the Federal Bureau of Prisons is unable to adequately address the medical needs of elderly inmates. And this is exacerbated by the fact that "inmates age 50 and older [are] the fastest growing segment of [the Bureau of Prison's] inmate population." This is to say nothing of the inherent vulnerability such inmates have with respect to younger inmates.

An 87-month sentence for an elderly inmate would manifestly be unjust and disproportionate to the otherwise admitted seriousness of Stone's offense. To put such a sentence into better perspective, an 87-month sentence is greater than the average sentence imposed in arson (69 months), assault (33 months) and robbery (75 months) cases in 2018.[2]

As the government rightly recognized in its supplemental sentencing memorandum, quoting the U.S. Supreme Court, "the prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The government now suggests a sentence between 37 and 46 months would be appropriate. But even 37 months is higher than the vast majority of those sentenced for obstruction of justice offenses and not in line with what typical obstruction offenders receive. The average sentence imposed on obstruction of justice offenders with little to no criminal history, after all, is only 9.4 months. And that actually is more in line with what Stone's attorneys suggest.

Of course, what sentence ultimately is imposed is not up to Trump, the remaining prosecutors or Stone's attorneys. That determination rests solely with Judge Jackson. What is clear, though, is that the sentences recommended by the guidelines themselves often are far too draconian, as even Judge Jackson herself found when sentencing Paul Manafort last year to a sentence well below what the guidelines called for.

In an interesting twist this past Friday, attorney Michael Avenatti, who famously represented adult film actress Stormy Daniels in her defamation lawsuit against Trump, was convicted in federal court of trying to extort \$25 million from Nike Inc. We calculate his sentencing range to be the exact same as Stone's: 87 to 108 months.

An 87-month sentence would tie the highest sentence ever imposed on a defendant convicted of extortion. Reminiscent of the old adage "for my friends everything, for my enemies the law," it is highly doubtful the president will tweet outrage over a guidelines sentence for his one-time nemesis Avenatti.

Ultimately, it is unfortunate the president did not take this opportunity to further the policy objectives he started with the First Step Act by opining about the guidelines' excessively

severe nature generally. Indeed, he could have taken this occasion to appoint commissioners to the moribund U.S. Sentencing Commission, which has been without a quorum for over a year.

As both the Stone and Avenatti cases exemplify, the guidelines are badly in need of major reform, which cannot be done without sentencing commissioners. If the president is going to continue tweeting about Stone's and possibly Avenatti's sentencings, perhaps he could tweet about these matters too.

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[1] <https://oig.justice.gov/reports/2015/e1505.pdf>

[2] <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table27.pdf>