New York Law Journal
NEW YORK LAW JOURNAL SPECIAL REPORT
An ALM Publication
White-Collar Crime
WWW.NYLJ.COM
VOLUME 264—NO. 102
MONDAY, DECEMBER 7, 2020

DOJ's Arguments in Trump Litigation Should Benefit Other Defendants

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In the past year, we have seen the Department of Justice (DOJ), under the direction of Attorney General William Barr, present arguments in several cases that implicate the conduct of either President Donald Trump or his close advisors. In this article, we consider certain positions taken by DOJ in cases involving Roger Stone, Michael Flynn and the subpoenas duces tecum issued by the New York District Attorney's Office in connection with its investigation into the Trump Organization. In each instance, DOJ has taken positions that diverge from the positions usually taken by DOJ prosecutors in ordinary criminal prosecutions.

This has led to understandable criticism: Why should DOJ treat President Trump or his advisors differently than other defendants are treated? Equal justice under law is the highest value of our legal system, and no one should receive preferential treatment because they are friends with the president. This is why bar associations and former prosecutors have spoken out against these steps. Rather than insist that the president's associates be treated more harshly, we offer this modest proposal: Remedy the unequal treatment by affording to all criminal defendants the same consideration accorded to Stone, Flynn and the Trump Organization. Defense lawyers should cite to DOJ's positions in these three cases and ask courts to give ordinary defendants the same treatment.

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'United States v. Roger Stone'

Roger Stone, a longtime Republican operative and a friend and advisor of President Trump, was convicted of crimes relating to the obstruction of the Mueller investigation into Russian interference with the 2016 presidential election. Before Stone's sentencing, on Feb. 10, 2020, the government initially proposed that Stone receive a sentence within the Sentencing Guidelines range applicable to his offense, which was 87 to 108 months' imprisonment. This is

consistent with the position that the government ordinarily takes at sentencing, where it typically advises the court that a within-the-range sentence is reasonable under 18 U.S.C. §3553(a). Shortly after the government filed its brief seeking a Guidelines sentence, President Trump tweeted on Feb. 11, 2020, that the sentencing recommendation was "horrible," "very unfair," and a "miscarriage of justice." Later that day, on February 11, the government filed a "Supplemental and Amended Sentencing Memorandum" in which it took the exact opposite position: that a within-the-range sentence "would not be appropriate or serve the interests of justice in this case." *United States v. Stone*, No. 19-cr-00018, Dkt. No. 286 (D.D.C. Feb. 11, 2020).

The arguments presented by the government were familiar ones to defense counsel in federal sentencing. The government contended that, in two different ways, the Guidelines overstated Stone's culpability. The government also argued that a within-the-range sentence would be longer than sentences imposed in other obstruction of justice cases, violating §3553(a)(6)'s direction to avoid "unwarranted sentencing disparities." Finally, the government pointed to other factors individual to Stone as justifying a below-the-range sentence, such as his age (he was 68 years old), health, and lack of a criminal record. In the end, the district court varied downward to a sentence of 40 months' imprisonment.

These same arguments should be considered in every federal sentencing. The Guidelines are too harsh and often overstate true culpability or work an unfairness in a given case. This is part of why, according to the U.S. Sentencing Commission's 2019 annual report, federal district judges in 2019 only imposed within-the-range sentences in 51.4% of the cases before them for sentencing. In spite of this, DOJ rarely recommends a sentence outside of the Guidelines range in the typical case, except where the defendant is a cooperating witness. Indeed, in May 2017, Attorney General Sessions confirmed that DOJ policy counsels that "[i]n most cases, recommending a sentence within the advisory guideline range will be appropriate" and prosecutors are required to obtain supervisory permission, with documented reasoning, before suggesting a sentence outside of that range. These policies discourage and prevent prosecutors from doing what they did in the *Stone* case: identifying reasons for why a Guidelines sentence is too long.

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Instead of only providing the tailored, nuanced sentencing analysis for friends of President Trump, such case-specific analysis by the government should be the norm, and the government should advocate for below-the-range sentences in a broader array of cases than it currently does. And district courts should challenge prosecutors to treat ordinary defendants just as well as Stone was treated. If ordinary defendants were given this type of treatment, sentencing in federal court would be fairer than it is today.

'United States v. Michael Flynn'

Michael Flynn was one of President Trump's top campaign advisors and his initial national security advisor in January 2017. However, in November 2017, he was charged in a criminal information with making false statements to the Federal Bureau of Investigation (FBI) about conversations he had with Russian government officials. See *United States v. Flynn*, No. 17-cr-00232, Dkt. No. 1 (D.D.C. Nov. 30, 2017). Flynn pleaded guilty, became a cooperating witness, and was scheduled to be sentenced when he changed counsel and sought to withdraw his guilty plea. Id. at Dkt. No. 151 (Jan. 14, 2020). While this motion was pending, DOJ filed a motion to dismiss the charges against Flynn. Id. at Dkt. No. 198 (May 7, 2020).

The stated reason for the motion to dismiss is that Flynn's false statements were not "material," even if untrue; the FBI already knew the truth about Flynn's calls with the Russian officials and there was no ongoing investigation at the time of his interview. The government's motion to dismiss has not yet been decided, as the district court has appointed retired judge John Gleeson as amicus curiae to assist in its determination about whether to grant the motion. As Judge Gleeson pointed out in one of his filings, prosecutors routinely reject arguments similar to the ones that it made in its motion to dismiss the Flynn case. Id. at Dkt. No. 223 (June 10, 2020). The government's legal position also seems to be contradicted by existing law. See, e.g., *United States v. Moore*, 612 F.3d 698. 701 (D.C. Cir. 2010) (a statement is material if it is "capable of affecting" the "general function" that a federal agency was performing when the statement was made to it).

What is more, DOJ often takes unduly aggressive positions in its obstruction of justice prosecutions. It has done so

despite being told over and over again by the Supreme Court that it is improperly charging individuals and institutions with obstruction of justice. See *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) (reversing conviction for violation of the tax omnibus clause where broad interpretation "risk[s] the lack of fair warning and related kinds of unfairness"); *Yates v. United States*, 574 U.S. 528, 536 (2015) (rejecting the government's "unrestrained reading" of obstruction statute); *Arthur Andersen v. United States*, 544 U.S. 696, 703 (2006) (reversing conviction for obstruction and urging "restraint" in assessing the reach of obstruction statutes out of concern that "fair warning" must be given to those who might violate the law). Nothing suggests that the Flynn prosecution ran afoul of any of these specific principles, but the Department of Justice should be more mindful of the risk of unfairness that sometimes accompanies a free-standing charge of obstruction of justice. When a district court considers a novel argument about whether particular conduct should be subject to an obstruction prosecution, it should remember DOJ's arguments about materiality in the Flynn case and hold DOJ to its concessions that would further narrow the reach of the obstruction of justice statutes.

Trump Organization Subpoenas

Finally, the Office of the District Attorney for New York County (DANY) has been investigating the Trump Organization and its personnel. Subpoenas have been issued to the Trump Organization's accountants. Attorneys for President Trump have challenged the legality of the subpoenas and litigated these issues to the Supreme Court. Some arguments have been premised on the notion that the president is above the law and should not be the subject of legal process while he is president, despite Supreme Court holdings to the contrary. See *Clinton v. Jones*, 520 U.S. 681 (1997); *United States v. Nixon*, 418 U.S. 683 (1974). To bolster the president's claims, the Department of Justice has intervened in these proceedings, presenting novel arguments that are at odds with those defense attorneys are accustomed to hearing from DOJ lawyers when discussing a subpoena. For example, DOJ complained to the Supreme Court that there were "serious questions about the subpoena's purpose" and stated that DANY "has not tailored [its] subpoena to a criminal investigation." *Trump v. Vance*, No. 19-635, Brief for the United States as Amicus Curiae Supporting Petitioner (Feb. 3, 2020). DOJ also criticizes DANY for not showing why it needs the records now as opposed to at some point in the future, or explaining whether it could obtain evidence from other sources. Id.

> When viewed in the abstract, DOJ's arguments in these three cases about **sentencing considerations, prosecutorial overreach, and overbroad subpoenas** are compelling.

Defense attorneys who have negotiated subpoenas with DOJ prosecutors will find it surprising to hear DOJ making these arguments in favor of judicial limits on the breadth of grand jury subpoenas. It is more common for DOJ prosecutors to seek sweeping production of documents, even from institutions and individuals for whom the production of documents would work a real hardship, and even where the documents are of questionable relevance to any investigation. Rather than only raising these types of arguments in support of President Trump—who has teams of lawyers prepared to answer subpoenas, and who in this case need do absolutely nothing given that the subpoena is addressed to his accountants—DOJ should recognize that many of the concerns it has raised in the *Trump v. Vance* case would be worth considering when it propounds and enforces broad subpoenas in its many investigations.

Conclusion

In short, when viewed in the abstract, DOJ's arguments in these three cases about sentencing considerations, prosecutorial overreach, and overbroad subpoenas are compelling. While President Trump and his associates may not be the appropriate beneficiaries of DOJ's newfound skepticism of prosecutorial power, we should not be so quick to urge a reversal on punitive grounds. Rather, criminal proceedings would be fairer if the same consideration and open-minded approach available to these favored few were also provided to other defendants and targets of investigation. Defense counsel should readily cite to the positions taken by DOJ in these cases. To advance the cause of equal justice under law, we hope that federal judges will hold DOJ prosecutors to the concessions made in these cases when those judges are presiding over criminal cases in which DOJ attempts to take positions that differ from those taken in these investigations.

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