Federal Prosecutors and the Clemency Power

On July 7, 2000, President Clinton commuted the prison sentences of five federal inmates convicted of drug crimes. In contrast to the January 2001 Marc Rich pardon debacle or the controversial 1999 Tiaon commutations, these cases generated little opposition and went relatively unnoticed by the press. Nevertheless, these cases are important to the debate over clemency because each reflects the positive role that clemency can play in the run-of-the-mill cases that make up the bulk of the federal criminal docket. These commutations are also significant because in four of the five cases, the prosecutors either supported or at least chose not to object to the petitions. This article discusses these July 2000 commutations and argues that there are sound reasons for federal prosecutors to support clemency petitions in a variety of circumstances.

I. Clemency, the Prosecution Function, and Mandatory Minimum Sentencing

A. Rationales for the Clemency Power

“Why should we go to the expense and effort of investigating, convicting, and sentencing an offender and then release him by commuting his sentence?” So commented a long-time federal narcotics prosecutor about the appropriateness of the January 2001 Clinton pardons of a dozen or more non-violent drug offenders. Contrary to this stereotypical prosecutorial reaction, there are sound reasons for federal prosecutors to support commutation petitions. To understand why prosecutors might want to support certain kinds of clemency petitions, one must examine three things: the rationales that have been advanced for the clemency power, the fundamental precepts underlying the prosecution function, and lastly, certain features of the current federal criminal justice system which produce an unfortunately large number of disparate and unduly harsh sentences for which there is currently no remedy but clemency.

A variety of rationales have been advanced for the exercise of the clemency power. For example, one vein of clemency theory uses hindsight to examine the fairness of the original sentence. Historically, in this tradition, clemency could be used to raise doubts about the validity of the conviction itself. Today, the more prevalent use of hindsight is to examine whether individual sentences now seem disproportionate, either vertically, as compared to co-defendants, or horizontally, compared to similarly-situated offenders.

A second vein of clemency theory looks forward from the conviction, focusing on the rehabilitative efforts of the inmate. In this model, the original sentence was fair, both in some absolute sense and comparatively, but subsequent extraordinary efforts by the individual have demonstrated an unusual degree of rehabilitation that warrants release. Clemency in this sense can be seen as an exceptional form of parole.

Finally, some commentators view clemency in a political context. When exercised on behalf of a prominent individual, as when President Ford pardoned President Nixon, the clemency power is a way to bring political stability by circumventing a painful and divisive trial. When exercised on behalf of groups of similarly-situated individuals, the clemency power can be used by the President as a means of setting or advancing policy goals, as when President Carter pardoned certain individuals who failed to register for the draft during the Vietnam War. While each model is theoretically distinct, elements of each justification can be detected in the July 2000 commutations.

B. The Prosecution Function and Clemency

ABA Standard for Criminal Justice 3-12 asserts the well known maxim that “the duty of the prosecutor is to seek justice, not merely to convict.” With regard to sentencing, the ABA Standards state that “[t]he prosecutor should not make the severity of sentences the index of his or her effectiveness” and should seek “to avoid unfair sentence disparities.” For the typical line Assistant U.S. Attorney, a case generally ends when the defendant is sentenced, the appeal is resolved, and the case file closed. An evaluation of the fairness of sentencing practices, however, is dependent upon the concept of inter-temporality—the consideration of the impact of a decision both now and in the future. Thus, an effort to truly focus on the fairness of sentencing requires prosecutors to significantly shift their frame of reference. With this longer time horizon, clemency can be the only tool that prosecutors have at their disposal to function as a hindsight device to account for developments over the entire length of a defendant’s imprisonment. This is true whether the new developments are defined as rehabilitative efforts by the inmate, shortened sentences for co-defendants, or because of a legal or policy shift that impacts similarly-situated offenders. For prosecutors who take this long-term view of sentencing fairness, an appropriate use of clemency should not, therefore, be seen as a “get out of jail free card” for the lucky (or politically-connected) defendant, but as a small but important tuning mechanism in which prosecutors can play a supporting rather than an adversarial role.
C. Prosecutorial Power under the Mandatory Minimum Sentencing Regime

The need for an active exercise of long-term prosecutorial oversight of sentencing, which might include supporting clemency in appropriate cases, has been made all the more necessary by certain features of current federal criminal law. This is particularly true in narcotics cases, where statutory changes have dramatically increased prosecutorial power to create disparate and unduly harsh sentences.

Beginning in 1986, and continuing to the present, ever-increasing mandatory minimum penalties tied solely to ever-decreasing amounts of drugs has increased lengthy sentences for low-level and first-time offenders. These mandatory minimum penalties tied to drug quantity have also tremendously increased the power of federal prosecutors over sentences since they completely control charging decisions and largely control the terms of plea bargains. Moreover, because only federal prosecutors can initiate substantial assistance


The interaction of these changes has led to specific kinds of disparities and disproportionate sentences that rarely existed in the era of discretionary sentencing and can be directly tied to the increase in prosecutorial discretion and power. Therefore, in these kinds of cases, prosecutors should be open to exploring whether the exercise of the clemency power can address these injustices. In fact, that is exactly what seems to have happened in several of the July 2000 commutations.

II. The July 2000 Commutations

A. Cooperation Cases: Promises Made, Promises Kept

The least controversial class of clemency cases for prosecutors to support flow from the prosecutor's exclusive power over substantial assistance. Included in the July 2000 clemencies was the case of Alain Orozco. After Orozco was arrested, he was willing to cooperate and testify against a bigger fish, but because of other charges pending against him, as well as false statements he had made to the police, prosecutors felt the case would be too weak if based on his testimony alone. Later, when additional evidence corroborating Orozco became available, Orozco testified for the government. By that point, however, more than a year had passed, and under the terms of Federal Rule of Criminal Procedure 35(b), the government could no longer file a substantial assistance motion. Rule 35(b) limits the time period within which the government can move for a sentence reduction based on cooperation to one year after sentencing, unless the information the defendant provides was discovered after this period. Here, Orozco gained this information before his arrest and therefore his post-sentence cooperation did not fall within the time allowed under the rule.

Faced with this situation, the U.S. Attorney for the Northern District of Georgia filed the petition for commutation on behalf of Orozco. This was not the first "substantial assistance" clemency granted during the Clinton administration. In 1995, President Clinton had commuted the sentence of another inmate under similar circumstances. In the context of clemency theory, these clemencies can be justified as rehabilitative or under the hindsight fairness rubric. If one views cooperation as an effort to ameliorate the harm caused by one's participation in a criminal enterprise, the focus is on the defendant and therefore rehabilitative. Under the fairness concept, one could say that these pardons were necessary because all defendants who provide substantial assistance should receive the benefit of their cooperation and be treated similarly. Clemency was necessary because the strictures of Rule 35 frustrated this fairness goal. Lastly, one could also view these pardons from a policy perspective: shedding light on an overly restrictive Rule 35 and hopefully spurring a movement to amend the rule to account for this type of case.

B. Vertical Disparity and Horizontal Disparity

The combination of quantity-based mandatory minimums together with the tremendous advantages conferred by substantial assistance agreements also results in a variety of disparities that can be addressed by prosecutorial support for clemency. As anyone familiar with federal narcotics prosecutions knows, the theory for taking down a trafficking ring is to flip lower-level participants against their higher-up co-conspirators. Facing lengthy mandatory minimums, many defendants agree to cooperate. Unfortunately, this prosecution strategy is not always implemented according to theory, and sometimes works to the detriment of certain classes of defendants.

For example, the lowest level participants, especially drug couriers and street distributors, usually have the least amount of information. When their one contact in the operation, usually just above them, decides to cooperate first, the typical drug courier or street distributor is left with no one to cooperate against. In addition, sometimes the more naive participants, or those involved more because of relationships than because of the profit motive, are often unwilling or just too slow to act in their self-interest and cooperate. This is often true of intimate partners, usually women, who are involved with major traffickers. Moreover, because their romantic partners are high up in the narcotics distribution operation, even limited acts by these women that assist the operation lead to their legal responsibility for huge quantities of drugs and severe sentences. Meanwhile, their more culpable partners are often able to negotiate
lesser sentences through cooperation based on information unknown to the women. While during the investigation and indictment process prosecutors may not be able to ensure equitable sentences due to timing and the need for cooperating witnesses, when the dust has settled and all the sentences are known, clemency can even out the worst injustices created by the cooperation lottery.

The Army Pofahl clemency can be seen as partially falling into this category. Pofahl’s husband ran an international ecstasy ring that manufactured and imported an enormous amount of the drug into the United States. She went to trial and was found guilty of conspiracy to manufacture and distribute ecstasy and of money laundering. She was sentenced in 1992 to 292 months in prison. In contrast, her husband served less than five years in Germany, and due to his cooperation was not sentenced to any additional time in this country. According to the government, Pofahl played more than a minimal role in her husband’s operation. She allegedly traveled to Guatemala and continued to deal drugs after her husband’s incarceration. The U.S. Attorney’s Office in San Antonio that prosecuted the case did not “support or recommend the commutation” that Pofahl received in July 2000, after serving nine years of her sentence, although the chief of the criminal division of that office stated that it did “lay out a sentencing argument favorable to Ms. Pofahl” in its submission to the pardon attorney.

Another July 2000 clemency could also be characterized as a sentencing disparity case. Louise House pleaded guilty in 1990 to a continuing criminal enterprise charge relating to a heroin-distribution ring. House provided testimony that helped convict her more culpable supplier and was sentenced to fifteen years (which was a reduced term because of House’s cooperation). When a successful appeal reduced the supplier’s sentence to about the same term as House received, the prosecutor reportedly said that her sentence no longer seemed fair. However, the fact that House was 63 and in poor health may also have contributed to the decision to release her. “Thus, the House clemency should be seen both as a disparity case and a mercy/compassion case in which the punishment exacted no longer seems necessary.”

C. Horizontal Disparity and Changes in the Law
A more controversial class of clemency cases involves inmates whose sentences were proportionate at the time of sentencing but now appear to be disproportionately to defendants sentenced more recently due to changes in the law, sentencing guidelines, or prosecutorial policy.

The only beneficial statutory change for low-level narcotics offenders in recent years was the passage in 1994 of the so-called “safety valve.” For the first time since the 1986 mandatory minimum drug laws took effect, federal judges were granted the power, without the requirement of a substantial assistance motion from the government, to sentence certain drug offenders to shorter prison terms than the otherwise required mandatory penalties would dictate. Unfortunately for many inmates, while there seemed to be bipartisan support to make the safety valve retroactive, the final conference bill that was passed omitted this provision. Thus, low-level, non-violent drug offenders sentenced before 1994 were, and in some cases still are, serving disproportionately longer sentences than similarly-situated defendants sentenced after passage of the safety valve.

The kind of horizontal disparity presented by this situation seems to have played a role in the July 2000 clemency of Shawanda Mills. Mills was arrested after narcotics officers found over 5,000 grams of cocaine in her checked luggage at the Cincinnati/Northern Kentucky Airport. Before her arrest, the police noticed another individual, Johnny Jackson, who was displaying great interest in the encounter between Mills and the agents. Jackson was questioned but allowed to board another plane. While still at the airport, Mills identified Jackson as the owner of the drugs and he was arrested when his connecting flight landed. However, he, too, immediately decided to cooperate and thereby, in the view of the United States Attorney’s Office, deprived Mills of the opportunity to provide substantial assistance, as she had only served as courier once before and for the same person. Although she clearly would have qualified for the “safety valve,” her sentencing took place a year too early and therefore she was sentenced to 188 months in prison.

The United States Attorney for the Eastern District of Kentucky supported Mills’ clemency petition and asked that her sentence be reduced to reflect the low end of her guideline sentence (87 months), because that is the term she likely would have received had the safety valve existed at the time of her sentencing. While in his letter the U.S. Attorney also noted her low level of culpability, the disparity between her sentence and her more culpable co-defendant, and her inability to enter into a cooperation agreement because of her co-defendant’s immediate decision to cooperate, the stark disparity between her sentence and the post-safety-valve defendants seems to have played a very significant role in his decision to support her petition.

D. Rehabilitation and Opposition to Quantity Based Mandatory Minimums
The final July 2000 clemency case shares some of the issues already considered but it raises two more that are even more controversial to the prevailing prosecutorial mind-set: the value of rehabilitation and generalized hostility to mandatory minimum penalties.
In 1989, when Serena Nunn was 19 years old, she was indicted for her participation in her boyfriend's father's massive cocaine conspiracy. After a multi-defendant trial, she was convicted and sentenced to 188 months in prison. Although Nunn was one of the less culpable members of the conspiracy, there was evidence that she drove her boyfriend to meetings and made telephone calls to tell different people that they owed him money. In addition, a combined total of about ten grams of powder and crack cocaine were found hidden in her bedroom.

Nunn's clemency petition contained a letter from one of the two prosecutors, who was by then in private practice. In this letter, he stated that he had no objection to a commutation nor did three of the main law enforcement agents who had worked on the case. In a conversation with the judge, the former prosecutor allegedly went further and encouraged the judge to support her efforts to be released.

While the prosecutor's letter certainly helped, Judge David J. Doty's letter to the President was likely the key ingredient in her successful clemency application. His letter proffered two grounds. First, he believed there was an uncorrectable legal error that could only be addressed by clemency. Briefly stated, Nunn's guideline range was increased two levels for obstruction of justice based upon allegedly threatening statements she made to a witness who was contemplating cooperating with the government. Six years later, Nunn's new pro bono counsel filed an ineffective assistance of counsel motion that included an attack on the performance at sentencing of the original defense attorney, who had not forced the "threatened witness" to testify. Although he felt trial counsel probably erred, Judge Doty found that the error did not rise to the high level required by current ineffective assistance of counsel doctrine.

While this first ground would clearly fall within the fairness rationale with which many prosecutors might concur, the judge raised another, more sweeping issue. This second argument advances a broad-based attack on the fairness of the mandatory minimum and sentencing guidelines as applied to Nunn. Initially, Judge Doty argued that her sentence was unjust in light of the deals given to more culpable co-defendants who played a more significant role in the operation but who cooperated with the government. However, Judge Doty then went on to note his general opposition to mandatory minimum penalties, citing the well-known statements of opposition from the bench and bar, and the hardship Nunn has suffered through her incarceration, including the death of many close family members. Lastly, he placed great emphasis on Nunn's rehabilitation. He cited her acceptance of responsibility, her substantial educational achievements, and her need to be released to continue her education due to the residency requirements of four year colleges.

Certainly the disparity between her sentence and her co-defendants', as well as the uncorrectable legal error, are within the realm of reasons with which prosecutors might legitimately concur. However, the additional grounds articulated by the judge, including her youth, prior clean record, and substantial rehabilitation efforts, coupled with the court's strong philosophical opposition to mandatory sentencing, are not criteria most prosecutors are likely to support.

First, under the prevailing retributivist view of clemency, despite the sympathy of a particular case, rehabilitation of an offender is not a legitimate consideration, given Congress' decision to end federal parole. Prosecutorial support for clemency for prisoners who undertake to reform themselves in prison undermines this clear legislative choice and could lead to an even more ad hoc and arbitrary form of parole by clemency. Second, even more at variance with a prosecutorial mind-set would be advocacy of clemency based on hostility to the length of the statutorily-prescribed penalties for drug offenses. To the extent that a federal prosecutor believes at the inception of a case that a mandatory minimum is not appropriate for a defendant, the office can decline prosecution and shift the case to the state system.

However, I am not convinced that even the issues of rehabilitation and cases involving particularly harsh results of mandatory minimum statutes that a prosecutor's vote on a clemency petition should be an automatic "no." To support this argument, I return again to a discussion of the prosecution function and the purposes of clemency to determine whether there are any principled grounds for prosecutors to support the rehabilitative and criminal justice policy aspects of clemency petitions like that of Serena Nunn.

III. Prosecutors and Clemency as a Policy Tool
The Commentary to ABA Standard 3-1.2 states that "as the public official in constant contact with the day-to-day administration of criminal justice, the prosecutor occupies a unique position to influence the improvement of the law." Because of their institutional continuity and credibility with Congress, federal prosecutors play a unique role in recognizing and advising on reforms to the criminal justice system. The prosecutor's role has been further enhanced over the last twenty years as the war on drugs and the overall politicization of crime policy has driven rehabilitation and offender rights issues almost out of the system.

The questions that remain, however, are (1) to what extent federal prosecutors who believe that some grave injustices have resulted from the decisions of the Congress to eliminate parole, raise drug penalties, and alter the allocation of discretion between judges and prosecutors, should act on these concerns by supporting clemency petitions, and (2) to what extent, such
actions should be based on the hope that they might bring greater public and legislative attention to the injustices created by these structural changes.

First, with regard to clemency petitions based solely on rehabilitation, my inclination is to generally advise individual prosecutors and U.S. Attorneys’ Offices against taking an active role. While prosecutors are quite knowledgeable and competent to evaluate legal issues and horizontal and vertical sentencing equity, they rarely have much contact with defendants during service of their sentences. Thus, prosecutors are not in the best position to evaluate the extent or extraordinariness of the inmate’s rehabilitative efforts. To the extent that rehabilitation is considered by the President to be a valid basis for clemency, the Office of the Pardon Attorney is probably in the best position at the Department of Justice to have the expertise necessary to make the comparative and qualitative judgments required. Nevertheless, individual prosecutors or offices should be allowed to provide whatever information about the surrounding circumstances they feel is appropriate to help evaluate a rehabilitation-based petition.

For those prosecutors generally unhappy with the larger issues, such as mandatory-minimum sentences and the abolition of parole, the ultimate protest is to transfer to the civil division or leave for private practice (or academia). However, short of those drastic steps, clemency in particular cases can still serve to ameliorate those unjust aspects of the mandatory minimum sentencing regime that are more clearly the product of prosecutorial decision-making than the statutes or power allocation changes themselves.

One example of an issue ripe for evaluation by prosecutors as a basis for supporting clemency petitions, and which was not raised by any of the July 2000 pardons, is the pockets of horizontal sentencing disparities that have been created by significant changes in charging criteria between administrations. During Bush the Elder’s Presidency, some United States Attorneys’ Offices, such as the District of Columbia, brought almost all eligible crack distribution cases in federal court to take advantage of mandatory minimum penalties. If these five gram crack cases had been brought in D.C. Superior Court by the same office, these defendants would have received much lower sentences and even probation in some cases. With the transition in 1992 to a Democratic administration, prosecutorial policy changed in the District of Columbia as well as in other offices. Instead of taking any drug case that qualified for a mandatory term, the U.S. Attorney in the District shifted the federal narcotics unit’s focus to larger quantity cases or cases involving violence and gangs. With this prosecutorial policy change, similarly-situated offenders in Washington, D.C. convicted before President Clinton’s appointee took office clearly received much longer sentences than those whose cases were referred to the D.C. Superior Court system after the transition. Different changes in policy at other offices may have caused similar pockets of horizontal sentencing disparity as earlier charging decisions came to be seen as excessive or at least unwarranted by a new U.S. Attorney. Including earlier defendants in this policy change would only be fair and is certainly consistent with an inter-temporal approach to the ABA Standards for Prosecution.

Another area, already mentioned, in which line prosecutors could use clemency as a policy tool involves cases similar to that of Shawndra Mills, involving the so-called “safety-valve” inmates. As of November 1, 2000, there were approximately 487 defendants still incarcerated who would have been eligible for the safety valve had it been made retroactive at passage in 1994. Although many similarly-situated people filed clemency petitions at the end of Clinton’s term, only a handful more were granted commutations. Like Shawndra Mills, many of these 487 non-violent, first time offenders were given substantially longer sentences for their offenses than their more culpable co-defendants who had more information to trade because of their deeper involvement in drug trafficking. Thus, on both vertical disparity and change of law/horizontal disparity grounds, federal prosecutors should consider the example set by the Eastern District of Kentucky and consider supporting clemency petitions by members of this group.

The difference between the safety-valve cases and the change-in-charging-criteria cases discussed above is that horizontal sentencing disparities in the safety-valve cases are the result of Congressional action rather than prosecutorial discretion. Nevertheless, based on Congressional approval of the safety valve, the largely bipartisan support for the provision, and basic notions of fairness, it seems within reason that prosecutors could take this factor into consideration when determining their position on a clemency position.

Nevertheless, one could argue that prosecutorial support for safety-valve defendants starts prosecutors down a slippery slope that encourages undermining of legislative policy. Ultimately, though, this argument rests on two flawed premises. First, it fails to account for the reality that prosecutorial discretion over charging decisions plays the most significant role in all of these cases. It was true, even at the height of the war on drugs, that not every narcotics bust that had sufficient quantity for a federal mandatory minimum was brought in federal court and it is true now. In my experience, federal prosecutors who declined federal prosecution of small, yet qualifying cases as part of office priority-setting were not, and are not now, generally accused by the media or the public-at-large of undermining the legislative agenda. Therefore, to the extent that prosecutors are willing to look at sentencing equity...
over the course of an inmate’s sentence, it can also be argued that fairness requires that clemency be available to reduce sentences if similarly-situated defendants are no longer receiving equivalent terms.

This explanation blends into a second, broader constitutional, separation of powers argument. While it is correct to say that the legislature passes the criminal law but the prosecutor is responsible for enforcing it, the Framers recognized that each branch of government could act as a check upon the excesses of the others. Executive clemency is part of this constitutional scheme and has always been seen as having a political component. To the extent a President is ultimately willing to act on the Attorney General’s recommendation to grant clemency petitions to advance the goals of consistency and fairness in sentencing or to highlight policy differences with Congress, it seems fair game for line federal prosecutors to use their advisory role in clemency petitions to do the same.16

Conclusion

Sentencing fairness is a prosecutorial obligation. Given the dramatic increase in prosecutorial power at the expense of judges and defense attorneys over the past fifteen years, prosecutors have an even greater duty at both the individual and policy level to seek fair and just sentences for those they choose to prosecute in the federal system. Because fair and just sentencing must incorporate the concept of inter-temporality, consideration of both hindsight, including an evaluation of horizontal and vertical disparity, and subsequent developments, such as rehabilitation and policy changes, is necessary to evaluate sentencing practices properly. Because of the length of many federal sentences, and because important changes can take place years later, clemency is sometimes the only tool that can address and adjust the equities of individual cases and bring public and legislative attention to important sentencing issues. This article has suggested, therefore, that prosecutors embrace their advisory role over clemency petitions and be willing to endorse (or at least not oppose) a variety of clemency categories. Using the lesser-known July 2000 commutations, I hope to have provided some examples of thoughtful and courageous federal prosecutors whose examples will be followed.

Notes

1 Related to author by an Assistant United States Attorney, April 4, 2001 (the speaker asked to remain unidentified in this article).

2 This article begins with the premise that although the President can exercise (and recently has exercised) the pardon power against the wishes of, or without consulting the original line prosecutors, in the run-of-the-mill federal criminal case, the views of line prosecutors are likely to carry significant weight with the Office of the Pardon Attorney and the President. Moreover, particularly after the Marc Rich case, in which the prosecutors in the Southern District of New York complained they were not consulted, it is even more likely, except in the most political or cases, that future Presidents are likely to give great weight to the opinions of the original prosecutors and are less likely to grant a pardon over their strong objections. See, e.g., Josh Getlin, Clinton Pardons a Billionaire Fugitive, and Questions Abound, L.A. TIMES, January 24, 2001, at A1.

3 See Brian M. Hoffstadt, Normalizing the Federal Clemency Power, 79 TEX. L. REV. 561, 572–79 (2001) (suggesting that clemency in the past acted as fail safe for catching mistakes in lower court proceedings but claiming that such a role, while still possible, is less necessary now due to improvements in representation and appeal procedures).

4 See id. at 583–88; Elizabeth Rapaport, Retribution and Redemption in the Operation of Executive Clemency, 74 CHI.-KENT L. REV. 1501, 1521 (2000).

5 See Rapaport, supra note 4, at 1524–29 (discussing the benefits of rehabilitative clemency in context of the sympathetic case of Precious Bedell, a mother who accidently killed her child and who underwent a dramatic personal transformation while incarcerated, but who was repeatedly denied clemency). Rehabilitation can take many forms. It can be personal rehabilitation through education, good behavior and expression of remorse and personal responsibility, or less frequently, through selfless acts of heroism such as protecting a guard from injury or attack. See id. at 1523–24 (noting clemency for doctor arrested in Lincoln assassination based upon his willingness to treat patients in jail at great risk to himself). The current Pardon Attorney regulations clearly contemplate this rehabilitative clemency by including among other requirements, a five year waiting period. See Hoffstadt, supra note 3, at 580.

6 See Rapaport, supra note 4, at 1531. This view has taken on a greater urgency given the absence of parole in the federal system.

7 See Hoffstadt, supra note 3, at 590. The pardon of John Deutsch also could be considered in this category. John Deutsch, a former CIA Director, was widely accused of having stored classified intelligence materials on his home computer. See, e.g., CBS Evening News With Dan Rather, (CBS television broadcast, January 20, 2001) (transcript on file at 2001 WL 6115080); Clinton OKs Stack of Pardons Before Exit; Fees Cash to Put Last of 110,000 Cops on Streets, SAN DIEGO UNION & TRIB., January 21, 2001, at A9.

8 See Hoffstadt, supra note 3, at 590.

9 A.B.A. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2(c) (3d ed. 1993).

10 See id. at § 3–61.

11 Inter-temporality refers to the impact of decisions on participants in a system both currently and over time. Particularly for inmates and their families, those perceptions are formed over the entire length of a sentence, if not beyond. Peter Margulies argues that incorporating the concept of inter-temporality into policy decisions would require state actors to “situate themselves not merely in the moment, but over time.” This would help ensure that “the state be accountable for the ways in which its own policies ... play out in practice.” Peter Margulies, Surviving the State: Transition, Discretion, and Membership in Domestic Violence
Law at 8 (manuscript on file with author); see also Jon Elster, Myopia and Foresight, in NUTS AND BOLTS FOR THE SOCIAL SCIENCES 42, 44 (1989) (analyzing the tendency of people to discount the future); Aristotle: "Rational Fools, in Beyond Self Interest 25, 37-38 (Jane J. Mansbridge, ed. 1990).

12See Hoffstadt, supra note 3, at 584. Although disparities in federal sentencing were supposed to be addressed by the Federal Sentencing Guidelines, the addition of mandatory minimum sentences for drug crimes before the first set of Guidelines was ever finished dramatically limited the Guidelines as a positive independent influence on drug sentencing equity because statutorily determined drug quantities establish the floor for all sentences.


14The statute requires a defendant to provide substantial assistance in the investigation and prosecution of another person who has committed an offense. See 18 U.S.C. § 3553(e); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. Only time spent in the investigation and prosecution of another will constitute substantial assistance motion, and its failure to do so is virtually unreviewable. Id.

15The exception is the so-called “safety-valve” statute, which permits sentences lower than a mandatory minimum for certain low-level, non-violent offenders. See 18 U.S.C. § 3553(t) (2000).

16In Orozco's case, the United States Attorney himself initiated the clemency petition so that Orozco could reap some benefit for the “substantial assistance rendered in the investigation and prosecution of another.” Petition for Commutation of Sentence on Behalf of Alain Orozco, aka Allen Jean Velasquez, by Richard H. Deane, Jr., United States Attorney (N.D. Ga.), April 26, 1999 (petition on file with author).

17Rule 35(b) states as follows:

(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.


19Rule reform, like many changes in the criminal justice system, can have its genesis in the story of a single, compelling case. Although the best chance for reform of Rule 35 would come from the Justice Department in response to these cases, widespread discussion in the press and academic literature could also spur a proposal from the bench or defense bar.

20Pofahl's petition also argues that she was unfairly convicted due to errors of trial counsel and that she would have benefited from a modification of the definition of relevant conduct. See Petition for Commutation of Sentence On Behalf of Amy Pofahl, by David Parker, Attorney for the Petitioner, 4-6 (on file with author); U.S. SENTENCING GUIDELINES MANUAL, Appendix C, Amend. 439 (2000). Nevertheless, much of the support she received from public figures was based on the disparity between her sentence and her husband's. See Letter from Senator David Pryor to Roger C. Adams, Pardon Attorney, at 1 (July 20, 1999) (on file with author).

21Amy Pofahl's husband, Sandy Pofahl, financed and ran an international manufacturing and distribution operation for ecstasy. Initially, Mr. Pofahl selected Guatemala and Germany as the manufacturing countries because he believed the drug was still legal in those countries. When this assumption proved incorrect in Germany, he was prosecuted and convicted in that country. See Pofahl Petition, supra note 20, at 1–3.

22Goldhaber, supra note 18. Pofahl's clemency petition likely was aided by a public relations campaign that flowed from a story about her in Glamour Magazine. See David France, You Be the Jury: Does This Woman Deserve to be Locked Up for 24 Years?, GLAMOUR, June 1999, 224–27 & 290–91. Given her substantial role in the offense and the size of her husband's operation, her case did seem less appealing than the other July clemencies, despite the clear disparity between her sentence and her husband's.


24See Goldhaber, supra note 18 (After the commutation was granted, the prosecutor on the case told a reporter that "poor health was also a factor."). At age 63 and in poor health, House was clearly no threat under any conception of her role in the offense for which she was convicted. Theoretically, programs like compassionate release should cover this aspect of House's case but here too, the Justice Department and Bureau of Prisons have interpreted this provision as nothing more than a right to die outside of prison (and cynically, a way for someone else to cover the final medical costs and death expenses of terminal inmates). See 18 U.S.C. § 3582(c)(1)(A) (1988) (outlining a means for a court, upon motion of the Director of the Bureau of Prisons, to reduce an inmate's sentence "if it finds that extraordinary and compelling reasons warrant such a reduction...); see also Marjorie P Russolli, Too Little, Too Lato, Too Slow: Compas sionate Release of Terminally Ill Prisoners—Is the Cure
Worse than the Disease?, 3 WIDENER J. PUB. L. 799, 817 (1994) (reporting that Title 18 U.S.C. § 3582(c)(1) is being utilized by the Bureau of Prisons to effectuate medical parole for terminally ill prisoners). Margaret Colgate Love distinguishes a mercy based theory of clemency from the school which tries to place clemency entirely within the prevailing retributivist philosophy of punishment. See Love, supra note 18, at 1503-05. See also Kathleen Dean Moore, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 84 (1989). Love looks to Jeffrie Murphy to define this concept, arguing that mercy is distinct from justice and fairness concepts. As an “autonomous moral virtue,” clemency is granted out of compassion for the good of both the individual and the community rather than because individual in some sense deserves the pardon. Love, supra note 18, at 1503 (citing Jeffrie Murphy, Mercy and Legal Justice, in JEFFRIE MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 175 (1988)).

The “safety valve” provision is contained in 18 U.S.C. § 3553(f), and provides:

f) Limitation on applicability of statutory minimums in certain cases—notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant as truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.


See Letter from Julie Stewart, FAMM President, to Bruce Lindsay, White House Counsel, November 1, 2000 at 2 (noting that Representatives Barney Frank, John Conyers, Henry Hyde, and Bill McCollum were original signatories on a letter to Attorney General Reno urging retroactivity) (letter on file with author).

And of course, these sentences are often much higher than the sentences of defendants serving time for either drug or violent offenses in state prisons.

Under these facts, the U.S. Attorney’s Office’s decision that she was not entitled to a 5K1.1 substantial assistance motion is curious and might represent a crabbed interpretation of what cooperation may entail. Mills appears to have been the reason the government was able to arrest Jackson, her supplier, at all. The fact that Jackson, too, decided to cooperate, simply makes Mills’ by then already-completed cooperation more valuable. Certainly, the experience of this author and other former AUSAs suggests some offices would have viewed Mills’ decision to finger Jackson at the airport sufficient to warrant a substantial assistance reduction.

Mills’ clearly more culpable co-defendant received just 30 months due to his cooperation.


See Graves letter, supra note 18.


Attached to the motion was a supporting affidavit from the “threatened witness” which denied that he had interpreted her comments at the time as a threat. Based on this affidavit and his own review of the transcript of the audiotape of the conversation, the judge was satisfied that he had incorrectly increased her Guideline level.

See Letter from David S. Doty, Senior Judge, United States District Court for the District of Minnesota, to William J. Clinton, President, United States of America, 3–5 (March 14, 2000); reprinted in the Appendix.

While this scenario is typical, this case might have been more extreme because it appears that some co-defendants were allowed to plead to pre-Guideline offenses, and therefore avoid both the mandatory minimum and no parole conditions of the current sentencing regime. See id. at 6–7.

See id. at 7–8.

Even during the heyday of the war on drugs, this was occasionally done. In 1992, I prosecuted a woman who had been indicted on a federal weapons charge for a sawed-off shotgun that belonged to her drug trafficking boyfriend. The defendant had been a crack addict and admitted to knowledge and control over the weapon in her bedroom dresser. After extensive negotiations (mostly within my own office), and with the judge’s strong encouragement, we allowed her to plead to a non-mandatory weapons charge under the D.C. Code which allowed probation and continued drug treatment rather than incarceration. This kind of disposition, however, was extremely rare in my experience.

A B.A. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, supra note 9, at § 3–1.2, commentary at 6.

42 Allowing individual prosecutors to play an active role in rehabilitation based clemency petitions also opens the door to the influx of highly personalized criteria and therefore the operation of stereotypes and prejudice.
See 21 U.S.C. § 841(b) (1987) (requiring a mandatory minimum sentence of five years for possession of five grams of crack cocaine); but see D.C. Code §§ 33-541(cX2), 33-549 (setting the mandatory minimum sentence for a comparable amount of cocaine at four years, but providing first time addicts with treatment, and allowing "attempt" pleas for first time offenders which are not subject to mandatory minimum penalties). Charging disparities also existed between U.S. Attorney’s Offices during the same administration. Even during the war on drugs, some U.S. Attorney’s Offices in source cities could only take high quantity cases because of the volume of cases being brought to them by various federal and state law enforcement agencies.

Sentencing entrapment cases are another area where horizontal sentencing disparity could exist. The basic premise of the sentencing entrapment defense is that while the defendant may have been predisposed to commit a comparatively minor crime, such as the sale/purchase of a small amount of drugs, it was the conduct of governmental agents that persuaded the defendant to commit a more serious offense, such as the sale/purchase of a large amount of drugs or a more severely punished type of drug, and the defendant’s sentence should not be increased because of that governmental conduct. See, e.g. Jeff LeBine, Sentencing Entrapment Under the Federal Sentencing Guidelines: Activism or Interpretation? 44 Wayne L. Rev. 1519 (1998). Although only a few courts have recognized this sentencing mitigation defense, some prosecutors no longer counsel law enforcement officers to encourage suspects to manufacture or obtain narcotics or quantities of narcotics they were not initially inclined to traffic.

Peter Margulies suggests that an inter-temporal perspective allows for “feedback between the legal norms and the individual or popular preferences that norm seeks to govern.” The country’s decision to elect a president with a different approach to sentencing and punishment of non-violent drug offenses, for example, would provide a democratic rationale for using clemency to achieve consistency in the treatment of offenders convicted under different administrations. Margulies, supra note 11, at 34. See A.B.A. Standards for Criminal Justice Prosecution Function and Defense Function, supra note 9.

See Memorandum from Julie Stewart, President of Families Against Mandatory Minimums (FAMM) to Bruce Lindsey, White House Counsel, 1 (November 1, 2000) (on file with author).

Of course, the best way to address this issue would be for Main Justice, perhaps through the Pardon Attorney, to issue a policy paper on this issue. In the absence of such action, it is in some sense perhaps unfair and ad hoc for a few people to win the commutation lottery based upon an individual prosecutor’s sympathy. Nevertheless, in the larger scheme, to the extent that horizontal sentencing disparities have been created by prosecutorial and statutory changes, justice for some via commutation is better than justice for none.

Obviously, in the policy area, U.S. Attorneys and their assistants are as a practical matter likely to follow the broad criminal justice policy goals of the President and his Attorney General. Nevertheless, individual Offices can play a role in setting policy from the bottom up by the positions taken on clemency petitions.