

PERFECT PHONE CALLS: REDEFINING VINDICTIVE PROSECUTION IN THE TRUMP ERA

On July 26, AUSA Leo Wise had this exchange with Maryellen Noreika, the judge presiding over the Hunter Biden case.

THE COURT: I have had one or two cases involving a person struggling with addiction who bought a gun, we usually see a felony charge for false statement.

The Defendant has admitted that his statement was false, but he wasn't charged. Again, I'm not trying to get into the purview of the prosecutor, and I understand the separation of powers, it's in your discretion, but I just want to ask, does the government have any concern about not bringing the false statement charge in light of our discussion of 922(g)(3) and the constitutionality of that charge.

MR. WISE: No, Your Honor.

Less than three hours later, after Wise revealed that prosecutors had a different understanding of the immunity provision in the plea deal than Hunter's lawyers did, Hunter Biden pled not guilty to two misdemeanor tax charges.

Hunter Biden faces stiffer penalties after exercizing a constitutional right

Hunter Biden exercised his constitutional right to plead not guilty to a plea deal that wasn't what he had understood it to be.

Exactly 50 days later, Leo Wise and Derek Hines obtained an indictment charging Hunter Biden with three crimes under 18 USC 922: the original charge for possessing a gun as an addict – 922(g)(3) – along with two false statement charges 922(a)(6) and 924(a)(1)(A) that Wise had said less than two months earlier prosecutors didn't intend to charge. Then, the government dismissed the previous diversion agreement that charged Hunter solely with 922(g)(3).

Whereas on July 26, Hunter faced the possibility of avoiding any jail time for the gun crime and, even if he failed to fulfill the terms of his diversion, he faced a maximum of 10 years, as of September 14, on paper he faces 25 years. (In reality he would face a fraction of this and the total exposure is similar.) Hunter Biden faces those formally stiffer penalties even though AUSA Wise told Judge Noreika that the gun diversion was, "a contract between the parties so it's in effect until it's either breached or a determination, period."

The sharply increased penalty that Hunter Biden faces after agreeing to a diversion agreement but then pleading not guilty to tax charges may be a key dynamic in motions we'll see in weeks ahead.

What Abbe Lowell said we could expect

Between the arraignment and his bid for a Trump subpoena, Hunter Biden's lawyer Abbe Lowell has set expectations about what will occur between now and submission of pretrial motions on December 11.

He has asked for "Brady and other discovery," but as of last week, "the defense has not received such material [about the targets of his subpoena request] in discovery from the prosecution or elsewhere, notwithstanding specific discovery requests and that some of this information likely resides with the DOJ."

He said he expected to request an evidentiary hearing, which will presumably be tied to one or more motions to dismiss the indictment.

He described that those motions to dismiss would argue:

- The gun charges are unconstitutional
- The diversion agreement prohibits these charges
- A selective and/or
- Vindictive prosecution claim

The motion to dismiss the gun charges on constitutional grounds will associate this case with other similar challenges already wending their way towards SCOTUS. Whatever Noreika decides to do about it, it will mostly delay resolution of this case as those appeals proceed.

Lowell, and before him Chris Clark, have repeatedly said that Weiss could not indict Hunter on the gun charges because the diversion agreement remains in effect. I'm not sure how Lowell will make the argument that DOJ has effectively breached a "bilateral contract," though it may also play a part in a vindictive prosecution claim, as I describe below.

Selective prosecution arguments almost never work. It would have to lay out evidence that there were similarly situated people – who purchased a gun without disclosing their addiction but, absent some other crime tied to the gun, were not charged. It is not enough to point to abundant data showing that this charge is rarely charged (as a number of journalists have laid out), which, if he files such a motion, Lowell would surely have. You also have to argue that you were charged only *because* you're a protected class, which historically has meant racial discrimination. While (as Carissa Byrne Hessick recently laid out when Trump tried a selective prosecution claim) people have *tried*

to say they were selectively prosecuted because of their political views, that hasn't worked yet. And you could as easily argue that Hunter was being charged because he is the son of the guy who championed these drug and gun laws in the first place as you could that he was being charged because he is the President's son – goodness knows the 2A crowd would make that argument.

One of the only reasons such a motion might work here where it would otherwise not is because there are people – thus far speaking anonymously to the press – who have stated that Hunter was charged *only because* he is who he is. For example, Glenn Thrush described that,

When officials with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives reviewed Hunter Biden's gun application several years ago, they believed the case most likely would have been dropped if the target were a lesser-known person.

And NYT described, in a story including Thrush, that,

Mr. Weiss told an associate that he preferred not to bring any charges, even misdemeanors, against Mr. Biden because the average American would not be prosecuted for similar offenses.

If Lowell can find these witnesses – experts on gun crimes who said Hunter was charged only because he was prominent and a Weiss associate whom Weiss purportedly told he knew that average Americans would not be prosecuted for such crimes –and get them to testify, then he would have what virtually no other defendant would: Proof that the prosecutor who brought the charge knew that similarly situated defendants would not be charged, but charged the defendant anyway.

Vindictive prosecution bids almost never work pre-trial

It's Lowell's mention of a possible vindictive prosecution claim that I revisited after reading his subpoena request and writing this post.

Normally, vindictive prosecution claims argue that a prosecutor retaliated against a defendant because they exercised a constitutional or statutory right. As mapped out above, Lowell might argue that David Weiss ratcheted up the gun charges against Hunter – 25 years of exposure instead of a diversion agreement – *because* he exercised his right to plead not guilty on the tax charges.

But that argument would be thwarted by several precedents that limit the ability of a defendant to plead vindictive prosecution, especially pre-trial. Bordenkirscher basically held that making dickish threats as part of plea negotiations is not vindictive prosecution. Goodwin made it much harder to argue that a prosecutor's decision to ratchet up charges in response to a defendant's decision to go to trial was presumptively vindictive, basically holding that the prosecutor may have, instead, added charges out of some societal interest in the prosecution.

You can see how this works in the case of Hatchet Speed, based on facts – involving felony gun charges in one district and the addition of a felony charge to a misdemeanor in another – not dissimilar from Hunter's case. On January 6, Speed was an NRO contractor with TS/SCI clearance and a Naval reservist still training at Andrews Air Force Base. He had ties to the Proud Boys and expressed a fondness for Hitler. He went on a \$50,000 weapon buying spree after January 6, including devices that – prosecutors successfully argued in a second trial – qualified as silencers under federal law. He was charged for unregistered silencers in EDVA and, at first, misdemeanor trespassing charges for

his actions on January 6. Between the time his first EDVA trial ended in mistrial and a guilty verdict in his retrial, DOJ added a felony obstruction charge in DC, which his excellent FPD attorneys argued was retaliation for the mistrial. But DOJ responded with an explanation of the process leading to the addition of the felony obstruction charge: they added a second prosecutor, got better at prosecuting obstruction for January 6, found some more damning video of Speed at the Capitol, and came to recognize how Speed's comments about the attack would prove the corrupt intent required for obstruction charges. They were pretty honest that they regarded Speed as a dangerous dude that they wanted to put away, too.

The same process might well happen if Lowell files a vindictive prosecution claim. Under Goodwin, Weiss might have to do little more than say there was a societal interest in jailing Hunter Biden to affirm the import of the gun laws his father continues to champion.

As with the selective prosecution claim, some facts exist with the Hunter Biden prosecution that might distinguish this from all the other impossible claims of vindictive prosecution. Most important is the contested status of that diversion agreement, about which both sides made conflicting claims during the failed plea hearing. If Noreika credits it as a bilateral contract between the two sides, as both Wise and Clark claimed it was at points during the hearing, then she might treat a vindictive prosecution claim as an abrogation of a contract followed by the ratcheting up of charges. If Noreika links it to the tax plea, as both sides described it as at different points in that hearing, then the question of whether Weiss reneged on the larger plea becomes an issue, but which might make this just a case of dickish threats covered by Bordenkirscher.

There's also the fact that Weiss will have to come up with an explanation of why he and Leo Wise thought pretrial diversion was in the

societal interest on June 20, why Leo Wise thought false statement charges were unnecessary on July 26, but then decided felony prosecution, including on two false statements charges, was in the societal interest on September 14. This is why Abbe Lowell keeps repeating,

no new evidence related to these charges emerged between June 20 (when the plea deal was first presented to the Court) and July 26 (when the prosecution reneged on its deal), and in fact only more favorable case law on this issue has developed since then.

While there was more evidence in Speed's case (newly discovered video from the Capitol), mostly prosecutors just argued the evidence looked different as other obstruction cases unfolded.

Lowell is arguing that the only thing that explains why the five year old evidence against Hunter Biden might look different in September than it did in June is because of the political pressure brought to bear on Weiss, and maybe the threats that both Weiss and Thomas Sobocinski have described to the House Judiciary Committee that was significantly responsible for the threats.

That would make this a political influence and violent threats case, not a vindictive prosecution case – possibly a different kind of motion to dismiss on Due Process grounds, but not a vindictive prosecution case. Normally, though, prosecutors have lots of tools to exclude that kind of thing.

Vindictiveness on a much grander scale

Which brings me to Lowell's request to serve subpoenas on Donald Trump, Bill Barr, Jeffrey Rosen, and Richard Donoghue, which first sent me down this rabbit hole.

Consider the timing. The November 15 filing makes an impossible request; it asks for subpoena *returns* by December 1.

Defendant Robert Hunter Biden, through his counsel, respectfully moves this Court to enter an order directing that subpoenas duces tecum be issued to the following individuals—Donald John Trump (“Mr. Trump”); William P. Barr (“Mr. Barr”); Richard Donoghue (“Mr. Donoghue”); and Jeffrey A. Rosen (“Mr. Rosen”)—pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, and that each subpoena recipient be required to provide any responsive documents and materials by December 1, 2023, to allow Mr. Biden sufficient time to review the material in advance of any necessary pre-trial motion, evidentiary hearing, and/or trial.

Thus far, Judge Noreika has not ordered Weiss to respond, but if they do in normal order and Lowell replies, this thing wouldn’t be fully briefed until December 6. Lowell couldn’t possibly expect subpoena returns, even assuming any of those served would respond without legal challenge, until after the new year.

The motion reviews the standard for subpoenas and admissibility at length, but as Popehat noted in a piece that otherwise got many of the facts of this case (such as the role of Biden officials in it) wrong, it doesn’t brief *how* Lowell would be able to use these records. Lowell mentions vindictive or selective prosecution but doesn’t, yet, make a case for it. Lowell cites just one precedent for obtaining subpoenas for use in pretrial filings, as opposed to at trial.

Lowell doesn’t mention Armstrong, the precedent that usually makes it impossible for defendants to get discovery in selective prosecution challenges. But that may be instructive. *Before* Lowell is making a request for discovery based

on a selective and/or vindictive prosecution claim, he is first asking for subpoenas, without fully laying out whether this would be a selective or vindictive or political influence prosecution claim.

Instead of arguing Armstrong, Lowell instead notes that he knows these records actually exist. "Before the government intones its stock phrase, this is no fishing expedition."

On that point, he's right. There *are* records responsive to these subpoenas. But it's worth looking at what they are, what else would be included if he got full response to these subpoenas.

The subpoenas ask for any communications provided to the January 6 Committee mentioning Hunter Biden (request 4). The request cites Richard Donoghue's notes of Trump referencing the Hunter Biden prosecution. I'm fairly certain those notes came from the Archives; they were the subject of a special waiver of Executive Privilege back in July 2021. For a variety of reasons, finding similar such notes at the Archives would be virtually impossible without another Executive Privilege waiver, a waiver that because of the conflict, would have to come from Trump, not Biden.

The subpoenas ask for any personal records, such as diaries, that, "reference to any formal or informal decision, discussion, or request to investigate or prosecute Hunter Biden" (request 3). If Donoghue's notes were not treated as official documents, those would be included. Any drafts of Bill Barr's book or notes that formed the basis for it, also cited in this motion, would also be included. In the subpoena request, Lowell cites to this WaPo story for Barr's quote about Trump's harassment, in which DOJ beat journalist Matt Zapotosky attributes Trump's comments to Barr based on the fact that Hunter's, "name was in the news because of the discovery of a laptop belonging to him."

The full reference in the book describes Will

Levi witnessing the call, which raises questions about whether he was *on the call* taking notes (as Richard Donoghue was during the December 27, 2020 call) rather than standing by, listening to just one side of the conversation as described in the book.

In mid-October I received a call from the President, which was the last time I spoke to him prior to the election. It was a very short conversation. The call came soon after Rudy Giuliani succeeded in making public information about Hunter Biden's laptop. I had walked over to my desk to take the call. These calls had become rare, so Will Levi stood nearby waiting expectantly to see what it was about. After brief pleasantries about his being out on the campaign trail, the President said, "You know this stuff from Hunter Biden's laptop?"

I cut the President off sharply. "Mr. President, I can't talk about that, and I am not going to."

President Trump hesitated, then continued in a plaintive tone, "You know, if that was one of my kids—"

I cut him off again, raising my voice, "Dammit, Mr. President, I am not going to talk to you about Hunter Biden. Period!"

He was silent for a moment, then quickly got off the line.

I looked up at Will, whose eyes were as big as saucers. "You yelled at the President?" he asked, confirming the obvious. I nodded. He shook his head in disbelief.

A month after the election, the Washington Post reported that there was already an investigation of Hunter Biden under way when I started as Attorney General and that this fact was never

leaked. The President never confronted me about that report directly, but I had heard he was angry that I didn't say anything after the presidential debate in which Biden falsely suggested the relevant e-mails on his son Hunter's laptop may have been placed there by the Russians. Biden's bogus statement relied on a letter published a few days before by a coterie of retired intelligence officials who had lost their professional bearings and lent their names to partisan hackery. Their claim was exposed a few days later when the FBI, together with John Ratcliffe, the director of national intelligence, made clear there were no grounds to think the laptop's damning content reflected foreign disinformation. But, of course, the media, having heralded the letter's fictitious claims, stayed mostly quiet about its debunking. The damage was done. Biden got away with deception. And Trump thought I was to blame.

This, as well as other Hunter Biden references in the book, are fundamentally incompatible with Barr being personally involved in the Scott Brady project, including having personal knowledge of the circumstances by which Donoghue ordered the FD-1023 to be shared with the Hunter Biden team within ten days of this conversation.

But the degree to which Barr conducted Ukraine-related issues – not to mention a reference to sending Barr a laptop the day after FBI received a laptop believed to have been owned by Hunter Biden – on his personal cell phone would suggest he may have far more, and far more forthright, records about his knowledge of the Hunter Biden investigation in his personal possession. Those would be covered by the subpoena request for communications with, “any Executive Branch official, political appointee, Department of Justice official, government agency, government official or staff person, cabinet member”

(request 2).

Trump too would have, "communications...discussing any formal or informal investigation or prosecution of Hunter Biden, including, but not limited to, any decision, referral, or request to investigate or not investigate or charge or not charge Hunter Biden" (request 1). Lowell includes eight examples in his motion: social media posts, four from during Trump's term and four during the period between the posting of the plea and the failed plea deal.

Those are easy. The records exist, including records over which Trump could invoke no conceivable privilege.

Abbe Lowell is not making up his claim that the top officials at DOJ and Donald Trump communicated about this investigation. He's not even making up the insinuation that some were intimately involved in efforts to filter dirt, potentially including from Russian agents, into the investigation of Hunter Biden. Scott Brady has already confessed to that.

But one detail of the subpoenas hints at where this could go: In addition to requests for communications with government officials about prosecuting Hunter Biden, it also requests for communications with any, "attorney for President Trump (personal or other) discussing or concerning Hunter Biden" (request 2).

These subpoenas ask for communications with Rudy Giuliani about Hunter Biden.

While the DOJ people may have insulated themselves from direct contact *with* Rudy (for example, Barr spoke with Victoria Toensing about Dmitry Firtash and the Brady project was set up through Robert Costello), *Trump* would have a gold mine of contacts with Rudy, *including about the "Hunter Biden" "laptop."* He might claim privilege over those.

You know what other communication Trump had, "discussing any formal or informal investigation or prosecution of Hunter Biden" (request 1)? The

perfect phone call with Volodymyr Zelenskyy, including – to the extent it still exists – the version in which Zelenskyy named Burisma explicitly, the version in which Trump referenced recordings of Biden discussing corruption, the kind of thing, Lev Parnas claims, that had already been offered up by Mykola Zlochevsky, the guy who went on to make a new bribery claim about Joe Biden after that call.

What *these* subpoenas ask for pertains to political influence and threats. But they also ask for evidence of a different kind of vindictive prosecution: Trump's explicit effort to exact his revenge for the Russian investigation on Democrats, on his Democratic opponent, by investigating Hunter Biden.

That's a due process violation. But not of the kind covered by all the precedents that make it virtually impossible to prove vindictive prosecution.

Serving notice

These subpoenas seek evidence showing that Trump's demand for an investigation of Hunter Biden for vindictive reasons reached the team investigating Hunter Biden. These are impossible subpoenas, insofar as they ask for compliance according to an impossible timeline and ask for compliance that may not legally be available (indeed, to the extent Trump has items in his possession, for various reason they may be covered by the Mar-a-Lago protective order). To the extent subpoenas ask for things covered by various privileges, they would pose impossible challenges to overcome. To the extent the subpoenas ask for the perfect phone call in which Trump demanded Zelenskyy's help with an investigation of Hunter Biden, they are impossible subpoenas because the White House altered that record in real time.

But they are, also, subpoenas for records that undeniably exist, records that incorporate an

effort Bill Barr set up to cater to Donald Trump's personal lawyer that *did* result in at least one piece of evidence being introduced into the Hunter Biden investigation – Bill Barr's communications with (!!!) Margot Cleveland would be responsive to his subpoena and would prove that point – records that further show that on at least two occasions, the President of the United States personally berated the Attorney General (or Acting Attorney General) making demands about this investigation.

The subpoena request does one more thing, as well. It notes that under 26 USC 7217, if any of Trump's demands about this investigation covered a demand for tax prosecution – the kind of tax prosecution still being pursued in California – it would constitute a felony, one that explicitly names the President among those covered by the crime.

For his part, Mr. Trump has made a plethora of concerning public statements calling for an investigation or possible prosecution of Mr. Biden, both while in office and since leaving, that further suggest improper partisan, political demands were at play, either expressly or implicitly. See also 26 U.S.C. § 7217 (making it a felony for the President to request an IRS investigation of an individual).

These may be impossible subpoenas, but they do serve notice.

My guess is that, when and if Weiss responds, he simply says that those big efforts to politicize this investigation are totally separate from this little tiny isolated gun indictment. He may claim he doesn't follow the Twitter feed of the guy who appointed him anyway – the same excuses Bill Barr made about other demands Trump served on DOJ via Twitter. Weiss may say, with reason, that some of Richard Donoghue's involvement in this case actually served to ensure the

investigation did not influence the 2020 election. But to even broach that subject, he'd have to admit that some of Richard Donoghue's efforts, such as ordering Weiss' attorneys to accept a bribery allegation from the head of Burisma made during impeachment, made after Rudy Giuliani solicited dirt from him, possibly in exchange for favors from DOJ that just happened to coincide with the closure of an investigation into him, can in no way be considered such a thing. Weiss may even say that to the extent that he sheep-dipped his prosecution team, swapping Lesley Wolf for Leo Wise, he has further isolated the team from such improper influences, influences that (Joseph Ziegler helpfully revealed) have been documented going back to 2019.

However Weiss responds, that response will precede whatever motions to dismiss – whether it's selective or vindictive or *really* vindictive prosecution – that Abbe Lowell ultimately does file.

None of that will change the precedents – Armstrong and Bordenkirsch and Goodwin and others – that make it nearly impossible for defendants to make these arguments.

But there are aspects of this case, both the known evidence (much of it offered up by law enforcement officers whose actions led to threats against the prosecution team) and the legal posture leftover from that failed plea deal, that make the motions to dismiss genuinely different.

This case is, on one hand, a very simple prosecution involving claims Hunter Biden made in his book, the application of a law that his father championed. It is also, however, a test of whether defendants can fight a different kind of vindictive prosecution, the kind Trump demanded and continues to demand.

Thanks to Carissa Byrne Hessick, who generously served as a sounding board for my thoughts leading up to this post. The errors in the post

are all mine.