

IN ADVANCE OF ROBERT HUR HIT JOB, DOJ UPDATED PUBLIC IDENTIFICATION POLICY

As Politico and NYT reported, there has been a fair amount of back and forth between lawyers for President Biden, Richard Sauber and Bob Bauer, and Bradley Weinsheimer, the career DOJ employee that Merrick Garland has put in the center of matters pertaining to Special Counsels.

I'll come back to those more generally.

But I wanted to call attention to a particular part of the exchange. In a February 8 letter responding to a letter Biden's attorneys sent to Merrick Garland, Weinsheimer excused Robert Hur's gratuitous swipes at Biden this way:

Your claim that Special Counsel Hur inappropriately commented on uncharged conduct is misplaced. As an initial matter, as described above, rather than commenting on uncharged conduct, Special Counsel Hur was applying the evidence he gathered to the applicable law. While Department policy advises Department employees to exercise caution when describing uncharged conduct, the policy also provides that when considering a statement about uncharged individuals, deciding officials should consider whether public disclosure may advance a significant law enforcement interest, including [1] **upholding the integrity of the investigation**, and [2] **whether the public has a significant need to know the information**. [my emphasis and bracketed numbers]

As Biden's attorneys described in their February 12 response, Weinsheimer's response confused

them at first, because they didn't recognize the reference.

Then they found it in what they call "a recent addition to the Justice Manual."

Finally, your letter also defends Special Counsel Hur's comments by describing Department policy that, in your words, "provides that when considering a statement about uncharged individuals, deciding officials should consider whether public disclosure may advance a significant law enforcement interest, including upholding the integrity of the investigation, and whether the public has a significant need to know the information." You did not provide a citation for this reference, and we were puzzled at its use as a defense of Special Counsel Hur's conduct since we were unfamiliar with this language. Our uncertainty about the provenance of this reference and its applicability in this case was justified when **we discovered that it appears to stem from a recent addition to the Justice Manual** that has nothing to do with prosecutorial comments about uncharged conduct. That provision, Justice Manual 9-27.760, addresses whether it is appropriate to *identify* "by name or unnecessarily specific description" an uncharged party. It does not speak to appropriate "statements about uncharged individuals," as you state. [my emphasis]

That got me looking for this "recent addition."

Lo and behold, *this month*, February 2024, DOJ added a bunch of new language to the section of the Justice Manual describing "9-27.760 – Limitation on Identifying Uncharged Parties Publicly" (see the precursor). In addition to tweaking its applicability from those "officially" charged to those "publicly"

charged, it added a bunch of new language. That language requires approval from a US Attorney, Assistant Attorney General, "or their designee," before identifying someone in prosecution filings or a declination. It lists factors to consider.

For the same reasons, following the conclusion of a case (whether by closing of an investigation or conclusion of a prosecution), DOJ personnel should not publicly disclose the identity (either by name or unnecessarily specific description) of uncharged parties absent approval of the United States Attorney or Assistant Attorney General, or their designee. When evaluating whether to grant approval, the United States Attorney or Assistant Attorney General, or their designee, may consider factors such as:

- *The privacy, safety, and reputational interests of uncharged parties;*
- *The potential effect of any statements on ongoing criminal investigations or prosecutions, see JM 1-7.600, 1-7.610;*
- *Whether public disclosure may advance significant law enforcement interests, such as where release of information is necessary to protect public safety or uphold the integrity of the law enforcement*

- investigation; and*
- *Other legitimate and compelling governmental interests, including whether the public has a significant need to know the information.*

Public statements concerning the identity of uncharged parties following the conclusion of a case are permissible only if the legitimate and compelling government interests served, including law enforcement interests, substantially outweigh the privacy and reputational interests of the uncharged parties. To the extent a public statement regarding uncharged parties meets this standard and is otherwise permitted by law, such disclosure must be limited to the extent necessary to advance the government interests served by the disclosure.

Significant justification for identifying uncharged parties commonly exists where it is ordered by the Court, is necessary to protect the integrity of the case, or assists the government in meeting its burden of proof. In these instances, the use of generalized terms or descriptions may be unfeasible or insufficient or may create confusion or false impressions for the judge or jury. For example, in conspiracy trials, the identity and conduct of uncharged parties are often highly relevant to the government's case, and it is not feasible to shield that individual's identity in proving the case. In such instances where significant justification exists relating to court proceedings and pleadings, prior approval by the appropriate United States Attorney or Assistant Attorney General is not necessary.

As Sauber and Bauer note, this section is not about whether you can call someone a doddering old man in a declination statement, it's about whether you can name someone who has not been in a declination statement at all (for example, Hur named some, but not all, of the people interviewed in his report, including Biden's ghost writer, who was already facing hacking threats). It simply is inapplicable.

But I find it just as interesting that Weinsheimer used language that could only have predated the draft report by days if not hours (the White House had reviewed and responded to the report by February 5). And he took that as *permission* to attack the doddering old man, rather than a restriction on doing so.

Frankly, I'm unsympathetic to some of the White House concerns. The report was and should have been made public. That's not the problem.

The problem is it's a shitty report that gets the law wrong, uses a political lens to assess key details (like Hur's distinction between Ronald Reagan's "diaries" and Biden's "notebooks"), and takes unnecessary swipes at Biden.

I think it was equally inappropriate for Hur to compare Biden's conduct with Trump's. That's not his job, and having botched the analysis of 18 USC 793(e) (not to mention missed that unlike Biden, Trump had been cut off from classified briefings after leaving office), his comparison is useless.

Weinsheimer seems to be suggesting it was cool for Hur to attack the doddering old man and weigh in on an investigation he's not involved in to defend his own failed prosecution. He's fooling himself if he thinks this reassures the public.