

Making The Pitch For A Civil Resolution In A Criminal Case

By **Bill Athanas** (March 8, 2024)

Last month, special counsel Robert Hur issued a report detailing his reasons for declining to charge President Joe Biden for retaining classified documents from Biden's time as vice president.

Regardless of one's views on its conclusions and underlying rationale, at least some of the report's significance results from the rare glimpse it provides into prosecutorial decision making.

The report was delivered pursuant to special counsel regulations, but the U.S. Department of Justice imposes a similar obligation, in substance if not in form, in every investigation of significance.



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While declination memos seldom take the form of the Hur report, they are prepared in virtually every case the DOJ investigates but ultimately chooses not to prosecute.

Because those memos — and the rationales they detail — are almost never disclosed publicly, defense counsel can lose sight of the factors that drive the decision to charge or decline a particular case.

Beyond the typical factual disputes, legal challenges and equitable arguments that counsel often raise lie the specific bases set forth in the Principles of Federal Prosecution contained in the Justice Manual.

While the principles are internal, nonlitigable factors that create no substantive rights, they nevertheless can provide a foothold for demonstrating why criminal prosecution is unnecessary or ill-advised.

Bases for Declining Prosecution

Assuming the threshold probable cause requirement is met, the Principles of Federal Prosecution identify three potential reasons for declining prosecution: "(1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution."^[1]

The first reason, detailed in Justice Manual Section 9-27.230, largely echoes the elements of Title 18 of the U.S. Code, Section 3553(a), which guide sentencing decisions.

The second reason, described in Justice Manual Section 9-27.240, memorializes the DOJ's so-called Petite policy, which focuses on whether an otherwise viable case is better suited to be prosecuted in a different jurisdiction.

Together, those potential justifications provide a range of opportunities for advocacy regarding the target's personal circumstances, the particulars of the individual allegations, and the propriety of federal charges when other sovereigns may also be investigating.

Common Prosecutorial Responses

The third reason differs both in terms of focus and extent of potential application. By allowing for the possibility of a different form of resolution, the noncriminal-alternatives reason can be distinguished from the binary choice in the federal interest factor.

The inquiry changes from a simple decision of whether the target should be held to account or avoid responsibility altogether, to an analysis of what type of consequences an individual or entity should face.

As such, application of this reason can be far more palatable to prosecutors who have often allocated substantial time and effort to the investigation. The notion that at least some form of penalty will result from that effort is far more appealing than the thought of the target being allowed to walk away without suffering any consequences.

Despite the greater flexibility and logical appeal of this factor, it can nevertheless prompt a visceral negative reaction from prosecutors. The reasons underlying that response obviously vary, but the way in which it is framed is a frequent cause.

Without further explanation and context, the argument is often interpreted — and sometimes presented — in the most simplistic of terms: "This is just a civil case." Prosecutors who hear that message from defense counsel may interpret it as an assertion that the case lacks merit or significance.

Whether intentional or otherwise, such arguments effectively diminish the intelligence and effort of prosecutors, particularly when made after the investment of years of work.

Without further context, the argument also diminishes the lawyer's credibility. Because virtually every white collar case with an identifiable victim can also be pursued civilly, raising that argument suggests a level of naïveté or inexperience.

More significantly, for prosecutors well-versed in evaluating presentations from counsel at the preindictment stage, the argument is often perceived as a sign that defense counsel has no compelling or even colorable challenges to the threatened prosecution, and is simply trying to concoct a reason to make the case go away.

Strategies for Overcoming Negative Reactions

To overcome these pitfalls, counsel would be well served to study both the substance of the noncriminal alternatives section and its commentary. The former is relatively straightforward:

In determining whether there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:

1. The sanctions or other measures available under the alternative means of disposition;
2. The likelihood that an effective sanction will be imposed;
3. The effect of non-criminal disposition on federal law enforcement interests; and
4. The interests of any victims.[2]

The commentary makes clear at the outset that declination on this basis can occur even if sufficient evidence exists to charge, noting: "When a person has committed a federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal prosecution must be commenced."^[3]

The comment catalogs the broad range of noncriminal alternatives that can qualify as a basis to decline prosecution. It also instructs prosecutors to "familiarize themselves with these alternatives" and directs that they "should consider pursuing them if they are available in a particular case."

This language effectively creates an affirmative obligation on prosecutors to evaluate thoroughly the possibility of a noncriminal resolution, even without defense counsel raising the issue.

Focus on the predictability and proportionality of noncriminal outcomes.

When counsel does raise that issue, however, the manner in which that argument is presented matters greatly. In that context, predictability and proportionality are the most important touchstones.

Counsel should understand that most criminal prosecutors will bristle at the prospect of declining an otherwise viable case based on the mere possibility of a lesser punishment, particularly a civil sanction.

To address that concern, counsel should focus on showing that alternative consequences are simply not theoretical or an imaginary slap on the wrist.

The section's requirement that prosecutors consider "the likelihood that an effective [non-criminal] sanction will be imposed" requires that counsel show more than the mere possibility that some entity or individual might at some point pursue a civil or regulatory action against the target.

To meet this requirement, counsel should be prepared to provide specifics regarding:

- Agencies with regulatory authority that possess subject matter and geographic jurisdiction over the conduct at issue — the argument carries even greater force when those agencies already have active investigations into the matter;
- Identifiable plaintiffs with standing to bring civil actions whose claims are within applicable statutes of limitations; and
- Examples of regulatory or civil actions brought on similar facts, resulting in meaningful sanctions.

While not without risk, inviting regulators to consider licensing or disciplinary actions against the target can be a valuable strategy. Though this approach can theoretically result in the client facing additional penalties beyond the criminal realm, the reality is that such consequences would likely follow as a matter of course in the event a criminal case results — it is not as though these sanctions would have otherwise gone overlooked.

The possibility of arriving at a resolution that makes civil sanctions an alternative rather than merely an additional penalty can often be worth the risk.

Regarding proportionality, counsel must start by recognizing many prosecutors' perception of the inadequacy of any punishment short of imprisonment. To overcome that belief, counsel should evaluate the sentence the target would actually serve upon conviction, rather than simply determine the likely guideline range.

While uncertainty about the judicial draw can make forecasting the likely sentence somewhat challenging, the U.S. Sentencing Commission's website provides a helpful tool for predicting outcomes based on sentences actually imposed within a given cell on the sentencing table.[4]

Because that historical data does not yet factor in the recently passed zero-point offender adjustment, consideration of its impact will likely reduce the sentence imposed even further.

From that number, some basic calculations of credits due to incarcerated persons under the First Step Act should further slash the amount of time the target truly faces.

In addition to establishing that the term of incarceration is likely to be far lower than the government might anticipate, counsel can further demonstrate the proportionality of a civil sanction by detailing its full impact.

Criminal prosecutors often have limited experience in civil proceedings, even those brought by enforcement agencies. As a result, they may not fully appreciate how events such as the loss of a professional license, the payment of a large fine, the effect of negative publicity, the loss of reputational standing, or even the cost and impact of defending a complex civil suit can trigger aftereffects that may remain for years.

Even those prosecutors who have some familiarity with the impact that such sanctions can cause may not possess a full understanding of the ways the particular target may be affected. Providing those details can help narrow the gap between the prosecutor's perception and target's reality.

Factor in the interests of any victims.

Understanding the full scope and impact of a noncriminal resolution may reveal it to be far a more effective sanction than a prosecutor might otherwise anticipate, which in turn shows that traveling that route aligns with federal law enforcement interests.

Even if those criteria are met, however, one more essential step remains: demonstrating how such a resolution serves "[t]he interests of any victims."

As a starting point on this issue, counsel should recognize that a proposed noncriminal resolution that fails to address victim losses has virtually no chance of success.

Where identifiable victims exist, fulfillment of this element requires compensation at least in the amount of restitution that would be required under the Victim and Witness Protection Act. Often, additional recompense — interest, consequential damages, and the creation of settlement funds or charitable donations — may be necessary.

While those costs can swell rapidly, they are typically dwarfed by the economic impact and collateral effects that would result from charges being filed.

Conclusion

While the Principles of Federal Prosecution discuss noncriminal resolutions as an alternative to criminal prosecution, counsel advocating for that outcome should be prepared for a simple question from most prosecutors: Why can't both avenues be used?

Under this rationale, all the supposedly compelling interests identified by counsel can be served without the need to undermine the legitimacy of the criminal investigation.

When this issue arises, the analysis shifts from the benefits and virtues of a noncriminal resolution to the costs and risks of indictment. In that context, simplistic and generalized arguments bemoaning the unnecessary expenditure of scarce government resources, or warning of the unpredictability of litigation, are almost always doomed to failure.

Instead, counsel should focus on the specific challenges that a criminal prosecution creates, and the precise legal and factual issues that the government will need to overcome to secure a conviction.

That is easier said than done, of course, and in many cases those arguments will fail. But in those situations where a noncriminal outcome truly represents the most appropriate means of resolution, counsel should be able to identify genuinely compelling factors in both categories.

Even without the depth of visibility into prosecutorial decision making provided by the Hur report, counsel should be able to formulate arguments in a principled and credible fashion, avoiding the instinctive negative reaction that often results when proposing civil remedies, while also plotting a path toward resolution that both sides can accept.

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[1] Justice Manual, §9-27.220.

[2] Justice Manual, §9-27.250.

[3] Justice Manual, §9-27.250.

[4] <https://www.ussc.gov/guidelines/judiciary-sentencing-information>.