IN MOTION TO DISMISS, HUNTER BIDEN ACCUSES HOUSE GOP OF SEPARATION OF POWERS VIOLATION

It'll take me a few days to get through the pile of motions to dismiss Hunter Biden filed yesteday.

As I noted, I think the challenge to his gun charges based on a claim that the diversion agreement remains valid is strong. I think both the challenge to the constitutionality of the gun charge and the challenge to David Weiss' appointment are designed to create appealable issues — I really hate the appointment challenge, but Republicans might love it. While strong, the selective and vindictive prosecution motion likely still isn't strong enough to get by the near-impossible standard set for such things.

While I suspected we'd see some version of all of those (I expected a *different* challenge to Weiss' Special Counsel appointment, given that he has admitted no political officers have or are supervising him), there's something I didn't expect, at least not in this form: a claim, as part of the selective and vindictive prosecution claim, that Congress has impermissibly usurped DOJ's role in Hunter Biden's prosecution.

Altogether, between two or three different passages, the filing spends over ten pages (of almost 70) cataloging House GOP interference (footnotes omitted):

> Republican Members of Congress were quick to take credit for sabotaging Mr. Weiss's proposed Plea Agreement, celebrating the end of the deal as their doing. House Oversight Committee Chairman Comer declared outside the

> Capitol: “I think that you’re seeing our investigation that’s shined a light on the many wrongdoings of the Biden family has picked up a lot of credibility today, because now we see that there are a lot of crimes that this family’s committed and that played out in court today.”29 Chairman Smith told Fox News that afternoon “justice has been served,”30 and later said: “Announcement of a special counsel only happened because congressional GOP exposed the two-tiered judicial system by shining light onto the investigation into Hunter Biden’s alleged financial crimes & the political interference that shielded both him & POTUS from scrutiny.”31 See infra Section I.A. (discussing congressional admissions of interference with DOJ). And now these same Republican leaders are praising the new tax charges that were just piled on in California (years after DOJ had the relevant facts and after it agreed to resolve them with a plea to misdemeanor offenses), while simultaneously criticizing them as an effort to “protect” Mr. Biden and demanding even more charges.32
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> In other words, these officials have (1) accused DOJ of trying to protect Mr. Biden by resisting calls to investigate him based on baseless accusations in the first place, (2) criticized DOJ for declining to charge him with a crime for which no similarly situated person would be charged, (3) claimed credit for Mr. Weiss caving to their pressure and forcing Mr. Biden to enter a Plea Agreement he should never have had to consider, (4) claiming credit for Mr. Weiss subsequently yielding to their pressure and scrapping that plea deal, (5) boasting that the appointment of a Special Counsel (which those officials had demanded for years) was their doing , and (6) declaring they were the cause

> for Mr. Weiss now bringing misdemeanor and felony tax charges DOJ had not believed were warranted until they intervened. This ludicrous and shameless behavior would be comical if it were not so deeply unfair to Mr. Biden, embarrassing to the country, and offensive to the concept of justice. It is overwhelmingly clear that nothing the Justice Department could charge Mr. Biden with, no matter how unjustified, would satisfy these officials, which is no surprise given that their real objective is to attack the President and the Democratic Party before an election. 33
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> In sum, politicians and public officials at war with their political rivals are flouting separation of powers to intentionally interfere with the Executive Branch's handling of this case, and the casualties are Mr. Biden's constitutional rights, any objective appearance of fairness, and public confidence in the justice system. DOJ is responsible for preventing this, but the agency was bullied into investigating Mr. Biden in the first place and now everything the agency does (or does not to) earns it condemnation and reprisal.

Relying on a *losing* effort to make a similar argument, Abbe Lowell argued that the things that decision said would amount to a separation of powers violation exists here.

> Here, however, the scale tips the other way. A lone congressman is not just cajoling and exhorting. Many members of Congress, including the last Speaker of the House, Chairman of the House Oversight Committee, Chairman of the House Judiciary Committee, and the Chairman of the Ways & Means Committee are actively interfering with DOJ's investigation, using their authority to

> pressure and malign DOJ, and using congressional committees limited to investigating government agencies to conduct a criminal investigation of private conduct by a private citizen—one they are conducting based on a publicly stated presumption of guilt. They have gone as far as releasing agents' entire investigative file during the investigation. Their actions have overcome Special Counsel Weiss's independent judgment, causing him to abandon the very resolution of this case that he proposed prior to their pressure. As noted above, these Republican House Members have publicly claimed credit for causing Special Counsel Weiss to cave under their pressure. See supra Section IV (discussing congressional interference).105 There was no such evidence in Mardis.
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> Congress has intruded on the executive function to an extent that only dismissal of these charges can cure, and DOJ has abdicated its responsibility and pledge to prevent it from doing so. The Court should not hesitate to step in and safeguard Mr. Biden's rights, the independence of purity of government, and the integrity of the justice system.
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> 105 Because the Congress and DOJ are both part of the United States Government which prosecutes a criminal defendant, there is "no difference between prejudicial publicity instigated by the United States through its executive arm and prejudicial publicity instigated by the United States through its legislative arm." Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952). "Pretrial publicity originating in Congress, therefore, can be

> attributed to the Government as a whole and can require postponement or other modification of the prosecution on due process grounds." 10 Opinions Of The Office Of Legal Counsel Of The United States Department Of Justice 77 (1993) (April 28, 1986, Statement of Charles J. Cooper, Deputy Asst. Att'y Gen., Off. of Legal Counsel).

As always, the chances any of this works are really slim. And given how Judge Maryanne Noreika dealt with an amicus filing that Jason Smith submitted (mentioned in the brief), I doubt she'll look too kindly on the argument.

Some of this is absolutely correct: Trump can be gagged to ensure a fair trial process. Yet not only aren't Congress parties to these prosecutions (so they couldn't be gagged), but under Speech and Debate, there's almost no way that a judge could silence them.

But there is similarly a real risk that Hunter Biden could never get a fair trial, because the GOP has generated a non-stop media blitz claiming he is guilty of things for which there's not a shred of evidence.

It will take months for this to be resolved. But it bears notice, the day before Hunter is due to appear for a subpoena, that it's a key part of the argument here.