

MARYELLEN NOREIKA NEVER ANSWERED MARK SCARSI'S QUESTION

As I laid out in this post, Judge Maryellen Noreika's opinion denying Hunter Biden's bid for immunity under his diversion agreement provided new insight on the nature of her intervention at the July 26, 2023 plea hearing, and her attempt to refashion that intervention after the fact. Among other things, I showed:

- Judge Noreika provided several indications that she knew, during the hearing, that Probation head Margaret Bray had refused to sign the diversion agreement before the hearing. Given the logistics as described by AUSA Benjamin Wallace, her knowledge of that fact almost certainly had to come from conversations between Bray and Noreika in advance of the plea hearing, and as such, Bray's refusal to sign the agreement may amount to proxy refusal from Judge Noreika, who was not a party to the agreement.
- Bray's discussion with Wallace (which, if Bray refused to sign the diversion agreement at Noreika's direction, would

amount to *ex parte* communication between the judge and prosecution) created information asymmetry in the hearing. When Leo Wise made comments about the diversion only going into effect once Bray (or Noreika, as he once misspoke) signed it, Hunter's team had no way to know that that discussion was only happening because of Bray's earlier refusal. When Wallace piped up to affirm Judge Noreika's question about the clause under which she should review the plea, Hunter's team had no way of knowing that his assent may have reflected *ex parte* knowledge of Noreika's concerns about how the plea and diversion agreements worked together.

- Contrary to her portrayal of the hearing in her opinion, Noreika's intervention in the diversion agreement *preceded* the moment when Leo Wise "appeared to revoke" the deal. The deal collapsed, temporally at least, *first* because of her intervention and only *subsequently* because her intervention gave Wise

opportunity to renege on the scope of the immunity agreement.

- Judge Noreika *still* claims to have a veto over the substance of the diversion agreement, a contract to which she is not a party.
- After intervening based on a claim that Hunter's immunity wasn't as broad as he understood, her opinion ruled that even though none of the parties to the diversion agreement disputes that it would cover at least gun, tax, and drug crimes, she nevertheless ruled the immunity grant was too uncertain to be applicable to gun, tax, and drug crimes.

Given the assertions and omissions in Noreika's opinion, Hunter Biden may have a plausible argument that she did precisely what she claimed she feared: unconstitutionally intervened in a prosecutorial decision that David Weiss had already committed himself to.

Noreika's opinion puts *her* actions that day at issue, every bit as much as Weiss' subsequent actions are.

That makes the disparate treatment that Judge Noreika and Judge Scarsi gave to Hunter's selective and vindictive prosecution claim important.

To be sure, both opinions are supposed to be addressing different things, two different prosecutorial decisions. And both opinions, at

least at times, artificially limit their consideration to developments after that failed plea.

Nevertheless, even after ruling (before he would rule again) that Abbe Lowell had not procedurally presented his case, Scarsi engaged in a laudable point by point treatment of Hunter Biden's claims.

As a result, the two judges took a dramatically different approach to Hunter's claim that Republican members of Congress had attempted to intervene in his criminal case directly. The longer version of that argument from Abbe Lowell, presented before Judge Noreika, looks like this:

Then on July 25, just one day before Mr. Biden's scheduled plea hearing, Chairman Smith actually tried to intervene in this case to file an amicus curiae brief "in Aid of Plea Hearing" (United States v. Biden, D.E. 7, No. 23-mj-00274-MN), in which, with no shame about doing real political interference while complaining about non-existent involvement by others, he encouraged the Court to "consider" the unfounded allegations by the IRS agent whistleblowers that the probe into Mr. Biden was tainted by political interference and attaching transcripts of their testimony (*which contained confidential taxpayer and grand jury information*) on the public docket. (D.E. 7-3 (Smith Memo) ("[T]he Defendant appears to have benefited from political interference which calls into question the propriety of the investigation of the U.S. Attorney's Office . . . it is critical that the Court consider the Whistleblower Materials before determining whether to accept the Plea Agreement.")) 25

In Scarsi's response to a shorter version of this argument, which was posted before Judge

Noreika ruled, he raised the question of whether Judge Noreika had considered Jason Smith's attempt to intervene in the case.

On June 23, 2023, the Ways and Means Committee of the United States House of Representatives voted to publicly disclose congressional testimony from the IRS agents who worked on the tax investigation. Jason Smith, chair of the Ways and Means Committee, told reporters that the agents were "[w]histleblowers [who] describe how the Biden Justice Department intervened and overstepped in a campaign to protect the son of Joe Biden by delaying, divulging and denying an ongoing investigation into Hunter Biden's alleged tax crimes." Farnoush Amiri, GOP releases testimony alleging DOJ interference in Hunter Biden tax case, PBS NewsHour (June 23, 2023, 3:58 p.m.),

<https://www.pbs.org/newshour/politics/gop-releases-testimony-alleging-dojinterference-in-hunter-biden-tax-case>.²⁹ One day before the plea hearing in the United States District Court for the District of Delaware, Mr. Smith moved to file an amicus curiae brief imploring the court to consider the IRS agents' testimony and related materials in accepting or rejecting the plea agreement. Mem. of Law in Support of Mot. for Leave to File Amicus Curiae Br., United States v. Biden, No. 1:23-mj-00274-MN (D. Del. July 25, 2023), ECF No. 7-2; Amicus Curiae Br., United States v. Biden, No. 1:23-mj-00274-MN (D. Del. July 25, 2023), ECF No. 7-3.³⁰

²⁹ This source does not stand for the proposition that several leaders of house committees "opened a joint investigation." (Selective Prosecution Mot. 6.)

³⁰ The docket does not show that the

Delaware district court resolved the motion, and the Court is uncertain whether the court considered Mr. Smith's brief.

[snip]

After the plea hearing, Mr. Smith told Fox News, "I think that justice is being served," Jason Smith on Hunter Biden plea deal collapse: Justice is being served, Fox News (July 26, 2023, 7:01 p.m.), <https://www.foxnews.com/video/6331889313112> [<https://perma.cc/YL3P-JNW5>]. [my emphasis]

As I noted in this post, Scarsi actually over-read what Abbe Lowell argued here. Lowell only argued that the amicus was proof that Jason Smith *attempted* to intervene, not that Judge Noreika had considered his amicus.

Meanwhile, Scarsi applies a measure – whether Judge Noreika considered Smith's amicus, not whether he tried to file it – that Lowell doesn't make (and which is irrelevant to a vindictive prosecution motion, because Noreika is not the prosecutor); Smith did succeed in getting the amicus unsealed, including the exhibits that Hunter claimed include grand jury materials. Whether or not Judge Noreika considered the content of the amicus, that Smith filed it is undeniable proof that Smith tried to intervene, which is all Hunter alleged he did.

Scarsi, by contrast, raised the question – again, before Judge Noreika ruled – of whether Judge Noreika considered Jason Smith's plea to scotch the plea deal before she intervened in a contract to which she was not a party. Judge Scarsi raised the question of whether Smith had *succeeded* in intervening, with Noreika.

Noreika, who offered no indication she had reviewed Scarsi's selective prosecution language (though his opinion on this topic was in the same omnibus ruling she cited on the diversion agreement), didn't answer that question. Instead, in her selective and vindictive prosecution opinion, she simply dismissed the bulk of that claim with one paragraph.

In attempting to show discriminatory purpose, Defendant points to past and recent statements made by former President Trump, **alleged** conduct of one of the former president's personal attorneys (Rudy Giuliani) and a **purported** criticism and pressure campaign by Congressional Republicans. (See *id.* at 27-37). None of this evidence, however, is relevant to any alleged discriminatory purpose in this case. The charging decision at issue here – from 2023 – did not occur when the former president was in office. Nor did it occur when Mr. Giuliani was **purportedly** trying to uncover "dirt" about Defendant and presenting that information to U.S. Attorneys across the country. (See *id.* at 30). And the pressure campaign from Congressional Republicans **may have occurred** around the time that the Special Counsel decided to move forward with indictment instead of pretrial diversion, but the Court has been given nothing credible to suggest that the conduct of those lawmakers (or anyone else) had any impact whatsoever on the Special Counsel. It is all speculation. [my emphasis]

Noreika does three things in this passage (besides ignoring Bill Barr's intervention last year, which is pertinent to her silence about Alexander Smirnov). First, she treats Rudy's intervention as contested (even while falsely claiming Hunter had described his gun purchase in his memoir, when instead he only did so in

text messages, published by NYPost, that Rudy obtained from Hunter's hard drive). She did so even in spite of Lowell's submission of Scott Brady's transcript, detailing Rudy's intervention, as a supplemental authority.

Generally, as she does elsewhere, she fails to do what she claimed to do, to consider "the prosecution's decision to abandon the Plea and Diversion Agreement framework." Her description of David Weiss as "Special Counsel" is the tell here: she's dating Weiss' actions to a date, August 11, that postdates the first steps of abandoning the diversion. And she's explicitly focused on the indictment, not the abandonment, even though she claims to be considering the abandonment.

Having fiddled with the timing, she then – astoundingly – questions whether and when a pressure campaign from Congress happened! Noreika here cites Lowell's later discussion of Congressional intervention, not the earlier factual background discussion for the entire motion that mentions Smith's filing to her own docket specifically.

Given Noreika's own apparent veto of a contract between prosecutors and Hunter Biden, Noreika's treatment of Lowell's separation of powers is more interesting.

At the end of his selective- and vindictive-prosecution arguments, Defendant argues that his prosecution also violates the separation of powers. (See D.I. 63 at 54-60). The gist of Defendant's argument is that the Legislative Branch has failed to respect the prosecutorial discretion vested in the Executive Branch and instead attempted to usurp that authority. (Id.). In particular, Defendant claims that many members of Congress "are actively interfering with DOJ's investigation" and conducting "a criminal investigation of private conduct by a private citizen" – i.e.,

Defendant. (Id. at 58). He goes so far as to assert that these Legislative Branch officials “have overcome Special Counsel Weiss’s independent judgment” and, even further, those officials are the reason that pretrial diversion was abandoned in favor of indictment. (Id.). Defendant’s separation-of-powers argument is not credible.

As an initial matter, Defendant never disputes that the Executive Branch holds the ultimate power to prosecute in his case and that that branch of government is headed by his father. And Defendant does not actually accuse the Legislative Branch of successfully encroaching on or usurping the Executive Branch’s power. Indeed, Defendant’s argument is more subtle and nuanced; he alleges that the Legislative Branch is exerting pressure on the Special Counsel, purportedly causing him to make charging decisions that he would not otherwise make simply because members of Congress are unhappy. Yet members of the Legislative Branch pressuring Executive Branch officials or the Special Counsel to act is fundamentally different than actually making charging decisions or influencing them. And, apart from Defendant’s finger-pointing and speculation, the Court has been given no evidence to support a finding that anyone other than the Special Counsel, as part of the Executive Branch, is responsible for the decision to indict Defendant in this case instead of continuing to pursue pretrial diversion. There is thus no basis to find a violation of the separation of powers under the facts here.

I think the two judges’ opinions that Lowell’s separation of powers argument has no basis in precedent is absolutely right. But Noreika’s

treatment of it here is far more suspect given her own description that she intervened in a contract to prevent David Weiss from entering into a contract that limited his prosecutorial authorities. If Noreika thereby usurped Weiss' authority, then this whole focus on whether Congress influenced Weiss is misplaced.

The question becomes whether Congress influenced her.

And in spite of the fact that Judge Scarsi *specifically raised* the question of whether Noreika had considered Jason Smith's intervention, Noreika didn't answer that question. Instead, her treatment of Lowell's interference claim – the facts meant to apply to the entire selective and vindictive motion to dismiss – instead entirely dodges the uncontested fact that Smith attempted to intervene *with her*.

On July 19, 2023, Margaret Bray recommended Hunter Biden for diversion. On July 20, at least per Benjamin Wallace, Probation "agreed to revisions to the diversion agreement to more closely match the conditions of pretrial release that Probation recommended in the pretrial services report issued yesterday."

Neither judge has addressed why that doesn't amount to approval to the extent Bray has authority over the diversion. Scarsi simply rewrote Probation's agreement out of his opinion. Noreika simply dismissed its import.

More importantly, no one explained what happened between July 20 and July 26 such that Bray declined to approve the diversion agreement she had approved six days earlier. What changed?

One thing that changed was the intervention of Congress with Judge Noreika.