HUNTER BIDEN MOVES TO ENJOIN DAVID WEISS UNDER AN APPROPRIATIONS ARGUMENT TRUMP ADOPTED

Abbe Lowell has moved to enjoin David Weiss from spending any more unappropriated funds in the prosecution of Hunter Biden.

> Mr. Biden moves to enjoin the Special Counsel's investigation and prosecution of him from now into the future because the Special Counsel lacks a valid appropriation from Congress. Previously, Mr. Biden moved to dismiss the indictment as the tainted fruit of past Appropriations Clause violations (D.E.62). Had that motion been granted, no future violation would have occurred. That said, the Special Counsel insisted dismissal was not the proper remedy and that alleged Appropriations Clause violations "are 'best seen as requests for injunctions.'" (D.E.72 at 24 (quoting United States v. Bilodeau, 24 F.4th 705, 711 n.6 (1st Cir. 2022)).) Although Mr. Biden preferred dismissal as a remedy (i.e., how could one enjoin past violations?), he did not object to injunctive relief, explaining: "Under either view, this case could not proceed, so it is unclear how the Special Counsel's preferred remedy would benefit him." (D.E.80 at 16.) This Court, however, found no Appropriations Clause violation, so it did not reach the question of the appropriate remedy. (D.E.101.) 1
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> 1 At this morning's hearing, the Court

> questioned the timeliness of this Motion. As explained above, the Motion is timely because the prior motion to dismiss the indictment was for past Appropriations Clause violations and Mr. Biden now seeks to enjoin future constitutional violations. While the time has passed for Mr. Biden to bring pre-trial motions to dismiss based on the Special Counsel's past decision to indict, nothing prevents Mr. Biden from seeking to enjoin future constitutional violations. The Special Counsel cannot be given a blank check to indefinitely spend unappropriated federal funds in violation of the Appropriations Clause. The need to explicitly seek injunctive relief did not arise until the Third Circuit Motion Panel's May 9, 2024 decision dismissed the appeal under 28 U.S.C. § 1292(a) because injunctive relief was not explicitly requested, and the Court declined to hear Biden's claim for relief at law (dismissal) on an interlocutory basis. Parties frequently seek to cure defects identified by opinions, for example, plaintiffs often file amended complaints and prosecutors file superseding indictments following motions to dismiss all the time, and the situation is no different here. Additionally, the prior scheduling order for pre-trial motions were for motions to dismiss. (D.E.57.) The parties clearly understood there were other "pre-trial motions" that would be filed addressing future issues and this Court set a new schedule for addressing some of those issues (D.E.117 (e.g., motions in limine, expert disclosure motion)), and the Special Counsel filing several such motions in limine this morning. The Court has not limited the Special Counsel orMr. Biden's from objectingto any kind of future conduct.

Lowell is doing so because the Third Circuit order finding that none of Hunter's appeals merited interlocutory jurisdiction rejected his challenge to Weiss' Special Counsel appointment (which argued both the appointing a sitting US Attorney SCO violated DOJ's own rules and also that Weiss' appointment was not appropriated) in part because Judge Noreika had not formally refused his injunction.

> In the defendant's third motion to dismiss, he argued (1) the prosecuting U.S. Attorney's appointment as a special counsel violated 28 C.F.R. § 600.3(a)'s requirement that special counsel be "selected from outside the United States Government" and (2) the Special Counsel improperly used an appropriation established by Congress for "independent" counsel without the requisite independence. See United States v. Biden, No. 1:23-cr-00061-001, 2024 WL 1603775 (D. Del. Apr. 12, 2024). **The defendant contends the denial of this motion is appealable because it, in effect, refused him an injunction. The District Court did not explicitly refuse to enjoin the continued appointment of the special counsel, nor the continued use of appropriation of funds, nor did the defendant explicitly ask for such an injunction**. Furthermore, the defendant has not shown the order has a "serious, perhaps irreparable, consequence" and can be "effect[ually] challenged only by immediate appeal." See, e.g., Office of the Comm'r of Baseball v. Markell, 579 F.3d 293, 297–98 (3d Cir. 2009) (citing Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981)). Accordingly, the denial of the defendant's third motion to dismiss is not an appealable order denying an injunction.
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> The District Court's denial of the defendant's third motion is also not appealable as a collateral order. For

> collateral-order purposes, the rejection of the defendant's claim that the Special Counsel's appointment violated a regulation is analogous to other challenges to a prosecutor's appointment or authority. Rejection of these challenges do not constitute collateral orders. See Deaver v. United States, 483 U.S. 1301, 1301–03 (1987) (Rehnquist, C.J., in chambers); United States v. Wallach, 870 F.2d 902, 907 (2d Cir. 1989); Deaver v. Seymour, 822 F.2d 66, 70–71 (D.C. Cir. 1987); United States v. Caggiano, 660 F.2d 184, 191 & n.7 (6th Cir. 1981). Moreover, categorically similar issues have been reviewed on appeal after a final or otherwise appealable decision. E.g., Morrison v. Olson, 487 U.S. 654, 668, 659 (1988); In re Grand Jury Investigation, 916 F.3d 1047, 1051 (D.C. Cir. 2019); United States v. Blackley, 167 F.3d 543, 545–49 (D.C. Cir. 1999); United States v. Wade, 83 F.3d 196, 197–98 (8th Cir. 1996); United States v. Prueitt, 540 F.2d 995, 999–1003 (9th Cir. 1976); In re Persico, 522 F.2d 41, 44–46 (2d Cir. 1975). Similarly, there is no collateral-order jurisdiction over the District Court's rejection of the defendant's appropriation argument and this order can be effectively reviewed after final judgment. E.g., United States v. Trevino, 7 F.4th 414, 420–23 (6th Cir. 2021); cf. United States v. Bilodeau, 24 F.4th 705, 711–12 (1st Cir. 2022) (finding appellant's injunction request could not be effectively reviewed after final judgment). [my emphasis]

In other words, Lowell asked for this injunction so Noreika would refuse it, giving him a better shot at appeal before the Third Circuit.

I've consistently said I think this challenge is garbage — garbage on precedent and garbage on

DOJ rules.

I still do — though David Weiss' persistent efforts to claim he is also, simultaneously, the US Attorney who made deals he has since reneged on with Hunter Biden could make the challenge more interesting down the road. Effectively, David Weiss is claiming to be both SCO and US Attorney, all while hiding discovery US Attorney David Weiss knows to exist.

That said, since Hunter first made this argument, Trump has adopted it (I've got a post started comparing these things, but remember that Trump was indicted on the stolen documents case two months *before* Hunter was indicted on gun crimes, but Hunter's gun trial is scheduled to be done before any of these frivolous hearings start in Florida) — with backing from right wing luminaries like Ed Meese. And Judge Cannon is so impressed with the garbage argument she has scheduled a hearing on it for June 21.

And Hunter has argued this same (IMO, garbage) argument in Los Angeles and the Ninth Circuit, where precedents for such appeals are somewhat more lenient (which Lowell addressed in a follow-up after the Third Circuit decision).

I'm not saying any of this will work. I think Lowell might be better served asking to make an amicus argument before Judge Cannon, if it's not too late, if only because that'll disrupt the political bias with which Cannon has run her courtroom. (Though again, that would do nothing to spare Hunter a trial.) We have long since spun free of actual evidence much less law in all these three Trump appointed judge's courtrooms.

But Hunter's continued effort to push this may complicate Cannon's effort to treat this as a novel right wing argument. It could even — though this is unlikely — create a circuit split long before Cannon gets her show hearing. Or it could confuse the right wingers on SCOTUS.

The SCO challenge, in my opinion, is not interesting at all on the law. But the way in

which these two cases are working in parallel on this point in particular makes the effort to better frame an appeal immediately more interesting.

Update: Unsurprisingly, the 9th Circuit – a panel of all Dem appointees – rejected Hunter Biden's bid for interlocutory appeals of his failed Motions to Dismiss.