No. 19-50242

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

DUNCAN D. HUNTER,
DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Southern District of California
18CR3677-W

CONSOLIDATED REPLY TO THE MOTION TO DISMISS AND TO HUNTER'S RESPONSE TO THE ORDER TO SHOW CAUSE

The appeal should be dismissed. In the alternative, this interlocutory appeal should be expedited to resolve Hunter's frivolous assertion of legislative privilege and finally permit the parties to get to trial.

The district court denied the assertion of Speech or Debate Clause protection. Hunter appeals that order. In doing so, his Response abandons two arguments made to the court below, and ostensibly adds a new claim, equally frivolous, that the district court never addressed and that Hunter now asserts for the first time on appeal. But an interlocutory appeal is not an opportunity to raise new claims Hunter wishes he previously made.

More troubling, in forwarding these arguments, he omits material facts[1] and distorts the record.[2] Nevertheless, those omissions and distortions do not amount to clear error below, nor to any colorable argument that a Speech or Debate Clause violation occurred. Hunter's appeal should be dismissed. To the extent that the Court prefers to address the matter after more briefing, the interlocutory appeal should be expedited.

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[1] Hunter suggests that the district court "could not have been more clear" in its assessment of this appeal. Appellant's Consolidated Response Brief (App.Br.)1,26-27. But Hunter removes the nuance in the court's statements that show it is far from clear: "*I'm not in a position to say that it's frivolous or not frivolous*." *Compare* App.Br.27 *with* Appx:14-15. This reluctance was at least partially attributed to the fact that the district court had no experience ruling on Speech or Debate issues. Appx:14-15.

Hunter also accuses the government of "prosecutorial manipulation" in submitting a proposed order to the district court. App.Br:28. He omits that the order was submitted to the district court only after it was first *approved* by Hunter's own attorneys. *See* Government's Declaration (Decl):1-2 (filed under seal).

[2] Hunter wrongly claims that the government inflated the seriousness of the crimes against the Hunters by charging them with spending in excess of $250,000 in campaign funds. App.Br:6. While it is true that Margaret Hunter received $116,000 from the campaign, this is *in addition to* the more than $250,000 in campaign funds the Hunters embezzled in order "to purchase goods and services for their personal use and enjoyment." ER:91,95.

1. Hunter's Appeal Should Be Dismissed as Frivolous

In arguing that his appeal is not frivolous, Hunter does not seriously engage on the merits at all. He does not show how the district court clearly erred in concluding that the trip to Italy was a personal trip, or that his attempt to schedule a Navy base tour served as a "pretext for the family vacation and not for any legislative purpose." Appellant's Excerpts of Record to its Motion to Dismiss or Expedite filed on July 22, 2019 ("ER"):1. Hunter's response, instead, principally rests in rebuking the United States for supposedly relying "almost entirely on a one-sided proposed order drafted by the prosecution" and "using misdirection" to invoke the district court's conclusion that the appeal lacks merit. App.Br:3,26-28.

The district court properly found that "Hunter's claim that the indictment as a whole should be dismissed for violation of his Speech or Debate Clause protections is wholly without merit." ER:3. Hunter's attorneys reviewed and approved this Order before it was entered—a fact Hunter omits in his Response. Decl:1-2. It was submitted to the lower court (with a copy to Hunter's defense team) in an email stating: "[w]e have conferred with Mr. Hunter's counsel and the parties believe [the Order] reflects the Court's findings today." Decl:1-2, Ex.1-3. More importantly, it is not the district court's characterization of the appeal that matters; it is its factual findings, showing that Hunter took a

family trip and tried to conceal that through pretext. Hunter says nothing about why *that* finding is clearly erroneous. That alone supports dismissal of his appeal.

Similarly, Hunter raises new—and wildly inaccurate—claims about the grand jury seeing or hearing protected information seized in search warrants. App.Br:13-14. It is curious that Hunter's newest attorney can even make an assertion about what the grand jury saw or heard (since he was not there), but more significant that he omits the history of sustained communications between Hunter's attorneys and the prosecution team to ensure that any evidence of legislative acts would *not* be presented to the grand jury. *See* Decl:2-4, Ex. 5-11.[3]

A. Efforts to Schedule a Pretextual Navy Base Tour Are Not "Legislative"

To prevail on appeal, Hunter must demonstrate that the district court clearly erred in its factual findings about the purpose of Hunter's challenged acts. Hunter's appeal is frivolous because he has not and cannot rebut the district court's conclusion that his trip to Italy was a

[3] Hunter faults the government for "focus[ing] on just three isolated aspects of the evidence." App.Br:15. That was not some deficiency, but the product of the litigation Hunter pursued below. The government addressed these three arguments precisely because they were the only claims raised in Hunter's Motion to Dismiss, *see* ER:167-68; 173-74, and by the express language of the trial court. App.Appx:14-15. These three acts are therefore the only claims that are ripe for appellate review.

personal trip and that any communications about the base tour served as pretext. This Court must accept the district court's finding that the challenged acts are not "legislative" in nature (and therefore not protected by the Speech or Debate privilege). *See United States v. Menendez*, 831 F.3d 155, 169 (3d Cir. 2016) (holding that appeals court must conclude that acts were not legislative where the district court found senator did not meet his burden of establishing that primary purpose of act was legistative).

The district court correctly found that Hunter's abandoned attempt to schedule a visit to a Navy base "was designed primarily to provide a pretext for the family vacation and not for any legislative purpose."[4] ER:2. And this finding was not limited to the written Order. At the hearing, for example, the district court found that the Italy "vacation was going to go forward regardless." ER:200-01. These

[4] Hunter wrongly asserts that courts do not look to motive in determining the scope of Speech or Debate privilege. In fact, as a threshold to making the determination, courts must inquire into "the content, purpose, and motive of the act to assess its legislative or nonlegislative character." *Menendez*, 831 F.3d at 166, 167 ("Only after we conclude that an act is in fact legislative must we refrain from inquiring into a legislator's purpose or motive."); *United States v. Renzi*, 651 F.3d 1012, 1024 (9th Cir. 2011) (Clause does not "preclude inquiry into any legislative activity with some degree of facial validity."). Here, the district court properly inquired into Hunter's motives, and determined that the base visit was "not for any legislative purpose" and constituted a "non-legislative act." ER:2.

findings are not clearly erroneous, and Hunter has raised no claim that they are. Because he has no colorable claim that his Italy trip was legislative, Hunter's appeal on this ground is frivolous and should be dismissed.[5]

B. FEC Reports Are Not "Legislative"[6]

Throughout the period covered by the indictment, Hunter was required to file reports with the Federal Election Commission (FEC) in his role as a *candidate* for Congressional office, not—as Hunter incorrectly claims (App.Br:21)—"in his role as a legislator." Legislators have no duty to file FEC reports; candidates for federal office do.[7] Hunter's only obligation to file arose because he sought reelection and continued to pursue federal office as a *candidate*.

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[5] Below, Hunter also claimed that the OCE reports and draft press releases about it constituted legislative acts protected by the Speech or Debate clause. He has appropriately declined to rest on that in his opposition. In any event, neither the OCE Report nor draft press release were ever presented to the grand jury or made part of the Indictment. Decl:4.

[6] Hunter concedes he never raised this issue below. App.Br.20,n.5. Indeed, when asked to specify the counts requiring dismissal before the district court, he pleaded only that he was "not prepared to do that right now." ER:217. He never raised this claim later. He should not be permitted to raise it for the first time in an interlocutory appeal, seeking review of the district court's order. This is an entirely new claim, not an argument in support of a claim.

[7] An individual seeking election (or reelection) to federal office becomes a "candidate," and must then file reports to the FEC, when he receives

Under clear Supreme Court authority, Hunter's political activities in pursuit of reelection are not protected legislative activity. *United States v. Brewster*, 408 U.S. 501, 512 (1972) ("[I]t has never been seriously contended" that *political* activities—including acts taken to "develop[] continuing support for future elections"—"have the protection afforded by the Speech or Debate Clause[.]").

Arguments that Speech or Debate privileges apply to required financial disclosures have consistently failed. *See*, *e.g.*, *United States v. Myers*, 692 F.2d 823, 849 (2d Cir. 1982) (legislators' filing of required financial disclosures is not privileged); *Menendez*, 831 F.3d at 175 (same); *United States v. Schock*, 891 F.3d 334, 336 (7th Cir. 2018) (legislators' reimbursement claims not privileged). Hunter cites *Miller v. Transamerican Press Inc.*, 709 F.2d 524, 528, 531 (9th Cir. 1983) to support his hollow claim that "FEC disclosures fall directly within the purpose of the Speech or Debate Clause." App.Br:22. But *Miller*—which held that a former congressman could not be compelled to disclose information about materials "he inserted in the Congressional Record" and "his legislative purpose in inserting it" (but could be compelled to disclose "political rather than legislative"

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contributions or makes expenditures that exceed $5,000. *See* 52 U.S.C. § 30101(2)(A).

activities)—has no applicability here, and does not address anything analogous to FEC disclosures.

Hunter's new claim that all FEC reports must be treated as protected legislative activity is at odds with decades of Supreme Court precedent, starting with *Buckley v. Valeo*, in which the reporting requirements and many other aspects of FECA were upheld against constitutional challenges. 424 U.S. 1 (1976). His claim is also at odds with every criminal and civil enforcement action relating to FECA's fundraising, spending, and reporting requirements. Under Hunter's reading of the Clause, not only would incumbent federal legislators be immune from prosecution—they could never be compelled to file FEC disclosures at all. *See Renzi*, 651 F.3d at 1020. It is well-settled that FEC reports are an appropriate part of the political sphere; they are thereby unaffected by any legislative privilege. Hunter's newly-raised claim is entirely frivolous.

2. Hunter's Appeal Merits Expedited Review

Ninth Circuit Rule 27-12 provides for expedited briefing and hearing of appeals "upon a showing of good cause." An interlocutory appeal of a Speech and Debate claim involving a sitting member of Congress is itself good cause for expedited treatment. Indeed, this Court noted that "[t]he Speech or Debate privilege has traditionally received expedited treatment by the judiciary." *Miller*, 709 F.2d at 531

n.5 (finding expedited treatment appropriate so legislators may be freed quickly from the burden of defending themselves).

The rationale for this conclusion is self-evident. Even Hunter acknowledges that the need for timely resolution of an appeal involving a sitting congressman is more acute than in cases involving other citizens. *See* App.Br:7 (quoting *United States v. Myers*, 635 F.2d 932, 936 (2d Cir. 1980)). The pendency of criminal charges against a congressman "implicate[s] aspects of our representative form of government." App.Br:7-8, *quoting Myers,* 635 F.3d. at 936 (observing that a congressman is his constituents' "sole voice and vote in the House"). [8]

Moreover, interlocutory appeals by nature result in "delays and disruptions" that "are especially inimical to the effective and fair administration of the criminal law." *DiBella v. United States*, 369 U.S. 121, 126 (1962); *see also United States v. Grace*, 526 F.3d 499, 526, (9th Cir. 2008) (concurrence) (noting the disruption and delay caused by interlocutory appeals); *accord Abney v. United States*, 431 U.S. 651, 662 n.8 (1977) (encouraging courts to establish procedures to expedite dilatory interlocutory appeals).

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[8] The 50th congressional district is comprised of almost three-quarters of a million citizens, whose sole representative in Congress now operates under the cloud of a federal indictment and stripped of his committee assignments.

Hunter nonetheless asserts that "there is no valid reason to proceed on an expedited schedule." App.Br:30. In forwarding this curious proposition, he cites this Court's decision in *Renzi*, where "the mandate did not issue *for nearly two years* following the notice of appeal." *Id*. (emphasis added). Hunter omits, though, that Renzi was a *former* congressman, having left office approximately four years prior to indictment—leaving no similar reason for expedited treatment of his appeal.[9]

This case has been pending for well over a year, and the trial date has already been reset by several months. If the case is not expedited (and if *Renzi* serves as a guide), Hunter's appeal may not be determined for another year or more, putting off indefinitely the date when he could be brought to trial. Without expedited treatment, the citizens of Hunter's district will suffer, the trial will await a resolution,

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[9] Appellant also argues against expediting because his chosen appellate counsel is extremely busy and unable to handle the matter on an expedited basis. App.Br:30 (citing *United States v. Rivera-Corona*, 618 F. 976, 979 (9th Cir. 2016)). Scheduling needs of new counsel, however, should be accommodated only when compatible with "the fair, efficient and orderly administration of justice." *Id*. This Court, for example, has denied the substitution of new trial counsel the day before trial when that would necessarily result in delay. *United States v. Neman*, 673 Fed. Appx. 649, 652 (9th Cir. 2016). Present appellant counsel—retained days before the notice of appeal was due in a matter that had been ongoing for almost two years with the attention of at least five other defense attorneys—should get no more leeway.

and justice will be delayed. *See Miller*, 709 F.2d at 531; *United States v. Gambino*, 59 F.3d 353, 360 (2d Cir. 1995) ("the public is the loser when a criminal trial is not prosecuted expeditiously"); *United States v. Kubrick*, 444 U.S. 111, 117 (1979) ("the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."); *United States v. Claiborne*, 727 F.2d 842, 851 (9th Cir. 1984) (emphasizing, in the context of an interlocutory appeal, "the public policy favoring the rapid disposition of criminal cases" (quoting *United States v. Leppo*, 634 F.2d 101, 104 (3d Cir. 1980))).

CONCLUSION

This Court should dismiss Hunter's appeal. Alternatively, review should be expedited to allow the trial to proceed as currently scheduled on January 14, 2020, or as soon thereafter as possible.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This reply complies with the page limitation of Fed. R. App. P. 27(d)(2) because it contains 2,442 words, which does not exceed 2,600 words.

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