A LIKELY LOOMING BATTLE IN THE STOLEN DOCUMENT CASE: CLASSIFIED WHITE HOUSE COUNSEL DOCUMENTS

In this post, I argued that DOJ hopes to use a motion to stay Judge Aileen Cannon's injunction against using materials seized from Donald Trump in any criminal investigation tactically — basically, to highlight she's just stalling the investigation.

But I want to flag something that I think will be contentious going forward: Classified documents involving White House Counsel.

In its description of why all classified documents should be exempted from Judge Cannon's injunction, DOJ noted that classified records cannot belong to Trump, and so he has no basis to make a Rule 41(g) motion. But their explanation of why such records would be excluded from any attorney-client privilege determination is more telling. It only extends to Trump's personal lawyers.

> But that rationale is categorically inapplicable to the classified records at issue in this motion, which are easily identifiable by their markings, are already segregated from the other seized records, and do not include personal records or potentially privileged communications with **his personal attorneys**.
>
> [snip]
>
> The classification markings establish on the face of the documents that they are government records, not Plaintiff's

> personal records. The government's
> review of those records does not raise
> any plausible attorney-client privilege
> claims because such classified records
> do not contain communications between
> Plaintiff and his **private attorneys**. [my
> emphasis]

DOJ is right that any classified documents
obviously belong to the government.

But Trump's lawyers don't even want to cede that
point. They refused the motion for a stay with
respect to classified documents (which is not
surprising, because in the hearing Jim Trusty
said they could just make copies of all the
classified records).

> Counsel for the United States has
> conferred with counsel for Plaintiff,
> and Plaintiff opposes the government's
> motion.

But there are known government documents in
which the White House Counsel were involved that
are likely among the ones Trump would most like
to withhold: starting with discussions about
materials (including a mention of Burisma)
excised by the White House Counsel's office from
the transcript of the call between Trump and
Volodymyr Zelenskyy.

The particular language used here — specifying
that attorney-client privilege only extends to
stuff involving Trump's "personal" or "private"
attorneys — suggests there *are* materials at
issue involving Trump's non-private attorneys,
which could be DOJ but is most likely the White
House Counsel.

As I have noted, there are three known
classified documents that were put in the
potentially privileged bucket, at least at the
start.

There's one document marked Confidential and
another marked Secret seized from drawer(s) in

Trump's office.

26	Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2020-11/2020
1 US Government Document with CONFIDENTIAL Classification Markings	
1 US Government Documents with SECRET Classification Markings	
357 US Government Documents/Photographs without Classification Markings	

And there's a Top Secret document stashed along with clippings dating back to 1995 in box 29.

Item #29 – Box/Container from Storage Room
86 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/1995 – 05/2019
1 US Government Document with TOP SECRET Classification Markings
35 US Government Documents/Photographs without Classification Markings

Plus, the packet involving clemency for Roger Stone — while it was not treated as potentially privileged — does include information marked as Secret.

Item #1 – Documents from Office
1 US Government Document with SECRET Classification Markings
2 US Government Documents/Photographs without Classification Markings

If that involved communications with DOJ or the White House Counsel, I could see Trump trying to claw it back as well.

DOJ says that none of these involve Trump's personal lawyers. But they're not ruling out that they involve lawyers you and I paid for, the White House Counsel. And *those* documents are among the ones I can imagine Trump might care the most about.