

TRUMP SWEEPS EVIDENCE OF OBSTRUCTION UNDER THE APPELLATE RUG

Trump submitted his response to DOJ's motion for a stay of Judge Cannon's injunction and one part of her order appointing Dearie. To help show what the two sides have done, I want to compare the structures and content/scope arguments, which I've done below.

Several things stick out.

First, Trump – in the form of his competent appellate lawyer, Chris Kise – spent almost a quarter of their response addressing an appellate issue: whether DOJ can move for a stay of the part of the Special Master order requiring a review of the documents marked as classified. This part of the filing is competent, larded with precedent (the government's primary precedent, unsurprisingly, is *US v Nixon*). I'm not well-versed enough in appellate issues to assess this argument (I think it doesn't adequately account for the posture of DOJ's appeal). So I'll leave it out there for smarter people to address.

The two sides are telling a very different history. Trump has simply ignored everything that preceded August 8 – as well as the basis for the Espionage and obstruction investigations into him – to suggest his personal items and classified records were seized out of the blue on August 8. DOJ, of course, tells the story of his extended obstruction before that.

Because the government doesn't deal with the public harm in a separate section from the one in it which it deals with the government interest in national security, Trump suggests the government conflates the two. Trump, meanwhile, suggests he still has a say in what is good for national security. Underlying all

this is who gets to decide what is the public good, and whether DOJ's claims of national security harm (plus the criminal investigation) get there by themselves.

Aside from the appellate issue, Trump's argument is a moving target, at one point treating Cannon's order as she granted it (to find possessory interest in the potentially privileged material Trump has had in hand for 4 days), in other places ignoring the government's more bracketed argument. Nowhere does Trump address the government's argument that even if the documents are declassified, they are still evidence in a criminal investigation into obstruction and still necessary for national security purposes. In short, Trump largely addresses Cannon's larger order, not DOJ's much more circumscribed request.

Update: Here is DOJ's reply, which I'll address later on Wednesday.

Go to emptywheel resource page on Trump Espionage Investigation.

DOJ motion

Intro and Summary

Two weeks after a search, Trump asked for a special master and a stay. The government thinks the ruling was problematic for a bunch of reasons, but is only asking for a stay of the most problematic parts involving documents marked classified.

A. Background

This spans from Trump's refusal to return documents to NARA, the criminal referral, the June 3 meeting, and the search warrant.

B. Proceedings below

This was brought on equitable jurisdiction, which requires exceptional circumstances. It

notes that Cannon did not resolve the question of whether a former President can prohibit the current Executive from reviewing their own documents.

The government is appealing only with respect to records bearing classified markings. Cannon did not address the issue that there is no way Trump owns these documents

Then Cannon ordered the government to share classified documents with Dearie and Trump's lawyers.

Argument

I. The government is likely to succeed on the merits

A. The court erred by exercising jurisdiction as to records bearing classification marks

1. Trump lacks standing
2. Cannon's exercise of equitable jurisdiction cannot extend to these records under *Richey*
3. The PRA doesn't apply to returning records, plus the reason these aren't accessible to Trump is because he failed to comply with PRA

B. Records bearing classification marks aren't subject to any plausible claim of privilege

1. Executive privilege exists for the benefit of the Republic
2. Any claim of privilege by a former against the incumbent would fail with regards to

records bearing classified markings

3. Trump declined to invoke privilege when served with a subpoena

C. No factual dispute justifies Cannon's order with regards to records bearing classified marks

1. Trump doesn't dispute the government recovered records bearing classification marks
2. Even if Trump claimed he declassified these, they were still subject to the subpoena, plus the claim they might be "personal" means he can't invoke privilege

II. The government and the public is irreparably harmed

A. By enjoining the investigation, Cannon's order prevents the government from protecting national security

B. The injunction unduly interferes with a criminal investigation

C. Disclosure of records to the Special Master and plaintiff's counsel would jeopardize national security

III. A partial stay would not harm Trump

DOJ has already reviewed these, and the only harm that might come is the investigation into him, which is not a cognizable harm.

Trump response

I. Summary and argument

The investigation of Trump is unprecedented. Having failed to convince Cannon to stay her order, the government appealed. She made no error.

II. Factual background

The government conducted a search and to protect Trump's interest, Trump asked for a third party review. The government enjoined further criminal investigation but not national security review. Cannon appointed Dearie, who has a lot of experience.

The government sought a stay and Cannon denied it. Dearie has a lot of experience. The government sought a stay.

III. Standard of review

1. Likely to prevail
2. Irreparable harm
3. Trump will suffer no substantial harm
4. The public interest will be served

A. Standard of review – injunction

Requires clear abuse of discretion.

B. Standard of review – appointment of Special Master

Abuse of discretion, but not on interlocutory appeal.

IV. Argument

A. Cannon properly temporarily enjoined the government because she didn't enjoin the

national security review.

1. The government misconstrues the standard for Rule 41(g) review [This is not a Rule 41(g) review, and Trump doesn't address anything but the privileged material]
2. The government hasn't proven the documents are classified [The government's argument holds even if the documents are only marked classified]
3. Trump has a possessory interest in Presidential Records [which they establish because he has access, but not possession of]
4. The government cannot say it will be irreparably harmed because Cannon disagreed with the sworn declaration saying that the investigation must be part of the national security review
5. Trump and the public would be harmed by a stay [without addressing the public need or the classification issue]

B. The government's motion for a stay amounts to an appeal of the Special Master appointment which is not appealable on an interlocutory basis.