

# TRUMP WANTS TWO WEEKS TO REVIEW 64 DOCUMENTS; DOJ EXPECTS REVIEW OF 500 DOCUMENTS A DAY

Yesterday, Judge Raymond Dearie submitted his draft work order to the two sides in the Trump Special Master review and then they responded (DOJ; Trump). Dearie didn't release his draft publicly but Trump's wails about it hint at some of its contents.

As a number of people have noted, Trump objects that Dearie has set a deadline for Trump's initial designation of materials by October 7, thereby allowing the debate over the seized materials to end by November 30. But Trump wants to ignore that there's going to be an extended debate about this and clearly would like to extend this past Judge Aileen Cannon's November 30 deadline.

The District Court's order indicates a presumptive end-date of November 30, 2022. The proposed calendar, circulated today to the parties only, compresses the entirety of the inspection and labeling process to be completed by October 7, 2022.

To be fair to Trump, the government's plan seems to envision this process taking an extra week, until October 15 or so.

Trump wails even more shrilly about the fact that Dearie first asked why any Rule 41(g) litigation would happen in this Special Master proceeding rather than the docket where the warrant was issued and then asked for a list of documents Trump had declassified.

[W]e are concerned that it contemplates

resolving issues that were not raised by Judge Cannon in her order, her order denying the stay, or oral argument. Specifically, Judge Cannon was aware of the likelihood of eventual Rule 41(g) litigation and established a process by which the Special Master would evaluate any such claims before reporting and recommending to the Court. While the Plaintiff is, of course, willing to brief anything ordered by the Court under the auspices of the Special Master, we are concerned that the Draft Plan directs the Plaintiff to address whether Rule 41(g) litigation should be litigated under Case No. 9:22-MJ-08332-BER. The Plaintiff respectfully sees no indication the District Court planned to carve out related litigation for a merits determination by the issuing magistrate for the warrant in question. Most importantly, none of the District Court's Orders have ever indicated that this was even a consideration.

Similarly, the Draft Plan requires that the Plaintiff disclose specific information regarding declassification to the Court and to the Government. We respectfully submit that the time and place for affidavits or declarations would be in connection with a Rule 41 motion that specifically alleges declassification as a component of its argument for return of property. Otherwise, the Special Master process will have forced the Plaintiff to fully and specifically disclose a defense to the merits of any subsequent indictment without such a requirement being evident in the District Court's order.

Trump's response to this is telling. He refuses to reveal which documents he declassified because (he claims – remember none of his lawyers are NatSec lawyers) it would be a

defense to the merits of any subsequent indictment.

That ignores, of course, the obstruction statute, which asked for documents marked classified, not classified documents. But it's also a confession that Trump's lawyers don't understand how classification works. If these documents were declassified, there would need to be a record.

This effort is significantly an attempt, pre-indictment, to make an argument about the classification status of the documents. If *Cannon* were to treat Trump's claims of declassification seriously, for example (and everything we've seen from here says she would happily do so to help Trump out of his legal jam), it would make it far harder to sustain a claim that the documents were National Defense Information. But this stunt may soon meet diminishing returns, unless and until Dearie (who knows more about national security than any of Trump's lawyers and Cannon) is fired.

As I noted in this post, in her order appointing Dearie, Cannon edited the boilerplate language in Special Master orders to give herself the authority to remove Dearie, unrelated to whether his process gets bogged down.

More interesting still: It says Trump won't submit any declarations until he's doing so in the process of claiming he owns these formerly classified documents. Cannon, of course, should have demanded that he at least assert *that* he had declassified some of these documents to sustain her usurpation of Executive Branch authorities, if not a log of which ones. If and when Cannon fires Dearie for overstepping her neat plan to stave off a Trump indictment, this point of dispute will become central. But by then, Cannon's own nonsensical rulings may also be exposed.

There's an even more telling dispute between the government and Trump, though. The government's filing basically enters into this process with

so much good faith that it squeaks: not contesting the conflicts of his lawyers, not disclosing what other parts of Cannon's order they may still appeal, not even suggesting they'll continue to appeal the order on classified documents if the 11th Circuit does not issue a stay. On that point, they say simply, they'll return to it.

1 The government applied to the Eleventh Circuit for a stay last week and Plaintiff's response is due tomorrow at noon, before the Master's preliminary conference. If the Eleventh Circuit stays Judge Cannon's order with respect to documents with classification markings, then the Special Master will not review the documents with classification markings. If the Eleventh Circuit does not stay the review of the documents with classification markings, the government will propose a way forward.

The government is approaching this review as if Dearie will quickly resolve all these issues and they can move on with their investigation. It's worth noting, to the extent that the NSD lawyers involved have been involved in FISA proceedings, they may well understand how Dearie likes to work in consultative discussions not dissimilar from this one.

Much of the rest of the government filing basically addresses practicalities: How to share these documents. It proposes to get Relativity (a legal discovery software tool) to scan and upload everything within days. Trump will have to pay for the license, because he has to pay for all of this.

The government proposes that Trump's team review 500 documents a day, which will result in a 22-day review time period after the documents are scanned, which would complete them all by around October 15, with a few days to start the scanning process.

But it's clear Trump wants to do none of this work (indeed, he likely wants to delay until they've seen all the documents at once). That's evident because he's proposing a two week deadline for the 64 potentially privileged documents that (all sides note) the government provided Trump on September 16.

Plaintiff to create privilege log (with basis) for Exh. A documents: TBD (two weeks?)

This is insane! Trump wants two weeks to delay reviewing 64 documents he had already had three days to review by yesterday. According to both the government and Dearie proposals, Trump should have finished with that document review on Saturday.

I think there's a non-zero chance Dearie gets fired, and I assume Trump just hopes that happens before the government has won a stay of Cannon's order prohibiting them from accessing the classified records and before he has admitted that most if not all of these potentially privileged documents are not.

Axios reported that Trump believed Dearie would be suspicious of the FBI based on his experience with the Carter Page order, something I had already contemplated in this thread. Even if he were, though, he'd be suspicious within the context of the law. Moreover, as I noted, there was still plenty in the application to sustain suspicion in Page, including that he seemed to know in advance of the October surprise that WikiLeaks delivered on October 7 and he destroyed a phone as soon as the investigation into him became clear.

And unless and until he gets fired, Dearie seems to plan to make these legal issues public – something that never works out well for Trump.