

TRUMP'S FILE B-076: CALVINBALL PING PONG

I spent part of last weekend attempting to understand how Judge Cannon might explain throwing out Raymond Dearie's work plan (which included a rolling process designed to finish up by November 30). This is what I came up with (by all means please let me know if I've made errors, but otherwise, don't invest too much in this because the big takeaway is that Judge Cannon is playing Calvinball, so the current rules mean little).

What Cannon appears to have done is with no formal notice of what the deadline was or even that ten plus five was no longer operative, treat Dearie's September 23 filing as his final action in setting the plan, but along the way use her own five day deadline for complaints instead of the September 27 deadline Dearie gave, which is the only way Trump's temporal complaint would be timely yet have her order not be days premature.

The next day, with no notice of any new deadline, Cannon issued her order throwing out most of Dearie's plan. I've spent hours and days looking at this, and there's no making sense of the deadlines. Certainly, this could not have happened if *any* of Dearie's deadlines had been treated as valid.

DOJ took a look at what Cannon had done and moved the 11th Circuit to accelerate the review process. They cited a number of reasons for the change in schedule. They described that Cannon *sua sponte* extended the deadline on the review to December 16.

On September 29, subsequent to the parties' submission of

Letters to Judge Dearie, the district court *sua sponte* issued an order extending the deadline for the special master's review process to December 16 and making other modifications to the special master's case management plan, including overruling the special master's direction to Plaintiff to submit his designations on a rolling basis.

Depending on how you make sense of Cannon's Calvinball deadlines, it was a *sua sponte* order, because Trump's complaint about the deadlines (not to mention his complaints generally) came in after the deadline attached to the Dearie plan that Cannon seems to treat as his final official action.

I think what really happened is that Cannon fired Dearie without firing him in response to *being told by the 11th Circuit* she had abused her authority, ensuring not only that nothing he decides will receive any consideration, but also ensuring that he has almost no time to perform whatever review role he has been given.

Effectively, Judge Cannon has just punted the *entire process* out after the existing appeals schedule, at which point – she has made clear – she'll make her own decisions what government property she's going to claim Trump owns.

I believed, when I wrote that a week ago, Judge Dearie would have no real say in the process until November 14 (see the timeline below), after Trump had made designations on all the seized documents and then spent ten days fighting over those designations with DOJ.

I don't know what Dearie thought, but on October 4 – one day after receiving the designations from the filter team materials, five days after Cannon's order – he canceled a scheduled October 6 status hearing, citing the order.

Then, yesterday, he had a say, issuing an order in response to the filter team designations he received on October 3. The order did the following:

- Reveal a set of about 35 pages of Category A files that Trump had raised no attorney-client privilege over (marked in turquoise below)
- Ordered the Privilege Review Team to provide those files to the Case Team by October 10 so they can review Trump's Executive Privilege and Presidential Records Act claims
- Indicated he would "promptly issue a report making recommendations" about Trump's attorney client privilege claims as to the remaining Category A and Category C documents
- In fact of a dispute over whether Dearie should make a privilege designation on file B-076, confirmed there was no dispute about the document in question because Trump made no privilege claim over it

- Ordered DOJ to return the originals of all the Category B documents to Trump by October 10, including file B-076
- Set a status hearing for October 18

As I laid out here, Category A documents are government documents involving some legal issue. Category B documents are the personal documents (including those pertaining to Trump's health, taxes or accounting) that DOJ proposed returning 38 days ago. Category C is a new category, possibly limited to this document turned over to the filter team after the initial filter team inventory was completely,

On Monday, September 26, counsel for the Privilege Review Team provided Plaintiff's counsel with another example of filter failure. The email in question was identified by the "FBI case team," and returned to the Privilege Review Team, which is characterizing the communication as non-privileged. Plaintiff believes the email falls squarely into the category of attorney-client privileged.

Possibly it includes different kinds of documents (such as the call logs) that don't precisely fit the other two categories.

Here's what we know of the designations so far, with turquoise being things Dearie cleared to share with the Case Team. (I've marked items Trump has claimed no privilege over with an N, items he has claimed privilege over parts of with a P, items that he must be claiming privilege over with a Y, and used question marks for items that, because of the additional category, I'm not certain about.)

Potentially Privileged						
	Item number		Items	Pages		Privilege?
Category A			21	138		
	1	Draft 2019 immigration initiative		1	1	N
	2	Congressional clamecy for RN		2	2-3	N
	3	Senate clamecy request for RN		1	4	N
	4	Printed email from Head Coach		1	5	N
	5	Unisigned Kasowitz Letter to Mueller		11	6-16	Y
	6	Executive Action to Curb Illegal Immigration		2	17-18	Y
	7	Email RE John Walker Lindh		2	19-20	Y
	8	Letter re Ted Suhl Clemency		8	21-28	Y
	9	Public letter abt Blago Clemency		2	29-30	N
	10	Blago commutation internal analysis		3	30-32	Y
	11	Public letter re Blago		1	33	N
	12	Internal Pardon package for IR and JC		7	34-40	P
	13	Internal Pardon package for MB		12	41-52	P
	14	Printed email from Harder to NYT		1	53	N
	15	Meeting requests for your approval		1	54	N
	16	Molly's questions for POTUS approval		1	55	N
	17	12/31/2020 Kurt Hilbert email		5	56-60	P
	18	12/31/20 Kurt Hilbert email sharing 10 files		4	61-64	Y
	19	Red folder marked NARA letters		27	65-91	?
	20	NARA letters and signing sheet		7	92-98	?
	21	36 pages of call records		39	99-137	?
Category B			43	382		
	3	Morgan Lewis letter		3		N
	33	Privileged document		1		
			64	520		
		September 28 email				

Here's what happens next, best as I can tell according to the rules of Calvinball.

First by Monday, DOJ will give all the original documents in Category B back. That seems to comply with Judge Cannon's plans, because according to Judge Cannon's original order, if both sides agree on the privilege designation for a file, it "shall be handled in accordance with the parties' agreement."

If the Privilege Review Team agrees with Plaintiff's position, the subject document shall be handled in accordance with the parties' agreement. If the Privilege Review Team disagrees with Plaintiff's position, the dispute shall go to the Special Master for a report and recommendation and, if either party objects to the report and recommendation, to the Court for de novo review and decision. Failure to object to a report and recommendation within five (5) calendar days shall result in waiver of that objection.

Both sides say Trump should have the originals, and by Monday – a federal holiday – Trump will have the originals back. As I've written, that will eliminate one of the harms that Judge Cannon deliberately inflicted on Trump in order to justify getting involved.

It's the other part of the order I find more interesting: If someone objects to what Dearie has done, they've got five calendar days – so until October 12 – to complain to Cannon so she can overrule Dearie.

One side has complained about what Dearie did to not make a privilege determination on B-076, because there's no dispute: Trump has not claimed privilege over it. Making the determination wasn't controversial. Rather, deciding to make the determination at all is what one side has complained about.

Document B-076 is a one-page document from Morgan Lewis, the law firm involved in Trump's taxes.

06	Letter from Morgan Lewis regarding taxes (duplicate of Item No. 03)	FILTER-B-076
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It's significant because the duplicate (item 3, which is four copies of the same one-page letter) is one basis for Judge Cannon's claim that DOJ had made a filter failure. Here's how the filter team has described it.

An additional seventh box was transferred to the custody and control of the Privilege Review Team agents on August 10 ,2022, after a Case Team agent observed a document on Morgan Lewis letterhead comingled with newspapers.⁶ Consistent with the filter protocol set forth in the Affidavit, the Case Team stopped its review of the entire box and provided it to the Privilege Review Team agents to conduct a review to identify and segregate potentially privileged materials.

⁶That document is item Number 3 in Exhibit B (FILTER-B-065 to FILTER-B-068). Also contained within the seventh box were Item Numbers 1 to 4 in Exhibit A (FILTER-A-001 to FILTER-A-005), which the Privilege Review Team agents identified as potentially privileged after receiving custody and

control of the box.

And here's how Judge Cannon *used that document* (among others) to claim both that Trump was being deprived of personal tax documents *and* that the filter process had failed.

According to the Privilege Review Team's Report, the seized materials include medical documents, correspondence related to taxes, and accounting information [ECF No. 40-2; see also ECF No. 48 p. 18 (conceding that Plaintiff "may have a property interest in his personal effects")]. The Government also has acknowledged that it seized some "[p]ersonal effects without evidentiary value" and, by its own estimation, upwards of 500 pages of material potentially subject to attorney-client privilege [ECF No. 48 p. 16; ECF No. 40 p. 2]

[snip]

Review is further warranted, as previewed, for determinations of privilege. The Government forcefully objects, even with respect to attorney-client privilege, pointing out that the Privilege Review Team already has screened the seized property and is prepared to turn over approximately 520 pages of potentially privileged material for court review pursuant to the previously approved ex parte filter protocol [ECF No. 48 p. 14]. In plain terms, the Government's position is that another round of screening would be "unnecessary" [ECF No. 48 p. 22]. The Court takes a different view on this record.

To begin, the Government's argument assumes that the Privilege Review Team's initial screening for potentially

privileged material was sufficient, yet there is evidence from which to call that premise into question here. See *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th at 1249–51; see also *Abbell*, 914 F. Supp. at 520 (appointing a special master even after the government’s taint attorney already had reviewed the seized material). As reflected in the Privilege Review Team’s Report, the Investigative Team already has been exposed to potentially privileged material. Without delving into specifics, the Privilege Review Team’s Report references at least two instances in which members of the Investigative Team were exposed to material that was then delivered to the Privilege Review Team and, following another review, designated as potentially privileged material [ECF No. 40 p. 6]. Those instances alone, even if entirely inadvertent, yield questions about the adequacy of the filter review process.¹³

¹³ In explaining these incidents at the hearing, counsel from the Privilege Review Team characterized them as examples of the filter process working. The Court is not so sure. These instances certainly are demonstrative of integrity on the part of the Investigative Team members who returned the potentially privileged material. But they also indicate that, on more than one occasion, the Privilege Review Team’s initial screening failed to identify potentially privileged material. The Government’s other explanation—that these instances were the result of adopting an over-inclusive view of potentially privileged material out of an abundance of caution—does not satisfy the Court either. Even accepting the Government’s untested premise, the

use of a broad standard for potentially privileged material does not explain how qualifying material ended up in the hands of the Investigative Team. Perhaps most concerning, the Filter Review Team's Report does not indicate that any steps were taken after these instances of exposure to wall off the two tainted members of the Investigation Team [see ECF No. 40]. In sum, without drawing inferences, there is a basis on this record to question how materials passed through the screening process, further underscoring the importance of procedural safeguards and an additional layer of review. See, e.g., *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) ("*In United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991), for instance, the government's taint team missed a document obviously protected by attorney-client privilege, by turning over tapes of attorney-client conversations to members of the investigating team. This *Noriega* incident points to an obvious flaw in the taint team procedure: the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion.").

In other words, this Morgan Lewis document is one of the central documents to Cannon's argument that the FBI is not to be trusted, that the investigative team has been tainted, that poor Donald Trump is being deprived of his personal tax records.

And Dearie has now made public that that's bullshit.

But Trump, who didn't claim it was privileged, now has the opportunity – by October 12 – to complain to Cannon that his hand-picked Special Master is being mean again.

And that would happen before DOJ submits its merits brief to appeal Cannon's decision to get involved in the first place, which is due on October 14.

Regardless of the error that the 11th Circuit already ruled Cannon had made by intervening, Dearie has now eliminated much of the claimed harm that Cannon invented to intervene. He has ordered returned all the personal medical and tax documents that Cannon used to claim he was being deprived of very sensitive documents. And he has confirmed that for one of three claimed filter failures – *the only one*, importantly, pertaining to a non-governmental document – was not a privileged document at all.

Trump could ask Cannon to overrule Dearie for even making that public. But that would make it clear – and public for DOJ's brief – that Cannon was once again intervening to create a harm she could then invoke to claim a need to intervene.

I don't know whether under Judge Cannon's Calvinball rules Dearie was supposed to take these steps at all. But if she wants to override them (again), it'll make it clear that she's simply creating harms to excuse her intervention.

Update: Reworded the B-076 language per nedu's comments.

Timeline

September 29, 2022: Cannon order alters Dearie work plan

September 30, 2022: DOJ motion to extradite 11th Circuit appeal

October 3, 2022; Trump response to 11th Circuit; motion to seal privilege log; original privilege status report unsealed; Potentially privileged material designations submitted (under seal)

October 4, 2022: Trump SCOTUS appeal of part of 11th Circuit decision; Dearie cancels October 6 status hearing

October 5: Vendor selected

October 7: Dearie issues order on filter team materials, sets October 10 and October 20 deadlines (in bold)

October 10: Deadline to return originals of Category B documents to Trump

October 11: DOJ Reply to Trump Emergency Motion at SCOTUS

October 12: Deadline to complain to Cannon about Dearie's October 7 order

October 13: DOJ provides materials to Trump

By October 14: DOJ provides notice of completion that Trump has received all seized documents

On or before October 14: DOJ revised deadline to 11th Circuit

October 18: Phone Special Master conference

October 19: Original deadline for DOJ appeal to 11th Circuit

October 20: Deadline for disputes about Executive Privilege and Presidential Records Act on filtered material

21 days after notice of completion (November 4): Trump provides designations for all materials to DOJ

November 8: Election Day

November 10, 2022: Trump revised deadline to 11th Circuit

10 days after receiving designations (November 14): Both sides provide disputes to Dearie

November 17, 2022: DOJ revised reply to 11th Circuit

30 days after DOJ appeal (November 18): Original Trump response to 11th Circuit

21 days after Trump reply (December 9): Original DOJ reply to 11th Circuit

December 16: Dearie provides recommendations to Cannon

January 3: New Congress sworn in

No deadline whatsoever: Cannon rules on Dearie's recommendations

Seven days after Cannon's no deadline whatsoever ruling: Trump submits Rule 41(g) motion

Fourteen days after Cannon's no deadline whatsoever ruling: DOJ responds to Rule 41(g) motion

Seventeen days after Cannon's no deadline whatsoever ruling: Trump reply on Rule 41(g)