GOVERNMENT ASKS RAYMOND DEARIE TO RECOMMEND JUDGE CANNON LIFT INJUNCTION ON 2,794 DOCUMENTS

The global issues briefs from DOJ and Trump in the Special Master proceeding have been unsealed (DOJ, Trump).

The focus of both filings address what DOJ calls Trump's gamesmanship but which is basically the kind of Calvinball that Judge Aileen Cannon appears to love. For many, if not most, of the 2,916 documents at issue, Trump's argument appears to be:

- If valuable then Tom Fitton (meaning, the misapplied argument that the President can designate anything "personal" and therefore effectively take possession of Presidential Records merely by sticking it in a box)
- If not Tom Fitton, then Executive Privilege (meaning, if Raymond Dearie is not impressed by misapplied Tom Fitton logic, then he should allow Trump to withhold documents under a privilege claim)

DOJ provides a lot of reasons that's nonsense, including that if Trump thinks something is

personal then it obviously can't be privileged.

A key part of the argument, however, is that even if Trump were able to invoke Executive Privilege against the government, DOJ would overcome that here because of the criminal investigation.

> Plaintiff's assertions of executive privilege fail under United States v. Nixon, because the government has a "demonstrated, specific need" for the seized records in its ongoing criminal investigation. 4
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> 4 Because the government satisfies United States v. Nixon's "demonstrated, specific need" test, which applies to a sitting President, the Court need not consider Plaintiff's status as a former President for purposes of this analysis. [citations omitted]

Trump dodges addressing the Nixon standard by complaining that he hasn't seen the unsealed affidavit that authorized the search, and so the government has failed to reach the Nixon standard.

> Although crucial to the executive branch's decision-making processes, executive privilege is neither absolute nor unqualified. Nixon, 418 U.S. at 706. Rather, the Supreme Court has recognized that the privilege must "yield to the demonstrated, specific needs for evidence in a pending criminal trial." Id. at 713. In providing this standard, the Supreme Court clarified that in order to overcome an assertion of executive privilege, the party seeking the privileged material must "clear three hurdles: (1) relevancy; (2) admissibility; and (3) specificity." Nixon, 418 U.S. at 700. The Supreme Court again affirmed this standard in Cheney v. U.S. Dist. Court for Dist. of

> Columbia, 542 U.S. 367, 386 (2004).
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> Currently, the affidavit in support of the search warrant which authorized the search of Mar-a-Lago is under seal, and, therefore, inaccessible to Plaintiff. Plaintiff is therefore unaware of the specific arguments relied upon by the Magistrate in issuing the warrant authorizing seizure of the documents at issue. Given that, Plaintiff must take the position that the Government has failed to clear the three hurdles articulated by the Court in Nixon.

In other words, in a civil challenge to a lawful warrant, Trump is saying he should be able to retain stuff by default until he has seen the warrant against him.

Which is one reason why something *else* the government does is so interesting. It asks Dearie to recommend that Judge Cannon lift the injunction on all the documents — 2,794 out of 2,916 — over which Trump has not invoked either Executive and/or Attorney-Client privilege.

> Finally, as the government has noted previously, the categorization of the records at issue as Presidential or personal does not ultimately affect the government's ability to use and review them for criminal investigative purposes. See D.E. 150 at 4 n.*. Plaintiff has asserted attorney-client privilege only as to one document out of 2,916 documents at issue here, and Plaintiff has asserted executive privilege as to only 121 documents. As to the remaining 2,794 documents, Plaintiff does not assert any privilege that would bar the government's further review and use of these materials for purposes of the ongoing criminal investigation. Although Plaintiff and the government disagree as to the proper categorization of numerous records as

> "personal" or "Presidential" for the purposes of PRA, neither categorization would supply a basis to restrict the government's review and use of those records. Indeed, personal records that are not Presidential records or government property are seized every day for use in criminal investigations. Thus, absent any specific justification from Plaintiff for continuing to restrict the government's review and use of the 2,794 records for which Plaintiff has not asserted any privilege, there is no reason to maintain the Court's injunction as those those records.

This takes Judge Cannon's premise on its face, as if this is just a normal Special Master review to ensure that the government doesn't access any privileged documents for an investigation. If that were the case, she would easily approve the sharing of all documents over which the plaintiff had not made any privilege claim.

It may or may not work. But if Dearie were to act on this request immediately, then Cannon would either have to override it or grant it before the 11th Circuit makes its final decision on the appeal. Judge Cannon's intervention is inappropriate on its face. But if she refuses to release non-privileged documents to the government, it will become clear that she is doing nothing more than attempting to thwart the criminal investigation of Trump.