11TH CIRCUIT TO TRUMP: YOU'RE NOT SPECIAL

The 11th Circuit has, as expected, vacated Aileen Cannon's order enjoining the government from investigating Donald Trump, remanding it with an order to dismiss the suit. (Though they gave Trump seven days to appeal before the order goes into effect.)

The opinion's key point is that, were they to rule for Trump, it would create an impossible precedent, either halting much pre-indictment access to seized material, or creating an exception only for former Presidents.

> In considering these arguments, we are faced with a choice: apply our usual test; drastically expand the availability of equitable jurisdiction for every subject of a search warrant; or carve out an unprecedented exception in our law for former presidents. We choose the first option. So the case must be dismissed.
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> [snip]
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> The law is clear. We cannot write a rule that allows any subject of a search warrant to block government investigations after the execution of the warrant. Nor can we write a rule that allows only former presidents to do so. Either approach would be a radical reordering of our caselaw limiting the federal courts' involvement in criminal investigations. And both would violate bedrock separation-of-powers limitations. Accordingly, we agree with the government that the district court improperly exercised equitable jurisdiction, and that dismissal of the entire proceeding is required.

Much of the opinion is an *Richey* analysis—the analysis Cannon worked so hard to manufacture. It's not all that interesting. The key point is that, as Jay Bratt told Judge Cannon on August 30, the precedent in the circuit is clear.

But in conducting a Richey analysis, which it ultimately called a "sideshow," the opinion took repeated swipes at the efforts Cannon went to make shit up to benefit Trump.

> The district court was undeterred by this lack of information. It said that "based on the volume and nature of the seized material, the Court is satisfied that Plaintiff has an interest in and need for at least a portion of it," though it cited only the government's filings and not Plaintiff's. But that is not enough. Courts that have authorized equitable jurisdiction have emphasized the importance of identifying "specific" documents and explaining the harm from their "seizure and retention." See, e.g., Harbor Healthcare Sys., L.P. v. United States, 5 F.4th 593, 600 (5th Cir. 2021) (Harbor did "far more than assert vague allegations" by pointing to "thousands" of privileged documents that the government retained for four years). Neither the district court nor Plaintiff has offered such specifics.

The opinion was even more scathing, though, in dismissing the notion that leaking classified information would harm Trump.

> Plaintiff has adopted two of the district court's arguments, dedicating a single page of his brief to discussing the first and third theories of harm. On the first argument, Plaintiff echoes the district court and asserts that he faces an "unquantifiable potential harm by way of improper disclosure of sensitive information to the public." It is not clear whether Plaintiff and the district

> court mean classified information or information that is sensitive to Plaintiff personally. If the former, permitting the United States to review classified documents does not suggest that they will be released. Any official who makes an improper disclosure of classified material risks her own criminal liability. See, e.g., 18 U.S.C. § 798. What's more, any leak of classified material would be properly characterized as a harm to the United States and its citizens—not as a personal injury to Plaintiff.

The only thing specific to Trump's status as an ex-President, besides the opinion's repeated reminder that he is not special, is the way with which the opinion twice dismissed Trump's claim that if he had designated these documents his personal property under the Presidential Records Act, it would allow him to keep it. That's nonsense, of course, because warrants authorize the seizure of personal property as a general rule.

> Indeed, Plaintiff does not press the district court's theory on appeal. Instead, he argues that the Presidential Records Act gives him a possessory interest in the seized documents. This argument is unresponsive. Even if Plaintiff's statutory interpretation were correct (a proposition that we neither consider nor endorse), personal interest in or ownership of a seized document is not synonymous with the need for its return.3 In most search warrants, the government seizes property that unambiguously belongs to the subject of a search. That cannot be enough to support equitable jurisdiction.
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> [snip]
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> Plaintiff's alternative framing of his

> grievance is that he needs a special master and an injunction to protect documents that he designated as personal under the Presidential Records Act. But as we have said, the status of a document as personal or presidential does not alter the authority of the government to seize it under a warrant supported by probable cause; search warrants authorize the seizure of personal records as a matter of course. The Department of Justice has the documents because they were seized with a search warrant, not because of their status under the Presidential Records Act.
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> 3 During discussion of this factor at oral argument, Plaintiff's counsel noted that the seized items included "golf shirts" and "pictures of Celine Dion." The government concedes that Plaintiff "may have a property interest in his personal effects." While Plaintiff may have an interest in these items and others like them, we do not see the need for their immediate return after seizure under a presumptively lawful search warrant.

Here, Jim Trusty's wails about Celine Dion really served to demonstrate how absurd the grievance was. Ultimately, Trump's Celine Dion picture was not a sufficiently urgent piece of property to hold up a search warrant.

A very conservative panel, including two Trump appointees, just confirmed that he's not special anymore.