

# US government appeals court order delaying criminal investigation of Donald Trump

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On Thursday, September 8, United States government prosecutors filed formal notice that they are appealing the decision issued on the Labor Day holiday by Judge Aileen Cannon of the Southern District of Florida that would delay an ongoing criminal investigation of Donald Trump.

Cannon ordered the appointment of a “special master” to sort through 27 boxes containing 11,000 pages of documents and 1,800 other items seized during the August 8 search at Trump’s Mar-a-Lago Resort in Palm Beach, Florida. Attorneys for Trump and for the US Department of Justice (DOJ) were due to submit an agreed list of possible special masters to the judge on Friday.

The 24-page decision ordering a special master is a legal travesty, a clumsy, result-driven provocation by a political operative installed to carry out tasks for the extreme right-wing faction lining up behind Trump’s authoritarian assault on what remains of bourgeois democracy in the United States. Cannon no doubt sees it as a downpayment on her elevation to the Eleventh Circuit Court of Appeals or even the Supreme Court when the Republican Party returns to power.

From the standpoint of historical precedents, the legal issues are not close, and Cannon’s attempt to bridge the chasm by walking on water should meet with the usual results.

The world can see that Trump violated multiple laws after he left office on January 20, 2021, with boxes of presidential papers, including over 300 bearing various levels of national security classifications. The post-Watergate Presidential Records Act makes all such papers the property of the United States; they do not belong to the outgoing president.

Trump’s absconding to Mar-a-Lago with presidential papers at the end of his term was more than just stuffing his suitcases with towels after a hotel stay, because the documents included secret and top secret reports, many of which bear special restrictions limiting access to a select few, to be reviewed only in highly secure locations. Such documents contain US imperialism’s most guarded information, including the identities of covert agents and methods used for intercepting sensitive foreign communications.

Separate laws, including the Espionage Act of 1917, criminalize the unauthorized possession or mishandling of state secrets.

The boxes stashed at Mar-a-Lago, Trump’s 38-bedroom private country club, could have been pilfered by anyone with access to the grounds, including guests or housekeeping and security staff. Given the opportunities created by Trump’s habitual behavior, the files were vulnerable and may have already been breached.

The question that remains unanswered is Trump’s motive. Convicted former Trump lawyer Michael Cohen, who understands his former client’s mobster-like thinking, says categorically that Trump intended to use state secrets as blackmail to prevent his own criminal prosecution. There were probably multiple other reasons, including extracting “favors” from foreign governments, all centered around Trump’s authoritarian conception that he is a government in exile, and “l’état c’est moi.”

## The president as a law unto himself

Cannon’s ruling embraces Trump’s authoritarianism. “As a function of Plaintiff’s former position as President of the United States, the stigma associated with the subject seizure is in a league of its own,” Cannon wrote, adding, “A future indictment, based to any degree on property that ought to be returned, would result in reputational harm of a decidedly different order of magnitude.”

Cannon’s choice of language flouts the jurisprudential maxim: “All are equal before the law.” Cannon instead put Trump in a “league of his own” throughout the decision. She wrote, “the investigation and treatment of a former president is of unique interest to the general public, and the country is served best by an orderly process that promotes the interest and perception of fairness.”

The processes to which Trump has been subjected to date have been the same, or less intense, as those that would apply to anyone investigated for criminal conduct.

The events leading up to the search are documented in court filings. Realizing that Trump was storing boxes of presidential papers at Mar-a-Lago, the National Archives and Records Administration (NARA) began negotiating their recovery in May 2021. Trump stalled until January 2022, when he turned over 15 boxes, supposedly his entire stash.

When cataloging the contents, NARA found 184 classified documents, including 25 marked “top secret,” jumbled in with miscellaneous papers and mementoes. NARA referred its findings to the Department of Justice (DOJ), which, as a matter of course, assigned the investigation to the FBI.

After encountering runarounds and stonewalling, the FBI served a grand jury subpoena on May 11 requiring the production of all classified documents still at Mar-a-Lago. After more stalling and saber rattling, on June 3 Trump’s representatives met with three FBI agents and a DOJ lawyer at Mar-a-Lago, where Trump’s people turned over 38 classified documents, 17 marked “top secret,” in a sealed “redweld” file folder. They then allowed the FBI to inspect a storage room containing boxes, but denied the agents’ request to examine the contents.

Trump’s lawyers provided the DOJ with certifications under penalty of perjury that there were no further confidential documents at Mar-a-Lago to be turned over as required by the subpoena.

Apparently, the FBI obtained contrary information from its informants in the Trump orbit as well as from Mar-a-Lago surveillance video showing boxes being moved in and out of the storage room despite Trump’s pledge to maintain its security.

In any event, Trump’s brazen lies were irrefutably exposed by the August 8 execution of the search warrant, a crucial fact Cannon ignored.

During the search, FBI agents opened boxes in the storage room as well as some that were located in Trump’s personal office, finding another 100 restricted documents. Many had extremely high security classifications, and, according to a recent leak published by the *Washington Post*, at least

one contained highly sensitive nuclear weapons secrets pertaining to a foreign country. There were also dozens of empty classification folders, leaving unanswered questions about the contents.

The now famous FBI photograph taken during the search, submitted in a court filing, displays a few of the confidential documents and folders found in Trump's office.

Having ample probable cause to suspect criminal activity at Mar-a-Lago, there was nothing unusual about law enforcement serving a warrant and seizing the evidence. Any "stigma" was the result of Trump's own illegal possession of the documents, his subsequent lies, and ultimately his defiance of the subpoena. All of these facts are left out of Cannon's analysis.

For anyone familiar with law enforcement execution of search warrants, what stands out about August 8 is the deference FBI agents gave Trump. They arrived during daytime, while the club was closed for the summer, and negotiated arrangements with Trump's lawyers, who stood by while the search took place. In violation of FBI protocol, Trump and family members were allowed to watch the agents inside Mar-a-Lago on the club's surveillance system. No media were summoned, and the search only became widely known after Trump announced it.

Issues regarding the return of property improperly seized during a search are normally addressed by the bench officer who issued the warrant, in this case, United States Magistrate Judge Bruce Reinhart. (Magistrate judges assist district judges and have judicial authority over assigned matters such as search warrants.) In fact, motions were filed, resulting in Reinhart's release of the heavily redacted affidavit of probable cause.

### **Bypassing the magistrate in favor of Judge Cannon**

To make an end run around Reinhart, who was obviously not buying Trump's positions, Trump filed a new lawsuit weeks after the search to appoint a special master to review the materials seized.

The case was assigned randomly to 41-year-old Aileen Mercedes Cannon, among the last of Trump's 245 judicial appointments. She was confirmed on November 9, 2020, during the last days of the Republican-controlled Senate, as Trump's electoral defeat became obvious.

Born in Cali, Colombia to a Cuban-exile mother, Mercedes Cubas, and an American father, Michael Cannon, she grew up privileged near Miami. After graduating from Duke University in North Carolina, Cannon spent two years as a paralegal in the Civil Rights Division of the Department of Justice during the George W. Bush administration, when Clinton-era reforms were being dismantled. In 2005 she enrolled at the University of Michigan Law School, where she immediately joined the Federalist Society, the well-funded right-wing pipeline to the federal judiciary.

After graduation, Cannon clerked for Iowa-based Eighth Circuit Judge Steven Colloton, a judicial reactionary who made Trump's shortlist for the Supreme Court, which had been drawn up by the Federalist Society. She next spent three years as a junior associate at Gibson, Dunn & Crutcher, an international firm of 1,600 attorneys tightly connected to the Republican Party establishment. Cannon took a major step down when she left, spending the next seven years as an assistant United States attorney writing briefs in opposition to appeals by criminal defendants, often arguing in favor of governmental seizures and against the suppression of evidence.

Cannon has no significant publications and very limited trial experience. She was a legal cipher when Florida Senator Marco Rubio invited her to apply for a federal court opening. The only testimony noted in the media during her May 2020 confirmation hearing was her praise for her "loving mother" who, "at the age of 7, had to flee the repressive Castro regime in

search of freedom and security." Cannon continued: "Thank you for teaching me about the blessing that is this country and the importance of securing the rule of law for generations to come."

For Cannon, "the rule of law" includes manipulating facts and doctrine to throw a monkey wrench into a DOJ investigation that appears to be closing in around Trump.

Instead of transferring the motion for a special master to Magistrate Judge Reinhart, where it belonged, or dismissing the case outright as legally frivolous, Cannon ordered Trump's lawyers to file proper papers, as the first set were incompetent. The day after receiving them, without giving the government an opportunity to respond, Cannon issued an extraordinary "Preliminary Order" announcing her "intent to appoint a special master."

After the government filed a lengthy response shredding the legal and factual basis for Trump's request, Cannon issued her order, which has been widely derided for its sophomoric analysis. The following is just a sampling.

Laurence Tribe, professor emeritus of constitutional law at Harvard University, tweeted that Cannon's decision was "utterly lawless" and "disgraced her position."

The *New York Times* quoted Samuel W. Buell, a Duke University law professor, saying that the decision was "laughably bad" and the written justification "even flimsier," and Peter M. Shane, a legal scholar and specialist in the separation of powers, wrote: "Even if there is some hypothetical situation in which a former president could shield his or her communications from the current executive branch, they would not be able to do so in the context of a criminal investigation—and certainly not after the material has been seized pursuant to a lawful search warrant."

Former acting Solicitor General Neal Katyal, who has represented the United States in dozens of cases before the Supreme Court, called Cannon's reference to "reputational" harm "insane," because every criminal defendant "has reputational harm." He asked: "Are we now going to have special masters in every crime investigation?"

Trump's own attorney general, Bill Barr, told Fox News, "The opinion, I think, was wrong, and I think the government should appeal it. It's deeply flawed in a number of ways."

The government's appeal goes to the Eleventh Circuit Court of Appeals, where six of the 11 active judges were appointed by Trump.



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