

US prosecutors move to exempt classified documents seized at Mar-a-Lago from review by special master

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US government lawyers filed a motion Thursday before federal judge Aileen Cannon for a “partial stay” that would exempt about 100 documents marked “classified” and “top secret” from an injunction she handed down last week. Judge Cannon’s injunction prohibits federal prosecutors from using the fruits of the search warrant executed August 8 at former president Donald Trump’s Mar-a-Lago resort while a “special master” sorts through 33 boxes containing 11,000 pages of miscellaneous paperwork.

The motion for a partial stay was filed immediately after the government filed notice of its appeal of Cannon’s injunction to the Atlanta-based Eleventh Circuit Court of Appeals, one of the most conservative federal appeals courts in the country. Six of the court’s 11 active judges were appointed by Trump.

The notice of appeal does not stop Cannon’s order from taking effect, and any ruling on the merits will take a minimum of several months, as issues need to be briefed and argued, and opinions drafted. In the meantime, however, the Eleventh Circuit can stay the order in whole or in part. The rules require that such requests for stays pending appeal first be made to the judge who issued the injunction.

The motion seeks only a partial stay because the government is, for the time being, conceding that a special master can identify documents seized by the FBI that are protected by attorney-client privilege or that should be returned to Trump. The government argues that those presidential records for which Trump claims executive privilege should be turned over to the National Archives with the rest of Trump’s presidential papers, where there are federal statutes already in place to allow former presidents to protect certain papers from exposure.

Cannon’s injunction is not absolute. It explicitly carves out “intelligence classification and national security assessments” from its broader prohibition against the government’s using materials seized at Mar-a-Lago for its criminal investigation. The government’s motion for a partial stay argues that the potential damage to US intelligence and national security caused by Trump’s illegal retention of the classified documents cannot be assessed fully and in a timely manner without the FBI’s criminal investigation tools, including grand jury subpoenas, search warrants and witness interviews.

Because Cannon’s order allowed the “national security risk assessment” to continue, the government argued, “the order

reflects an implicit determination that no potential assertion of executive privilege by [Trump] could justify preventing the Executive Branch from conducting that review and assessment of the classified records,” including “use of the information by the government in an ongoing criminal investigation.”

The government supported its motion with a sworn statement by Alan Kohler, assistant director of the FBI’s Counterintelligence Division, that the national security assessment Cannon allowed to proceed has now been suspended because the same agents and supervisors are equally involved in the criminal investigation, and they would be in violation of her injunction if the national security assessment continued.

Cannon directed Trump to file his responsive papers by 10 a.m. Monday. The judge is expected to rule by Wednesday, as the government indicated that it will otherwise ask the Eleventh Circuit for a partial stay on Thursday, September 15.

This increasingly bitter, public dispute between the US intelligence community—represented by the government attorneys and the FBI—and Trump is not rooted in concern for the democratic rights of the population to the presidential papers Trump removed at the end of his term, any more than it is a “deep state” vendetta against Trump. The government’s legal papers, and the arguments being made in them, are focused on appealing to right-wing judges such as Cannon to protect the most important secrets of US imperialism, including the identities of covert agents and the capacities of “signals intelligence” from being compromised by the maverick former president.

While the contents of the 100 classified documents remain sealed, according to the *Washington Post*, at least one document described “a foreign government’s military defenses, including its nuclear capabilities.” Trump has given no explanation for keeping the confidential documents and lying about their continued presence at Mar-a-Lago last June in response to an FBI subpoena.

Trump’s possible motives include using the state secrets as leverage to prevent his own prosecution for fomenting the January 6, 2021 attempted coup or other crimes, or to exchange with foreign governments in return for personal “favours.” Regardless, the haphazard storage of the classified documents at Mar-a-Lago exposed them to theft or copying by anyone who could obtain access, including club guests and staff.

This unprecedented conflict within the highest levels of the

ruling elite is unfolding against the explosive backdrop of the NATO-Russia war in Ukraine, intensifying tensions with China, a deepening financial crisis, a pandemic that has taken years off US life expectancy, one climate-related disaster after another, and, most importantly, a growing insurgency by the working class.

According to the government, the approximately 100 documents marked “classified” that the FBI seized from a storage room and Trump’s office at Mar-a-Lago “have already been segregated from the other seized records and are being maintained separately.” The government asserts that because of their security classifications, by definition these records belong to the government, not Trump. Moreover, they cannot be the subject of attorney-client or executive privilege.

“A classification review of these materials was in progress at the time of the Court’s order but has not been completed,” the government wrote in its stay motion. A “classification review” means that the “original classification authority is asked to determine whether documents bearing classification markings are, in fact, properly classified”—in other words, whether unauthorized disclosure “reasonably could be expected to result in damage to the national security.”

Asserting that the FBI agents engaged in the review of the classified documents cannot be “bifurcated” between national security and criminal investigators, FBI Assistant Counterintelligence Director Kohler explained, “the FBI itself is part of the United States Intelligence Community (IC), and since the 9/11 attacks, the FBI has integrated its intelligence and law enforcement functions when it exercises its national security mission.”

Kohler asserted in his sworn statement that Trump’s possession of the classified documents may have already “compromised” intelligence, and “the FBI would be responsible for taking some of the necessary steps to evaluate that risk.” He continued: “The same is true of the empty folders with ‘classified banners’ that were among the seized materials in this case. The FBI’s investigative authorities could be instrumental in determining what materials may once have been stored in these folders and whether they may have been lost or compromised.”

Finally, Kohler pointed out that “while other IC elements may have certain limited investigative authorities, the FBI is the only IC element with a full suite of authorities and tools to investigate and recover any improperly retained and stored classified information in the United States.”

The government cited *Nixon v. Administrator of General Services*, a post-Watergate precedent in which the Supreme Court overruled Richard Nixon’s claim of executive privilege when he asserted it against “the very Executive Branch in whose name the privilege is invoked.” That is exactly what Trump is attempting here.

Based on its analysis, the government asked Cannon for a limited stay, “pending appeal, to the extent the Order (1) enjoins the further review and use for criminal investigative purposes of records bearing classification markings and (2) requires the government to disclose those classified records to a special master.”

In her injunction, Cannon ordered that the lawyers for Trump

and the government confer and file a joint report proposing individuals to serve as the special master and the scope of the review. The report was filed Friday, the day after the government’s motion for a partial stay.

The parties failed to agree on a special master or who should pay the expenses. The main substantive disagreement, however, was whether Trump’s attorneys and the special master will have access to the documents marked confidential.

Consistent with its position on the partial stay, the government contends that the 100 confidential documents should remain separate, and not be provided to either Trump or the special master. According to the government, allowing a special master to review the classified material would “cause the most immediate and serious harms to the government and the public,” noting that those documents have already been moved to a secure facility, separate from the rest of the seized Trump papers.

In response, Trump’s lawyers wrote, “The government’s position incorrectly presumes the outcome—that their separation of these documents is inviolable,” and “their stance wrongly assumes that if a document has a classification marking, it remains classified in perpetuity,” a flagrant misstatement of the government’s position.

Ignoring the reality that Trump lost the election and has been out of office for more than a year and a half, his lawyers argued, “If any seized document is a Presidential record, Plaintiff [Trump] has an absolute right of access to it while access by others, including those in the executive branch, has specific limitations. Thus, President Trump (and/or his designee) cannot be denied access to those documents, which in this matter gives legal authorization to the Special Master to engage in first-hand review.”

They add in a footnote, “Plaintiff anticipates filing a deeper analysis of these issues in upcoming filings.”

Justice Department lawyers filed a sealed report with Cannon explaining that they had already sorted through the documents, using a “filter team” to separate out more than 500 pages of documents potentially covered by attorney-client privilege. That arrangement was approved by the US magistrate judge who authorized the search warrant for Mar-a-Lago.

The government has asked that the “filter report,” but not the documents themselves, be unsealed. Numerous media outlets have joined the request, but for as yet unstated reasons, Trump is opposed.



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