

Judge in Mar-a-Lago case denies government motion to exempt documents marked classified

John Burton**16 September 2022**

Late Thursday, US District Judge Aileen Cannon denied the Justice Department motion to stay her injunction in relation to some 100 documents marked “confidential,” “secret” or “top secret” seized pursuant to the search warrant served last month at Donald Trump’s private club, Mar-a-Lago, near Miami, Florida.

In a separate order, Cannon appointed Senior United States District Judge Raymond Dearie, 78, as the special master to sort through the 33 boxes and 11,000 pages seized by the FBI during the August 8 execution of the search warrant.

Cannon is a right-wing ideologue, the daughter of an anti-communist Cuban exile mother. A member of the Federalist Society, she was appointed to the federal judiciary by Trump in 2020.

In her initial ruling supporting Trump’s suit calling for the appointment of a third-party “special master” to review the documents seized by the FBI at Mar-a-Lago, and in the meantime enjoin federal prosecutors from using the documents to develop their criminal case against Trump, Cannon essentially argued that as ex-president, Trump had to be given extraordinary deference, to the point of being above the law.

The Presidential Records Act of 1978, enacted in the wake of the Watergate scandal and the resignation of Richard Nixon, declares that government records are not the personal property of the president—either during or after his or her term of office—but are rather the property of the US government.

For the bourgeoisie and its state, the handling of state secrets is a critical issue, and their protection is ruthlessly enforced. In the affidavit submitted by the Department of Justice to a federal judge to secure the search warrant, one of the laws cited as having possibly been violated by Trump is the Espionage Act of 1917. The *Washington Post*, citing anonymous sources, has reported that one of the documents seized from Mar-a-Lago contained top secret information about a foreign government’s nuclear weapons systems.

The Justice Department has argued that any delay in pursuing a criminal investigation of the improper handling of classified documents is a threat to US national security. This makes all the more extraordinary the deference given by Cannon to Trump—who, after all, headed up a conspiracy to overthrow the government on January 6, 2021 and continues to declare Joe Biden’s election fraudulent and his administration illegitimate. It is a measure of the intensity of the crisis of the US political system and the raging internal struggle within the ruling elite and the state.

In the ruling handed down Thursday, Cannon reiterated that her order affects only “further review and use of the seized materials for

criminal investigative purposes.” According to Cannon, her order “allows the Government to continue to review and use the materials seized for purposes of intelligence classification and national security assessments.”

In consultation with Trump’s legal team, prosecutors and the National Archives and Records Administration (NARA), Dearie is to classify each document either as a government record or Trump’s personal property, and determine which documents are attorney-client communications. Some 550 pages have already been so identified and segregated by the FBI “filter team”, following the procedure outlined in the search warrant, but Cannon deemed that insufficient.

Dearie will also review Trump’s vague potential claims to “executive privilege,” which have no support in any existing legal precedent. The Justice Department has asserted that agency records marked classified by the intelligence community necessarily cannot fall within any definition of executive privilege, but Cannon rejected that argument.

The parties have five days following each ruling by Dearie to file an objection with Judge Cannon, who will then conduct a “de novo” review and issue the final ruling, which will be subject to appeal to the Eleventh Circuit Court of Appeals and, potentially, the Supreme Court.

Although the government has noticed an appeal, unless the Eleventh Circuit intervenes, Cannon’s injunction will remain in effect until Dearie’s review is completed. Cannon’s order set a deadline of November 30, over a month later than the prosecutors had requested, but two weeks less than Trump wanted, and ordered Trump to pay all the special master’s fees and expenses, denying his request to split those expenses with the government.

Cannon directed Dearie “to prioritize review of” the documents with classification markings and “to file interim reports.” As a result, the injunction against the government’s use of the contents of the documents marked as classified in its ongoing criminal investigation could be lifted in a matter of weeks, or could drag out for months or longer.

Dearie, the only suggested name accepted by both sides, is a Republican conservative with a conventional judicial reputation and a long record of protecting state secrets. President Ronald Reagan appointed him in 1982 as the United States attorney for the Eastern District of New York, which encompasses Brooklyn, Queens and Long Island, and then as a district judge in 1986. Dearie served as the chief judge of the Eastern District from 2007 until taking senior status, a form of partial retirement, in 2011.

In 2012, Chief Justice John Roberts appointed Dearie to the Foreign Intelligence Surveillance (FISA) Court, where he served until 2019, reviewing and invariably approving warrants for the most highly sensitive domestic US intelligence operations.

When denying the stay, Cannon brushed aside the national security concerns raised in the government's submissions, in sharp contrast to the deference federal judges invariably extend to high-ranking government officials who assert national security interests based on classified information. Instead, Cannon acted like a Fox News host, questioning whether "the approximately 100 documents isolated by the Government" are actually "classified government records," and asserting "that evenhanded procedure does not demand unquestioning trust in the determinations of the Department of Justice."

"The Court declines to conduct a subset-by-subset, piecemeal analysis of the seized property, based entirely on the Government's representations about what is contained in a select portion of the property," Cannon concluded.

In fact, the prosecutors carefully explained that about 100 of the documents seized by the FBI on August 8 are "marked as classified." (Emphasis added). By law, such markings signify that their unauthorized disclosure "reasonably could be expected to result in damage to the national security." The "classification review", put on hold because of the injunction, is directed to confirming whether each document remains classified.

Cannon omits entirely from her analysis the events that culminated in the search warrant. In January, 2022, NARA recovered 15 boxes of presidential records from Mar-a-Lago that included 184 unique documents marked as classified. NARA notified the Department of Justice, which referred the matter to the FBI for investigation.

The FBI obtained a grand jury subpoena directing Trump to turn over all documents marked as classified still at Mar-a-Lago. Trump did not challenge the subpoena. He made no claim that documents had been declassified, and he did not assert executive privilege. Instead, on June 3 his attorneys turned over 38 additional unique documents marked as classified with a sworn certification that no other such documents existed.

On July 6, Trump turned over a hard drive with Mar-a-Lago surveillance videos. Although the description of the videos remains redacted in the search warrant affidavit, it has been reported that the videos show containers being moved in and out of storage, contrary to assurances Trump gave to the FBI.

There is no question that Trump's attorneys lied under oath, as demonstrated by the now famous photograph of papers found in Trump's Mar-a-Lago office, replete with "secret" and "top secret" covers and banners, and acronyms warning that human intelligence sources (HCS) and signals interception protocols (SI) would be "compromised" by dissemination.

According to the government, in addition to the roughly 100 marked documents, 48 empty folders once containing highly classified documents were also seized during the August 8 search. The fate of their contents remains unknown.

While Trump has repeatedly claimed publicly to have declassified documents he removed from the White House, no such mention has appeared in any of his legal filings to date, nor does Cannon address alleged declassification by Trump in her rulings. That is because declassifications necessarily leave a paper trail. Intelligence agencies expect to be informed when the identities of their covert sources and methods of information gathering are no longer classified, and therefore become subject to public disclosure under the Freedom of

Information Act.

As the government argued in support of the stay: "For obvious reasons, the Intelligence Community (IC) would have a compelling need to understand which formerly-classified records have now been declassified, why and how they were declassified, and the impact of any such declassification, including on the IC's protection of its sources and methods and on the classification status of related records or information."

Cannon dismissed out of hand the sworn declaration by Alan E. Kohler, Jr., assistant director of the FBI's Counterintelligence Division, which stated that ongoing security assessments are so "inextricably linked" to the criminal investigation that it would be "exceedingly difficult to bifurcate the personnel involved," and that therefore the security assessments had been suspended.

"Although it might be easier, in the immediate future, for the Government's criminal investigative work to proceed in tandem with the Security Assessments," Cannon wrote, "the Government's submissions on the subject do not establish that pausing the criminal investigative review pending completion of the Special Master's work actually will impede the intelligence community's ability to assess the potential risk to national security that would result from disclosure of the seized materials."

Cannon makes clear that her unprecedented parsing of the government's national security concerns arises from what she deems "the extraordinary circumstances presented," namely "the position formerly held by Plaintiff [Trump]," the US presidency.

Finally, Cannon's rulings ignore entirely the government's concerns about storage of the classified records at Mar-a-Lago, where they were essentially left unattended for extended periods while Trump was at his apartment in New York City or his Bedminster, New Jersey, golf club.

Federal regulations require documents marked top secret to be stored in containers or vaults equipped with alarms, all of which must comply with strict standards. On top of that, each location must be inspected every two hours by someone with the necessary security clearance. Cannon ignores all of this.

When asked Wednesday about his possible indictment for the classified documents illegally stashed at Mar-a-Lago, Trump told right-wing radio host Hugh Hewitt that any criminal charges against him would trigger "problems in this country the likes of which perhaps we've never seen before." When Hewitt asked for details, Trump responded, "I think they'd have big problems, big problems."

Trump added, referring to his fascistic base, "They will not sit still and stand for this ultimate of hoaxes." After Hewitt said that his comments could incite violence, Trump replied, "That's not inciting. I'm just saying what my opinion is. I don't think the people of this country would stand for it."

This legal chess game is being played out in South Florida amid a deepening social crisis, where significant sections of the ruling elite are at each other's throat over how best to deal with war abroad, a deepening economic collapse at home and the growing insurgency of the working class.



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