

Appeals court lifts stay of FBI investigation into Trump's mishandling of state secrets

John Burton**22 September 2022**

Late Wednesday, a three-judge panel of the Eleventh Circuit Court of Appeals granted the US government's motion for leave to resume its use of the roughly 100 documents marked classified, including some "top secret," seized pursuant to the search warrant served by the FBI at Donald Trump's Mar-a-Lago resort.

The Eleventh Circuit ruling, technically a partial stay pending appeal, reverses two lower court decisions by Judge Aileen Cannon of the Southern District of Florida that exempted Trump from myriad laws governing classified documents and presidential records.

Cannon extended broad accommodations to Trump based on his status as a former president. Her rulings, which have been justifiably maligned as fawning and amateurish by many legal commentators, temporarily stalled the ongoing criminal investigation into Trump's mishandling of state secrets, including violations of the 1917 Espionage Act alleged in the search warrant affidavit.

On September 5, Cannon enjoined the Department of Justice (DOJ) and the FBI from any further use of the fruits of the August 8 search, which consists of 33 boxes containing more than 11,000 pages of documents and 1,800 other items, pending their review by a special master.

On September 15, she denied the DOJ's request for a partial stay limited to carving out the 100 documents marked classified. In doing so, she rejected concerns raised by Alan Kohler, the assistant director of the FBI's Counterintelligence Division, and reaffirmed what she labeled "the extraordinary circumstances presented," namely "the position formerly held by" Trump.

The unsigned appellate decision—by two Trump-nominated judges and one Obama nominee—is a major

setback for the aspiring dictator. It sets the table for his indictment and prosecution, although whether such actions will follow remains to be seen.

While the ruling went into effect immediately, Trump can still petition to the Eleventh Circuit as a whole to review the ruling "en banc," and he can petition directly to the Supreme Court, but neither move is likely to change the outcome.

The special master's review of the other materials for potential claims of Trump ownership, attorney-client privilege and executive privilege will continue, but without the 100 classified documents, which will remain in the possession of the DOJ.

Trump is in hot water because he and his advisers failed to appreciate the determination within the bourgeois state, including on the part of his own nominees, to defend state secrets essential to the interests of US imperialism.

The result was not entirely unexpected, but the speed and sweeping character of the 29-page decision—briefing was completed less than 24 hours before and Trump lost decisively on every point—came as a surprise.

The Eleventh Circuit ruling followed by one day the initial hearing by the special master, Senior US District Judge Raymond Dearie, in his Brooklyn courtroom. Dearie, who spent seven years on the Foreign Intelligence Surveillance Act (FISA) Court reviewing top secret warrant applications, asked Trump's lawyers for the evidence that the 100 documents marked classified are not actually still classified. The attorneys responded that revealing Trump's declassification evidence would undermine Trump's defense to a criminal indictment.

"You can't have your cake and eat it," Dearie said, while suggesting that the classified documents might be

too sensitive for Trump's lawyers, and even for Dearie himself, to review. Regardless, the Eleventh Circuit has now ruled that none of the documents marked classified will be included in the special master's review.

Although returning a semblance of judicial normalcy to a case that Judge Cannon had steered into a rabbit hole, neither the Eleventh Circuit nor Dearie are motivated by the defense of democratic values. They are conscious agents of US imperialism, who do not tolerate the circulation of unsecured documents that could reveal to adversaries, or even to allies, crucial intelligence, including human sources, sophisticated electronic intercepts and cryptography.

After pointing out that, despite several opportunities, Trump did not file legal challenges regarding the documents he took from the White House to Mar-a-Lago after losing the election, and that his attorney flat-out lied under oath to the DOJ that all documents marked confidential were returned in response to the FBI's subpoena, the Eleventh Circuit panel slammed Trump's blatant disregard for national security.

Writing, "Since World War I, the Executive Branch has engaged in efforts to protect national security information by means of a classification system graded according to sensitivity," the three appellate judges explained that the classification levels "turn on whether the unauthorized disclosure of the information reasonably could be expected to cause either 'damage' (Confidential), 'serious damage' (Secret), or 'exceptionally grave damage' (Top Secret) to national security. Once so designated, classified materials may remain classified for up to ten years," subject to certain provisions to extend or shorten that period.

Many of the documents recovered at Mar-a-Lago, including some found completely unsecured in Trump's office desk drawers, were marked "Top Secret." At the time of the search Mar-a-Lago was closed for the season and Trump was at his New York residence, along with his Secret Service detail.

"For our part," the Eleventh Circuit continued, "we cannot discern why Plaintiff [Trump] would have an individual interest in or need for any of the one hundred documents with classification markings," the "unauthorized disclosure of which could reasonably be expected to cause identifiable or describable damage to the national security."

Trump "suggests that he may have declassified these

documents when he was president," the appeals court noted, but "the record contains no evidence that any of these records were declassified. And before the special master Plaintiff resisted providing any evidence that he had declassified any of these documents."

During a softball interview with Sean Hannity hours before the Eleventh Circuit ruled, Trump took his mantra of "L'etat, c'est moi" to a new level. "I declassified the documents when they left the White House," Trump told one of the chief Fox News propagandists. "There doesn't have to be a process as I understand it. If you're the president of the United States, you can declassify just by saying it's declassified, even by thinking about it."

Trump's explanation is preposterous. The agencies generating the classified materials have to be informed that their information will no longer be treated as confidential so they can take steps to protect their sources, some of whom may face arrest or even execution.

Regardless, the Eleventh Circuit concluded that "the declassification argument is a red herring because declassifying an official document would not change its content or render it personal. So even if we assumed that [Trump] did declassify some or all of the documents," the court continued, "that would not explain why he has a personal interest in them."

No explanation indeed. No one has attempted to explain Trump's interest in retaining Top Secret documents after leaving office other than former Trump lawyer Michael Cohen, who suggests that his ex-client intended to use the classified information for blackmail as he maneuvers to retake power at the head of a MAGA and QAnon fascist movement.



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